



Public Service Commission

State of North Dakota

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Brian P. Kalk

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Darrell Nitschke

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September 30, 2009

Darrell Nitschke, Executive Secretary
North Dakota Public Service Commission
600 E Boulevard Ave, Dept 408
Bismarck, ND 58503

RE: Proposed Findings of Fact, Conclusions of Law, and Order
Case No. RC-09-316

Dear Mr. Nitschke:

Enclosed for filing are Proposed Findings of Fact, Conclusions of Law, and Order in Case No. RC-09-316 as requested by the Commission at the September 9, 2009 hearing.

Please contact me if you have any questions.

Sincerely,

Annette Bendish
Staff Counsel

cc: Brian Bjella, Crowley Fleck PLLP

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Falkirk Mining Company
Notice Violation No. 0903
Violation**

Case No. RC-09-316

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

October __, 2009

Appearances

Commissioners Kevin Cramer, Tony Clark, and Brian P. Kalk.

Annette Bendish, Legal Counsel, Public Service Commission, State Capitol, 600 E Boulevard Ave, Dept 408, Bismarck, North Dakota 58505, on behalf of the Public Service Commission staff

Brian R. Bjella, Attorney-at-Law, Crowley Fleck, PLLP, 400 East Broadway, Suite 600, Bismarck, North Dakota 58501, on behalf of Falkirk Mining Company.

Allen C. Hoberg, Administrative Law Judge, Office of Administrative Hearings, 1701 North Ninth Street, Bismarck, North Dakota 58501-1882, as Procedural Hearing Officer.

Preliminary Statement

On June 17, 2009, the Reclamation Division of the Public Service Commission (Commission) issued Notice of Violation No. 0903 (NOV) to the Falkirk Mining Company (Falkirk). The notice of violation was issued for removing topsoil from a reclaimed area that has received partial bond release for the construction of a haul road prior to approval of the revision that contained the design plans for the road.

On July 10, 2009, the NOV was modified to correct the characterization of the reclaimed area where the topsoil was removed.

On July 10, 2009, the Commission received a request for a Formal Hearing from the Falkirk Mining Company.

On July 29, 2009, the Commission issued a Notice of Formal Hearing, scheduling the public hearing at 1:30 p.m. CDT, on September 9, 2009, in the Public Service Commission's Hearing Room, 12th Floor, State Capitol, Bismarck, North Dakota.

Also on July 29, 2009, the Commission assessed a proposed penalty of \$350 for the NOV.

Having allowed all interested persons an opportunity to be heard, and having heard, reviewed, and considered all testimony and evidence presented, the Commission makes the following:

Findings of Fact

1. On March 17, 2009, Revision 32 to Permit NAFK-8705 (Revision) was submitted to the Commission by Falkirk.
2. The Revision included updates for the pending renewal of Permit NAFK-8705 and plans for the expansion of the wash bay pond and relocation of haul road A to the north onto reclaimed land to accommodate the expansion of the washbay bond.
3. On May 27, 2009, Reclamation Division Staff (Staff) received an email from Greg Obrigewitch on behalf of Falkirk as a follow-up to an earlier telephone conference in which Mr. Obrigewitch requested permission to begin topsoil stripping operations for the construction of the relocated haul road A.
4. On May 28, 2009, Staff responded to Mr. Obrigewitch's request. After reviewing Falkirk's request, Staff had questions that needed to be answered before approvals could be given. Falkirk's request was also discussed by telephone and Staff concluded that construction of relocated haul road A should wait until Revision 32 was approved.
5. On May 29, 2009, Commission Staff conducted a routine inspection of the Falkirk Mine.
6. During the May 29, 2009 inspection, Staff witnessed scrapers removing topsoil from a previously reclaimed area where the relocated haul road A would be constructed.
7. While the May 29 inspection was being conducted by a Staff inspector, Falkirk also called Staff to report the scraper activity and indicated in a May 29 email that the stripping of the haul road was the result of a miscommunication between Falkirk staff.
8. North Dakota Administrative Code section 69-05.2-11-02(3) requires that revision applications must be filed and approved before the date the permittee expects to change operations or initiate operations not previously approved.

9. Falkirk was told by the Assistant Director of the Reclamation Division on May 29 not to restore the topsoil because it was the subject of a pending revision and would be stripped soon.

10. Falkirk admits that the topsoil was removed and it should not have been removed.

11. Falkirk chose to replace the removed topsoil against the Assistant Director's direction.

12. On June 3, 2009, Staff again inspected the Falkirk mine. The area where the topsoil stripping had occurred on May 29 was not discernable by staff because topsoil had been replaced and equipment had leveled the entire area.

13. The actual size of the affected area is unknown because neither Staff nor Falkirk photographed the affected area before Falkirk replaced topsoil on the affected area.

14. The NOV was terminated on July 20, 2009 because of the Commission's approval of Revision No. 32 to Permit NAFK-8705 on June 24, 2009.

15. The Commission may assess a civil penalty of up to \$3,500 per day based on the history of previous violations at the mine where the violation is found. Falkirk does not have a history of violations and no penalty based on history should be assessed.

16. The Commission may assess a civil penalty of up to \$3,500 per day based on the seriousness of the violation. Falkirk's violation did not have any adverse impact on the environment; however, it is serious to some degree in that the proper procedure as required by the North Dakota Administrative Code was not followed. A penalty of \$100 should be assessed for seriousness.

17. The Commission may assess a civil penalty of up to \$3,000 per day based on the degree of fault of the permittee. A violation caused by negligence, but not through reckless, knowing, or willful conduct may be assessed a penalty of only \$1,500 per day. A violation caused by a greater degree of fault than negligence, or through reckless, knowing, or intentional conduct may be assessed a penalty of up to \$3,000 per day. In this case, the NOV was caused by a miscommunication between Falkirk's permitting staff and others in field operations. A penalty of \$250 should be assessed for negligence.

18. 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 frame following notification of the violation. No deduction can be made for normal compliance. The compliance in this case was normal and there is no reduction for good faith.

19. Under North Dakota Administrative Code section 69-05.2-28-05 the commission or its authorized representative may vacate a notice of violation for good cause.

From the foregoing Findings of Fact, the Commission now makes its:

Conclusions of Law

1. The Commission has jurisdiction over this proceeding under North Dakota Century Code Chapter 38-14.1.
2. The penalty assessed is reasonable considering the history of violations, seriousness of the violation, negligence, and good faith in attempting to achieve rapid compliance as explained by North Dakota Administrative Code section 69-05.2-28-12.
3. Falkirk has not demonstrated good cause for vacating the Notice of Violation.

From the foregoing Findings of Fact and Conclusions of Law, the Commission now make its:

Order

The Commission orders:

1. The Notice of Violation is NOT VACATED and the proposed penalty is AFFIRMED.

PUBLIC SERVICE COMMISSION

Tony Clark
Commissioner

Kevin Cramer
Chairman

Brian P. Kalk
Commissioner