

Testimony of the North Dakota Public Service Commission

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NORTH DAKOTA'S SURFACE COAL MINING REGULATORY PROGRAM

Mr. Chairman and members of the Committee, I am Kevin Cramer, Commissioner of the North Dakota Public Service Commission (PSC). Thank you for the invitation to be with you this morning. It is my pleasure to be able to deliver this testimony on behalf of the PSC.

Program History and Overview

The Public Service Commission has had the responsibility of administering North Dakota's reclamation law for more than 40 years. The mission of the Commission's Reclamation Division is to administer the program in an effective and fair manner and to ensure that surface coal mining operations are conducted in ways that they: 1) are environmentally sound and minimize adverse effects, 2) protect public interests and the rights of property owners, and 3) return mined lands to long term beneficial uses, with the productivity of agricultural lands restored to premine levels.

North Dakota's first reclamation law became effective in 1970. That law contained minimal reclamation requirements for grading mine spoil piles and seeding the graded areas. The 1973 Legislature amended the law to require that topsoil be saved and respread over mined lands that had to be re-graded to the approximate original contour. In 1975, the reclamation law was again amended and these changes required the mine operator to save and respread up to five feet of suitable soil materials, including subsoil as well as topsoil. In addition, these amendments required that the productivity of mined lands having an agricultural use be restored to the premine level.

The federal Surface Mining Control and Reclamation Act was enacted in 1977 and since that time the Commission's administration of the state reclamation law has come under the oversight of the federal Office of Surface Mining (OSM) within the U.S. Department of the Interior. A new reclamation law was passed by the 1979 Legislature to conform to the federal act. The PSC also had to adopt comprehensive rules that complied with federal regulations. OSM approved North Dakota's coal regulatory program in late 1980. Although some changes to the federal and state programs were made in the mid to late 1980's, these regulatory programs have been relatively stable for more than 20 years.

The mine permitting process requires a comprehensive application from mine operators detailing the pre-mining environment resources (soils, vegetation, geology, ground water, surface water, wildlife, cultural resources, etc.). Certain business entity and legal information must also be provided, including copies of coal leases or other documents showing that the mining company has the right to mine. Detailed operations plans must be provided including the design plans for sedimentation ponds and other surface water management structures, plans for soil removal and storage, the layout and sequence of

mine pits, design plans for haul roads and other support facilities, and plans for using any explosives to fracture the coal or overburden. Each year, 30 million tons of lignite coal is extracted from North Dakota. Reclamation plans include postmining topography and land use maps, plans for soil replacement and erosion control, the seed mixtures and revegetation methods that will be used, and methods used to determine revegetation success for final bond release. Surface and ground water monitoring plans must also be included. The PSC's Reclamation Division is authorized eight full-time staff members with backgrounds in biological and physical sciences, and engineering to review the multiple aspects of the mining permits.

Reclamation Division staff members who review the permit applications also conduct mine inspections to ensure that mining and reclamation activities are carried out in compliance with the reclamation law and rules and approved plans in the permit. This involves checking most activities at the mines including: soil removal and re-spreading, overburden removal and grading, water management, erosion control, blasting, seeding and vegetation, contemporaneous reclamation, and certain record keeping. The inspections are conducted without prior notice to the mining company. The large active mines are inspected at least twice per month.

Mine operators are also required to submit a performance bond sufficient to cover the cost of reclamation for the worst-case reclamation condition that will occur at the mine. The Commission would use the bond money to hire contractors to complete reclamation if a mining company would fail to do so. A portion of the performance bond must be held for at least 10 years following the seeding of the reclaimed lands. Mining companies can file applications to release the bond in phases as the reclamation activities are completed. Partial bond release can be requested for 1) the completion of grading, 2) replacement of subsoil and topsoil, and 3) the establishment of vegetation on the reclaimed lands. However, most mining companies wait and just file applications for final bond release rather than filing requests for partial bond release.

When the operator has successfully completed all requirements of the regulatory program and the ten-year revegetation liability period has expired, final bond release may be requested. As part of the application for final bond release, mining companies must demonstrate that lands reclaimed to agricultural uses yield at least equal to what they did prior to mining. Any premine water supplies that are needed for the postmining land use must be replaced before final bond release and the mining company must otherwise demonstrate that no significant hydrologic damage has occurred outside the permit area. The Commission's jurisdiction over the reclaimed land ends once final bond release is granted.

Mining companies must publish newspaper notices when applying for new permits, significant revisions, permit renewals, and bond releases. The Reclamation Division also sends notices to all surface owners affected by the applications. The landowners and other persons with an interest that may be affected have the right to file written objections and to request an informal conference on these applications. The surface owners are also notified of bond release inspections and invited to participate in the inspections. Following approval of any of these applications, an interested person has the right to request a formal hearing before the Commission.

Any person can file a complaint with the Commission on alleged violations of the reclamation law. Staff from the Reclamation Division will then conduct an inspection to investigate the complaint and respond in writing to the complainant.

Since North Dakota's first reclamation law was enacted by the 1969 Legislature, over 144,000 acres, or 225 sections of land, have been permitted for surface coal mining. This includes more than 22,000 acres that have been totally bond released. Currently there are 121,840 acres permitted for mining that includes areas used for roads, sedimentation ponds, and soil stockpiles as well as the areas that are actually mined for coal. Of this current permit acreage, it is estimated that 56,000 acres have been disturbed by mining activities. About 21,000 acres are currently in use for active mining operations and the remaining 35,000 acres are either in the process or have been reclaimed. About 10,000 acres of reclaimed land have been graded, re-soiled reclaimed and seeded for ten years or more.

About 60% of the land permitted for mining had a pre-mine land use of cropland and percentage of reclaimed land having a cropland postmining land use is also near 60%. Nearly one-third of the permitted lands have premining and postmining uses for livestock grazing. Other postmining land uses include wetlands, woodland, shelterbelts, farmsteads, public roads, and industrial.

The postmining industrial lands are primarily used for the disposal of coal ash from power plants near the mines. Mined lands used for ash disposal are permitted by the North Dakota Department of Health for waste disposal. The county also needs to approve this land use. Although the PSC releases the performance bond as industrial use, the site will remain under the jurisdiction of the State Health Department long after the ash disposal site is closed, capped with clay, and re-vegetated. The Health Department requires long term groundwater monitoring around this sites.

Final bond release has been granted for 22,390 acres. These lands are no longer under the Commission's jurisdiction. This includes 6,221 acres that were subject to North Dakota's early reclamation laws. Since 2003, the Commission has approved final bond release for 11,520 acres that were subject to the 1979 reclamation law.

Environmental and citizen groups often allege that mined lands in North Dakota are not being reclaimed contemporaneous with the mining. This is not true. The attached graph shows the running total of the acreage disturbed by mining, the acreage of reclaimed land that has been re-soiled and seeded, and the reclaimed lands that have received final release. The graph covers the time period from 1999 to 2011. You will note that the "Disturbed" and "Soiled/Seeded/Planted" lines are nearly parallel, showing that acreage reclaimed each year is about equal to that disturbed. Between 1,500 and 2,000 acres are disturbed each year by coal mining and similar acreage is reclaimed each year. Final bond release lags for a number of reasons. However, the primary reasons for this are the minimum 10-year revegetation liability period that applies to reclaimed lands, and, reclaimed lands at active mines are often bisected for haul roads and other long term facilities that continue to support active mining operations.

Recent and Ongoing Permitting Activities

In late July, the Commission approved the Falkirk Mining Company's significant revision that added 16,924 acres to the permit for the Riverdale Mine Area southwest of

Underwood. This additional area extends Falkirk's permit area further west and south to within a few miles of the Missouri River. Coal mined from the expanded permit area will be supplied to the Coal Creek Station for several decades.

In the spring of 2010 the Commission received the permit application from South Heart Coal, LLC, to permit 4,581 acres for a new mine southwest of South Heart in Stark County. This application was deemed complete in January and the public comment period ended in mid March. Over 30 requests for an informal conference were received on this application and many other letters and e-mails were submitted in opposition to the application. In addition, a box of about 2,000 postcards signed by people opposing this application was delivered to the Commission. An informal conference was held June 28th on South Heart Coal's application that was attended by about 100 people. Most of the concerns relate to the closeness of the proposed mine to the Theodore Roosevelt National Park. The mine would be located about 15 miles southeast of the southeast boundary of the park. However, South Heart Coal needs to respond to the Reclamation Division's technical deficiency letter on this application and this is not expected until early 2012. The informal conference will be reconvened once the Reclamation Division completes its review of the deficiency response. Also, South Heart Coal plans to file applications for air quality and water discharge permits with the State Health Department about the same time as the response is submitted to staff's technical deficiency letter.

The Reclamation Division is also waiting for a response to its technical deficiency letter sent in August of 2010 on the Otter Creek Mining Company's application to permit a new 5,500 acre mine northwest of Center. No one has objected to this new mining permit in Oliver County. The Otter Creek Mining Company is a subsidiary of the North American Coal Corporation which also owns the Falkirk Mining Company and Coteau Properties Company. In addition, BNI Coal, Ltd. is preparing an application to permit nearly 9,000 acres southeast of Center. This application will expand the Center Mine into a new mine area just south of Minnkota Power's Milton R. Young Station.

In-situ Coal Gasification

Staff members of the Reclamation Division are also participating with a team of western states representatives and OSM staff to learn more about the underground coal gasification process. The process involves the combustion of in-place coal seams and extracting the combusted gases to produce a synthetic gas, similar to that produced at the Dakota Gasification plant north of Beulah. Several companies are conducting exploratory drilling programs in Alaska for possible in-situ coal gasification. In Wyoming, the Land Quality Division may soon issue a Research and Development license to allow a company to conduct a 90-day test burn using the in-situ coal gasification process. It appears the targeted coal seams for the in-situ process are at least 600 feet deep. Great Northern Project Development has also expressed interest in underground coal gasification as a possible method to develop some of its coal resources in Montana and North Dakota. The Montana Department of Environmental Quality is under a legislative mandate to adopt in-situ mining rules that are no more stringent than federal regulations. The federal regulations currently apply underground coal mining standards to the in-situ coal gasification process. However, the western underground coal gasification team will be considering more specific guidelines for the in-situ process, including how to calculate the amount of the performance bond. The primary concerns about the underground coal gasification process are

groundwater contamination and disruption and possible surface subsidence above coal seams that are gasified.

Federal Oversight

As previously stated, the Department of the Interior's Office of Surface Mining oversees the PSC's administration for the coal regulatory program as required by federal law. The federal Office of Surface Mining currently funds 64% of the PSC's coal regulatory program costs and the remaining 36% comes from State general funds. The federal Office of Surface Mining prepares evaluation plans to review various components of the program and annual reports are presented to the Commission. We have received excellent evaluation reports from OSM for many years.

However, in the past couple of years OSM has decided the state coal regulatory programs need to come under a greater level of scrutiny and has revised several policies related to the federal oversight of state programs. These changes include conducting more federal inspections of the mines, OSM review of state-issued mining permits and require the corrections of anything they consider a permit defect, and additional data that is collected during the evaluation of state programs. An overriding concern with these policy changes is the pre-emption of state rights as OSM moves to establish a stronger federal presence in coal regulatory programs administered by the states.

New Federal Rules

OSM is continuing to work a new comprehensive stream protection rule and related Environmental Impact Statement. While the primary reason for the proposed rule is related to mountaintop mining and valley fills in Appalachia, the rule would apply nationwide. From what staff heard at a recent meeting between OSM and the western states, OSM plans to change the stream definitions to provide more protection to ephemeral streams (those that flow only a short time after precipitation events) and require a more complete baseline data set for all streams, including assessing the biologic communities in streams. The proposed rule will include a definition of "material hydrologic damage" that pertains to off permit mining impacts and it will require more in-depth stream monitoring before, during and after mining. In addition, the OSM director said the proposed stream protection rule will modify other performance standards, including re-defining approximate original contour for re-grading standards and to require the use of more native species when planting reclaimed lands. OSM is working on a schedule for issuing the proposed rule, but it does not appear it will be issued until sometime in 2012.

OSM is also conducting outreach for proposed rules for the placement of coal ash in mined lands. As envisioned by OSM, the placement of coal ash in mined lands would have to be considered a "beneficial use" to be regulated under the OSM rule. If mine placement of coal ash is considered "disposal", it would come under the coal ash rules that EPA will be adopting. EPA is reviewing more than 300,000 comments submitted on its proposed coal ash rule and will decide whether to classify coal ash as a hazardous or a non-hazardous waste.

Federal Funding

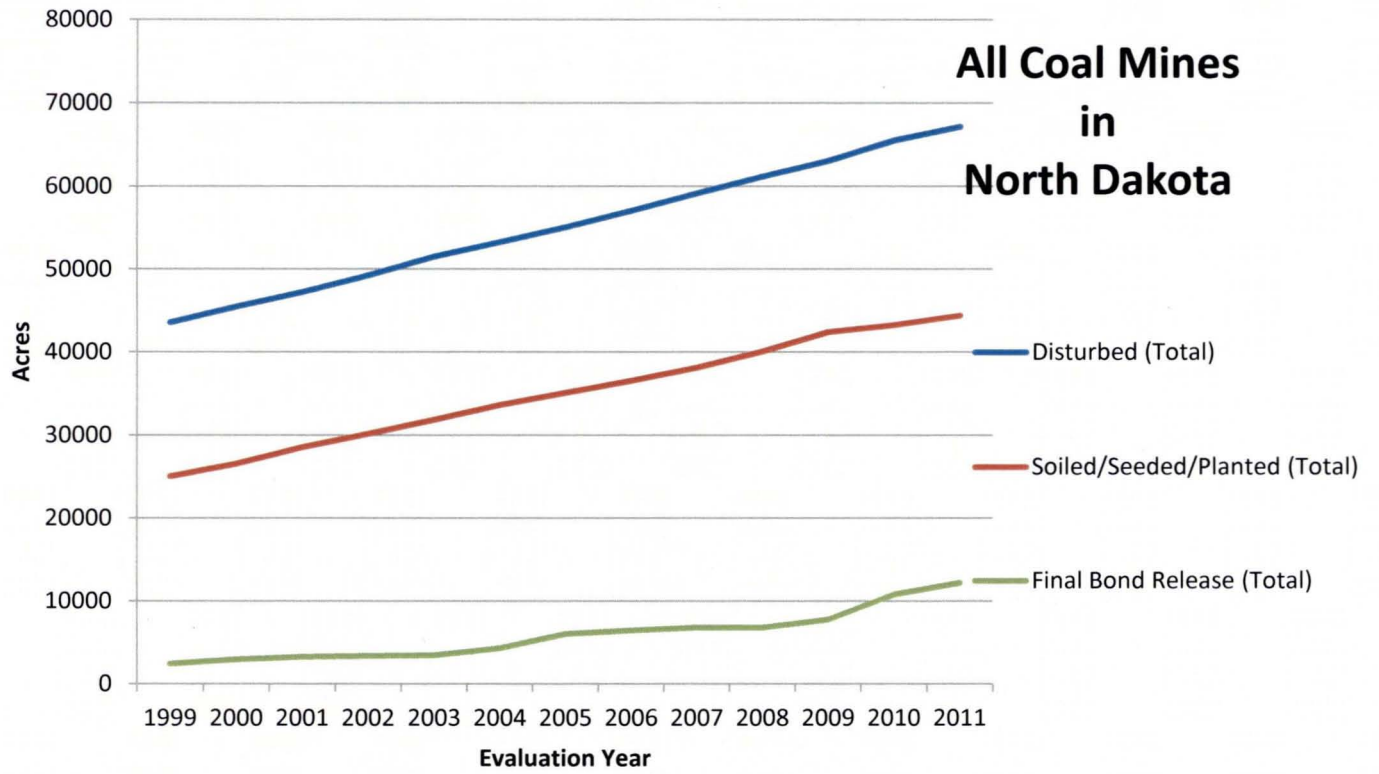
Sufficient federal funding for state coal regulatory programs has been a concern for the past two years. OSM budgets as submitted by the administration for federal fiscal years

2011 and 2012 proposed reducing the federal share of state regulatory program funding nationwide from approximately \$71 million to \$60 million, or by about 15%. Ever since state coal regulatory programs were approved in the early 1980s, OSM has funded at least 50% of the state program costs. The federal funding percentage increases for states that have federal lands permitted for coal mining (including lands where only the coal is owned by the federal government). The current federal funding percentage for North Dakota's regulatory program is 64% due to the amount of federal coal tracts that are in mining permits. The reduction in federal funds for state regulatory programs was not approved by Congress for FY 2011, and it does not appear it will be approved for federal FY 2012 either. However, it seems the current administration will continue to try to cut federal funding for state programs.

OSM plans a new federal rulemaking to recover some of the federal share of state regulatory program costs. OSM plans to do this in phases. The first phase will address the collection of funds from the coal industry to cover some of the cost of regulating mines where OSM is the direct regulatory authority. OSM regulates coal mining in Tennessee and Washington since those states have opted not to do so. OSM also regulates mining on Indian lands in New Mexico and Montana. Another phase would recover some of the state program costs. OSM would set national permit fees and collect them from the mining companies. These funds would then be returned to the states for paying part of the federal share of the coal regulatory program. OSM said the rule would allow a state to opt out of the federal fee collection system, but it would then have to come up with its own revenue mechanism to pay the federal share of the regulatory program cost. The state could collect additional fees from industry themselves or pay the federal share with state funds. OSM has not provided a timeline for this rulemaking.

The challenges that face the regulation of coal mining in North Dakota primarily relate to actions of the federal government.

Mr. Chairman and members of the Committee, this concludes my testimony about the coal regulatory program. I would be happy to answer any questions you may have.



and one OSM staff served on the ASMR Program Committee. Three NDPSC staff and two OSM staff, including the CFO Director, gave presentations at the event.

As part of the North Dakota program, citizens are allowed to request informal conferences regarding actions by the NDPSC. In the spring of 2011, several citizens groups represented by Plains Justice requested a conference regarding the South Heart Coal Mine permit application. The NDPSC granted the informal conference, and the conference was held in Dickinson, ND on June 28th. Plains Justice and its constituents argued against a permit approval regarding the South Heart Mine. An administrative law judge presided over the conference and will make a ruling on the request once NDPSC deems the permit application is complete.

IV. Major Accomplishments and Innovations

The NDPSC continues to administer an efficient and successful coal regulatory program as set forth in Section 102 of SMCRA. 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 (Appendix 1, Table 8) considering the amount of land mined and reclaimed each year. The NDPSC 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 NDPSC 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 Reclamation Division continues to work closely with mining companies and encourages 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. The Center Mine also converted Permit BNCR-9702 from a paper copy to an electronic version. 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 computers equipped with Global Positioning System (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 in the Western Region (WR) and Technical Innovation and Professional Services (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.

During the course of this evaluation year, North Dakota Mines achieved final bond release for a total of 1407 acres. This includes 270 acres of Administrative release for previously undisturbed lands, 771 acres of disturbed lands at the Glenharold Mine, and 366 acres of disturbed land at the Center Mine. The Glenharold Mine consists of permits CCGH-8003 and BCGH-8204. During EY2011, permit CCGH-8003 at the Glenharold Mine achieved all final bond release. (See Appendix 1, Table 6), leaving BCGH-8204 as the only remaining permit at the mine.

The North Dakota Public Service Commission continues to conduct frequent and thorough inspections. North Dakota conducted 83 complete inspections and 458 partial inspections on all active mine sites during this evaluation year. North Dakota also conducted 23 complete inspections and 60 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 required number of State inspections was calculated using 26 inspectable units.

Overall, North Dakota has an excellent coal regulatory program. NDPSC staff continues 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 NDPSC 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

OSM Directive REG-8 *Oversight of State Regulatory Programs* (REG-8) dictates that OSM oversight of State programs will focus on the on-the-ground/end-result success of the State programs in achieving the purposes of SMCRA. To further the concept of reporting end-results and on-the-ground success, each OSM field office is required by REG-8 to prepare findings from performance standard evaluations of 1) off-site impacts, 2) reclamation success and 3) customer service. These evaluations are required to report the number and degree of off-site