

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: *DKM* *JL*  
Dean Moos, Jim Deutsch and Steve Schroeder

DATE: July 22, 2009

SUBJECT: Proposed Penalty and Notice of Formal Hearing for NOV-0903 issued to  
The Falkirk Mining Company, Case No. RC-09-316



**SUMMARY** - Notice of Violation (NOV) 0903 was issued to The Falkirk Mining Company (Falkirk) on June 17, 2009 for removing topsoil from a reclaimed area for the construction of a haul road prior to approval of the revision that contained the design plans for the road. Permit revision provisions under NDAC 69-05.2-11-02(3) require that a revision be approved before the permittee initiates operations not previously approved. Falkirk has requested a formal hearing in the matter and the Commission needs to propose a civil penalty for the NOV and issue a notice of formal hearing in the matter. The Reclamation Division recommends that the Commission propose a civil penalty of \$350 for NOV-0903 and issue a notice of formal hearing for holding the hearing on September 9, 2009.

**DISCUSSION:** Since Falkirk has requested a formal hearing on NOV-0903, the Commission is required to propose a civil penalty prior to the hearing. The amount of the proposed penalty can also be contested during the hearing. Also, we must normally hold a hearing within 30 days of receipt of the request for the hearing; however, Falkirk waived its right to a hearing within the 30 day time period and asked that it be held in early September. All parties are available the afternoon of September 9 for the hearing.

Four factors must be considered in determining the amount of a proposed 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-0903 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-0903, Falkirk has received three NOV's in

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the past three years. Based on the criteria we have used in the past, Falkirk does not have a history of violations; therefore, a penalty assessment based on history is not warranted.

Recommended penalty assessment for history - \$0

**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. Falkirk's violation did not have any adverse impact on the environment; however, it is serious to some degree in that proper procedure as specified by rules was not followed. A penalty for seriousness is warranted.

Recommended penalty assessment for seriousness - \$100

**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 the NOV was caused by miscommunication between Falkirk's permitting staff and others in field operations. Therefore, we believe a penalty for negligence is warranted.

Recommended penalty assessment for negligence - \$250

**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 was considered normal. No extraordinary measures were either required or taken to abate this violation.

Recommended deduction for good faith - None

In conclusion, the Reclamation Division recommends a civil penalty of \$350 (\$100 for seriousness and \$250 for negligence) for NOV-0903. Attached is a Proposed Motion to assess a proposed penalty and to issue a notice of formal hearing to begin the hearing at 1:30 p.m. CST, September 9, 2009, in the Commission Hearing Room. Alan Hoberg from the Office of Administrative Hearings will preside over the formal hearing as the procedural hearing officer.

Attachment