

CHAPTER 69-05.2-28 INSPECTION AND ENFORCEMENT

Section

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69-05.2-28-01. Inspection and enforcement - Requests for inspections.

1. A person may request an inspection of a surface coal mining and reclamation operation by filing a signed, written statement, or making an oral report followed by filing a signed, written statement, which gives the commission reason to believe that any requirement of North Dakota Century Code chapter 38-14.1, this article, or any permit condition, has not been complied with, and including the person's telephone number and address.
2. The identity of any person supplying information to the commission relating to a possible violation or imminent danger or harm will remain confidential, if requested by that person, unless that person elects to accompany the inspector on the inspection, or unless disclosure is required by a court.
3. The commission will notify the person of when the inspection is to occur as far in advance of the inspection as possible. The person may accompany the inspector on the inspection. The person has a right of entry to, upon, and through the operation, but only in the presence of and under the control, direction, and supervision of the inspector.
4. Within ten days of the inspection, or, if there is no inspection, within fifteen days of receipt of the person's written statement, the commission will send the person the following by certified mail:
 - a. If an inspection was made, a description of the enforcement action taken, which may consist of copies of the inspection report and all notices of violation and cessation orders

issued as a result of the inspection, or, an explanation of why no enforcement action was taken.

- b. If no inspection was conducted, an explanation of the reason.
 - c. An explanation of the person's right, if any, to informal review of the action or inaction of the commission.
5. The commission will give copies of all materials in subsection 4 within the time limits specified in that subsection to the permittee or operator alleged to be in violation, except that the name of the citizen will be removed unless disclosure is permitted under subsection 2.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-27, 38-14.1-28

69-05.2-28-02. Inspection and enforcement - Review of decision not to inspect or enforce - Review of adequacy and completeness of inspections.

1. Any person who is or may be adversely affected by a surface coal mining and reclamation operation may ask the commission to informally review a decision not to inspect or take appropriate enforcement action with respect to any violation alleged by that person in a filing under section 69-05.2-28-01.
 - a. The request must be in writing and include a statement of how the person is or may be adversely affected and why the decision merits review.
 - b. The request must be made within thirty days of the date the person received the materials required by subsection 4 of section 69-05.2-28-01.
2. The commission will conduct the review and inform the person, in writing, of the results within thirty days of the commission's receipt of the request. The permittee or operator alleged to be in violation will also be given a copy of the results, except that the name of the person will not be disclosed unless confidentiality has been waived.
3. Informal review under this section does not affect any right to formal review under North Dakota Century Code section 38-14.1-30, or to a citizen's suit under North Dakota Century Code section 38-14.1-40.
4. Any person who is or may be adversely affected by a surface coal mining and reclamation operation may notify the commission in writing of any alleged failure on the part of the commission to make adequate and complete or periodic inspections.
 - a. The notification must include sufficient information to create a reasonable belief that the requirements are not being complied with and to demonstrate that the person is or may be adversely affected.
 - b. The commission will, within fifteen days of receipt of the notification, determine whether the requirements are being complied with, and if not, will immediately order an inspection to remedy the noncompliance.
 - c. The commission will furnish the complainant with a written statement of the reasons for the determination and any actions taken to remedy the noncompliance.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-03

69-05.2-28-03. Inspection and enforcement - Cessation order - Affirmative relief - Modification - Vacation - Termination - Notice to owners and controllers.

1. If a cessation ordered under subdivision a of subsection 1 of North Dakota Century Code section 38-14.1-28 will not completely abate the imminent danger or harm as quickly as possible, the commission or its authorized representative will impose affirmative obligations on the operator or permittee to abate the condition, practice, or violation. The cessation order will specify the timetable for abatement and any interim steps. The cessation order may also require the use of existing or additional personnel and equipment.
2. Reclamation operations and related activities must continue while a cessation order is in force unless otherwise provided in the order.
3. The commission or its authorized representative may modify, terminate, or vacate a cessation order for good cause and may extend the time for abatement if failure to abate was not caused by lack of diligence by the permittee or operator.
4. The commission or its authorized representative will terminate a cessation order by written notice when all conditions, practices, or violations listed in the order are abated.
5. Termination of a cessation order does not affect the commission's right to assess civil penalties for the violation, condition, or practice for which the order was issued.
6. Surface coal mining operations conducted without a valid permit constitute a condition or practice which causes or can reasonably be expected to cause significant imminent environmental harm to land, air, or water resources, unless the operations are an integral, uninterrupted extension of previously permitted operations, and the person conducting them has filed a timely and complete permit application.
7. Within sixty days after issuing a cessation order, the commission will notify in writing any person identified under subsection 3 of section 69-05.2-10-05 and subdivisions e and f of subsection 1 of section 69-05.2-06-01 as owning or controlling the permittee, that the cessation order was issued and that the person has been identified as an owner or controller.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-28

69-05.2-28-04. Inspection and enforcement - Cessation order - Informal minesite hearing.

1. A notice of violation which requires cessation of mining either expressly or by necessary implication or any cessation order issued under subsection 1 of North Dakota Century Code section 38-14.1-28 will expire within thirty days of actual notice to the operator or permittee unless an informal public minesite hearing is held within that time. An informal public minesite hearing will be automatically scheduled by the commission and held within thirty days of the issuance of the cessation order unless the hearing is waived, in writing, by the operator or permittee.
2. The informal public minesite hearing will be held at or reasonably close to the minesite in order to allow viewings of the site during the hearing, or at any other location acceptable to the commission and the operator or permittee.
3. A notice of violation or cessation order will not expire as provided in subsection 1, if the condition, practice, or violation in question has been abated or if the informal public minesite hearing has been waived.

4. The commission will give as much advance notice as is practicable of the time, place, and subject of the informal public minesite hearing to:
 - a. The operator or permittee; and
 - b. Any person who filed a report which led to the issuance of that notice of violation or cessation order.
5. The commission will post notice of the hearing in its offices and publish notice, where practicable, in the official county newspaper of each county where the operation is located and in other daily newspapers of general circulation in the area of the mine.
6. An informal public minesite hearing is not a formal hearing under North Dakota Century Code section 38-14.1-30. The hearing will be conducted by a representative of the commission other than the person who initiated the notice of violation or cessation order, who may accept oral or written arguments and any other relevant information from any person attending.
7. Within five days after the close of the informal public minesite hearing, the commission or its authorized representative will affirm, modify, or vacate the notice of violation or cessation order in writing. The decision will be sent to the persons identified in subsection 4.
8. Procedures of this section do not affect the right of any operator or permittee to a formal hearing under North Dakota Century Code section 38-14.1-30. A request for a formal hearing must be made within the time prescribed in that section to preserve the right to formal administrative review of the notice or order. However, there is no right to request review of the commission's decision on an informal public minesite hearing.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-28

69-05.2-28-05. Inspection and enforcement - Notice of violation - Remedial measures - Modification - Vacation - Termination.

1. A notice of violation issued under subdivision b of subsection 1 of North Dakota Century Code section 38-14.1-28 may include any remedial action required, interim steps, if appropriate, and the time for accomplishment of any interim steps.
2. The commission or its authorized representative may modify, vacate, or terminate a notice of violation for good cause.
3. The commission or its authorized representative will terminate a notice of violation by written notice when all violations listed in the notice are abated.
4. Termination of a notice of violation does not affect the commission's right to assess civil penalties for the violation for which the notice was issued.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-28

69-05.2-28-06. Inspection and enforcement - Notice of violation - Extension of abatement period.

The commission or its authorized representative may extend the time for abatement or for accomplishment of an interim step, if the failure to meet the time previously set was not caused by lack

of diligence on the part of the permittee or operator. The total time for abatement may not exceed ninety days from the date of issuance.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-28

69-05.2-28-07. Inspection and enforcement - Cessation order or notice of violation - Inability to comply.

1. Inability to comply will not be considered grounds for vacating a cessation order or notice of violation.
2. Inability to comply may not be considered in determining whether a pattern of violations exists.
3. Unless caused by lack of diligence, inability to comply may be considered only in mitigation of the amount of civil penalty and of the duration of permit suspension.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-28, 38-14.1-30, 38-14.1-32

69-05.2-28-08. Inspection and enforcement - Suspension or revocation of permits - Pattern of violations.

1. The commission may determine that a pattern of violations exists or has existed, based on two or more inspections within any twelve-month period, after considering the circumstances, including:
 - a. The number of violations, cited on more than one occasion, of the same or related requirements of North Dakota Century Code chapter 38-14.1, this article, or the conditions of the permit;
 - b. The number of violations, cited on more than one occasion, of different requirements of North Dakota Century Code chapter 38-14.1, this article, or the conditions of the permit; or
 - c. The extent to which the violations were isolated departures from lawful conduct.
2. The commission will determine that a pattern of violations exists, if it finds that there were violations of the same or related requirements of North Dakota Century Code chapter 38-14.1, this article, or the permit conditions during three or more inspections within any twelve-month period.
3. Violations by any person or operator conducting surface coal mining operations on behalf of the permittee will be attributed to the permittee, unless the permittee establishes that the violations were acts of deliberate sabotage.
4. Whenever a permittee fails to abate a violation within the abatement period set or subsequently extended, the commission will review the permittee's history of violations to determine if a pattern of violations exists under this section, and issue an order to show cause as appropriate under subdivision c of subsection 1 of North Dakota Century Code section 38-14.1-28.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-28

69-05.2-28-09. Inspection and enforcement - Suspension or revocation of permits - Orders to show cause.

1. The commission may decline to issue an order to show cause, or may vacate an outstanding order to show cause, if the commission finds that, taking into account exceptional factors present, it would be demonstrably unjust to issue or to fail to vacate the order to show cause. The basis for this finding must be fully explained and documented in the records of the case.
2. Following the public hearing on an order to show cause, the commission may issue an order suspending a permit.
 - a. The order for permit suspension may be for a fixed or an indefinite term and include conditions for reinstatement.
 - b. A permit may be reinstated upon completion of a fixed term, provided the permittee demonstrates compliance with any conditions for reinstatement. If the permittee has not complied with the conditions, the commission may extend the suspension for an additional fixed term, suspend the permit indefinitely, or institute proceedings for revocation.
 - c. If a permit has been indefinitely suspended, the permittee may request reinstatement at any time. The commission may reinstate the permit, provided the permittee demonstrates compliance with any conditions for reinstatement.
 - d. The commission may, at any time and on its own motion, reinstate a permit that has been indefinitely suspended, or, institute proceedings for revocation.
 - e. Permit suspension shall not result in bond forfeiture unless the permit is subsequently revoked.
 - f. Reclamation operations, except as specified by the commission, must continue during suspension. However, all mining operations within the permit area must cease until the permit is reinstated.
3. If proceedings for permit revocation are instituted, the commission will issue an order to show cause why the permit should not be revoked under subdivision c of subsection 1 of North Dakota Century Code section 38-14.1-28. An opportunity for a hearing on the order to show cause will be provided under subsection 2 of North Dakota Century Code section 38-14.1-30.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-28, 38-14.1-30

69-05.2-28-10. Inspection and enforcement - Minesite hearing on requests for temporary relief.

A minesite hearing will be held on all requests for temporary relief filed under subsection 4 of North Dakota Century Code section 38-14.1-30 before relief may be granted. Temporary relief will not be granted if the provisions of subdivisions b and c of subsection 4 of North Dakota Century Code section 38-14.1-30 have not been met. If the commission and all parties agree, the hearing may be held at a location other than at the minesite.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-30

69-05.2-28-11. Inspection and enforcement - Inspections and monitoring - Filing requirements.

1. Copies of all records, reports, inspection materials, or information required by subsection 5 of North Dakota Century Code section 38-14.1-27 prepared by the commission, operator, or permittee must be promptly filed by the preparer in the county auditor's office where the operations occur.
2. Copies of all records, reports, inspection materials, or information obtained by the commission will be made immediately available to the public until at least five years after final bond release, except for information exempt from disclosure under subsection 3 of North Dakota Century Code section 38-14.1-13.

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

General Authority: NDCC 38-14.1-27

Law Implemented: NDCC 38-14.1-27

69-05.2-28-12. Inspection and enforcement - Determination of amount of civil penalty - Factors.

In determining the amount of any civil penalty assessed under subsection 1 of North Dakota Century Code section 38-14.1-32, the commission will consider the following:

1. **History of previous violations.** The commission may assess a civil penalty of up to three thousand five hundred dollars per day based on the history of previous violations by the operator or permittee at the particular operation.
 - a. If a violation is under review or if the time for review has not yet expired, the violation will not be considered.
 - b. No violation for which the notice of violation or cessation order has been vacated is considered.
 - c. Each violation is considered without regard to whether it led to a civil penalty.
2. **Seriousness.** The commission may assess a civil penalty of up to three thousand five hundred dollars per day based on the seriousness of the violation, including any irreparable harm to the environment and any hazard to public health or safety. The commission will consider:
 - a. The probability of the occurrence of the event which a violated standard is designed to prevent.
 - b. The extent of the potential or actual damage, in terms of area and impact on the public or environment.
 - c. The extent to which enforcement is obstructed by the violation.
 - d. The actual or potential duration of the damage or the impact on the public or the environment.
3. **Negligence.** The commission may assess a civil penalty of up to three thousand dollars per day based on the degree of fault of the operator or permittee in causing or failing to correct the violation, condition, or practice which led to the notice or order, either through act or omission.
 - a. A violation which occurs through no negligence, or, an inadvertent violation that was unavoidable by the exercise of reasonable care, is not considered.

- b. A civil penalty of up to one thousand five hundred dollars per day may be assessed for a violation caused by negligence, or the failure of an operator or permittee to prevent the occurrence of any violation of his permit or any requirement of North Dakota Century Code chapter 38-14.1 or this article, due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate the violation due to indifference, lack of diligence, or lack of reasonable care.
 - c. A civil penalty of up to three thousand dollars per day may be assessed for a violation which occurs through a greater degree of fault than negligence, or through reckless, knowing, or intentional conduct.
4. **Good faith in attempting to achieve compliance.** The commission may deduct up to one thousand dollars per day from the total civil penalty assessed based on the demonstrated good faith of the operator or permittee charged in attempting to achieve rapid compliance after notification of the violation.
- a. "Rapid compliance" means that the operator or permittee took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set for abatement.
 - b. No deduction will be made for normal compliance, which is abatement of the violation within the time set for abatement.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-32

69-05.2-28-13. Inspection and enforcement - Civil penalty - Assessment of separate violations for each day.

Whenever a violation has not been abated within the period set, a civil penalty of not less than seven hundred fifty dollars will be assessed for each day of the failure, except that if the operator or permittee initiates review proceedings with respect to the violation, the abatement period will be extended as follows:

1. If suspension of the abatement requirements of the notice or order is ordered in a temporary relief proceeding under subsection 4 of North Dakota Century Code section 38-14.1-30, after a determination that the operator or permittee will suffer irreparable loss or damage from the application of the requirements, the period permitted for abatement will not end until the date on which the commission issues a final order; and
2. If the operator or permittee initiates review proceedings under North Dakota Century Code section 38-14.1-35 with respect to the violation, in which the obligations to abate are suspended by the court, the daily assessment of a penalty will not be made for any period before entry of a final order by the court.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-30, 38-14.1-32, 38-14.1-35

69-05.2-28-14. Inspection and enforcement - Civil penalty - Escrow account and bond procedure.

1. Upon receipt of a timely request for a formal hearing by an operator or permittee under subsection 1 of North Dakota Century Code section 38-14.1-30, the commission will inform the operator or permittee, by certified mail, of the proposed amount of any civil penalty which may be assessed by the commission.

2. The operator or permittee shall then either pay the amount of the proposed penalty in full within thirty days and withdraw the request for a formal hearing, forward the amount of the proposed penalty to the commission within thirty days to be held in escrow pending a final commission decision on the violation and the amount of the penalty, or post a bond within thirty days with the commission payable to the state in the amount of the proposed penalty pending a final commission decision on the violation and the amount of the penalty.
3. If the operator or permittee requests review of a final commission decision under North Dakota Century Code section 38-14.1-35, the amount of the proposed penalty must continue to be held in escrow, or the bond must remain in full force and effect, until completion of review.
4. Except as provided in subsection 5, if the operator or permittee does not request review of a final commission decision under North Dakota Century Code section 38-14.1-35, the following procedures apply:
 - a. If the amount of the proposed penalty had been forwarded to the commission to be held in escrow, the escrow must end and the escrowed funds transferred to the commission in payment of the penalty; or
 - b. If a bond has been posted, the operator or permittee shall pay the amount of the penalty within thirty days after the assessment is mailed or the bond shall be forfeited.
5. If the final commission decision, or of the court on review, results in a reduction or an elimination of the amount of the proposed penalty, the commission will either refund all or part of the escrowed amount, with interest at the legal rate from the date of payment into escrow to the date of refund, or release all or part of the bond.
6. If the operator or permittee had previously forwarded the amount of the proposed penalty to the commission to be held in escrow and if the final decision of the commission results in an increase in the amount of the penalty, the operator or permittee shall pay the difference within thirty days after the assessment is mailed, unless judicial review is requested.
7. If the operator or permittee has failed to file a timely request for a formal hearing under subsection 1 of North Dakota Century Code section 38-14.1-30, the amount of any civil penalty will be incorporated in a final order of the commission as provided in subdivision b of subsection 1 of North Dakota Century Code section 38-14.1-29. The order will require the operator or permittee to pay the civil penalty within thirty days after the order is mailed.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-29, 38-14.1-30

69-05.2-28-15. Inspection and enforcement - Surface owner interference.

The surface owner is prohibited from interfering with reclamation procedures as long as the procedures form a part of a commission-approved reclamation plan.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-03

69-05.2-28-16. Inspection and enforcement - Individual civil penalty - Notice.

Where appropriate, the commission may assess an individual civil penalty under subsection 6 of North Dakota Century Code section 38-14.1-32. The commission will serve notice, consistent with rule 4 of the North Dakota Rules of Civil Procedure for service of a summons and complaint, on each person to be assessed an individual civil penalty. The notice will include an explanation of the reasons

for the penalty, the amount to be assessed, a copy of any underlying notice of violation and cessation order, and an opportunity for formal hearing under North Dakota Century Code section 38-14.1-30.

History: Effective May 1, 1992.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-32

69-05.2-28-17. Inspection and enforcement - Individual civil penalty - Opportunity for review.

The notice of proposed individual civil penalty assessment issued by the commission will become final thirty days after service unless:

1. The individual requests a formal hearing under North Dakota Century Code section 38-14.1-30; or
2. The commission and the individual or responsible corporate permittee agree within thirty days to a schedule or plan for the abatement or correction of the violation, failure, or refusal.

History: Effective May 1, 1992.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-32

69-05.2-28-18. Inspection and enforcement - Individual civil penalty - Payment.

1. If a notice of proposed individual civil penalty assessment becomes final in the absence of a request for formal hearing or abatement agreement, the penalty is due upon issuance of the final order.
2. If an individual named in a notice of proposed individual civil penalty assessment requests a formal hearing under North Dakota Century Code section 38-14.1-30, the penalty is due upon a final order affirming, increasing, or decreasing the proposed penalty.
3. Where the commission and corporate permittee or individual have agreed in writing on a plan for the abatement of or compliance with the unabated order, an individual named in the notice may postpone payment until receiving either a final order or written notice that abatement or compliance is satisfactory and the penalty has been withdrawn.

History: Effective May 1, 1992.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-32

69-05.2-28-19. Inspection and enforcement - Inspection of inactive surface coal mining operations.

The commission will conduct an average of at least one complete inspection per calendar quarter of each inactive surface coal mining operation. Partial inspections of inactive mines will be conducted as deemed necessary. For the purposes of this section, an inactive surface coal mining operation is one for which:

1. Surface coal mining operations have permanently ceased and all disturbed areas have been reclaimed and vegetation has been established in accordance with the approved reclamation plan and the lands are not contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by section 69-05.2-16-04; or
2. The commission has granted partial bond release for the disturbed areas pursuant to subsection 7 of section 69-05.2-12-12.

History: Effective May 1, 1999.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-27