


APPROVED

DATE: 1-14-09



**MOTION**

**January 14, 2009**

**Dakota Westmoreland Corporation  
Notice of Violation No. 0804  
Violation**

**Case No. RC-08-927**

I move the Commission assess a proposed penalty for Notice of Violation No. 0804 issued to the Dakota Westmoreland Corporation at the Beulah Mine and schedule an informal conference in the matter.


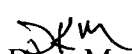

**MDB & JRD**

Reedata/dkm/Beulah/NOV 0804 Motion

**PUBLIC SERVICE COMMISSION**  
Reclamation Division  
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Memorandum

TO: Commissioners Cramer, Clark, and Kalk  
Darrell Nitschke, Executive Secretary  
Illona Jeffcoat-Sacco and Annette Bendish

FROM:  Mike Berg,  Dean Moos and  Jim Deutsch

DATE: January 8, 2009

SUBJECT: Proposed Penalty and Informal Conference for NOV 0804 issued to  
Dakota Westmoreland Corp., Case No. RC-08-927

**SUMMARY** - Notice of Violation (NOV) 0804 was issued to Dakota Westmoreland Corporation (DWC) on December 16, 2008 for failure to utilize a pre-blast warning and all-clear signal that can be heard within a range of one-half mile from the blast site when conducting blasting operations. Since DWC has requested an informal conference, the Commission is required to propose a civil penalty and schedule an informal conference on NOV-0804. The Reclamation Division recommends that the Commission propose a civil penalty of \$1,500 for NOV-0804 and schedule an informal conference in this matter.

**DISCUSSION**: During a routine inspection of the Beulah Mine on December 10, 2009, a coal blast was detonated in the West Silver Pit located in the S½ of Section 17, Permit KRSB-8603. A Reclamation Division inspector was located approximately 300 yards northeast of the blast site at the time of the blast detonation. Although the inspector was located relatively close to the blast site, the required pre-blast warning was not heard prior to the blast nor was an all-clear signal heard after the blast. NDAC 69-05.2-17-05(3) requires that "Warning and all-clear signals of different character that are audible within the range of one-half mile (0.85 kilometers) from the point of the blast must be given."

On December 31<sup>st</sup>, the Reclamation Division received a letter from DWC regarding the status of the required remedial actions. DWC's proposed remedial actions were considered inadequate and additional information has been requested.

In the December 31<sup>st</sup> letter, DWC also requested an informal conference on NOV-0804. Therefore, the Reclamation Division recommends that an informal conference on NOV-0804 be scheduled pursuant to NDCC 38-14.1-19. Under the provisions of the coal regulatory program, the Commission is required to propose a civil penalty whenever there is a request for an informal conference or a formal hearing on a Notice of Violation.

The Commission must consider four factors in determining the amount of a civil penalty. These factors are (1) History of previous violations; (2) Seriousness of the violation; (3) Negligence; and, (4) Good Faith in attempting to achieve rapid compliance. These factors and the recommended civil penalty under each with respect to NOV-0804 are discussed below:

**History of Violations:** The Commission may assess a civil penalty of up to \$3,500 per day on the history of previous violations at the mine where the violation is found. Generally, the history of violations within the preceding three years is considered and a penalty for history has not been recommended in the past if three or fewer violations have occurred in that three-year period. With NOV-0804, DWC has received five NOV's in the past three years. Based on the criteria we have used in the past, DWC has a history of violations and that requires a penalty to be assessed.

Proposed penalty assessment for history - \$500

**Seriousness of the Violation:** The Commission may assess a civil penalty of up to \$3,500 per day based on the seriousness of the violation. Factors to be considered in seriousness are the extent and the duration of potential or actual damage in terms of impact on the public or the environment. DWC's violation did not impact the environment; however, the required warning signals are a safety issue. DWC's failure to use a warning that was audible up to one-half mile is serious in that DWC employees or the public could be impacted by the blast. A penalty for seriousness is warranted.

Proposed penalty assessment for seriousness - \$500

**Negligence:** The Commission may assess a civil penalty of up to \$3,000 per day based on the degree of the fault of the permittee. However, a violation caused by negligence, but not through reckless, knowing or willful conduct may be assessed a penalty of up to only \$1,500 per day. A penalty of up to \$3000 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. In this case, we believe that DWC had not taken the necessary precautions to ensure that the warning siren was audible up to one-half mile from the blast site. Therefore, negligence is a factor in this violation.

Proposed penalty assessment for negligence - \$500

**Good Faith:** The Commission may deduct up to \$1,000 per day from the total civil penalty when a permittee takes extraordinary measures to abate the violation in the shortest possible time following notification of the violation. No deduction can be made for normal compliance. The compliance in this case is considered normal. No extraordinary measures were either required or taken to abate this violation.

Proposed deduction for good faith - None

In conclusion, the Reclamation Division recommends a civil penalty of \$1,500 (\$500 for history, \$500 for seriousness, and \$500 for negligence) as the result of NOV-0804. A Proposed Motion to assess the proposed penalty and to schedule an informal conference for 2:30 p.m. CST, February 10, 2009, in the Commission Hearing Room, is attached for your consideration. Alan Hoberg from the office of Administrative Hearings will preside over the informal conference.

#### Attachment

Caselib\08927\memo penalty assessment