

**ARTICLE 69-05.2**  
**SURFACE COAL MINING AND RECLAMATION OPERATIONS**

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**CHAPTER 69-05.2-01**  
**GENERAL PROVISIONS**

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**69-05.2-01-01. Applicability of article.**

This article applies to any person conducting surface coal mining operations; and to all surface coal mining operations conducted after August 1, 1980, on lands from which the coal had not yet been removed and to any other lands subject to North Dakota Century Code chapter 38-14.1 or this article.

1. This article does not apply to:
  - a. The extraction of coal by a landowner for the landowner's own noncommercial use from land owned or leased by the landowner.
  - b. Coal removal for reclamation operations under North Dakota Century Code chapter 38-14.2.
  - c. Coal extraction as an incidental part of federal, state, or local government-financed highway or other construction, except as provided by chapter 69-05.2-03.
  - d. Coal extraction of two hundred fifty tons [226.80 metric tons] or less under a coal exploration permit issued by the office of the state geologist.
2. The commission may on its own initiative and will, within a reasonable time of a request from any person who intends to conduct surface coal mining operations, make a written determination whether the operation is exempt under this section. The commission will give reasonable notice of the request to interested persons. Prior to the time a determination is made, any person may submit, and the commission will consider, any relevant written information. A person requesting that an operation be declared exempt has the burden of establishing the exemption. If an exemption is reversed through subsequent administrative or judicial action, any person who, in good faith, has made a complete and accurate request for an exemption and relied upon the determination, may not be cited for violations which occurred prior to the date of the reversal.
3. The commission may terminate its jurisdiction over the reclaimed site of a completed surface coal mining and reclamation operation, or increment of an operation, when it has released fully the related performance bond under the procedures of North Dakota Century Code section 38-14.1-17 and chapter 69-05.2-12.
4. The commission will reassert jurisdiction over a site if the bond release referred to in subsection 3 was based upon fraud, collusion, or misrepresentation of a material fact.

**History:** Effective August 1, 1980; amended effective May 1, 1990; January 1, 1993.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-02, 38-14.1-10, 38-14.1-37

**69-05.2-01-02. Definitions.**

The definitions in North Dakota Century Code section 38-14.1-02 apply to this article and the following terms have the specified meaning except where otherwise indicated:

1. "Adjacent area" means land located outside the affected area or permit area, depending on the context in which "adjacent area" is used, where air, surface or ground water, fish, wildlife, vegetation, alluvial valley floors, or other resources may be adversely impacted by surface coal mining and reclamation operations.

2. "Affected area" means any land or water upon or in which surface coal mining and reclamation operations are conducted or located.
3. "Agricultural activities" means, with respect to alluvial valley floors, the use of any tract of land for the production of animal or vegetable life, where the use is enhanced or facilitated by subirrigation or flood irrigation associated with alluvial valley floors. These uses include the pasturing, grazing, or watering of livestock, and the cropping, cultivation, or harvesting of plants whose production is aided by the availability of water from subirrigation or flood irrigation. Those uses do not include agricultural practices which do not benefit from the availability of water from subirrigation or flood irrigation.
4. "Agricultural use" means the use of any tract of land for the production of animal or vegetable life. The uses include the pasturing, grazing, and watering of livestock, and the cropping, cultivation, and harvesting of plants.
5. "Aquifer" means a zone, stratum, or group of strata that can store and transmit water in sufficient quantities for a specific use.
6. "Best technology currently available" means equipment or techniques which will:
  - a. Prevent, to the extent possible, additional contributions of suspended solids to streamflow or runoff outside the permit area, but in no event result in contributions of suspended solids in excess of requirements set by applicable state law.
  - b. Minimize, to the extent possible, disturbances and adverse impacts on fish, wildlife, and related environmental values and achieve enhancement of those resources where practicable.
  - c. The term includes equipment or techniques which are currently available anywhere as determined by the commission, even if they are not in routine use.
  - d. The term includes construction practices, siting requirements, vegetative selection and planting requirements, animal stocking requirements, scheduling of activities, and sedimentation pond design.
  - e. The commission has the discretion to determine the best technology currently available on a case-by-case basis.
7. "Blaster" means a person directly responsible for the use of explosives in surface coal mining operations who is certified under chapter 69-05.2-31.
8. "Cemetery" means any area of land where human bodies are interred.
9. "Coal mining operation" means, for purposes of restrictions on financial interests of employees, the business of developing, producing, preparing, or loading bituminous coal, subbituminous coal, anthracite, or lignite, or of reclaiming the areas upon which such activities occur.
10. "Coal preparation" means chemical or physical processing and the cleaning, concentrating, or other processing or preparation of coal.
11. "Coal preparation plant" means a facility where coal is subjected to chemical or physical processing or the cleaning, concentrating, or other processing or preparation. It includes facilities associated with coal preparation activities, including, but not limited to, the following: loading facilities, storage and stockpile facilities, sheds, shops and other buildings, water treatment and water storage facilities, settling basins and impoundments, and coal processing and other waste disposal areas.

12. "Coal processing waste" means earth materials which are wasted and separated from product coal during cleaning, concentrating, or other processing or preparation of coal.
13. "Collateral bond" means an indemnity agreement in a sum certain payable to the state of North Dakota executed by the permittee and which is supported by the deposit with the commission of cash, negotiable bonds of the United States or of North Dakota, or negotiable certificates of deposit of any bank authorized to do business in North Dakota, or an irrevocable standby letter of credit issued by a federally insured or equivalently protected bank authorized to do business in the United States, payable only to the commission upon presentation.
14. "Combustible material" means organic material that is capable of burning, either by fire or through a chemical process (oxidation), accompanied by the evolution of heat and a significant temperature rise.
15. "Community or institutional building" means any structure, other than a public building or an occupied dwelling, which is used primarily for meetings, gatherings, or functions of local civic organizations, or other community groups; functions as an educational, cultural, historic, religious, scientific, correctional, mental health, or physical health care facility; or is used for public services, including, but not limited to, water supply, power generation, or sewage treatment.
16. "Compaction" means increasing the density of a material by reducing the voids between the particles and is generally accomplished by controlled placement and mechanical effort such as from repeated application of wheel, track, or roller loads from heavy equipment.
17. "Complete inspection" means an onsite review of a permittee's or operator's compliance with all permit conditions and requirements imposed under North Dakota Century Code chapter 38-14.1 and this article, within the entire area disturbed or affected by surface coal mining and reclamation operations and includes the collection of evidence with respect to every violation of those conditions or requirements.
18. "Complete permit application" means an application for a surface coal mining and reclamation operations permit, which contains all information required by North Dakota Century Code chapter 38-14.1 and this article, to allow the commission to initiate the notice requirements of North Dakota Century Code section 38-14.1-18 and a technical review for the purpose of complying with the permit approval or denial standards of North Dakota Century Code section 38-14.1-21 and of this article.
19. "Cooperative soil survey" means a field or other investigation that locates, describes, classifies, and interprets for use the soils in a given area. The survey must meet the national cooperative soil survey standards and is the type of survey that is made for operational conservation planning by the United States department of agriculture natural resource conservation service in cooperation with agencies of the state and, in some cases, other federal agencies. If the survey is not available and a permit applicant is required to have a survey made, the map scale must be 1:20,000.
20. "Cropland" means land used for the production of adapted crops for harvest, alone or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar specialty crops. Land used for facilities in support of cropland farming operations which is adjacent to or an integral part of these operations is also included.
21. "Cumulative impact area" means the surface and ground water systems which may be affected until final bond release by:

- a. The proposed operation and all existing surface coal mining and reclamation operations;
  - b. Any operations for which a permit application has been submitted to the regulatory authority; and
  - c. All operations required to meet diligent development requirements for leased federal coal for which there is actual mine development information available.
22. "Developed water resources" means, for land use purposes, land used for storing water for beneficial uses such as stockponds, irrigation, wildlife habitat, fire protection, flood control, and water supply.
23. "Direct financial interest" means ownership or part ownership by an employee of lands, stocks, bonds, debentures, warrants, partnership shares, or other holdings, and also means any other arrangement where the employee may benefit from the employee's holding in or salary from coal mining operations. Direct financial interests include employment, pensions, creditor, real property, and other financial relationships.
24. "Disturbed area" means those areas that have been affected by surface coal mining and reclamation operations. Areas are classified as "disturbed" until reclamation is complete and the performance bond or other assurance of performance required by North Dakota Century Code chapter 38-14.1 and this article is released.
25. "Diversion" means a channel, embankment, or other manmade structure constructed to divert water from one area to another.
26. "Embankment" means an artificial deposit of material that is raised above the natural surface of the land and used to contain, divert, or store water, support roads or railways, or for other similar purposes.
27. "Emergency spillway" means the spillway designed to convey excess water through, over, or around a dam.
28. "Employee" means, for purposes of restrictions on financial interests of employees: any person employed by the commission as a state employee who performs any function or duty under North Dakota Century Code chapter 38-14.1; advisory board, commission members, or consultants who perform any decisionmaking functions for the commission under authority of state law or regulations; and any other state employee who performs any decisionmaking function or duty under a cooperative agreement with the commission. This definition does not include: the public service commissioners, who file annually with the director of the office of surface mining reclamation and enforcement, United States department of the interior; and members of advisory boards or commissions established in accordance with state laws or regulations to represent multiple interests, such as the North Dakota reclamation advisory committee.
29. "Ephemeral stream" means a stream which flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice, and which has a channel bottom that is always above the local water table.
30. "Essential hydrologic functions" means with respect to alluvial valley floors, the role of the valley floor in collecting, storing, regulating, and making the natural flow of surface or ground water, usefully available for agricultural activities, by reason of its position in the landscape and the characteristics of its underlying material. A combination of those functions provides a water supply during extended periods of low precipitation.

- a. The role of the valley floor in collecting water includes accumulating runoff and discharge from aquifers in sufficient amounts to make the water available at the alluvial valley floor greater than the amount available from direct precipitation.
  - b. The role of the alluvial valley floor in storing water involves limiting the rate of discharge of surface water, holding moisture in soils, and holding ground water in porous materials.
  - c. The role of the alluvial valley floor in regulating the natural flow of surface water results from the characteristic configuration of the channel floodplain and adjacent low terraces.
  - d. The role of the alluvial valley floor in regulating the natural flow of ground water results from the properties of the aquifers which control inflow and outflow.
  - e. The role of the alluvial valley floor in making water usefully available for agricultural activities results from the existence of floodplains and terraces where surface and ground water can be provided in sufficient quantities to support the growth of agriculturally useful plants, from the presence of earth materials suitable for the growth of agriculturally useful plants, from the temporal and physical distribution of water making it accessible to plants throughout the critical phases of the growth cycle either by flood irrigation or by subirrigation, from the natural control of alluvial valley floors in limiting destructive extremes of stream discharge, and from the erosional stability of earth materials suitable for growth of agriculturally useful plants.
31. "Existing structure" means a structure or facility used in connection with or to facilitate surface coal mining and reclamation operations for which construction began prior to August 1, 1980.
  32. "Extraction of coal as an incidental part" means the extraction of coal which is necessary to enable government-financed construction to be accomplished. Only that coal extracted from within the right of way, in the case of a road, railroad, utility line or other such construction, or within the boundaries of the area directly affected by other types of government-financed construction, may be considered incidental to that construction. Extraction of coal outside the right of way or boundary of the area directly affected by the construction shall be subject to the requirements of North Dakota Century Code chapter 38-14.1 and this article.
  33. "Fish and wildlife habitat" means lands or waters used partially or wholly for the maintenance, production, protection, or management of species of fish or wildlife.
  34. "Flood irrigation" means, with respect to alluvial valley floors, supplying water to plants by natural overflow, or the diversion of flows in which the surface of the soil is largely covered by a sheet of water.
  35. "Fragile lands" means geographic areas containing natural, ecologic, scientific, paleontologic, or aesthetic resources that could be damaged or destroyed by surface coal mining operations. Examples of fragile lands include valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, state and national natural landmark sites, areas where mining may cause flooding, environmental corridors containing a concentration of ecologic and aesthetic features, areas of recreational value due to high environmental quality, and buffer zones adjacent to the boundaries of areas where surface coal mining operations are prohibited under North Dakota Century Code section 38-14.1-07.
  36. "Fugitive dust" means that particulate matter not emitted from a duct or stack which becomes airborne due to the forces of wind or surface coal mining and reclamation operations or both. During surface coal mining and reclamation operations it may include emissions from haul roads; wind erosion of exposed surfaces, storage piles, and spoil piles; reclamation

operations; and other activities in which material is either removed, stored, transported, or redistributed.

37. "Government financing agency" means a federal, state, county, municipal, or local unit of government, or a department, bureau, agency, or office of the unit which, directly or through another unit of government, finances construction.
38. "Government-financed construction" means construction funded fifty percent or more by funds appropriated from a government financing agency's budget or obtained from general revenue bonds, but shall not mean government financing agency guarantees, insurance, loans, funds obtained through industrial revenue bonds or other equivalent, or in-kind payments.
39. "Ground cover" means the area of ground covered by vegetation and the litter that is produced naturally onsite, expressed as a percentage of the total area of measurement.
40. "Ground water" means subsurface water that fills available openings in rock or soil materials to the extent that they are considered water-saturated.
41. "Half-shrub" means a perennial plant with a woody base whose annually produced stems die back each year.
42. "Historic lands" means areas containing historic, cultural, or scientific resources. Examples include archaeological sites, national historic landmarks, places listed on or eligible for listing on the state historic sites registry or the national register of historic places, places having religious or cultural significance to native Americans or religious groups or places for which historic designation is pending.
43. "Historically used for cropland" means:
  - a. Lands that have been used for cropland for any five years or more out of the ten years immediately preceding the acquisition, including purchase, lease, or option, of the land for the purpose of conducting or allowing through resale, lease, or option the conduct of surface coal mining and reclamation operations;
  - b. Lands that the commission determines, on the basis of additional cropland history of the surrounding lands and the lands under consideration, that the permit area is clearly cropland but falls outside the specific five-years-in-ten criterion, in which case the regulations for prime farmland may be applied to include more years of cropland history only to increase the prime farmland acreage to be preserved; or
  - c. Lands that would likely have been used as cropland for any five out of the last ten years, immediately preceding such acquisition but for the same fact of ownership or control of the land unrelated to the productivity of the land.
44. "Hydrologic balance" means the relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the quantity and quality relationships among precipitation, runoff, evaporation, and changes in ground and surface water storage.
45. "Hydrologic regime" means the entire state of water movement in a given area. It is a function of the climate and includes the phenomena by which water first occurs as atmospheric water vapor, passes into a liquid or solid form, falls as precipitation, moves along or into the ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.
46. "Impounding structure" means a dam, embankment, or other structure used to impound water, slurry, or other liquid or semiliquid materials.

47. "Impoundment" means a closed basin, naturally formed or artificially built, which is dammed or excavated for the retention of water, sediment, or waste.
48. "Indirect financial interest" means the same financial relationships as for direct ownership, but where the employee reaps the benefits of such interests, including interests held by the employee's spouse, minor child, and other relatives, including in-laws, residing in the employee's home. The employee will not be deemed to have an indirect financial interest if there is no relationship between the employee's functions or duties and the coal mining operation in which the spouse, minor children, or other resident relatives hold a financial interest.
49. "Industrial and commercial" means, for land use purposes, land used for:
  - a. Extraction or transformation of materials for fabrication of products, wholesaling of products, or for long-term storage of products. This includes all heavy and light manufacturing facilities such as chemical manufacturing, petroleum refining, and fabricated metal products manufacture. Land used for facilities in support of these operations which is adjacent to or an integral part of that operation is also included. Support facilities include, but are not limited to, all rail, road, and other transportation facilities.
  - b. Retail or trade of goods or services, including hotels, motels, stores, restaurants, and other commercial establishments. Land used for facilities in support of commercial operations which is adjacent to or an integral part of these operations is also included. Support facilities include, but are not limited to, parking, storage, or shipping facilities.
50. "Intermittent stream" means a stream or part of a stream that flows continuously for at least one month of the calendar year as a result of ground water discharge or surface runoff.
51. "Irreparable damage to the environment" means any damage to the environment that cannot be corrected by action of the permit applicant or the operator.
52. "Knowingly" means, with respect to individual civil penalties, that an individual knew or had reason to know in authorizing, ordering, or carrying out an act or omission on the part of a corporate permittee that the act or omission constituted a violation, failure, or refusal.
53. "Land use" means specific uses or management-related activities, rather than the vegetation or cover of the land. Land uses may be identified in combination when joint or seasonal uses occur.
54. "Leachate" means a liquid that has percolated through soil, rock, or waste and has extracted dissolved or suspended materials.
55. "Materially damage the quantity or quality of water" means, with respect to alluvial valley floors, changes in the quality or quantity of the water supply to any portion of an alluvial valley floor where such changes are caused by surface coal mining and reclamation operations and result in changes that significantly and adversely affect the composition, diversity, or productivity of vegetation dependent on subirrigation, or which result in changes that would limit the adequacy of the water for flood irrigation of the irrigable land acreage existing prior to mining.
56. "Monitoring" means the collection of environmental data by either continuous or periodic sampling methods.
57. "Mulch" means vegetation residues or other suitable materials that aid in soil stabilization and soil moisture conservation, thus providing microclimatic conditions suitable for the germination and growth of plants.

58. "Native grassland" means land on which the natural potential plant cover is principally composed of native grasses, grasslike plants, forbs, and shrubs valuable for forage and is used for grazing, browsing, or occasional hay production. Land used for facilities in support of ranching operations which is adjacent to or an integral part of these operations is also included.
59. "Natural hazard lands" means geographic areas in which natural conditions exist which pose or, as a result of surface coal mining operations, may pose a threat to the health, safety, or welfare of people, property, or the environment, including areas subject to landslides, cave-ins, large or encroaching sand dunes, severe wind or soil erosion, frequent flooding, avalanches, and areas of unstable geology.
60. "Noxious plants" means species as defined in North Dakota Century Code section 63-01.1-02 that have been included on the official state list of noxious weeds.
61. "Occupied dwelling" means any building that is currently being used on a regular or temporary basis for human habitation.
62. "Operation plan" means a plan submitted by a permit applicant which sets forth a detailed description of the surface coal mining operations proposed to be conducted during the term of the permit within the proposed permit area.
63. "Outslope" means the face of the spoil or embankment sloping downward from the highest elevation to the toe.
64. "Owned or controlled" and "owns or controls" mean any one or a combination of the relationships specified in subdivisions a and b:
  - a. Being a permittee of a surface coal mining operation; based on instrument of ownership or voting securities, owning of record in excess of fifty percent of an entity; or having any other relationship which gives one person authority, directly or indirectly, to determine the manner in which an applicant, operator, or other entity conducts surface coal mining operations.
  - b. The following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority, directly or indirectly, to determine the manner in which the relevant surface coal mining operation is conducted:
    - (1) Being an officer or director of an entity;
    - (2) Being the operator of a surface coal mining operation;
    - (3) Having the ability to commit the financial or real property assets or working resources of an entity;
    - (4) Being a general partner in a partnership;
    - (5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record ten through fifty percent of the entity; or
    - (6) Owning or controlling coal to be mined by another person under a lease, sublease, or other contract and having the right to receive the coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation.

65. "Partial inspection" means an onsite review of a permittee's or operator's compliance with some of the permit conditions and requirements imposed under North Dakota Century Code chapter 38-14.1 and this article and includes the collection of evidence of any violation of those conditions or requirements.
66. "Perennial stream" means a stream or part of a stream that flows continuously during all of the calendar year as a result of ground water discharge or surface runoff.
67. "Performing any function or duty" means those decisions or actions which, if performed or not performed by an employee, affect surface coal mining and reclamation operations under North Dakota Century Code chapter 38-14.1.
68. "Permanent diversion" means a diversion remaining after surface coal mining and reclamation operations which has been approved for retention by the commission and other appropriate state agencies.
69. "Permanent impoundment" means an impoundment requested for retention as part of the postmining land use by the surface owner and approved by the commission and, if required, by other state and federal agencies.
70. "Person having an interest which is or may be adversely affected or person with a valid legal interest" includes:
  - a. Any person who uses any resource of economic, recreational, aesthetic, or environmental value that may be adversely affected by surface coal mining and reclamation operations or any related action of the commission.
  - b. Any person whose property is or may be adversely affected by surface coal mining and reclamation operations or any related action of the commission.
  - c. Any federal, state, or local governmental agency.
71. "Precipitation event" means a quantity of water resulting from drizzle, rain, snow, sleet, or hail in a limited period of time. It may be expressed in terms of recurrence interval. "Precipitation event" also includes that quantity of water emanating from snow cover as snowmelt in a limited period of time.
72. "Prime farmland" means those lands defined by the secretary of agriculture in 7 CFR 657 and historically used for cropland. Prime farmlands are identified based on cooperative soil surveys and soil mapping units designated as prime farmland by the natural resource conservation service.
73. "Principal shareholder" means any person who is the record or beneficial owner of ten percent or more of any class of voting stock.
74. "Principal spillway" means an ungated pipe conduit with minimum diameter of twelve inches [30.48 centimeters] constructed for the purpose of conducting water through the embankment back to streambed elevation without erosion.
75. "Probable cumulative impacts" means the expected total qualitative and quantitative, direct and indirect effects of mining and reclamation activities on the hydrologic regime.
76. "Probable hydrologic consequence" means the projected result of proposed surface coal mining and reclamation operations which may reasonably be expected to change the quantity or quality of the surface and ground water; the surface or ground water flow, timing, and pattern; the stream channel conditions; and the aquatic habitat on the permit area and adjacent areas.

77. "Productivity" means the vegetative yield produced by a unit area for a unit of time.
78. "Prohibited financial interest" means any direct or indirect financial interest in any coal mining operation.
79. "Public building" means any structure that is owned by a public agency or used principally for public business, meetings, or other group gatherings.
80. "Public office" means a facility under the direction and control of a governmental entity which is open to the public on a regular basis during reasonable business hours.
81. "Public park" means an area dedicated or designated by any federal, state, or local agency for public recreational use, whether or not such use is limited to certain times or days, including any land leased, reserved, or held open to the public because of that use.
82. "Public road" means a public way for purposes of vehicular travel, including the entire area within the right of way, all public ways acquired by prescription as provided by statute, and all land located within two rods [10.06 meters] on each side of all section lines. This definition does not include those public ways or section lines which have been vacated as permitted by statute or abandoned as provided by statute.
83. "Qualified laboratory" means a designated public agency, private consulting firm, institution, or analytical laboratory which can provide the required determination or statement under the small operator assistance program.
84. "Recharge capacity" means the ability of the soils and underlying materials to allow precipitation and runoff to infiltrate and reach the zone of saturation.
85. "Recreation" means, for land use purposes, land used for public or private leisure-time use, including developed recreation facilities such as parks, camps, and amusement areas, as well as areas for less intensive uses such as hiking, canoeing, and other undeveloped recreational uses.
86. "Recurrence interval" means the interval of time in which a precipitation event is expected to occur once, on the average. For example, the ten-year, twenty-four-hour precipitation event would be that twenty-four-hour precipitation event expected to occur on the average once in ten years. Magnitude of such events are as defined by the national weather service technical paper no. 40, Rainfall Frequency Atlas of the United States, May 1961, and subsequent amendments or equivalent regional or rainfall probability information developed therefrom.
87. "Reference area" means a land unit maintained under appropriate management for the purpose of measuring vegetation ground cover, productivity, and plant species diversity that are produced naturally or by crop production methods approved by the commission. Reference areas must be representative of geology, soil, slope, and vegetation in the permit area.
88. "Refuse pile" means a surface deposit of coal mine waste that does not impound water, slurry, or other liquid or semiliquid material.
89. "Renewable resource lands" means aquifers and areas for the recharge of aquifers and other underground waters, areas for agricultural or silvicultural production of food and fiber, and grazing lands.
90. "Replacement of water supply" means, with respect to protected water supplies contaminated, diminished, or interrupted by surface mining activities, providing a water supply on both a temporary and permanent basis equivalent to premining quantity and quality. Replacement includes providing an equivalent water delivery system and payment of operation and

maintenance costs in excess of customary and reasonable delivery costs for the premining water supplies.

- a. Upon agreement by the permittee and the water supply owner, the obligation to pay such excess operation and maintenance costs may be satisfied by a one-time payment in an amount which covers the present worth of the increased annual operation and maintenance costs for a period agreed to by the permittee and the water supply owner.
- b. If the affected water supply was not needed for the land use in existence at the time of loss, contamination, or diminution, and if the supply is not needed to achieve the postmining land use, replacement requirements may be satisfied by demonstrating that a suitable alternative water source is available and could feasibly be developed. If this approach is selected:
  - (1) Written concurrence must be obtained from the water supply owner; and
  - (2) When final bond release is requested for the tract of land that contained the premine water supply, the newspaper notice and the letters sent to property owners and governmental agencies pursuant to subsection 1 of North Dakota Century Code section 38-14.1-17 must identify the approximate location of the premine water supply and clearly state that the permittee does not intend to replace the water delivery system.

Based on comments that are received on the final bond release application, the commission will determine whether or not a replacement water delivery system is needed to protect the public interest. If the commission determines that a replacement water delivery system is needed, the permittee must install the water delivery system before final bond release will be granted.

91. "Residential" means, for land use purposes, single-family and multiple-family housing, mobile home parks, and other residential lodgings. Land used for facilities in support of residential operations which is adjacent to or an integral part of these operations is also included. Support facilities include, but are not limited to, vehicle parking and open space that directly relate to the residential use.
92. "Return on investment" means the relation of net profit for the last yearly period to ending net worth.
93. "Road" means a surface right of way used, constructed, reconstructed, improved, or maintained for travel by land vehicles for use in surface coal mining and reclamation operations. The term includes access and haul roads used in surface coal mining and reclamation operations, including use by coal hauling vehicles to and from transfer, processing, or storage areas. A road consists of the entire area within the right of way, including the roadbed, shoulders, parking and side areas, approaches, structures, ditches, and surface. The term does not include ramps and routes of travel within the immediate mining area or within spoil or coal mine waste disposal areas.
94. "Safety factor" means the ratio of the available shear strength to the developed shear stress on a potential surface of sliding, or the ratio of the sum of the resisting forces to the sum of the loading or driving forces, as determined by accepted engineering practices.
95. "Sedimentation pond" means a primary sediment control structure designed, constructed, and maintained in accordance with this article and including, but not limited to, a barrier, dam, or excavated depression which slows down water runoff to allow sediment to settle out. A sedimentation pond shall not include secondary sedimentation control structures, such as straw dikes, riprap, check dams, mulches, dugouts, and other measures that reduce overland

flow velocity, reduce runoff volume, or trap sediment, to the extent that such secondary sedimentation structures drain to a sedimentation pond.

96. "Shelterbelt" means a strip or belt of trees or shrubs planted by man in or adjacent to a field or next to a farmstead, feedlot, or road. Shelterbelt is synonymous with windbreak.
97. "Significant, imminent environmental harm to land, air, or water resources" is determined as follows:
  - a. An environmental harm is any adverse impact on land, air, or water resources, including, but not limited to, plant and animal life.
  - b. An environmental harm is imminent if a condition, practice, or violation exists which is causing such harm or may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under North Dakota Century Code section 38-14.1-28.
  - c. An environmental harm is significant if that harm is appreciable and not immediately reparable.
98. "Significant recreational, economic, or other values incompatible with surface coal mining operations" means those significant values which could be damaged by, and are not capable of existing together with, surface coal mining operations because of the undesirable effects mining would have on those values, either on the area included in the permit application or on offsite areas which could be affected by mining. Those values to be evaluated for their importance include:
  - a. Recreation, including hiking, boating, camping, skiing, or other related outdoor activities.
  - b. Agriculture, aquaculture, or production of other natural, processed, or manufactured products which enter commerce.
  - c. Scenic, historic, archaeological, aesthetic, fish, wildlife, plants, or cultural interests.
99. "Slope" means average inclination of a surface, measured from the horizontal. Normally expressed as a unit of vertical distance to a given number of units of horizontal distance, e.g.,  $1v$  to  $5h = 20$  percent =  $11.3$  degrees.
100. "Soil horizons" means contrasting layers of soil lying one below the other, parallel, or nearly parallel to the land surface. Soil horizons are differentiated on the basis of field characteristics and laboratory data. The three major soil horizons are:
  - a. A horizon. The uppermost layer in the soil profile, often called the surface soil. It is the part of the soil in which organic matter is most abundant and where leaching of soluble or suspended particles is the greatest.
  - b. B horizon. The layer immediately beneath the A horizon. This middle layer commonly contains more clay, iron, or aluminum than the A or C horizon.
  - c. C horizon. The deepest layer of the soil profile. It consists of loose material or weathered rock that is relatively unaffected by biologic activity.
101. "Spoil" means overburden that has been disturbed during surface coal mining operations.
102. "Stabilize" means to control movement of soil, spoil piles, or areas of disturbed earth by modifying the geometry of the mass, or by otherwise modifying physical or chemical properties such as by providing a protective surface coating.

103. "Subirrigation" means, with respect to alluvial valley floors, the supplying of water to plants from a semisaturated or saturated subsurface zone where water is available for use by vegetation. Subirrigation may be identified by:
- a. Diurnal fluctuation of the water table, due to the differences in nighttime and daytime evapotranspiration rates;
  - b. Increasing soil moisture from a portion of the root zone down to the saturated zone, due to capillary action;
  - c. Mottling of the soils in the root zones;
  - d. Existence of an important part of the root zone within the capillary fringe or water table of an alluvial aquifer; or
  - e. An increase in streamflow or a rise in ground water levels, shortly after the first killing frost on the valley floor.
104. "Substantial legal and financial commitments in a surface coal mining operation" means significant investments that have been made on the basis of a long-term coal contract in power plants, railroads, coal handling, preparation, extraction or storage facilities, and other capital-intensive activities.
105. "Successor in interest" means any person who succeeds to rights granted under a permit, by transfer, assignment, or sale of those rights.
106. "Surety bond" means an indemnity agreement in a sum certain payable to the state of North Dakota executed by the permittee or permit applicant which is supported by the performance guarantee of a corporate surety licensed to do business in the state of North Dakota.
107. "Surface coal mining operations which exist on the date of enactment" means all surface coal mining operations which were being conducted on July 1, 1979.
108. "Surface mining activities" means those surface coal mining and reclamation operations incident to the extraction of coal from the earth by removing the materials over a coal seam, before recovering the coal, or by recovery of coal from a deposit that is not in its original geologic location.
109. "Suspended solids" means organic or inorganic materials carried or held in suspension in water that will remain on a forty-five hundredths micron filter.
110. "Tame pastureland" means land used for the long-term production of predominantly adapted, domesticated species of forage plants to be grazed by livestock or occasionally cut and cured for livestock feed. Land used for facilities in support of pastureland which is adjacent to or an integral part of these operations is also included.
111. "Temporary diversion" means a diversion of a stream or overland flow which is used during surface coal mining and reclamation operations and not approved by the commission to remain after reclamation as part of the approved postmining land use.
112. "Temporary impoundment" means an impoundment used during surface coal mining and reclamation operations, but not approved by the commission to remain as part of the postmining land use.
113. "Ton" means two thousand pounds avoirdupois [0.90718 metric ton].
114. "Toxic mine drainage" means water that is discharged from active or abandoned mines or other areas affected by coal exploration or surface coal mining and reclamation operations,

which contains a substance that through chemical action or physical effects is likely to kill, injure, or impair biota commonly present in the area that might be exposed to it.

115. "Toxic-forming materials" means earth materials or wastes which, if acted upon by air, water, weathering, or microbiological processes, are likely to produce chemical or physical conditions in soils or water that are detrimental to biota or uses of water.
116. "Transfer, assignment, or sale of rights" means a change in ownership or other effective control over the right to conduct surface coal mining operations under a permit issued by the commission.
117. "Unconsolidated streamlaid deposits holding streams" means, with respect to alluvial valley floors, all floodplains and terraces located in the lower portions of topographic valleys which contain perennial or other streams with channels that are greater than three feet [0.91 meter] in bankfull width and greater than six inches [15.24 centimeters] in bankfull depth.
118. "Undeveloped rangeland" means, for purposes of alluvial valley floors, lands generally used for livestock grazing where such use is not specifically controlled and managed.
119. "Upland areas" means, with respect to alluvial valley floors, those geomorphic features located outside the floodplain and terrace complex, such as isolated higher terraces, alluvial fans, pediment surfaces, landslide deposits, and surfaces covered with residuum, mud flows or debris flows, as well as highland areas underlain by bedrock and covered by residual weathered material or debris deposited by sheetwash, rillwash, or windblown material.
120. "Valid existing rights" means a set of circumstances under which a person, subject to commission approval, may conduct surface coal mining operations on lands where North Dakota Century Code section 38-14.1-07 and section 69-05.2-04-01.1 would otherwise prohibit such operations. Possession of valid existing rights confers an exception from these prohibitions. A person seeking to exercise valid existing rights must comply with all other pertinent requirements of North Dakota Century Code chapter 38-14.1 and this article.
  - a. Property rights demonstration. Except as provided in subdivision c, a person claiming valid existing rights must demonstrate that a legally binding conveyance, lease, deed, contract, or other document vests that person, or a predecessor in interest, with the right to conduct the type of surface coal mining operations intended. This right must exist at the time that the land came under the protection of North Dakota Century Code section 38-14.1-07 and section 69-05.2-04-01.1. Applicable state statutory or case law will govern interpretation of documents relied upon to establish property rights, unless federal law provides otherwise. If no applicable state law exists, custom and generally accepted usage at the time and place that the documents came into existence will govern their interpretation.
  - b. Except as provided in subdivision c, a person claiming valid existing rights must also demonstrate compliance with one of the following standards:
    - (1) All permits or good-faith standard. All permits and other authorizations required to conduct surface coal mining operations had been obtained or a good-faith effort to obtain all necessary permits and authorizations had been made, before the land came under the protection of North Dakota Century Code section 38-14.1-07 and section 69-05.2-04-01.1. At a minimum, an application must have been submitted for the permit required under this article.
    - (2) Needed for and adjacent standard. The land is needed for and immediately adjacent to a surface coal mining operation for which all permits and other authorizations required to conduct surface coal mining operations had been obtained or a

good-faith attempt to obtain all permits and authorizations had been made, before the land came under the protection of North Dakota Century Code section 38-14.1-07 and section 69-05.2-04-01.1. To meet this standard, a person must demonstrate that prohibiting expansion of the operation onto that land would unfairly impact the viability of the operation as originally planned before the land came under the protection of North Dakota Century Code section 38-14.1-07 and section 69-05.2-04-01.1. Except for operations in existence before August 3, 1977, or for which a good-faith effort to obtain all necessary permits had been made before August 3, 1977, this standard does not apply to lands already under the protection of North Dakota Century Code section 38-14.1-07 and section 69-05.2-04-01.1 when the commission approved the permit for the original operation or when the good-faith effort to obtain all necessary permits for the original operation was made. In evaluating whether a person meets this standard, the commission may consider factors such as:

- (a) The extent to which coal supply contracts or other legal and business commitments that predate the time that the land came under the protection of North Dakota Century Code section 38-14.1-07 and section 69-05.2-04-01.1 depend upon use of that land for surface coal mining operations.
  - (b) The extent to which plans used to obtain financing for the operation before the land came under the protection of North Dakota Century Code section 38-14.1-07 and section 69-05.2-04-01.1 rely upon use of that land for surface coal mining operations.
  - (c) The extent to which investments in the operation before the land came under the protection of North Dakota Century Code section 38-14.1-07 and section 69-05.2-04-01.1 rely upon use of that land for surface coal mining operations.
  - (d) Whether the land lies within the area identified on the life-of-mine map submitted under chapter 69-05.2-07 before the land came under the protection of North Dakota Century Code section 38-14.1-07 and section 69-05.2-04-01.1.
- c. Roads. A person who claims valid existing rights to use or construct a road across the surface of lands protected by North Dakota Century Code section 38-14.1-07 and section 69-05.2-04-01.1 must demonstrate that one or more of the following circumstances exist if the road is included within the definition of "surface coal mining operations" in subsection 33 of North Dakota Century Code section 38-14.1-02:
- (1) The road existed when the land upon which it is located came under the protection of North Dakota Century Code section 38-14.1-07 and section 69-05.2-04-01.1 and the person has a legal right to use the road for surface coal mining operations.
  - (2) A properly recorded right of way or easement for a road in that location existed when the land came under the protection of North Dakota Century Code section 38-14.1-07 and section 69-05.2-04-01.1, and, under the document creating the right of way or easement, and under subsequent conveyances, the person has a legal right to use or construct a road across the right of way or easement for surface coal mining operations.
  - (3) A valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of North Dakota Century Code section 38-14.1-07 and section 69-05.2-04-01.1.
  - (4) Valid existing rights exist under subdivisions a and b.

121. "Viable economic unit" means, with respect to prime farmland, any tract of land identified as prime farmland by the state conservationist of the natural resource conservation service that has been historically used for cropland.
122. "Violation, failure, or refusal" means, with respect to individual civil penalties:
  - a. A violation of a condition of a permit issued by the commission; or
  - b. A failure or refusal to comply with any order issued under North Dakota Century Code section 38-14.1-28, or any order incorporated in a final decision issued by the commission under North Dakota Century Code chapter 38-14.1, except an order incorporated in a decision issued under subsection 1 of North Dakota Century Code section 38-14.1-29.
123. "Violation notice" means any written notification from a governmental entity of a violation of law, whether by letter, memorandum, legal or administrative pleading, or other written communication.
124. "Water table" means the upper surface of a zone of saturation, where the body of ground water is not confined by an overlying impermeable zone.
125. "Willful violation" means an act or omission which violates North Dakota Century Code chapter 38-14.1, this article, or individual permit conditions committed by a person who intends the result which actually occurs.
126. "Willfully" means, with respect to individual civil penalties, that an individual acted:
  - a. Either intentionally, voluntarily, or consciously; and
  - b. With intentional disregard or plain indifference to legal requirements in authorizing, ordering, or carrying out a corporate permittee's action or omission that constituted a violation, failure, or refusal.
127. "Woodland" means land where the primary premining natural vegetation is trees or shrubs.
128. "Woody plants" means trees, shrubs, half-shrubs, and woody vines.

**History:** Effective August 1, 1980; amended effective June 1, 1983; April 1, 1985; June 1, 1986; January 1, 1987; May 1, 1990; May 1, 1992; June 1, 1997; May 1, 1999; March 1, 2004.

**General Authority:** NDCC 38-14.1-03, 38-14.1-38

**Law Implemented:** NDCC 38-14.1-02, 38-14.1-03, 38-14.1-21, 38-14.1-38

#### **69-05.2-01-03. Promulgation of rules - Notice - Hearing.**

1. The commission may propose new rules under this article or propose amendments or repealers of any rule under this article and will hold a public hearing in accordance with the procedures of this section.
2. Any person or governmental agency may petition the commission to adopt, amend, or repeal any rule under this article. Upon receipt of the petition, the commission will determine if the petition provides a reasonable basis for proposing the issuance, amendment, or repeal of a rule.
3. If the petition has a reasonable basis, the commission will propose the rule, amendment, or repealer and hold a public hearing on the proposal.
4. The commission will issue a notice of the public hearing which will:

- a. Furnish a brief explanation of the purpose of the proposed rule.
  - b. Specify a location where the text of the proposed rule may be reviewed.
  - c. Advise all interested persons of the opportunity to submit written comments and to appear and testify at the hearing to offer oral testimony.
  - d. Provide the address to which written comments may be sent.
  - e. Specify the date, time, and place of the hearing.
5. The commission will publish notice of hearing in newspapers and provide a copy of the proposed rules and notice to the legislative council as required by subsection 4 of North Dakota Century Code section 28-32-02.
  6. The public comment period on the proposed adoption, amendment, or repeal of any rule under this article will close at the end of the public hearing, unless extended by the commission.
  7. The commission will consider all written comments and oral testimony received before adoption, amendment, or repeal of any rule under this article and make a written record of its consideration.

**History:** Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; May 1, 1992; May 1, 1999; May 1, 2001.

**General Authority:** NDCC 28-32-02, 38-14.1-03

**Law Implemented:** NDCC 28-32-02, 38-14.1-34, 38-14.1-41

**69-05.2-01-04. Notice of citizen suits.**

1. A person who intends to initiate a civil action on one's own behalf under North Dakota Century Code section 38-14.1-40 shall give notice of intent to do so.
2. Notice shall be given by certified mail to the commission.
3. Notice shall be given by certified mail to the alleged violator, if the complaint alleges a violation of North Dakota Century Code chapter 38-14.1, this article, a permit condition, or any commission order.
4. Service of notice is complete upon mailing to the last-known address of the person being notified.
5. A person giving notice regarding an alleged violation shall state, to the extent known:
  - a. Sufficient information to identify the provision of North Dakota Century Code chapter 38-14.1, this article, a permit or order allegedly violated.
  - b. The act or omission alleged to constitute a violation.
  - c. The name, address, and telephone numbers of the person or persons responsible for the alleged violation.
  - d. The date, time, and location of the alleged violation.
  - e. The name, address, and telephone number of the person giving notice.
  - f. The name, address, and telephone number of legal counsel, if any, of the person giving notice.

6. A person giving notice of an alleged failure by the commission to perform a mandatory act or duty under North Dakota Century Code chapter 38-14.1 or this article shall state, to the extent known:
  - a. The provision containing the mandatory act or duty allegedly not performed.
  - b. Sufficient information to identify the omission alleged to constitute the failure to perform a mandatory act or duty.
  - c. The name, address, and telephone number of the person giving notice.
  - d. The name, address, and telephone number of legal counsel, if any, of the person giving notice.

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

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-40

#### **69-05.2-01-05. Computation of time.**

1. Except as otherwise provided, computation of time is based on calendar days.
2. In computing any period of prescribed time, the beginning day is not included. The last day is included unless it is a Saturday, Sunday, or legal holiday on which the commission is not open for business, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.
3. Intermediate Saturdays, Sundays, and legal holidays are excluded from the computation when the period is seven days or less.

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

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-03

#### **69-05.2-01-06. Intervention.**

1. Any person, including any department, agency, or instrumentality of the state, local, or federal government, may petition to intervene at any stage of a proceeding conducted under North Dakota Century Code chapter 38-14.1 or this article.
2. The petitioner shall incorporate a statement setting forth the interest of the petitioner and, where required, a showing of why the interest is or may be adversely affected.
3. The commission will grant intervention where the petitioner:
  - a. Had a statutory right to initiate the proceeding in which the petitioner wishes to intervene;  
or
  - b. Has an interest which is or may be adversely affected by the outcome of the proceeding.
4. If neither subdivision a nor subdivision b of subsection 3 apply, the commission will consider the following in determining whether intervention is appropriate:
  - a. The nature of the issues;
  - b. The adequacy of representation of petitioner's interest which is provided by the existing parties to the proceeding;
  - c. The petitioner's ability to present relevant evidence and argument; and

- d. The effect of intervention on the commission's implementation of its statutory mandate.
- 5. Any person, including any department, agency, or instrumentality of the state, local, or federal government, granted intervention in a proceeding may participate as a full party. If an intervenor wishes to participate in a limited capacity, the extent and terms of the participation will be in the discretion of the commission.

**History:** Effective June 1, 1983; amended effective May 1, 1990.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-03

**69-05.2-01-07. Petitions for award of costs and expenses - Answer - Awards - Judicial review.**

- 1. Any person may file a petition for an award of costs and expenses, including attorneys' fees, reasonably incurred as a result of participation in any administrative proceeding under North Dakota Century Code chapter 38-14.1 or this article, which results in a final order being issued by the commission.
- 2. The petition must be filed within forty-five days after receipt of the order. Failure to timely file may constitute a waiver of the right to an award.
- 3. The petition must include the name of the person from whom costs and expenses are sought, and:
  - a. An affidavit setting forth in detail all costs and expenses, including attorneys' fees, reasonably incurred for, or in connection with, participation in the proceeding;
  - b. Receipts or other evidence of those costs and expenses; and
  - c. Where attorneys' fees are claimed, evidence concerning the hours expended, the customary commercial rate for similar services in the area, and the experience, reputation, and ability of the individuals performing the services.
- 4. Any person served with a copy of the petition has thirty days from service to file an answer.
- 5. Appropriate costs and expenses, including attorneys' fees, may be awarded:
  - a. To any person from the permittee if the person initiates administrative proceedings reviewing enforcement actions, upon a finding that a violation of North Dakota Century Code chapter 38-14.1, this article, or the permit occurred, or that an imminent hazard existed, or to any person who participates in an enforcement proceeding where such a finding is made if the commission determines that the person made a substantial contribution to the full and fair determination of the issues.
  - b. To any person, other than a permittee or the permittee's representative, from the commission if the person initiates or participates in any proceeding under North Dakota Century Code chapter 38-14.1 or this article upon a finding that the person made a substantial contribution to a full and fair determination of the issues.
  - c. To a permittee from the commission when the permittee demonstrates that the commission or its authorized representative issued a cessation order, a notice of violation, or an order to show cause why a permit should not be suspended or revoked, in bad faith and to harass or embarrass the permittee.

- d. To a permittee from any person where the permittee demonstrates that the person initiated a proceeding under North Dakota Century Code section 38-14.1-30 or participated in the proceeding in bad faith to harass or embarrass the permittee.
  - e. To the commission where it demonstrates that any person applied for review pursuant to North Dakota Century Code section 38-14.1-30 or that any person participated in the proceeding in bad faith and to harass or embarrass the government.
6. An award under this section may include:
- a. All costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred as a result of initiation or participation in a proceeding under North Dakota Century Code chapter 38-14.1 or this article; and
  - b. All costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred in seeking the award.
7. Any person aggrieved by a decision on the award of costs and expenses in an administrative proceeding may seek review of the decision under North Dakota Century Code section 38-14.1-35.

**History:** Effective June 1, 1983; amended effective May 1, 1990.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-35, 38-14.1-36