

**PUBLIC SERVICE COMMISSION**

Reclamation Division

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Memorandum

TO: Commissioners Cramer, Clark, and Kalk  
Darrell Nitschke, Executive Secretary  
Illona Jeffcoat-Sacco

FROM: <sup>MB</sup> Mike Berg, <sup>DKM</sup> Dean Moos, and <sup>JG</sup> Jim Deutsch

DATE: August 18, 2010

SUBJECT: Proposed Penalty and Notice of Informal Conference for NOV-1003  
issued to The Coteau Properties Company, Case No. RC-10-418

**SUMMARY** - Notice of Violation (NOV) 1003 was issued to The Coteau Properties Company Freedom Mine (Coteau) on July 8, 2010, for a pond discharge that resulted in some minor erosion outside of the permit area. The violation was issued for failure to have an energy dissipater on the discharge outlet of Pond P-N33-01 and for locating the discharge pipe beyond the permit boundary. Coteau has requested an informal conference in the matter and the Commission needs to propose a civil penalty for the NOV and issue a notice of informal conference in the matter. The Reclamation Division recommends that the Commission propose a civil penalty of \$1,000 for NOV-1003 and issue a notice of informal conference to schedule the conference for September 30, 2010.

**DISCUSSION:** During a routine mine inspection on June 30, 2010, a Reclamation Division inspector checked the water discharge from Pond P-N33-01. Water from the pond was being pumped at a rate of approximately 1,100 gallons per minute through a poly pipe. Although the pond is located within the permit area, the discharge outlet was located approximately 60 feet beyond the permit boundary. The discharge outlet was not equipped with an energy dissipater and a small erosion feature was beginning to form at the discharge point. NOV-1003 was issued to Coteau for failure to utilize energy dissipaters on the discharge outlet of Pond P-N33-01 as required by NDAC 69.05.2-16-10 and for causing a minor disturbance outside of within the permit area.

Upon discovery of the small erosion feature at the discharge outlet, Coteau immediately stopped the pump to discontinue the pond discharge. On the next day Coteau repaired the small erosion feature. Coteau completed the required remedial actions within the required abatement period and the NOV was terminated on July 22.

Since Coteau has requested an informal conference on NOV-1003, the Commission is required to propose a civil penalty prior to the informal conference. The amount of the proposed penalty can also be contested during the informal conference. Also, we must

normally schedule, but not hold, an informal conference within 30 days of receipt of the request. All parties are available on September 30<sup>th</sup> for the informal conference.

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-1003 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. This is the first NOV that Coteau has received since 1999. Based on the criteria we have used in the past, Coteau does not have a history of violations; therefore, a penalty assessment based on history is not warranted.

Recommended penalty assessment for history - None

**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. Although the extent of the erosion was minimal at the time it was discovered, it is an off-site impact directly attributable to Coteau's activities and there was the potential for more serious erosion had the discharge continued for a longer period of time. A penalty for seriousness is warranted.

Recommended penalty assessment for seriousness - \$250

**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, the primary reason for the NOV was for failure to install an energy dissipater on the discharge outlet. Inspectors had previously noted discharge outlets without energy dissipaters located both inside and outside of the permit area at the Freedom Mine and Coteau personnel were previously cautioned of the risks of not using an energy dissipater on discharge outlets, especially those located outside of the permit area. The failure to use an appropriate energy dissipater was due to lack of diligence and ordinary negligence. Therefore, we believe a penalty for negligence is warranted.

Recommended penalty assessment for negligence - \$750

**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. Even though Coteau immediately discontinued the pond discharge upon discovering the erosion and repaired the small erosion feature in a very timely manner, the compliance in this case is considered normal. No extraordinary measures were required to abate this violation.

Recommended deduction for good faith - None

In conclusion, the Reclamation Division recommends a civil penalty of \$1,000 (\$250 for seriousness and \$750 for negligence) for NOV-1003.

Attached is a Proposed Motion to assess a proposed penalty and to issue a notice of informal conference. The conference will be held in the Commission hearing room beginning at 1:30 p.m. CDT, September 30, 2010. Allen Hoberg from the Office of Administrative Hearings will preside over the informal conference and issue a recommended order following the conference. The Notice of Informal Conference is also attached.

Attachments

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