

SCANNED

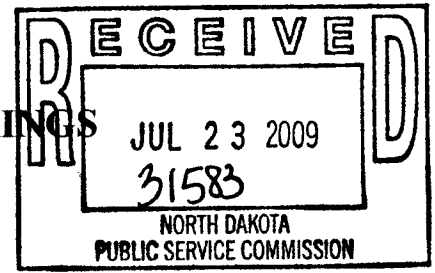
Date 7-23-09

File OAH-7-22-09-Finding-1tr (31583)



OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF NORTH DAKOTA
1707 North 9th Street
Bismarck, North Dakota 58501-1882



Allen C. Hoberg
DIRECTOR

July 22, 2009

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Jim Deutsch, Director
Reclamation Division
Public Service Commission
600 East Boulevard Avenue
Bismarck, ND 58505

Re: Dakota Westmoreland Corporation
Informal Hearing RC-08-612
OAH File No. 20090183

FROM DIRECTOR - RECLAMATION DIV.

Date: 7-23-09

Action:

Info. Only:

Info & File: RC-08-612

Dear Mr. Deutsch:

Enclosed are the original Recommended Findings of Fact, Conclusions of Law, and Order, as well as the proposed final Order in regard to the above-titled matter. If the Commission agrees with my recommendations, they may sign the proposed final Order and serve it on the parties. Alternatively, the Commission may issue its own separate order based on my recommended findings, or they may issue their own findings of fact and conclusions of law and their own separate order based on them.

Please send me a copy of the signed proposed final Order, if the Commission elects to sign it. If the Commission does not sign it, please send me a copy of the final order issued by the Commission in this matter. Also, please send me a copy of the findings of fact and conclusions of law upon which the order is based, if they are different from my recommended findings and conclusions.

Please send me a copy of any decision or order issued by the district court or the supreme court as a result of an appeal of this matter.

I am closing our file and returning that portion of the record I have in my possession to you for filing with the official agency record of this matter, as appropriate.

Sincerely,

[Handwritten signature of Allen C. Hoberg]
Allen C. Hoberg
Administrative Law Judge

Encl.

cc: Darell Herman
Jesse Noel, Dakota Westmoreland Corporation

SCANNED

Date 7-23-09

File OAH-7-22-09-recommended-findings

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

**Dakota Westmoreland Corporation
Revision No. 25
Permit No. KRSB-8802
Approval**

**Case No. RC-08-612
OAH File No. 20090183**

**RECOMMENDED
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

July 22, 2009

Preliminary Statement

On July 25, 2008, Dakota Westmoreland Corporation ("DWC") filed an Application with the North Dakota Public Service Commission ("Commission") for Revision No. 25 to Surface Coal Mining Permit KRSB-8802 for DWC's Beulah Mine. This revision proposes to cease mining activities in the mine area just east of State Highway 49 and adds final pit reclamation plans to the permit. The revision application was deemed complete on March 13, 2009, and notices were then published and sent to the affected landowners.

On May 8, 2009, the Commission received a request for an Informal Conference under N.D.C.C. § 38-14.1-19, from Darell Herman, personal representative of the Marguerite Herman Estate ("the Estate"), the landowner, with concerns about post-mining topography and drainage.

On June 3, 2009, the Commission issued a Notice of Informal Conference scheduling an informal conference to commence at 1:30 p.m. CDT on July 16, 2009, in the Commission Hearing Room, 12th Floor, State Capitol, Bismarck, North Dakota. On June 24, 2009, Commission staff issued a letter "Revised Notice of Informal Conference" rescheduling the informal conference as to time only, i.e. to commence at 9:30 a.m. CDT instead of 1:30 p.m. CDT.

The informal conference was held as rescheduled on July 16, 2009. Mr. Herman appeared without counsel, representing the Estate. DWC was represented by Bill Weaver, President, Jeff Frohlich, Manager of Engineering and Environment, and Randy Becker, Reclamation Manager. The Public Service Commission, Reclamation Division Staff, ("the Division") was represented by Jim Deutsch, Director, Dean Moos, Assistant Director, and Mike Berg, Environmental Engineer. Allen C. Hoberg, administrative law judge, designated as the Commission's hearing officer, presided. The proceeding was tape-recorded. Presentations were made by DWC, Mr. Weaver and Mr. Froelich, Mr.

Herman on behalf of the Estate, and Mr. Deutsch. Mr. Moos and Mr. Berg presented limited clarifying information. Several others present in the hearing room all associated with either of the parties or the Commission did not participate in the conference. See attached exhibit list for documentary evidence presented by the participants.

N.D.C.C. § 38-14.1-19 requires that the Commission issue a ruling within thirty days of the close of the informal conference. The ruling may thereafter be appealed to the Commission and reviewed at a formal hearing under N.D.C.C. § 38-14.1-30.

The Surface Mining Control and Reclamation Act, Public Law 95-87, provides that no person who presides at an informal conference shall participate in the decision making process at the appeal level. See N.D.C.C. § 37-14.1-30(3)(f). The Commission did not participate in the informal conference to allow for its full involvement at a formal hearing should the present order be appealed. The following order is based on the findings, conclusions and recommendations of the Commission's presiding hearing officer.

Findings of Fact

1. DWC asserts that it has met the requirements of N.D.C.C. § 38-14.1-24 (3), with regard to backfill and grading for final pit reclamation plan approval for Revision No. 25 to Surface Coal Mining Permit KRSB-8802 for DWC's Beulah Mine. The Estate asserts that the statutory requirements are not met because of topography (slope) and drainage concerns in the W 1/2 of section 19-143-87 in Oliver County, North Dakota (" W 1/2, Sec 19"). The Division has also expressed concerns about topography (slope) and drainage in that same 1/2 section. Issues raised by the Estate and the Division relating to topography (slope) and drainage concerns in W 1/2 Sec 19 were not resolved at the informal hearing.

2. N.D.C.C. § 38-14.1-24 states, in part, as follows:

38-14.1-24. Environmental protection performance standards.

General performance standards are applicable to all surface coal mining and reclamation operations and must require the permittee at a minimum to:

2. Restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining...

3. Backfill, compact..., and grade to reshape all areas affected by surface coal mining operations to the gentlest topography consistent with adjacent unmined landscape elements in order to develop a postmining landscape that will provide for maximum moisture retention, drainage that will complement the surrounding terrain, maximum stability, minimum soil

losses from runoff and erosion, with all highwalls, spoil piles, and depressions eliminated ..., and with maximum postmining graded slopes that do not exceed the approximate original contour...

***1

3. Prior to the Informal Conference, the Division issued to DWC a letter stating that “[t]he Reclamation Division has completed a technical review of the application for Revision 25 to Permit KRSB-8802 ... The following items must be satisfactorily addressed prior to Commission approval.” The letter in a comprehensive fashion addresses many areas of concern, including backfilling and grading. It specifically addresses post-mine topography in sections 19 and 24, at No. 20, on pages 4 and 5.²

4. The Division, in its letter, at No. 20, pgs. 4-5, asks DWC to reduce the slope of the highwall in Sections 19 and 24 to less than 6% to support the intended post-mine land use of cropland (a.); notes what appears to be a significant increase in acreage with slopes greater than 6% in the W 1/2 of Section 19 (b.); notes that the “pit floor” in sections 19 and 24 is extremely flat and asks for consideration of increasing the drainageway slope to about 1% or to construct a better defined drainage channel through this area (c.); and makes other related comments addressing the post-mine topography of sections 19 and 24.

5. The land in W 1/2, Sec 19 has been farmed as cropland by the Herman family since 1970. Prior to mining it was farmed going north to south with mile long fields. See exhibit 5. It is proposed to be returned to cropland following reclamation.

6. The evidence shows that although overall the slope of the land in W 1/2, Sec 19 is slightly less, the distribution of the slope is quite a bit different under DWC’s proposed final pit reclamation plan. And, there are two abrupt drops in elevation in two long slopes, or slope groups, one in the NW 1/4 of Sec 19 and one in the SW 1/4 of Sec 19. These two long slopes run further than just through the W 1/2, Sec 19, although most of these long slopes are in the W 1/2, Sec 19, and these long slopes help to create the large area of relatively flat land that runs through sections 19 and 24. See exhibits 3 and 10.

7. These two long slopes or slope groups drop in elevation rather quickly from 2080 feet to 2045 feet in the north and from 2085 feet to 2045 feet in the south. The flat area of the W 1/2, Sec 19 is at 2040 and 2035 feet. *Id.*

8. Although the average slope of the W 1/2, Sec 19 is 2.41% pre-mining and 2.27% proposed post-mining (a decrease of .14% in slope), again, the distribution of the slope is quite a bit different post-mining as compared to pre-mining. See exhibit 10, at 3.

¹ See N.D. Admin. Code § 69-05.2-21-02 which also relates to backfilling and grading but which is not implicated in this matter.

² The letter also addresses related waterflow (hydraulic balance) and water supply concerns in No. 6 and No. 11 on pages 2 and 3.

There is less slope in the 7-9% range, considerably more slope in the 4-7% range (especially 5-6%), considerably less in the 1-4% range, and considerably more in the 0-1% range. See *Id.* The considerably more slope in the 4-7% range consists almost entirely of the two long slopes or slope groups with significant drop in elevation, again, one in the north and one in the south of W 1/2, Sec 19. The considerably more slope in the 0-1% range is in between the two long slopes or slope groups. See *id.* at 1,2.

9. The Division recognizes the Estate's concern as legitimate but at the same time, at one point in the Informal Conference, said that in this area of the final pit it appears to be almost impossible to affect the slope of the area further without going back and redistributing (re-spreading) already reclaimed areas. See exhibits 3 and 4. But, this comment was before DWC gave further information about possible use of additional stockpiled spoil.

10. It appears from the presentation of DWC that it tried to do the best reclamation it thought possible in the area of Revision 25, considering already reclaimed areas, and especially considering the already approved area of nearby Revision 21. However, the Estate's and the Division's concerns are legitimate. There is a significantly different distribution of the slope in W 1/2, Sec 19 that may affect the farming (cropland) activity of the Estate post-mining. There is a significantly increased area in W 1/2, Sec 19 that is less than a 1% slope that may in the future result in poor drainage in the area, causing a ponding effect. Near the end of the conference, there was some further information provided by DWC that it may be able to use spoil stock piles up to the county road and the permit boundary, (down to the section line of W 1/2, Sec 19), to affect the slope, i.e. to increase the slope in the areas of very little slope (0-1% range).

11. DWC has not yet completed its response to the Division's May 12, 2009, letter. The Division said it needs to do its own volume computations and further studies with regard to the Revision 25 application. In short, the approval of Revision 25, notwithstanding the Estate's request for Informal Conference, is still in progress.

12. DWC said that if there was a ponding effect occurring later on the reclaimed land of W 1/2, Sec 19, because of poor drainage under its proposed final pit reclamation plan, Revision 25, "it could be fixed," presumably with monies from the DWC bond. It appears, however, that the possibility of poor drainage is in a rather large area of concern, about half of the NW 1/4, Sec 19 and most of the SW 1/4, Sec 19. It may be that DWC's reclamation plans for this large area can not be reconciled with the existing, already approved, nearby revisions and the Estate's and Division's legitimate concerns for this area. But, there is still uncertainty at this point in time.

From the foregoing Findings of Fact, the hearing officer recommends the following:

Conclusions of Law

1. The Commission has jurisdiction over DWC's surface mining and reclamation operations in North Dakota.
2. Issues raised by Estate and the Division relating to topography (slope) and drainage in W 1/2, Sec 19 were not resolved at the informal hearing. They are legitimate concerns based on N.D.C.C. § 37-14.1-24(3).
3. Clearly, DWC has restored the affected land, W 1/2, Sec 19, to a condition capable of supporting the uses which it was capable of supporting prior to any mining. See N.D.C.C. § 38-14.1-24 (2). However, DWC has a statutory obligation to backfill and grade "to reshape all areas affected by its surface coal mining operations to the gentlest topography consistent with adjacent unmined landscape elements in order to develop a postmining landscape that will provide for maximum moisture retention, drainage that will complement the surrounding terrain, maximum stability, minimum soil losses from runoff and erosion, with all highwalls, spoil piles, and depressions eliminated ..., and with maximum postmining graded slopes that do not exceed the approximate original contour." N.D.C.C. § 38-14.1-24(3). It is clear that drainage that will compliment the surrounding terrain and postmining graded slopes approximating original contour are still legitimate concerns and may prevent approval of Revision 25.
4. DWC has not responded to the Division's May 12, 2009, letter and the Division has not completed its studies. Approval of Revision 25 is, therefore, still a work in progress.
5. The evidence shows that under the applicable law, DWC has not yet met the requirements for approval of Revision 25 to Surface Coal Mining Permit KRSB-8802 for DWC's Beulah Mine. Although the Estate and the Division have some understandable, legitimate concerns about the steep slopes in two places in W 1/2, Sec 19 and about the drainage, with the possibility of a ponding effect occurring after completion of reclamation, it may be that further studies by the Division will show that consistent with the surrounding landscape and already approved revisions, and in light of further application of existing spoil piles, that little, if anything, can be done to change DWC's proposed plans for reclamation, short of redistributing materials from already reclaimed areas. Redistribution from already reclaimed areas would seem to be an extreme remedy. However, if little or nothing can still be done to change DWC's proposed final pit reclamation plans with regard to the two areas of concern in this Informal Conference, then the Commission should require DWC to construct a better defined drainage channel to relieve the possibility of a ponding effect occurring in W 1/2, Sec 19. This drainage channel requirement may be imposed prior to approval of Revision 25 or after approval is given, but before the final bond release.

From the foregoing Findings of Fact and Conclusions of Law, the hearing officer recommends the following:

Order

It is hereby ordered:

1. Issues raised by the Estate and the Division relating to topography (slope) and drainage concerns in the W 1/2 of section 19-143-87 in Oliver County, North Dakota have not been resolved.
2. It appears that DWC may not have met its statutory obligations under the law regarding backfilling and grading, especially in regard to drainage control, such that approval of its application for Revision 25 to Surface Coal Mining Permit KR5B-8802 for DWC's Beulah Mine should be approved only upon imposition of conditions.
3. Final approval of Revision No. 25 is premature. The Commission retains its jurisdiction over this application pending further action by DWC and its Reclamation Division staff.
4. DWC shall complete its response to the Reclamation Division's May 12, 2009, letter. The Reclamation Division staff shall complete its studies of DWC's proposed plans for final pit reclamation under Revision 25. After DWC completes its response and the Division completes its studies, the Commission may approve Revision 25 upon conditions or it may approve Revision 25 outright, without conditions.
5. This order may be appealed to the Commission within thirty days pursuant to N.D.C.C. § 37-14.1-20, for a formal hearing under N.D.C.C. § 38-14.1-30. Further, if no appeal is taken under §38-14.1-20 for a formal hearing under § 38-14.1-30 within 30 days of the issuance of this order, upon Commission approval of Revision 25, with or without conditions, within 30 days of the Commission's approval of Revision 25, either DWC or the Estate may request a formal administrative hearing under N.D.C.C. § 38-14.1-30, but only as to issues raised in this informal conference.

By: 
Allen C. Hoberg, Hearing Officer
Public Service Commission
Office of Administrative Hearings
1707 N. 9th Street
Bismarck, North Dakota 58501

Date 7.23.09
File OAH-7-22-09-cert-service

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Dakota Westmoreland Corporation
Revision No. 25
Permit No. KR5B-8802
Approval

Case No. RC-08-612
OAH File No. 20090183

Certificate of Service

The undersigned certifies that the original **ADMINISTRATIVE LAW JUDGE'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** and the original proposed final **ORDER** were mailed, inside mail, at the State Capitol, on the 22 day of July 2009, to:

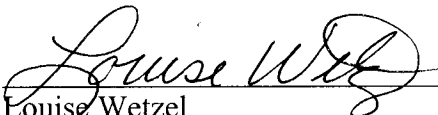
Jim Deutsch, Director
Reclamation and AML Divisions
Public Service Commission
600 East Boulevard Avenue
Bismarck, ND 58505

that true and correct copies of the above documents were mailed, regular mail, on the 22 day of July 2009, to:

Jesse Noel, P.E.
Manager, Engineering & Environment
Dakota Westmoreland Corporation
P.O. Box 39
Beulah, ND 58523-0039

Darell Herman
Personal Representative
Marguerite Herman Estate
1605 59th Avenue SW
Beulah, ND 58523

OFFICE OF ADMINISTRATIVE HEARINGS
Allen C. Hoberg, Administrative Law Judge


Louise Wetzel

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Dakota Westmoreland Corporation
Revision No. 25
Permit No. KRSB-8802
Approval

Case No. RC-08-612

Order

July 2009

The Public Service Commission adopts the Hearing Officer's July 22, 2009, Recommended Findings of Fact, Conclusions of Law and Order.

PUBLIC SERVICE COMMISSION

Tony Clark
Commissioner

Kevin Cramer
President

Brian P. Kalk
Commissioner