

CHAPTER 69-05.2-10
PERMIT APPLICATIONS - REVIEW, PUBLIC PARTICIPATION, AND
APPROVAL OR DISAPPROVAL

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69-05.2-10-01. Permit applications - Public notices of filing.

1. The advertisement required by North Dakota Century Code section 38-14.1-18 must also include:
 - a. The applicant's name and business address.
 - b. A map or description which must:
 - (1) Clearly show or describe towns, rivers, streams, or other bodies of water, local landmarks, and any other information, including routes, streets, or roads and accurate distance measurements, necessary to allow local residents to readily identify the permit area.
 - (2) Clearly show or describe the exact location and boundaries of the permit area.
 - (3) Show the north point (if a map).
 - (4) State the name of each owner of record of surface rights and, if the applicant proposes to mine coal or conduct activities that may impact future coal recovery, the names of each owner of record of coal rights within the permit boundaries.
 - c. The address of the commission, to whom written comments, objections, or requests for informal conferences on the application may be submitted.
 - d. If an applicant seeks a permit to conduct operations within one hundred feet [30.48 meters] of the outside right of way of a public road or to relocate a public road, a concise statement describing the road, the particular part to be relocated, where the relocation is to occur, and its duration.

2. The commission will distribute appropriate portions of the application to the state advisory committee specified in subsection 2 of North Dakota Century Code section 38-14.1-21 formed to aid the commission in evaluating the operations and reclamation plan. Members of the committee shall forward their evaluation to the commission within forty-five days of receipt.
3. If the application contains prime farmlands to be mined, the commission will furnish the state conservationist of the natural resource conservation service with the prime farmland reclamation plan submitted under section 69-05.2-09-15. The state conservationist shall provide review and comment on the proposed method of soil reconstruction and suggest remedial revisions if the plan is considered inadequate.
4. The applicant shall make a copy of the complete application available for the public to inspect and copy by filing it with the county auditor in the county where the mining is proposed. The applicant shall file the copy by the first date of the newspaper advertisement and any subsequent changes at the same time they are submitted to the commission.
5. In addition to the requirements of subsection 3 of section 38-14.1-18 of the North Dakota Century Code, the commission will notify all federal or state government agencies with authority to issue permits and licenses applicable to the proposed operations as part of the permit coordinating process and those with an interest in the proposed operations. These agencies include the soil conservation district office, the local United States army corps of engineers district engineer, the national park service, and the United States fish and wildlife service.
6. The commission will provide notice and opportunity for hearing for persons seeking and opposing disclosure prior to declaring any permit information confidential. Notice will be published in the official county newspaper of the county where the proposed operations will be located at least fifteen days prior to the hearing. Information requested to be held confidential must be clearly identified by the applicant and submitted separately. Confidential information is limited to:
 - a. Analysis of the chemical and physical properties of the coal to be mined, except information on coal components potentially toxic in the environment.
 - b. The nature and location of archaeological resources on public land and Indian land as required by the Archaeological Resources Protection Act of 1979.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-18

69-05.2-10-02. Permit applications - Informal conferences.

1. A request for an informal conference under subsection 5 of North Dakota Century Code section 38-14.1-18 must be in writing and:
 - a. Briefly summarize the issues the requester will raise.
 - b. State whether the requester desires to have the conference in the locality of the operations.
2. The commission will appoint one or more hearing examiners to preside at informal conferences on applications held under this section. No commissioner may preside at such informal conference. Hearing examiners shall have the authority delegated under section 69-02-04-07.
3. Informal conferences held under this section may be used by the commission as the public hearing opportunity required under section 69-05.2-04-01 on proposed uses or relocation of public roads.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-18

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

1. The commission will not issue the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of any law or rule of this state, the Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 445; 30 U.S.C. 1201 et seq.], or any law or rule in any state enacted under federal law or regulation pertaining to air or water environmental protection, incurred in connection with any surface coal mining and reclamation operation, or if any of the following are outstanding:
 - a. Delinquent civil penalties under North Dakota Century Code sections 38-12.1-08 and 38-14.1-32, the Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 445; 30 U.S.C. 1201 et seq.], or any law or rule in any state enacted under federal law or regulation pertaining to air or water environmental protection, incurred in connection with any surface coal mining and reclamation operation.
 - b. Bond forfeitures where violations upon which the forfeitures were based have not been corrected.
 - c. Delinquent abandoned mine reclamation fees.

- d. Unabated violations of federal and state laws, rules, and regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining and reclamation operation.
 - e. Unresolved federal and state failure-to-abate cessation orders.
 - f. Unresolved imminent harm cessation orders.
2. If a current violation exists, the commission will require the applicant or person who owns or controls the applicant, before the permit is issued, to:
 - a. Submit proof that the violation has been or is being corrected to the satisfaction of the agency with jurisdiction over the violation; or
 - b. Establish that the applicant, or any person owned or controlled by either the applicant or any person who owns or controls the applicant, has filed and is presently pursuing, in good faith, a direct administrative or judicial appeal to contest the validity of that violation. If the administrative or judicial authority either denies a stay applied for in the appeal or affirms the violation, then any operations being conducted under a permit issued under this section must immediately cease, until the provisions of subdivision a are satisfied.
 3. Any permit issued on the basis of proof submitted under subdivision a of subsection 2 that a violation is being corrected, or pending the outcome of an appeal under subdivision b of subsection 2, will be conditionally issued.
 4. The commission will not issue a permit if it finds the applicant, anyone who owns or controls the applicant, or the operator specified in the application, controls or has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations of any law or rule of this state, the Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 445; 30 U.S.C. 1201 et seq.], or any state or federal program approved under the Surface Mining Control and Reclamation Act of 1977, of such nature and duration, and with resulting irreparable damage to the environment as to indicate an intent not to comply with those laws, rules, or programs. The applicant, anyone who owns or controls the applicant, or the operator must be given an opportunity for hearing on the determination under North Dakota Century Code section 38-14.1-30.
 5. After an application is deemed ready for approval, but before the permit is issued, the commission's decision to approve or disapprove the application will be made, based on the compliance review required by subsection 1, in light of any new information submitted under

subsection 2 of section 69-05.2-06-01 and subsection 6 of section 69-05.2-06-02.

6. In addition to the requirements of subsection 3 of North Dakota Century Code section 38-14.1-21, no permit or significant revision will be approved, unless the application affirmatively demonstrates and the commission finds, in writing, on the basis of information in the application or otherwise available, which is documented in the approval and made available to the applicant, that:
 - a. The permit area is not on any lands subject to the prohibitions or limitations of North Dakota Century Code section 38-14.1-07 or the area has met the application review procedures of section 69-05.2-04-01.1.
 - b. For alluvial valley floors:
 - (1) The applicant has obtained either a negative determination; or
 - (2) If the permit area or adjacent area contains an alluvial valley floor:
 - (a) The operations would be conducted according to chapter 69-05.2-25 and all applicable requirements of North Dakota Century Code chapter 38-14.1.
 - (b) Any change in the use of the lands covered by the permit area from its premining use in or adjacent to alluvial valley floors will not interfere with or preclude the reestablishment of the essential hydrologic functions of the alluvial valley floor.
 - (3) The significance of the impact of the operations on farming will be based on the relative importance of the vegetation and water of the developed grazed or hayed alluvial valley floor area to the farm's production, or any more stringent criteria established by the commission as suitable for site-specific protection of agricultural activities in alluvial valley floors.
 - (4) Criteria for determining whether a mining operation will materially damage the quantity or quality of waters include:
 - (a) Potential increases in the concentration of total dissolved solids of waters supplied to an alluvial valley floor to levels above the threshold value at which crop yields decrease, based on crop salt tolerance research studies approved by the commission, unless the applicant demonstrates compliance with subdivision e

of subsection 3 of North Dakota Century Code section 38-14.1-21.

- (b) The increases in subparagraph a will not be allowed unless the applicant demonstrates, through testing related to local crop production that the operations will not decrease crop yields.
 - (c) For types of vegetation specified by the commission and not listed in approved crop tolerance research studies, a consideration must be made of any observed correlation between total dissolved solids concentrations in water and crop yield declines.
 - (d) Potential increases in the average depth to water saturated zones (during the growing season) within the root zone that would reduce the amount of subirrigated land compared to premining conditions.
 - (e) Potential decreases in surface flows that would reduce the amount of irrigable land compared to premining conditions.
 - (f) Potential changes in the surface or ground water systems that reduce the area available to agriculture as a result of flooding or increased root zone saturation.
- (5) For the purposes of this subsection, a farm is one or more land units on which agricultural activities are conducted. A farm is generally considered to be the combination of land units with acreage [hectarage] and boundaries in existence prior to July 1, 1979, or, if established after July 1, 1979, with boundaries based on enhancement of the farm's agricultural productivity not related to mining operations.
- (6) If the commission determines the statutory exclusions of subsection 3 of North Dakota Century Code section 38-14.1-21 do not apply and that any of the findings required by this section cannot be made, the commission may, at the applicant's request:
- (a) Determine that mining is precluded and deny the permit without the applicant filing any additional information required by this section; or
 - (b) Prohibit surface coal mining and reclamation operations in all or part of the area to be affected by mining.

- c. The applicant has, with respect to prime farmland, obtained either a negative determination or if the permit area contains prime farmlands:
 - (1) The postmining land use will be cropland.
 - (2) The permit specifically incorporates the plan submitted under section 69-05.2-09-15 after consideration of any revisions suggested by the natural resource conservation service.
 - (3) The operations will be conducted in compliance with chapter 69-05.2-26 and other standards required by this article and North Dakota Century Code chapter 38-14.1.
 - (4) The permit demonstrates that the applicant has the technological capability to restore prime farmland, within a reasonable time, to equivalent or higher yields as nonmined prime farmland in the surrounding area under equivalent management practices.
 - (5) The aggregate total prime farmland acreage will not be decreased from that which existed prior to mining based on the cooperative soil survey. Any postmining water bodies that are part of the reclamation must be located within the nonprime farmland portions of the permit area. If any such water bodies reduce the amount of prime farmland that a surface owner had before mining, the affected surface owners must consent to the creation of the water bodies and the plans must be approved by the commission.
 - d. The operations will not affect the continued existence of endangered or threatened species or result in the destruction or adverse modification of their critical habitats.
 - e. The applicant has submitted proof that all reclamation fees required by 30 CFR subchapter R have been paid.
 - f. The applicant has, if applicable, satisfied the requirements for approval of a cropland postmining land use under section 69-05.2-22-01.
7. The commission may make necessary changes in the permit to avoid adverse effects on finding that operations may adversely affect any publicly owned park or places included on the state historic sites registry or the national register of historic places. Operations that may adversely affect those parks or historic sites will not be approved

unless the federal, state, or local governmental agency with jurisdiction over the park or site agrees, in writing, that mining may be allowed.

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

General Authority: NDCC 38-14.1-03

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

69-05.2-10-04. Permit applications - Criteria for permit approval or denial - Existing structures.

1. No application which proposes to use an existing structure will be approved, unless the applicant demonstrates and the commission finds in writing that:
 - a. If the applicant proposes to use an existing structure under the exemption provided in subsection 4 of section 69-05.2-09-03:
 - (1) The structure meets the performance standards of North Dakota Century Code chapter 38-14.1 and this article.
 - (2) There will be no significant harm to the environment or public health or safety.
 - b. If the commission finds that an existing structure does not meet the performance standards, the applicant shall submit a compliance plan for modifying or rebuilding the structure. The permit will not be issued unless the commission finds that:
 - (1) The modification or reconstruction will bring the structure into compliance with the design and performance standards of this article and North Dakota Century Code section 38-14.1-24 as soon as possible, but not later than six months after permit issuance;
 - (2) The risk to the environment or to public health or safety is not significant during modification or reconstruction; and
 - (3) The applicant will monitor the structure to determine compliance with this article and North Dakota Century Code section 38-14.1-24.
2. Should the commission find that the existing structure cannot be reconstructed without causing significant harm to the environment or public health or safety, the applicant shall abandon the existing structure. The structure must not be used after the effective date of the

permit. Structure abandonment must proceed on a schedule approved by the commission under section 69-05.2-13-11.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-14, 38-14.1-21

69-05.2-10-05. Permit applications - Approval or denial actions. The commission will approve, require modification of, or deny all applications for permits according to the following:

1. The commission will not approve or disapprove a permit application prior to the expiration of the thirty-day period for requesting an informal conference or the filing of written comments or objections following the last publication of the public notice required by North Dakota Century Code section 38-14.1-18.
2. If no informal conference has been held under North Dakota Century Code section 38-14.1-19, the commission will approve, require modification of, or deny all permit applications within the review period specified in section 69-05.2-05-01.
3. If an application is approved, the permit will contain the following conditions:
 - a. The permittee shall minimize adverse impacts to the environment or public health and safety resulting from noncompliance with any term or condition, including:
 - (1) Accelerated or additional monitoring necessary to determine the nature and extent of noncompliance and the results of the noncompliance.
 - (2) Immediate implementation of compliance measures.
 - (3) Warning, as soon as possible after learning of noncompliance, any person whose health and safety is in imminent danger.
 - b. The permittee shall dispose of solids, sludge, filter backwash, or pollutants removed in the treatment or control of waters or atmospheric emissions as required by North Dakota Century Code chapter 38-14.1, this article, and any other applicable law.
 - c. The permittee shall conduct operations:
 - (1) To prevent significant, imminent environmental harm to public health or safety; and

- (2) Utilizing methods specified in the permit if the commission approves alternative methods of compliance with the performance standards of North Dakota Century Code section 38-14.1-24 and this article.
 - d. The operator shall pay all reclamation fees required by 30 CFR subchapter R for coal produced under the permit for sale, transfer, or use.
 - e. Within thirty days after a cessation order is issued under North Dakota Century Code section 38-14.1-28, except where a stay of the cessation order is granted and remains in effect, the permittee shall either submit the following information, current to the date the cessation order was issued, or notify the commission in writing that there has been no change since the last submittal:
 - (1) Any new information needed to correct or update the information previously submitted under subdivision e of subsection 1 of section 69-05.2-06-01; or
 - (2) If not previously submitted, the information required from a permit applicant by subdivision e of subsection 1 of section 69-05.2-06-01.
4. When the application is approved, the commission will publish notice in the official county newspapers and in daily newspapers of general circulation in the area of the proposed operations. The publication will provide a summary of the decision and notice that any person with an interest which is or may be adversely affected may request and initiate formal hearing procedures on the decision and may request temporary relief from permit issuance within thirty days of the publication of the notice.
5. At the time of publication of the decision required by subsection 4, the commission will:
 - a. Provide copies of all findings, decisions, and orders on an application to:
 - (1) Each person and government official who filed a written objection or comment.
 - (2) Each reclamation advisory committee member.
 - (3) The office of surface mining reclamation and enforcement, together with a copy of the approved application materials.

- b. Notify the appropriate government officials in the relevant county that a permit application has been approved and describe the location of the lands.

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

General Authority: NDCC 38-14.1-03

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

69-05.2-10-06. Permit applications - Permit approval for surface disturbances over federal mineral estates. The commission may approve and issue permits, revisions, and renewals for operations on lands where the surface estate is nonfederal and the mineral estate is federal, if:

1. The proposed surface disturbances support operations on adjacent nonfederal lands.
2. The commission consults with the office of surface mining reclamation and enforcement, to ensure that actions are not taken which would substantially and adversely affect the federal mineral estate.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990.

General Authority: NDCC 38-14.1-03

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