



OFFICE OF ADMINISTRATIVE HEARINGS

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February 17, 2009

RECEIVED

Illona A. Jeffcoat-Sacco
General Counsel
Public Service Commission
600 East Boulevard Avenue
Bismarck, ND 58505

FEB 18 2009

PUBLIC SERVICE COMMISSION

Re: Dakota Westmoreland Corporation
Notice of Violation No. 0804
OAH File No. 20090022

Dear Ms. Jeffcoat-Sacco:

Enclosed are the original Recommended Findings of Fact, Statements and 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, it 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 it may issue its own findings of fact and conclusions of law and its 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 it 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.

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,

Allen C. Hoberg
Administrative Law Judge

ACH/lmw

Encl.

cc: Jesse Noel, Dakota Westmoreland Corporation

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Dakota Westmoreland Corporation
Notice of Violation No. 0804
Violation

Case No. RC-08-927
OAH File No. 20090022

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

February 17, 2009

Preliminary Statement

On December 16, 2008, the Reclamation Division of the North Dakota Public Service Commission (“the Division”) issued Notice of Violation No. 0804 to Dakota Westmoreland Corporation (“Dakota Westmoreland”). The violation was issued for failure by Dakota Westmoreland to use a pre-blast warn and all-clear signal that can be heard within a range of one-half mile from the blast site when conducting blasting operations at its Beulah Mine.

On December 31, 2008, the North Dakota Public Service Commission (“Commission”) received a request for an Informal Conference on the Notice of Violation from Dakota Westmoreland.

On January 14, 2009, the Commission issued a Notice of Informal Conference as required by N.D.C.C. § 38-14.1-19. The Informal Conference (“the Conference”) was scheduled to be held on February 10, 2009, in the Public Service Commission Hearing Room, Bismarck.

The Conference was held as scheduled. Dakota Westmoreland was represented by its employees Jesse Noel, Jeff Frohlich, and DeLane Bauer. Noel, the manager of Engineering and Environmental at the Beulah Mine, made the primary presentation for Dakota Westmoreland.

Members of the Division were present, including its director, James Deutsch, and employees, Michael Berg, Guy Welch, Dean Moos, and Stephan Schroeder; and they were represented by Annette Bendish, Commission Counsel. Deutsch, Berg, Welch, and Bendish all participated in the Division's presentation, though Berg and Welch were the lead presenters. Administrative Law Judge (“ALJ”) Allen C. Hoberg, Office of Administrative Hearings, was designated as hearing officer to preside over the Conference. The Conference was recorded.

Following presentations by the Division and Noel, the parties gave follow-up presentations and, thereafter, made closing statements. There was no viewing of the location of the violation, but various maps of the site of the violation were part of the exhibits. Nine exhibits were made a part of the record: Division - exhibits PSC-1 through PSC-6, and Dakota Westmoreland - exhibits DWC-1 through DWC-3. *See* attached exhibit list. The ALJ also takes official notice of the other procedural documents in the Commission's file on this matter.

N.D.C.C. § 38-14.1-19 requires that the Commission issue a final ruling within 30 days of the close of the Conference. The final ruling may thereafter be appealed to the Commission and reviewed at a formal hearing. *See* 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 the Conference shall preside at or participate in the formal decision making process at the appeal level. *See* N.D.C.C. § 38-14.1-30(3)(f). The Commission did not participate in the Conference to allow for its full involvement at a formal hearing should the present order be appealed.

Based on the evidence presented at the Conference, the ALJ makes the following recommended findings of fact, conclusions of law and order (ruling). The proposed final order (ruling) is based on ALJ’s findings, conclusions, and order.

Findings of Fact

1. Dakota Westmoreland is a permittee under N.D.C.C. chapter 38-14.1, engaged in surface coal mining and reclamation operations at its Beulah Mine located in North Dakota.

2. On December 10, 2008, during an inspection of the Beulah Mine, the Division's inspectors noted a blast in the Middle Silver Pit area located in the S 1/2 of Section 17, Permit KRSB-8603 at approximately 10:45 a.m., CST. *See* Exhibits PSC-1 and PSC-2. The inspectors were located approximately 1600 feet northeast of the blast site at the time of the blast detonation.¹ The pre-blast warning signal and the all-clear signal were not heard by the inspectors or by a Dakota Westmoreland employee riding with the inspectors, although the inspectors and the employee were well within the one-half mile (2640 ft.) radius of the blast, the required distance under N.D. Admin. Code § 69-05.2-17-05 (3) that an audible warning and all-clear signal must be heard.

3. On December 16, 2008, the Division served a Notice of Violation on Jesse Noel, a Dakota Westmoreland Beulah Mine manager. *See* Exhibit PSC-3. The Notice of Violation cited Dakota Westmoreland for a violation of N.D. Admin. Code § 69-05.2-17-05(3), noting the inspection incident reported in the December 10, 2008, Inspection Report. The Notice of Violation stated required remedial action for Dakota Westmoreland, that "Dakota Westmoreland must use a siren or other audible warning system that can be heard within a range of one-half mile in any direction of the blast point under normal weather conditions prior to (pre-blast warning) and after each blast (all clear signal) using different signals for each."

¹ Although an inspector noted in his inspection report that he and another inspector were located 300 yards (900 feet) from the blast site at the time of the blast detonation, the best evidence at the hearing shows that they were likely located 1600 feet from the blast site at the time of the blast detonation. *See* exhibit DWC-1, figure 5. Commission staff did not dispute this evidence at the Conference.

4. On December 31, 2008, Dakota Westmoreland responded to the Notice of Violations stating, among other things, that “[b]ecause DWC disagrees with your finding of violation with respect to our audible blasting warning system, DWC respectfully (sic) requests an Informal Conference to discuss the issue in detail.” *See* Exhibit DWC-2.

5. On January 13, 2009, Mr. Noel sent a letter to Mr. Deutsch stating that it was installing a second siren on its blasting truck. *See* Exhibit DWC-3.

6. On January 15, 2009, in response to Dakota Westmoreland asking for an Informal Conference, Mr. Deutsch sent Mr. Noel a letter stating the Division’s proposed civil penalty of \$1,500 for the violation stated in the December 16, 2008, Notice of Violation, indicating a \$500 penalty for “History of Violations,” a \$500 penalty for “Seriousness of the Violation,” and a \$500 penalty for “Negligence,” and indicating no deduction for “Good Faith.” *See* Exhibit PSC-5. The letter states that the Division’s proposed penalty was issued in accordance with the provisions of N.D. Admin. Code § 69-05.2-28-12.

7. On January 27, 2009, a Division inspector again inspected the Beulah Mine. *See* January 27, 2009, Inspection Report. In regard to blasting, this inspection was specifically coordinated with Dakota Westmoreland to determine if Dakota Westmoreland’s blast warning, after the installation of a second siren, could be heard one-half mile away. A coal blast occurred in the Middle Silver Pit SE 1/4 of Section 17, Permit KR5B-8603, at approximately 1:26 p.m., CST during the inspection. *See* exhibit PSC-4. The blast warning signal was faintly heard at a distance of approximately one-half mile east, southeast of the blast truck. The all clear signal was not heard approximately one-half mile west, southwest of the blast truck. The blast truck with the two sirens on it was located in the pit several hundred feet east of the coal blast.

8. On February 6, 2009, Mr. Deutsch wrote to Mr. Noel. *See* exhibit PSC-6. He noted Dakota Westmoreland's January 13 letter and the January 27 Inspection Report. He stated:

[w]hile adding the second siren helps make the warning signal more audible, we believe a warning siren needs to be located out of the pit to be audible for the one-half mile distance required by subsection 3 of NDAC 69-05.2-17-05. Since the sirens were not audible upwind of the blast site during the January 27th inspection, NOV-804 is not being terminated at this time. This matter can be discussed at the February 10th informal conference.

(Emphasis in original.)

9. There is a public road about 1/4 mile from the December 10, 2008, and January 27, 2009, blast sites. No member of the public was on the road during either blast detonation.

10. It is Dakota Westmoreland standard procedure during its blasting operations at the Beulah Mine to locate the blasting truck in the coal pit where the blasting occurs, at a safe distance. Again, the blasting truck has mounted on it the warning siren, now two sirens.

11. Dakota Westmoreland, for its defense of the allegation of violation of N.D. Admin. Code § 69-05.2-17-05(3), states that it has tested its sirens and they are sufficient, i.e. they are audible out to one-half mile from the point of the blast; and that it uses sirens producing noise levels in decibels (110 decibels) at or near the highest acceptable level allowed by Department of Labor, Mine Safety and Health Administration ("MSHA") regulations (115 decibels). *See* exhibit DWC-1, figures 13-18. Further, Dakota Westmoreland states it has not been cited for the same violation under MSHA regulations; it believes it protects the public by use of the siren and other means (e.g. spotters and radio communication); it believes that environmental conditions (especially wind speeds) were not normal during either inspection, and that wind speeds and direction can affect whether a siren warning is audible; it believes that

locating the sirens outside of the pit may not make sense, that locating the sirens inside the pit provides the safest environment and is approved by MSHA; it believes that there were other noises that may have masked the sirens on December 10 (e.g. equipment noises); it believes that the inspectors were in a vehicle talking during the December 10 inspection when the siren gave its warning; it believes that no individuals were at risk during either the December 10 or January 27 blast; and it believes that DWC uses best safety practices with respect to blasting. *See* exhibit DWC-1, esp. figures 19-26.

12. Wind speeds during the December 10, 2008, inspection were estimated by the inspectors to be at 15-20 mph. They were estimated by Dakota Westmoreland to be at 15-25 mph, with gusts up to 33 mph. Wind speeds during the January 27, 2009, inspection were estimated to be at 15-20 mph. Wind speeds at 15-20 mph, or somewhat greater, may not be normal at the Beulah Mine site, or in North Dakota, but they are certainly not unusual. The ALJ takes official notice of wind speeds in North Dakota, and especially in Western North Dakota, noting that wind speeds are often at or exceeding 15-20 mph. *See e.g.* North Dakota Resource Map, U.S. Department of Energy, Natural Renewable Energy, www.windpoweringamerica.gov/maps and USGS, Northern Prairie Wildlife Research Center, Climate of North Dakota, Wind, www.npwrc.usgs.gov/resource/habit/climate/wind.htm

13. Evidence offered by the Division shows that at the Coteau Properties Freedom Mine north of Beulah, the permittee uses sirens in several different trucks at different locations while blasting, to give warning, along with other safety measures (e.g. radios) and that the Coteau sirens are audible up to 3/4 mile from the blast site.

10. The Division's reasoning for proposing a Commission assessment of \$1500 in civil penalty for the Notice of Violation was further explained at the conference. *See* Exhibit

PSC-5. The proposed penalty is not large and seems reasonable under the circumstances, especially considering the possibility of a maximum possible penalty of \$10,000.

Conclusions of Law

1. The Commission has jurisdiction of Dakota Westmoreland's surface mining and reclamation operations in North Dakota. *See* N.D.C.C. chapter 38-14.1.
2. The Commission has certain powers and duties with regard to surface mining and reclamation operations in North Dakota. *See* N.D.C.C. § 38-14.1-03. Amongst other powers and duties, the Commission must establish a program to protect society and the environment from the adverse effects of surface coal mining operations, N.D.C.C. § 38-14-03 (1); the Commission must adopt rules to carry out the purposes and provisions of N.D.C.C. chapter 38-14.1, N.D.C.C. § 38-14.1-03 (11); the Commission must exercise general supervision and administration and enforcement of N.D.C.C. chapter 38-14.1, N.D.C.C. § 38-14.1-03 (14); the Commission must make necessary investigations and inspections, N.D.C.C. § 38-14.1-03 (15); the Commission may issue necessary orders, N.D.C.C. § 38-14.1-03 (16); the Commission may hold necessary hearings and informal conferences, N.D.C.C. § 38-14.1-03 (17).
3. General performance standards are applicable to all surface coal mining and reclamation operations and must require the permittee to ensure that explosives are used only in accordance with existing statutes and rules adopted by the Commission. N.D.C.C. § 38-14.1-24 (13).
4. N.D. Admin. Code chapter 69-05.2-17 is the Commission's rules on Performance Standards - Use of Explosives. N.D. Admin. Code § 69-05.2-17-05 provides, in part, as follows:

69-05.2-17-05. Performance standards - Use of explosives - Surface blasting procedures.

3. Warning and all-clear signals of different character that are audible within a range of one-half mile [0.85 kilometers] from the point of the blast must be given. Each person within the permit area and each person who resides or regularly works within one-half mile [0.85 kilometers] of the permit area must be notified of the meaning of the signals through appropriate instructions. Recipients must be periodically and clearly informed of the meaning of the signals. Signs must be maintained according to subsection 6 of section 69-05.2-13-04.

5. N.D.C.C. §§ 38-14.1-29 and 38-14.1-32 are the Commission statutes on imposing civil penalties.

6. N.D. Admin. Code chapter 69-05.1-28 is the Commission's Inspection and Enforcement rules. N.D. Admin. Code § 69-05.2-28-12 sets for the factors for determination of the amount of civil penalty for violations of surface mining and reclamation operations law.

7. Clearly, the safety and protection of the public are important features of surface mining and reclamation operations. Dakota Westmoreland does not appear to dispute this conclusion. Dakota Westmoreland cites mitigating circumstances and environmental and other factors that it says helped to create conditions that were not normal when the blast detonations occurred on December 10 and January 27. It may be true that to some extent there were mitigating circumstances on December 10, 2008, but much less so, if at all, on January 27, 2009. Still, the pre-blast siren warning was not heard at 1600 ft. on December 10 and was faintly heard at 1/2 mile on January 27, and the all-clear signal was not heard at 1600 ft. on December 10 or at 1/2 mile on January 27. There appear to be no exceptions to the rule requiring warnings and all-clear signals to be heard. *See* N.D. Admin. Code § 69-05.2-17-05; *see generally*, N.D.C.C. chapter 38-14.1 and N.D. Admin. Code chapter 69-05.2-17. Neither Commission staff nor

Dakota Westmoreland cited any exception and the hearing officer can find none.² There are, apparently, more effective means and methods for Dakota Westmoreland to comply with the rule, and, in fact, these are being used by at least one other permittee. To date, however, Dakota Westmoreland has not seen fit to use those means and methods. The Division, then, is justified in proposing the civil penalty that it proposes for the violation alleged. Under the applicable law, the violation is proven. Under the applicable law, the civil penalty is appropriate.

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

Order


It is hereby ordered:

1. The NOV issued by the Division on December 16 2008, is **affirmed**.
2. Dakota Westmoreland is **ordered** to pay the \$1500 civil penalty imposed by the

Division for the violation of N.D. Admin. Code. § 69-05.2-17-05(3), proven in this matter.

Dated this 17th day of February 2009.

State of North Dakota
Public Service Commission

By: 
Allen C. Hoberg, Administrative Law Judge
Hearing Officer
Office of Administrative Hearings
1707 North 9th Street
Bismarck, North Dakota 58501-1882
Telephone: (701) 328-3260

² This conclusion seems to beg the question of whether a violation of the rule should be noticed by the Division when clearly uncommon environmental conditions exist (e.g. very, very strong winds); but, it can not be argued in this case that the winds were uncommon; they were not. Also, there appears to have been no other uncommon environmental affects or other uncommon factors on either December 10 or January 27.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Dakota Westmoreland Corporation
Notice of Violation No. 0804
Violation

Case No. RC-08-927

ORDER

_____, 2009

The Public Service Commission adopts the Hearing Officer's February 17, 2009, Recommended Findings of Fact, Conclusions of Law, and Order for the Informal Conference held on the Notice of Violation No. 0804 issued to Dakota Westmoreland Corporation.

PUBLIC SERVICE COMMISSION

Tony Clark
Commissioner

Kevin Cramer
President

Brian Kalk
Commissioner

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

Dakota Westmoreland Corporation
Notice of Violation No. 0804
Violation

Case No. RC-08-927
OAH File No. 20090022

CERTIFICATE OF SERVICE

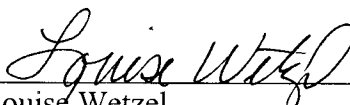
The undersigned certifies that the original of the **RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**, and the proposed final **ORDER**, were mailed, inside mail, at the State Capitol, on the 17 day of February 2009, to:

Illona A. Jeffcoat-Sacco
General Counsel
Public Service Commission
600 E. Boulevard Avenue
Bismarck, ND 58505

and that true and correct copies of the above documents were mailed, regular mail, on the 17 day of February 2009, to:

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

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



Louise Wetzel