

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Dakota Westmoreland Cooperation
Revision No. 24, Permit KRSB-8802
Application**

Case No. RC-08-162

**REVISION OF PERMIT TO ENGAGE IN
SURFACE COAL MINING AND RECLAMATION OPERATIONS**

October 22, 2008

Based on the Application for **Revision Number 24 to Surface Coal Mining Permit KRSB-8802** submitted by the Dakota Westmoreland Corporation (DWC) on April 15, 2008, and as revised through September 30, 2008, and all information and documentation contained therein, the North Dakota Public Service Commission (Commission) finds that the application meets all applicable requirements of Chapter 38-14.1 of the North Dakota Century Code (NDCC) and Article 69-05.2 of the North Dakota Administrative Code (NDAC). On the basis of the information set forth in the application or from that otherwise available and known by the applicant, the Commission finds that:

Finding No. 1. The permit revision application is accurate and complete and complies with the requirements of NDCC Chapter 38-14.1 and NDAC Article 69-05.2 [NDCC 38-14.1-21(3)(a)].

The applicant verified that all information in Revision No. 24 is true and correct to the best of their knowledge. This revision adds 54.5 acres to the permit that will be used for a walkway for moving a large dragline and loading shovel. The surface of the added acreage is owned by the Coyote Power Station Partners and the coal is under federal ownership. However, no coal will be mined from the added acreage as only surface disturbances are proposed. Commission staff conducted completeness and technical reviews to ensure that the required information was provided and the mining and reclamation plans meet all applicable requirements. The Reclamation Division sent completeness and technical deficiency letters to the applicant on May 7, 2008, August 1, 2008 and September 8, 2008. Responses to each letter were received and appropriate changes were made to the application to address the concerns that were listed. The Commission concludes that the application is now accurate and complete. The applicant published the required newspaper notices in the Hazen Star and Bismarck Tribune in July of 2008. The Reclamation Division published a notice on August 3, 2008 informing the public that mining operations were proposed within the right-of-way of State Highway 49. The Commission sent notices to local, state and federal agencies and Advisory Committee Members were sent copies of the permit revision application. Comments from Advisory Committee Members were forwarded to Dakota Westmoreland. The surface owners were notified of the lands being permitted with this revision via a Notice of Intent letter dated May 19, 2008. No written objections or requests for an informal conference were received on this application.

Finding No. 2. The applicant has demonstrated that reclamation as required by NDCC Chapter 38-14.1 and NDAC Article 69-05.2 can be accomplished under the reclamation plan contained in the permit application [NDCC 38-14.1-21(3)(b)].

Revision Number 24 adds 54.5 acres located in the N½ of Section 14, T143N, R88W, Mercer County, to the permit area of Surface Coal Mining Permit KRSB-8802. With approval of this revision, the total acreage in the permit will be 4,905.9 acres. The acreage in Section 14 is being added to construct a dragline walkway to Surface Coal Mining Permit KRSB-8603. The applicant plans to move the large dragline and loading shovel currently operating east of State Highway 49 in Permit KRSB-8802 to Permit KRSB-8603 located west of the highway. The dragline and shovel move also involves the re-disturbance of reclaimed land on the east side of the highway.

Reclamation of the affected areas will be carried out using reclamation procedures that have been successful in the past and satisfy the requirements of the North Dakota law and rules. The applicant's reclamation practices have proven effective in the past. There were no substantive changes to the previously approved mining and reclamation plans in Permit KRSB-8802.

The applicant has demonstrated that sufficient soil materials are available to meet the soil redistribution requirements of NDAC 69-05.2-15 and the revegetation requirements of NDAC 69-05.2-22. Since this added area will not be mined, the post-mining topography proposed by the applicant is essentially the same as the pre-mine topography and therefore meets the requirements of NDCC 38-14.1-24(3) and NDAC 69-05.2-21-02. The reclaimed land will be capable of supporting pre-mine uses, or higher or better uses, that existed prior to mining. No land use changes are being proposed on the lands being added to the permit in Section 14.

The applicant proposes delaying reclamation of the portion of the walkway corridor west of Highway 49 until a decision is made on extending its current contract with the Coyote Power Station. If this contract is extended, or the applicant enters into a contract for additional customers, mining would resume east of Highway 49. In any event, the applicant plans to reclaim the walkway in 2016. A variance from the three-year reclamation requirement under NDCC 38-14.1-24(14) is justified and the Commission is allowing the variance for the walkway corridor on the west side of State Highway 49.

Finding No. 3. Based on the assessment of the probable cumulative impact of all anticipated mining in the area, the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area [NDCC 38-14.1-21(3)(c)].

An assessment of the probable cumulative hydrologic impact of all anticipated mining in the area has been made as required by NDCC 38-14.1-14(1)(o). The Commission finds that the proposed operation has been designed to maintain the quantity, quality and hydrologic regime of surface and ground water systems in the area. The cumulative effects of all existing and proposed mining operations should not damage the hydrologic balance outside of the permit area. The detailed cumulative hydrologic impact assessment was previously filed with Permit KRSB-8802 in the Commission's offices.

Finding No. 4. Lands within the areas being added to the permit are not within an area designated unsuitable for surface coal mining operations, nor within areas under study or administrative proceedings under a petition to have an area designated as unsuitable for surface coal mining operations [NDCC 38-14.1-21(3)(d)].

None of the lands within the areas being added to the permit area have been designated unsuitable for surface coal mining operations pursuant to NDCC 38-14.1-05, nor are they within an area under study or administrative proceedings under a petition to have an area designated as unsuitable for surface coal mining operations.

Finding No. 5. The proposed mining operation will not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated or materially damage the quantity or quality of water in surface or underground water systems that supply these alluvial valley floors [NDCC 38-14.1-21(3)(e)].

Based on an examination of the geologic and geomorphic characteristics, soils, and the water quality and quantity of streams occurring within or adjacent to the permit area, it has been determined that no alluvial valley floors occur within or adjacent to the permit area.

Finding No. 6. In cases where the mineral estate has been severed from the surface estate, the applicant complied with the requirements of NDCC 38-18 [NDCC 38-14.1-21(3)(f)].

The applicant included leases and other documents in the revision application demonstrating compliance with the North Dakota Surface Owners Protection Act, NDCC 38-18. The lands being added with this revision are owned by the Coyote Partners.

Finding No. 7. Lands within the areas being added to the permit are not within areas subject to the prohibitions or limitations of NDCC 38-14.1-07 unless the area met the application review procedures of NDAC 69-05.2-04-01.1 [NDAC 69-05.2-10-03(6)(a)].

Lands being added to the permit with Revision No. 24 are:

- a) Not within the boundaries of units of the North Dakota State Park System, the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the National Wild and Scenic Rivers System, including Study Rivers designated under Section 5(a) of the Wild and Scenic Rivers Act and national recreation areas.
- b) Not federal lands within the boundaries of any national forest.
- c) Not within three hundred feet of any publicly owned park or places in the State Historic Sites Registry or the National Register of Historic Places. The pre-mine cultural resource survey for the areas being added to the permit with Revision No. 24 did not identify any new sites. The applicant has committed to reporting, testing and mitigating, if necessary, any previously unrecorded archeological, cultural, or historical materials that may be discovered as a result of mining related activities.
- d) Within one hundred feet of the outside right-of-way of State Highway 49. The applicant has received approval from the North Dakota Department of Transportation (NDDOT) to conduct mining activities within and adjacent to the highway right-of-way. However, the Department of Transportation's approval process did not provide for public notice with an opportunity for a hearing. Therefore, the Commission published

a newspaper notice on August 3, 2008 of the applicant's plans to conduct mining related activities within and adjacent to the highway right-of-way and stated that any interested person could request a public hearing with the Commission on the matter. No written comments, objections or requests for a hearing were received. The Commission finds that the public and interested landowners will be protected as required by NDAC 69-05.2-04-01.3 and is approving the mining operations within and adjacent to the right-of-way of State Highway 49 as proposed by the applicant.

- e) Not within three hundred feet of any public building, school, church, community, or institutional building.
- f) Not within one hundred feet of a cemetery.

Finding No. 8. With respect to prime farmland, the post-mining land use will be cropland, the reclamation plan was reviewed by the Natural Resource Conservation Service and they concurred with the prime farmland reclamation plan, operations will be conducted in compliance with NDAC 69-05.2-26 and NDCC 38-14.1, and the applicant has the technological capability to restore the productivity on reclaimed lands [NDAC 69-05.2-10-03(6)(c) and NDCC 38-14.121(6)].

A review of the Mercer and Oliver County Soil Surveys shows that no prime farmland is present within the area being added to the permit. In addition, the pre-mine land use of the area being added to the permit is native grassland and it has not been historically used as cropland. Therefore, a prime farmland operations and reclamation plan is not needed for the area being added to the permit.

Finding No. 9. The operations will not affect the continued existence of threatened or endangered species or result in the destruction or adverse modification of their critical habitats [NDAC 69-05.2-10-03(6)(d)].

No threatened or endangered species or their critical habitats were observed within or contiguous to the tracts being added to the permit area. Surface coal mining and reclamation activities will not affect the continued existence of threatened or endangered species or result in the destruction or adverse modification of their critical habitats. The whooping crane and gray wolf could occur as occasional migrants through the area. Habitats required for the black-footed ferret, least tern, pallid sturgeon and western prairie fringed orchid are not found in or adjacent to the permit area. Piping plover habitat does not exist on the tracts being added to the permit, but desirable habitat may be temporarily created during the mining and reclamation process. It is unlikely the Dakota skipper butterfly, a candidate species, exists in the area due to habitat requirements.

Finding No. 10. The applicant has submitted proof that all reclamation fees required by 30 CFR subchapter R have been paid [NDAC 69-05.2-10-03(6)(e)].

The applicant has paid all reclamation fees required by 30 CFR subchapter R. The Office of Surface Mining's Applicant Violator System office in Lexington, Kentucky was queried to verify that all fees have been paid.

Finding No. 11. The applicant has satisfied requirements for approving cropland as a post-mining land use [NDAC 69-05.2-10-03(6)(f)].

There is no pre-mine cropland being added to the permit area with this revision of the permit, nor will any cropland be reclaimed after the dragline road is removed and reclaimed.

Finding No. 12. All existing structures that will be used to support mining activities within the permit area comply with the requirements of NDCC 38-14.1-24 and NDAC 69-05.2-09-04 [NDAC 69-05.2-10-04].

One existing structure that is located in the area being added to the permit will be used to support mining activities, namely former Pond 12 which will be used to collect runoff from the constructed dragline road. This structure was previously permitted and later bond released to support a nearby ash disposal facility and it meets the applicable design and performance standards of NDCC 38-14.1-24 and NDAC 69-05.2.

Finding No. 13. No drill holes, boreholes or wells will be retained for other uses [NDAC 69-05.2-14-03].

The applicant has not proposed to retain any drill hole, borehole, or well for other uses.

Finding No. 14. No spoil in the permit area is known to cause toxic mine drainage [NDAC 69-05.2-16-11].

The chemical characteristics of the overburden materials in the permit area are such that they do not produce toxic mine drainage. The analysis of overburden samples included in the permit area do not reveal any substances that would cause any chemical reactions or physical effects that are likely to kill, injure, or impair biota commonly present in the area.

Finding No. 15. The applicant will not conduct mining activities within or near any perennial stream [NDAC 69-05.2-16-20].

There are no intermittent or perennial streams located within the areas being added to the permit with Revision No. 24.

Finding No. 16. The applicant does not propose to use any experimental practices in the permit area [NDAC 69-05.2-27-02].

There are no plans included in the revision application to use any experimental practices that may be allowed under NDAC 69-05.2-27-02.

Finding No. 17. The applicant does not control and has not controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations [NDAC 69-05.2-10-03(4)].

Commission records, and those in the Office of Surface Mining's Applicant Violator System, do not show that the applicant controls and has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations of NDCC 38-14.1 or of other states' laws which are based on P.L. 95-87 (the Federal Surface Mining Control and Reclamation Act), of such nature, duration, and with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of these laws.

Finding No. 18. Neither the applicant, nor any affiliated companies, have unabated violations or unpaid civil penalties [NDAC 69-05.2-10-03(1)].

Commission records, and those in the Office of Surface Mining's Applicant Violator System, do not indicate that the applicant, nor any affiliated companies, have any unpaid civil penalties or unabated violations of NDCC 38-14.1 or any other federal or state laws, rules, or regulations pertaining to air or water environmental protection. The North Dakota Department of Health has not informed the Commission about any unabated violations of their air and water environmental protection standards.

Finding No. 19. Performance bonds totaling \$9,028,304.67 are sufficient for the proposed surface coal mining operations in the consolidated bond area that includes this permit [NDAC 69-05.2-12-07].

A surety bond in the amount of \$9,028,304.67 covers this permit area at the Beulah Mine. An updated worst-case reclamation cost estimate for this permit was prepared with Revision No. 24 and the current bond amount was determined sufficient to perform the required reclamation, restoration, and abatement work in the permit area. The applicant has filed a surety bond stipulation to increase the bond area to include the additional 54.5 acres being added by Revision No. 24 to Permit No. KRSB-8802.

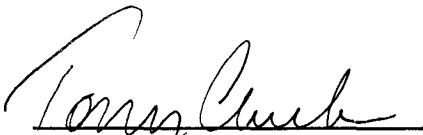
Subject to the right of any person with an interest that is or may be adversely affected to request a formal hearing under NDCC 38-14.1-30, **Revision Number 24 to Permit KRSB-8802** is hereby granted to the **Dakota Westmoreland Corporation** to engage in surface coal mining and reclamation operations on the following described areas subject to the requirements of Chapter 38-14.1 of the North Dakota Century Code, the rules promulgated thereunder, and the original permit conditions and plans in the approved revision application. (Also attached is a copy of the metes and bounds description of the areas being added to the permit.)

LOCATION

| MINE | ADDRESS | Section | Township | Range | County |
|-------------|----------------|----------------|-----------------|--------------|---------------|
| Beulah | Beulah, ND | 14 | T143N | R88W | Mercer |

Total = 54.5 ACRES

PUBLIC SERVICE COMMISSION


Tony Clark
Commissioner


Susan E. Wefald
President


Kevin Cramer
Commissioner

Metes and Bounds Description for Areas Added by Revision No. 24, Permit KRSB-8802

A tract of land situated in Section 14, T143N, R88W, Mercer County, North Dakota, being more particularly described as follows:

Beginning at a point which locate and established by use of the Dakota Westmoreland Corporation coordinate system, such point having coordinates: S 2,634.1 and W 1,756.9; such point also being designated as corner No. 640;

Thence N89°50'28"W a distance of 2682.3 feet to corner No. 668, along the section 14 quarter line;

Thence North a distance of 451.7 feet to corner No. 669;

Thence N61°05'44"E a distance of 575.9 feet to corner No. 670;

Thence S87°16'11"E a distance of 2,006.5 feet to corner No. 671;

Thence S74°02'50"E a distance of 1905.1 feet to corner No. 672;

Thence S0°01'10"E a distance of 122.9 feet to corner No. 639;

Thence N89°50'28"W a distance of 1657.8 feet to corner No. 640, the original point of beginning;

The above tract of land contains 54.5 acres, more or less.