



# Public Service Commission

## State of North Dakota

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January 15, 2009

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

Dear Mr. Noel:

The Public Service Commission has proposed a civil penalty of \$1500 (\$500 for history, \$500 for seriousness, and \$500 for negligence) for Notice of Violation (NOV) No. 0804, Case No. RC-08-927, issued to Dakota Westmoreland Corporation (DWC). The proposed penalty assessment was made at this time because DWC requested an Informal Conference on this matter. The proposed penalty of \$1500 must be paid to the Commission within thirty days of your receipt of this letter. The funds will be held in an escrow account pending final outcome of the Informal Conference.

Attached to this letter is a copy of the Notice of Informal Conference scheduling the conference for February 10, 2009, beginning at 2:30 p.m., CST, in the Public Service Commission's Hearing Room, 12<sup>th</sup> Floor, State Capitol, Bismarck, ND.

As required by NDAC 69-05.2-28-12, the Commission considered the following four factors in determining the proposed penalty for NOV-0804.

**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 measures 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 summary, a civil penalty of \$1500 is proposed for NOV-0804, which must be paid within thirty days of the receipt of this letter. The proposed penalty can be discussed at the Informal Conference scheduled for February 10, 2009.

If you have any questions, please contact our office.

Sincerely,



James R. Deutsch  
Director  
Reclamation Division

Enclosure

**HAND DELIVERED**