

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Dakota Westmoreland Corporation
Notice of Violation No. 0902
Violation

Case No. RC-09-176

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

June 24, 2009

Preliminary Statement

On April 27, 2009, the Reclamation Division of the Public Service Commission (Commission) issued Notice of Violation (NOV) No. 0902 to Dakota Westmoreland Corporation (DWC) following an inspection of the Beulah Mine on April 14, 2009. The violation was issued for failure to install appropriate erosion control measures in a reclaimed drainageway and along a haul road. While adequate erosion control measures were taken in part of the area, portions of area were not adequately protected which resulted in significant erosion.

On April 30, 2009, the Reclamation Division received a letter from DWC requesting an informal conference on NOV-0902. In the same letter, DWC also addressed the status of the required remedial action items.

On May 20, 2009, the Commission assessed a proposed civil penalty of \$2,750 (\$750 for history of violations, \$750 for seriousness, \$1,500 for negligence, and \$250 deduction for good faith) for NOV-0902, and scheduled an informal conference for July 7, 2009. On May 28, 2009, the Commission received a \$2,750 check from DWC for the proposed penalty and a letter withdrawing the request for the informal conference.

DWC completed the prescribed remedial measures within the abatement time as specified in the NOV and the NOV was terminated on June 10, 2009.

Findings of Fact

1. DWC is engaged in surface coal mining operations under permits issued by the Commission.
2. NOV-0902 stated, and the Commission finds, that DWC violated North Dakota Century Code 38-14.1-24(4) for failure to protect all surface areas affected by surface coal mining from erosion and attendant air and water pollution; N.D. Admin. Code Section 69-05.2-16-04(5) for failure to use appropriate measures to protect

areas from water erosion; N.D. Admin. Code Section 69-05.2-24-01(2) for lack of measures to control or prevent erosion from haul roads; and, N.D. Admin. Code Section 69-05.2-22-05 for failure to use appropriate stabilization practices to control erosion from reclaimed areas.

3. DWC requested an informal conference on NOV-0902 on April 30, 2009.
4. DWC completed all of the remedial actions specified in the notice of violation within the prescribed time.
5. DWC's request for an informal conference required the Commission to assess a proposed penalty.
6. N.D. Admin. Code Section 69-05.2-28-12 requires the Commission to consider four factors in determining the amount of 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.
7. The Commission finds that assessment of a civil penalty based on the history of previous violations at DWC's Beulah Mine is warranted. With NOV-0902, DWC has received six previous violations within the past three years. Although not all of the previous violations were of the same nature as NOV-0902, six violations within three years constitutes a history of violations.
8. The Commission finds that DWC's present violation was serious in that some environmental damage occurred. The erosion resulted in loss of topsoil and subsoil materials. In addition, some eroded materials from the haul road fill area went into Brush Creek. A penalty based on seriousness is warranted.
9. The Commission finds that DWC's violation was not due to reckless or willful conduct. DWC had a plan to use best management practices to minimize erosion both in the recreated drainageway and the sideslopes of the haul road. While some erosion control measures had been installed in the reclaimed drainageway, the erosion control fabric was not installed in all areas resulting in significant erosion of the areas that were not adequately protected. 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. A penalty based on negligence due to lack of diligence and reasonable care is warranted.
10. The Commission finds that DWC's compliance was very prompt in that the necessary repairs to the erosion along the haul road began even before issuance of the NOV. A deduction for good faith is warranted.
11. Based on these facts, the Commission proposed a penalty of \$750 for history, \$750 for seriousness, and \$1,500 for negligence, and \$250 deduction for good faith, totaling \$2,750, for NOV-0902.

12. The proposed penalty of \$2,750 was paid by DWC and the request for an informal conference was withdrawn on May 28, 2009.
13. The Commission terminated NOV-0902 on June 10, 2009.

From the foregoing findings of fact, the Commission now makes its:

Conclusions of Law

1. The Commission has jurisdiction over surface coal mining and reclamation operations conducted in North Dakota by DWC.
2. DWC violated the provisions of N.D. Century Code 38-14.1-24(4) and N.D. Admin. Code Sections 69-05.2-16-04(5), 69-05.2-24-01(2), and 69-05.2-22-05.
3. The Commission should assess a civil penalty for NOV 0902.

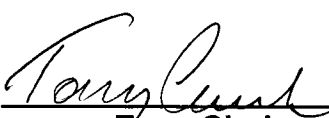
From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

Order

The Commission orders:

1. Notice of Violation No. 0902 is affirmed.
2. Dakota Westmoreland Corporation is assessed a total civil penalty of \$2,750 (\$750 for history, \$750 for seriousness, and \$1,500 for negligence, and \$250 deduction for good faith) for the violation.
3. The informal conference scheduled in the matter has been cancelled and the proceeding is closed.

PUBLIC SERVICE COMMISSION



Tony Clark
Commissioner



Kevin Cramer
President



Brian P. Kalk
Commissioner