



# Public Service Commission

## State of North Dakota

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May 21, 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 \$2,750 (\$750 for history, \$750 for seriousness, \$1,500 for negligence, and \$250 deduction for good faith) for Notice of Violation (NOV) No. 0902, Case No. RC-09-176, 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 \$2,750 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 July 7, 2009, beginning at 1:30 p.m., CDT, 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-0902.

**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-0902, DWC has received six 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 - \$750

**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 impact the environment by causing erosion and loss of topsoil and subsoil

materials. Also, eroded material from the haul road fill area went into Brush Creek. The violation was serious in that some environmental damage occurred. A penalty for seriousness is warranted.

Proposed penalty assessment for seriousness - \$750

**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 \$3,000 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, DWC had a plan to use best management practices to minimize erosion both in the recreated drainageway and sideslopes of the haul road. While some of the erosion control measures had been installed in the reclaimed drainageway, the erosion control fabric had not been installed in all areas. The areas where the erosion control fabric was installed had only limited erosion; however, the adjacent areas where erosion control fabric had not been installed, and had only been mulched and/or fall seeded, had significant erosion. With regard to the erosion along the haul road, a similar violation had occurred in June 2008. The failure to control erosion was due to lack of diligence and ordinary negligence. Therefore, negligence was a significant factor in this violation. A penalty based on negligence due to lack of diligence and reasonable care is warranted.

Proposed penalty assessment for negligence - \$1,500

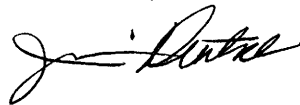
**Good Faith:** The Commission may deduct up to \$1,000 per day from the total civil penalty when a permittee takes extraordinary measures to abate the violation in the shortest possible time following notification of the violation. No deduction can be made for normal compliance. In this case, DWC began repair of the erosion along the haul road and constructing a sump below the haul road immediately following the April 14<sup>th</sup> inspection, even prior to the issuance of the violation. Repair of the erosion feature in the recreated drainageway was delayed due to muddy conditions. Much of the abatement work was very prompt and a deduction for good faith is warranted.

Proposed deduction for good faith - \$250

In summary, a civil penalty of \$2,750 is proposed for NOV-0902, 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 July 7, 2009.

If you have any questions, please contact our office.

Sincerely,



James R. Deutsch  
Director  
Reclamation Division

Enclosure

Certified Mail