

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

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

Case No. RC-09-316

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

November 12, 2009

Appearances

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

Annette Bendish, Legal Counsel, North Dakota Public Service Commission, State Capitol Building, 12th Floor, Bismarck, North Dakota 58505, on behalf of the North Dakota 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 The Falkirk Mining Company.

Allen C. Hoberg, Administrative Law Judge, Office of Administrative Hearings, 1707 North Ninth Street, Bismarck, North Dakota 58501-1882, as Procedural Hearing Officer.

Preliminary Statement

The Falkirk Mining Company (Falkirk) is the operator of the Falkirk Mine located near Underwood, North Dakota. Falkirk operates the mine under various permits issued by the North Dakota Public Service Commission (Commission).

On June 17, 2009, the Reclamation Division of the Commission issued Notice of Violation No. 0903 (NOV 0903) to 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 permit revision that contained the design plans for the road. The area of violation was described as "a small reclaimed area located in the SE¼ of Section 5, T145N, R82W, in Permit NAFK-8705."

In NOV 0903 Falkirk was directed to provide a remedial action letter. Falkirk submitted its remedial action letter dated July 2, 2009. In the remedial action letter it was noted that the affected area was not subject to partial bond release as noted in NOV 0903, but was fully bonded.

On June 24, 2009, the Commission approved Revision No. 32 to Permit No. NAFK-8705 by which Falkirk received approval for relocating topsoil within the affected area in order to construct a haul road. Subsequent to the approval of the revision, Falkirk did remove the topsoil within the affected area to construct the haul road.

On July 10, 2009, the NOV was modified to correct the characterization of the reclaimed area where the topsoil was removed. NOV 0903 was modified to state the nature of violation as "topsoil was removed from a previously reclaimed area prior to approval of a revision application that contained plans for the re-location of a primary haul road through the area."

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

On July 20, 2009, the Reclamation Division issued a Termination or Vacation of Notice of Violation informing Falkirk that NOV 0903 was considered abated upon approval of Revision No. 32 to Permit No. NAFK-8705 on June 24, 2009.

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 NOV 0903.

The hearing was held as scheduled on September 9, 2009 in the Commission Hearing Room, State Capitol, Bismarck, North Dakota.

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 the morning of May 29, 2009, Falkirk equipment mistakenly entered into a small reclaimed area located in the SE $\frac{1}{4}$ of Section 5, Township 145 North, Range 82 West, McLean County, North Dakota. That upon discovery of the mistake, after approximately ten scraper loads of topsoil had been removed, Falkirk personnel ordered the work to be immediately halted and the equipment removed. Shortly thereafter, Falkirk personnel notified the Reclamation Division of the Commission both by telephone call and electronic mail.

2. On May 29, 2009, Reclamation Division Staff, while conducting a routine inspection of the Falkirk Mine, observed scrapers removing topsoil from the area at issue in NOV 0903. Staff subsequently inspected the area of violation on June 3, 2009.
3. Falkirk personnel voluntarily reported the entry of its equipment into the affected area.
4. Falkirk's mistake occurred due to a miscommunication between Falkirk's environmental staff and operations staff.
5. While the Reclamation Division did not order that the topsoil be restored as it was subject to the pending Revision No. 32, Falkirk management directed its staff to restore the topsoil, which work was subsequently completed.
6. No harm occurred to the environment of the affected area by virtue of the unauthorized work. In addition, the unauthorized work did not pose a potential for adverse environmental impact because it was part of an imminent permit revision.
7. While it was initially believed by the Reclamation Division and Falkirk that the area had been partially bond released, it was subsequently verified by Falkirk in its July 2, 2009 remedial action letter and confirmed by the Reclamation Division in its July 10, 2009 modification of the NOV that the area was fully bonded.
8. Subsequently, after approval of Revision No. 32 to Permit NAFK-8705 on June 24, 2009, the topsoil was removed from the affected area to construct a haul road.
9. The affected area is small. Falkirk estimates that the affected area is approximately 55' x 100', comprising approximately 0.13 acre. Reclamation Division Staff could not determine the exact size of the affected area because at the time of Staff's June 3, 2009 inspection, topsoil had been replaced and equipment had affected the entire area.
10. North Dakota Administrative Code section 69-05.2-28-05(2) provides "(t)he Commission or its authorized representative may modify, vacate, or terminate a notice of violation for good cause."
11. Good cause exists to vacate NOV 0903 because no harm occurred to the environment from the disturbance of topsoil on May 29, 2009 in the affected area, Revision No. 32 to Permit NAFK-8705 authorizing the same work was issued on June 24; and Falkirk personnel voluntarily reported the matter.

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. North Dakota Administrative Code section 69-05.2-28-05(2) provides "(t)he Commission or its authorized representative may modify, vacate, or terminate a notice of violation for good cause."
3. Good cause exists to vacate NOV 0903.

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

Order

The Commission orders that NOV 0903 is vacated in all respects and no penalty be imposed.

PUBLIC SERVICE COMMISSION

VOTED NAY

**Tony Clark
Commissioner**



**Kevin Cramer
Chairman**



**Brian P. Kalk
Commissioner**

Commissioner Cramer Concurring

I believe the evidence supports a conclusion good cause exists to vacate NOV 0903.

The checks and balances of a three member commission which both oversees the division charged with enforcing reclamation laws and hears appeals by affected parties implies more discretion for the elected PSC than for the bureaucracy.


"Good cause" is not defined in code and lacks clear definition even in law dictionaries. It is a term intended to provide discretion to decision makers as they consider all of the evidence and testimony and is dependent on the circumstances of a particular situation and each individual case.

The circumstances in this case which support a "good cause" finding are several;

The mistake which led to the violation was self-discovered, self-reported and self-remediated. The mistake was discovered within hours of scrapers entering the affected area and reported the same day to Reclamation inspectors and administration. The mistake occurred because the affected area was one of two similar in nature. The other had received the permit revision allowing topsoil removal to begin while approval of the permit for the affected area was only pending. As it turned out, approval of the revision was imminent as less than one month later the PSC granted the revision.

While considering whether “good cause” exists to vacate the NOV, I contemplated whether there is “insufficient cause” for issuing the NOV in the first place. I have no quarrel with members of the Reclamation staff issuing the NOV as they simply carried out their duties as prescribed in code and by policy.

By choosing to carry out *the letter of the law*, however, I believe we would be violating the *spirit of the law*. While the various state and federal laws and rules with all of their penalties and consequences are designed to keep industry in check, good reclamation requires a commitment by all stakeholders to environmental protection. If self-reporting an honest and de minimis violation results in penal action by the PSC, we risk compromising the open and transparent relationship between regulators and industry that protects our citizens and land so well.



Kevin Cramer, Chairman

Commissioner Clark Dissenting

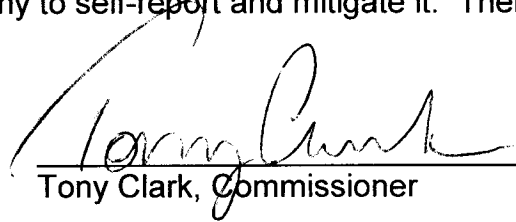
There is little disagreement about the facts of this case. By just about any standard, Falkirk’s violation was a minor one, but nonetheless it clearly was a violation. The staff contends it was a violation. The facts support the fact it was a violation. The company even admits it was a violation.

What Falkirk asks the Commission to do in this case is to use our discretion under the rules to say that because this was a minor violation, quickly caught and quickly mitigated, good cause exists to declare there was no violation at all. I do not read the term “good cause” as used in our rules that broadly.

In my opinion, good cause for vacating an order may exist when there are things like uncontrollable circumstances, acts of god, a grey area in the interpretation of the rules, or other outside events that might make for a technical violation of the rule, but one in which no reasonable person could suggest it was within the control of the mining company to prevent it.

But that is not the case here. It was miscommunication within the company that caused the violation. It was not gross negligence and it was not malicious, but it was a clear violation caused by a misunderstanding between the company's field operators and their supervisors.

Rather than having the Commission endorse the standard that a "violation is not a violation when we think it is minor," I would offer that the proper place to adjust for matters like seriousness and company remediation is in the penalty phase of the Commission's decision making process. This is why I have proposed an order to affirm the violation, yet would forbear from levying a fine, given the nature of the infraction and the good faith measures taken by the company to self-report and mitigate it. Therefore, I respectfully dissent.



Tony Clark, Commissioner