

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWEST DIVISION

DAKOTA RESOURCE COUNCIL)

Plaintiff,)

v.)

NORTH DAKOTA PUBLIC SERVICE)
COMMISSION)

Defendant.)

Case No. _____

COMPLAINT TO COMPEL
COMPLIANCE

I. INTRODUCTION

1.

NATURE OF THE CASE

This is a citizens’ suit under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328, for declaratory relief, a compliance order, and an award of costs and fees. Plaintiffs seek an order declaring Defendant in violation of SMCRA, compelling Defendant to refrain from giving further effect to certain policy memoranda unless and until Defendant obtains lawful approval of each memorandum from the Director of the Office of Surface Mining Reclamation and Enforcement (“OSM”) of the United States Department of the Interior; compelling Defendant to comply with 30 C.F.R. § 732.17(g) with respect to each future change in laws that make up the North Dakota state regulatory program for implementing SMCRA, and awarding costs and fees to Plaintiff from Defendant.

2.

PLAINTIFFS

Dakota Resource Council (DRC) is a North Dakota non-profit organization formed in 1978. DRC's principle place of business is 103½ S. Third Street, Suite 8, Bismarck, ND 58504. DRC has over 380 members across North Dakota.

DRC brings this action on behalf of certain of its members who live, work, and recreate in areas that are directly affected by surface coal mining and reclamation operations in North Dakota. DRC members recreate and work in areas whose attractiveness and utility are or would be diminished by surface coal mining and reclamation operations. Certain of Plaintiff's individual members own, live on, or ranch lands adjacent to or within sight of active or proposed surface coal mining and reclamation operations. Their peaceful enjoyment of their homes, the viability of their farming, ranching, and outfitting livelihoods, and their personal safety on local roads are or imminently would be threatened by surface coal mining and reclamation operations, including but not limited to blasting, digging, and hauling.

Plaintiff has standing to commence and prosecute this action because the interests of certain of Plaintiff's members are or may be adversely affected by Defendant's unlawful implementation of changes to the North Dakota regulatory program. Plaintiff's members depend on strict enforcement of SMCRA and the North Dakota regulatory program as approved by OSM to protect their affected interests. Plaintiff's members rely upon Plaintiff to bring litigation on their behalf to ensure that North Dakota regulators strictly comply with SMCRA in regulating surface coal mining operations in North Dakota.

3.

DEFENDANT

Defendant North Dakota Public Service Commission ("NDPSC") is the state regulatory authority for North Dakota within the meaning of 30 U.S.C. § 1291(26), as the result of approval

of North Dakota's state regulatory program by the Secretary of the Interior pursuant to 30 U.S.C. § 1253. *See* 30 C.F.R. Part 934. NDPSC's principal place of business is 600 East Boulevard, Department 408, Bismarck, ND 58505-0480. Mark Gruman is legal counsel for NDPSC.

II.

JURISDICTION AND VENUE

4.

This Court has subject matter jurisdiction over the claims set forth in this complaint pursuant to 30 U.S.C. § 1270(a). Alternatively, this court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 and § 2201 (declaratory judgment) and 30 U.S.C. § 1270(a)(2). The relief requested by Plaintiffs is authorized by statute in 28 U.S.C. §§ 2201 and 2202, and 30 U.S.C. § 1270(a)(2).

5.

Venue is proper in this Court pursuant to 30 U.S.C. § 1270(c), 28 U.S.C. § 1391, and LR 3.1(a). NDPSC conducts its business primarily from the North Dakota State Capitol in this district. Plaintiff has its office in this district. The events or omissions giving rise to the claims occurred in this district, where a significant portion of the surface coal mining and reclamation operations affected by the non-discretionary duties at issue are or would be located.

6.

Pursuant to 30 U.S.C. § 1270(b)(2), on March 26, 2012, Plaintiffs gave notice in writing to NDPSC of their intent to commence and prosecute this action. More than 60 days have since elapsed.

III.

STATUTORY AND REGULATORY FRAMEWORK

7.

The purpose of the Surface Mining Control and Reclamation Act (SMCRA) includes "to

establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations”, “assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations”, and “wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.” 30 U.S.C. § 1202(a), (b), and (m).

8.

Section 503(a) of SMCRA permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, “a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this (Act);... (and) rules and regulations *consistent with* regulations issued by the Secretary pursuant to this (Act).” 30 U.S.C. 1253(a)(1) and (7)(emphasis added).

9.

Following initial approval of each state regulatory program, federal law requires the Director of OSM to “determine whether a State program amendment is required and notify the State regulatory authority of the decision” within 30 days of the time when the Director is notified or becomes aware of any of the following conditions:

- (1) As a result of changes in the Act or regulations of this chapter, the approved State program no longer meets the requirements of the Act or this chapter; or
- (2) Conditions or events change the implementation, administration or enforcement of the State program; or
- (3) Conditions or events indicate that the approved State program no longer meets the requirements of SMCRA or its implementing federal regulations. 30 C.F.R. § 732.17(e).

10.

The federal regulations implementing SMCRA provide explicit procedures for any amendments to the approved state program. 30 C.F.R. § 732.17(e)-(h). Each state regulatory authority has a mandatory, non-discretionary duty to refrain from giving effect to any change to an approved state regulatory program unless and until the Director of OSM lawfully approves the change. 30 C.F.R. § 732.17(g).

IV.

FACTUAL BACKGROUND

11.

Following initial approval of North Dakota's state regulatory program on December 15, 1980, NDPSC has issued numerous surface mining "policy memoranda" (see Exhibit), some updated multiple times, governing various surface mining activities.

12.

Based on information and belief after reasonable inquiry, NDPSC has not submitted any of these memoranda to OSM for its evaluation and approval, nor has OSM lawfully approved any of these memoranda as an independent agency action, pursuant to the procedures that SMCRA requires.

13.

Some of the memoranda, including but not limited to memos 5, 6, 15, 18 and 20, contain substantive inconsistencies with the federal environmental protection performance standards that must be adopted and implemented under state regulatory programs for surface coal mining and reclamation operations. *See* 30 C.F.R. Parts 816-828.

14.

NDPSC is engaged in a pattern and practice of giving effect to each of these unapproved changes in the laws or regulations that make up the approved North Dakota program, in violation of 30 U.S.C. § 1254(a)(3) and 30 C.F.R. § 732.17(g).

V.

CAUSE OF ACTION: VIOLATION OF 30 C.F.R. § 732.17(g)

15.

For its cause of action, Plaintiff realleges each and every prior allegation of this complaint.

16.

Plaintiff has served proper notice of this Complaint on the relevant agencies and parties as required by 30 U.S.C. § 1270(b) and 30 C.F.R. § 700.13.

17.

NDPSC has engaged in a pattern and practice of violation of mandatory, non-discretionary duties to submit state program amendments to a review process culminating in either formal approval or denial by OSM prior to implementation, as required by 30 U.S.C. § 1253(h) and 30 C.F.R. § 732.17(g) and (h).

18.

Certain of Plaintiff's members who work, reside and recreate near regulated strip mines are aggrieved by these violations because the North Dakota state regulatory program as implemented is now inconsistent with certain federal permanent performance standards for state programs as a result of these violations, including weaker standards for reclamation and waste disposal practices than required under the federal program, which have resulted and will continue to result over time in diminished land values and quality of life.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

A) Provide declaratory relief stating that NDPSC has violated and continues to violate the Surface Mining Control and Reclamation Act and its implementing federal regulations as described above;

B) Enter an order compelling NDPSC to refrain from giving further effect to unapproved amendments to the North Dakota program, including but not limited to the specific amendments identified above;

C) Award Plaintiff its costs and expenses, including reasonable attorney fees, pursuant to 30 U.S.C. § 1270(d);

D) Retain jurisdiction over this action to ensure compliance with the Court's decree;
and

E) Grant all other relief the Court deems just and proper.

Dated this 30th day of May, 2012.

PLAINS JUSTICE
P.O. Box 1398
Billings, MT 59103
Tel. 406-969-1040
Fax: 866-484-2373

/s/ Carrie La Seur
Carrie L. La Seur
Email: claseur@plainsjustice.org

Attorney for Plaintiffs

Exhibit: NDPSC Surface Mining Policy Memoranda

Dates of Issue & Revisions	No.	Subject
3/8/1995	2	Mine Personnel Accompanying Commission Representatives During Inspections
3/8/1995 2/25/1988 8/10/1984 4/27/1978	3	Covering Toxic-Forming Materials with Nontoxic Material and Covering Combustible Materials with Noncombustible Material
3/8/1995	4	Payment of Charges for Analysis of Soil, Spoil and Water Samples Taken by PSC Representatives
3/8/1995 8/10/1984 3/8/1995	5	Suitable Plant Growth Material Removal
3/8/1995 8/10/1984 5/4/1979	6	Activities Covered by Surface Coal Mining Permits
3/8/1995 8/10/1984 8/2/1979	7	Coordination of State Regulatory Program Surface Coal Mining Operation Communications with the PSC, State Dept. of Health, and State Water Commission
3/8/1995 8/10/1984 10/15/1980	8	Applicability of the Ten-Year Revegetation Liability Period Pursuant to NDCC 38-14.1-24(18)
7/12/2006 12/19/2001 3/8/1995 11/10/1982 11/10/1982	9	Clarification of Bond Release Notice Requirements of NDCC 38-14.1-17
2/17/1994 9/24/1991 8/10/1984 4/29/1983	10	Clarification of 1) standards and methods for proving reclamation success on cropland areas disturbed after July 1, 1975 and not used in support of mining after May 3, 1978, 2) management practices for all reclaimed cropland, and 3) breaking pre-cropland grass-legume stands prior to final bond release
3/8/1995 8/10/1984 7/25/1983	11	Sedimentation Pond Design, Construction, Operation and Maintenance

Exhibit: NDPSC Surface Mining Policy Memoranda (Continued)

7/12/2006 12/19/2001 3/8/1995 2/12/1985	12	Impoundment Certifications and Impoundment Inspection Reports by a Registered Professional Engineer
3/8/1995 6/21/1985	14	Clarification of Annual Map Requirements, NDAC 69-05.2-13-02
1/13/1999 11/5/1985	15	Performance Bond Release for Disposal Operations Located on Mined Lands
7/2006	16a	Reclamation Cost Estimating Guidelines for Establishing Performance Bond Amounts
7/2009	16b	2009 Updates to Variable Costs
3/8/1995 1/20/1987	17	Suitable Plant Growth Material Removal and Redistribution Under NDAC 69-05.2-15, as revised January 1, 1987
2/3/1987	18	Policy for Allowing a Performance Bond to Cover More than One Permit Area
7/12/2006 7/30/1997 3/8/1995 5/18/1988 7/15/1987	19	Guidelines for Sedimentation Pond Removal and Pond Site Reclamation
1/29/2009 6/9/2004 7/30/1997 7/21/1992 9/6/1989	20	Performance Bond Responsibility for Water Management and Other Support Facilities
8/1/1995	21	Mine Waste Disposal
6/9/2004	22	Re-permitting Reclaimed Lands that Have Received Final Bond Release
7/12/2006	23	Mine-related Roads Subject to Design and Performance Standards and Road Certification Requirements

JS 44 (Rev. 09/11)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p>I. (a) PLAINTIFFS Dakota Resource Council</p> <p>(b) County of Residence of First Listed Plaintiff <u>Burleigh</u> <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i></p> <p>(c) Attorneys <i>(Firm Name, Address, and Telephone Number)</i> Carrie La Seur, Plains Justice, PO Box 1398, Billings, MT 59103 Tel. 406-696-8700</p>	<p>DEFENDANTS North Dakota Public Service Commission</p> <p>County of Residence of First Listed Defendant _____ <i>(IN U.S. PLAINTIFF CASES ONLY)</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys <i>(If Known)</i> Mark Gruman, Legal Counsel, North Dakota Public Service Commission, State Capitol, 600 East Boulevard, Dept. 408, Bismarck, ND 58505-0480</p>
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II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input type="checkbox"/> 3 Federal Question <i>(U.S. Government Not a Party)</i>
<input checked="" type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity <i>(Indicate Citizenship of Parties in Item III)</i>

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Med. Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee (Prisoner Petition) <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district <i>(specify)</i>	<input type="checkbox"/> 6 Multidistrict Litigation
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VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
30 USC 1201-1328

Brief description of cause:
Seeking Surface Mining Control and Reclamation Act compliance order

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ _____

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY *(See instructions):* JUDGE _____ DOCKET NUMBER _____

DATE: 05/30/2012

SIGNATURE OF ATTORNEY OF RECORD:

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____