

North Dakota

REGULATORY PERFORMANCE AGREEMENT

EVALUATION YEAR 2011  
(July 1, 2010 to June 30, 2011)

North Dakota Public Service Commission  
Reclamation Division

and

Office of Surface Mining  
Casper Field Office

December 2010

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## **I. BACKGROUND**

In December, 1980, the Secretary of the U. S. Department of the Interior approved North Dakota's permanent regulatory program under the provisions of the Federal Surface Mining Control and Reclamation Act (SMCRA). With that approval, the State of North Dakota assumed primary authority for regulating surface mining activities within the State. The North Dakota Public Service Commission, through the Reclamation Division, administers the permanent regulatory program. As provided by SMCRA, following program approval, the Office of Surface Mining (OSM) is responsible for overseeing the State's administration of its approved program. The Casper Field Office (CFO), under the Western Region (WR), carries out this responsibility.

## **II. OVERVIEW**

To measure the State's success in meeting the environmental protection goals of SMCRA, OSM and the North Dakota Public Service Commission (NDPSC) have cooperatively developed this Regulatory Performance Agreement. The Agreement focuses on measuring the on-the-ground success of the approved program and identifying the need for financial, technical, and other program assistance. OSM Directive REG -8, *Oversight of State Regulatory Programs*, dated December 21, 2006, forms the basis for this Agreement.

OSM is also committed to providing the NDPSC technical assistance to resolve complex site-specific issues. The oversight review and technical assistance efforts may blend in many instances where the NDPSC and OSM need to work together to resolve any program issues. This Agreement provides flexibility for this process during the development of specific work plans and subsequent evaluation reports.

Since the oversight review and technical assistance processes are continuous and not limited to one year, this Agreement contains the basic framework for oversight/technical assistance activities in North Dakota until it is amended or terminated. Both parties may amend this Agreement at any time to include additional review topics or technical assistance requests during any evaluation period. This arrangement will also provide the necessary flexibility to include unforeseen program problems as review topics at any time. Issues identified in the topical reviews or technical assistance requests that warrant further consideration may be included in this Agreement. Any evaluation topic or technical assistance request not completed during the evaluation period will move into the subsequent period for conclusion. Workload demands and staffing limitations of either party may affect the completion of the actions in this Agreement. The Agreement in no way supersedes or relieves the NDPSC or OSM of any responsibilities under previous cooperative agreements, MOU's, working agreements, the OSM approved State Program, or SMCRA.

## **III. OVERSIGHT REVIEW PROCEDURES/TECHNICAL ASSISTANCE**

Each agency will assign at least one staff member to jointly lead the evaluation of each selected review topic. The team leaders will determine the need for other staff as part of the evaluation design process. They will establish the period for the evaluation and the completion schedule for the detailed evaluation report.

## **A. Oversight Review Topics**

The oversight review topics for EY 2011, including technical assistance initiatives, are:

**Off-site Impacts** - OSM will continue to use NDPSC inspection data and observations from oversight inspections to evaluate offsite impacts associated with permitted and bond forfeiture sites.

Off-site impacts are anything resulting from surface coal mining and reclamation activity or operations that cause negative effects on resources (people, land, water or structures). Off-site impacts will be reported in the oversight report. An opportunity exists where the State and OSM may agree to jointly collect information on off-site impacts. The source for collecting off-site impact information has been State inspections, OSM oversight inspections, mine site visits, citizen complaints, and special oversight studies.

Positive impacts resulting from mining and reclamation activities and operations should be reported as an achievement in the oversight report and not included in Table 4, to avoid misunderstanding.

**Reclamation Success** - OSM will compare and evaluate the number of acres being mined to the number of acres being reclaimed pursuant to OSM Directive REG-8.

**Customer Service** - Each evaluation year, OSM is to monitor the NDPSC's customer service. Areas to be evaluated are bond releases and citizen complaints. OSM and the NDPSC will evaluate the NDPSC's outreach and interaction with the public and adjacent land owners during bond release actions and citizen complaint resolution. The standards will be the notifications requirements identified in the approved North Dakota coal program as well as the responsiveness of the NDPSC to citizen's concerns.

**Contemporaneous Reclamation** - CFO will evaluate mining and reclamation plans of approved permits to determine compliance with contemporaneous reclamation requirements, as defined by the State program rules.

**Maintenance of the Approved Program** - In cooperation with OSM, the NDPSC has developed program amendments that will resolve program deficiencies and satisfy its outstanding 30 CFR 732 notifications. OSM will process such revisions to ensure that the State's approved program is consistent with the Federal program. OSM will compare and identify any changes to the North Dakota program that have not been reviewed and approved by OSM as being as effective as the requirements of SMCRA.

**Financial Administration** - OSM and NDPSC will evaluate the financial administration of the State program. An OSM Financial Specialist will conduct this review in conjunction with NDPSC financial staff.

**Special Study Topics.** During EY2011, OSM and NDPSC will jointly conduct the following special studies:

1. **Agricultural Productivity on Reclaimed Mine Lands.** OSM and NDPSC will evaluate production data of agricultural crops on reclaimed mine lands in various stages of bond release to determine if production levels would be adequate for meeting final bond release criteria, as defined by State program rules. OSM and NDPSC will evaluate available production data submitted to NDPSC by mine operators from a representative sample of all active coal mine permits to determine if production levels would be adequate for meeting final bond release criteria required for agricultural cropland. This investigation will include a review of specific husbandry and management practices of reclaimed lands exhibiting successful production, considering variables such as site, soil thickness, crop type, precipitation, and duration of crop establishment. County-wide productivity data, may also be used for comparison. Any potential concerns identified in this evaluation may be addressed by future investigations.
2. **Vegetation Diversity on Reclaimed Mine Lands.** This study will be based on field observations made by both State and OSM personnel, during regularly scheduled oversight visits. The purpose of this study is to observe and identify any general trends in diversity of vegetation on reclaimed mine lands in North Dakota. Specific grazing, husbandry and management practices of reclaimed lands exhibiting successful diversity will be examined, considering variables such as site, soil thickness, seed mix, precipitation, noxious weed control, and duration of vegetation establishment. Any potential concerns identified in this overview may be addressed by future investigations.
3. **NDPSC's Process for Satisfying Provisions of the Clean Water Act (CWA).** As part of OSM's "Immediate Stream Protection Measures," OSM will evaluate NDPSC's process of coordinating issuance of the various permits and authorizations required under SMCRA and the CWA. The evaluation will ensure effective and coordinated compliance by the State and Federal agencies responsible for implementing provisions of the CWA.

## **B. Oversight Inspections**

To ensure compliance with the approved State program, OSM will conduct a minimum number of inspections equal to twenty five percent of the total number of inspectable units. One third of those inspections will be complete oversight inspections. At the beginning of EY2011, North Dakota has a total of 26 inspectable units. During EY 2011, OSM will conduct a minimum of two complete oversight inspections and four partial oversight inspections. At least one of the oversight inspections will be an independent OSM inspection. Independent inspections may consist of partial or complete inspections.

The purpose of the inspections and field site evaluations, as specified in OSM Directive REG-8, will be to evaluate the State's effectiveness in implementing its Inspection and Enforcement program, reclamation success and identify any off-site impacts. Evaluation of the State's effectiveness will be accomplished during OSM's Sample Inspections and other mine site visits, as well as, reviewing inspection reports and enforcement actions. Reclamation success will be evaluated based on field and permit review of AOC, land capability, hydrologic reclamation, and contemporaneous reclamation.

The following summarizes the types of inspections that will be conducted during the evaluation period:

**Sample Inspections** CFO will conduct complete, partial, and bond release inspections to evaluate the general effectiveness of the State's administration of its approved surface mining regulatory program. Complete inspections will be done by selecting permits for review that have not been inspected by OSM in the previous 2 years.

**Bond Release Inspections** -CFO will evaluate and report on the effectiveness of reclamation success during bond release, with an emphasis on final bond release.

**Special Study Inspections** -CFO will conduct inspections that pertain to certain aspects of the State's approved program. Inspections will be done to assess the State's effectiveness in administering specific parts of its program. Provided the availability of resources, special study inspections will continue to be done in the future in areas that CFO feels merit special attention or upon the State's request.

During EY 2011 CFO will conduct inspections of active mining sites to ensure that reclamation is being conducted according to the contemporaneous reclamation requirements of the approved reclamation plans.

**Miscellaneous Inspections** - In addition, the CFO may conduct inspections where:

- there is potential imminent danger to the public safety and/or imminent harm to the environment;
- there are citizens' complaints filed with the CFO;
- there are bond releases on Federal lands; and,
- partial inspections (as needed to evaluate the effectiveness of the State program in protecting the environment and public from negative off-site impacts).

### **C. Data & Information Exchange**

CFO and the NDPSC agree that the exchange of information is critical to the oversight process. State information is needed by OSM to complete day-to-day oversight activities, to maintain the nationwide Inspection and Enforcement Tracking System's inspectable units list, and to provide data to satisfy OSM's oversight reporting requirements.

NDPSC agrees to provide CFO the same mining and reclamation data submitted to NDPSC by individual operators, as stated in NDCC38-14.1-27 (1)(c), for independent evaluation by CFO. This data will include an annual map for the current year of the permit, and will be in such a format as to show the status of disturbance and reclamation. This data will include, at a minimum; the number of acres disturbed by mining practices and the number of acres re-soiled and seeded. This information needs to be submitted to CFO in sufficient time for inclusion in the current oversight evaluation report.

Other information may be required from data systems maintained by NDPSC staff.

### **D. Problem Resolution**

One main objective of OSM's oversight of State programs is to resolve identified problems as expeditiously as possible. CFO and the NDPSC will focus resources on resolving any problems that are identified during the oversight review. Issues identified may be resolved through action plans. However, selected issues may require modified procedures to ensure prompt resolution. These procedures will be developed jointly by the NDPSC and CFO on a case-by-case basis. CFO will report resolutions, incremental improvements toward resolutions, and any new issues, in the Annual Evaluation Report.

## **IV. PUBLIC OUTREACH**

OSM and the NDPSC are committed to interacting with citizen, environmental, and industry organizations on a continuing basis. CFO maintains a mailing list of organizations and individuals who have previously participated in regulatory activities. These groups/individuals will be requested to provide input into oversight activities throughout the evaluation year and are encouraged to provide suggestions for improvement of future annual evaluation reports and performance agreements. CFO will post these documents on the OSM website to encourage public participation. In addition, CFO staff will be available to meet with individual citizens or organizations at any time during the evaluation year. The NDPSC will be invited to participate in these meetings and a record of the meetings will be placed in OSM's public review file. OSM encourages groups to request and schedule meetings related to specific issues. Other opportunities for public outreach will be pursued throughout the evaluation year, as appropriate.

**V. INNOVATIVE STATE ACTIONS**

REG-8 has added recognition for innovative approaches related to managerial efficiency, problem resolution, environmental protection, and program implementation as a reporting element. Additionally, the NDPSC will identify and report to CFO, on an ongoing basis, any activities that in its judgment deserve recognition. Activities identified by either OSM or NDPSC will be discussed in the Annual Evaluation Report.

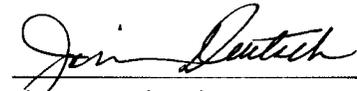
**VI. CITIZEN COMPLAINTS**

CFO will process citizen complaints using the procedures in OSM Directive INE-24, as amended.

**VII. SIGNATURES:**

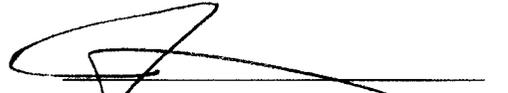
Signed in agreement by the parties this 16<sup>th</sup> day of DECEMBER 2010.

For the North Dakota Public  
Service Commission



Jim Deutsch, Director  
Reclamation Division  
North Dakota Public Service Commission

For the Office of Surface  
Mining



Jeffrey Fleischman, Director  
OSM/Casper Field Office