

**PUBLIC SERVICE COMMISSION**  
Reclamation Division

\*\*\*\*\*

Memorandum

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

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

DATE: November 18, 2010

SUBJECT: Proposed Penalty and Notice of Formal Hearing for NOV-1004 issued to  
The Coteau Properties Company, Case No. RC-10-598

**SUMMARY** - Notice of Violation (NOV) 1004 was issued to The Coteau Properties Company Freedom Mine (Coteau) on October 4, 2010, for failure to install the appropriate measures to control or prevent erosion and siltation from a section of haulroad at the Freedom Mine. The haulroad was constructed in 2009 and measures to control erosion and sedimentation were not installed in the north ditch resulting in erosion of the ditch bottom and sedimentation near the culvert location. Coteau 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 \$1,500 for NOV-1004 and issue a notice of formal hearing to schedule the hearing for December 17, 2010.

**DISCUSSION:** During routine mine inspections on September 2 and 29, 2010, a Reclamation Division inspector noted sediment deposition immediately downstream of a culvert (south ditch) that goes through the main haulroad near the center of Section 18, T145N, R87W. A follow-up inspection was conducted on September 30, 2010. At that time, significant erosion was noted in the ditch bottom of the north haulroad. Erosion features extended approximately 450 feet southwest and 750 feet northeast of the culvert and they ranged from 6" to 24" wide and 6" to 18" deep. Sediment deposition was noted on both the north and south sides of the haulroad in the area of the culvert under the haulroad. NOV-1004 was issued to Coteau for failure to install the appropriate sediment control measures to minimize erosion to the extent possible as required by NDAC 69-05.2-16-08(1)(c) and for failure to control or prevent erosion and siltation from haulroads as required by NDAC 69-05.2-24-01(2)(a).

Coteau has since repaired the erosion features and installed best management practices in the north haulroad ditch to minimize future erosion and sedimentation. Coteau completed the required remedial actions within the required abatement period and the NOV was terminated on October 25, 2010.

60 RC-10-598 Filed: 12/17/2010 Pages: 3  
Coteau Exhibit 15

9 RC-10-598 Filed: 11/18/2010 Pages: 3  
Memorandum

Since Coteau has requested a formal hearing on NOV-1004, the Commission is required to propose a civil penalty prior to the formal hearing. The amount of the proposed penalty can also be contested during the formal hearing. Normally we must hold a formal hearing within 30 days of receipt of the request; however, Coteau waived the right for the hearing to be held within 30 days of filing the request. As previously discussed, all parties are available on December 17<sup>th</sup> for the formal 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-1004 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 second NOV that Coteau has received this year and only the second NOV 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. The erosion caused minor sedimentation on a reclaimed area that is just north of the haulroad. 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 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 the necessary erosion and sediment control measures in the north haulroad ditch. Other than seeding, no other erosion and sediment control measures were installed in the north haulroad ditch. Coteau's September 17, 2009, certification of this haulroad following its construction noted that the installation of silt fence adjacent to culvert installations to control erosion remained to be completed at that time. However, it was apparent on September 30, 2010, that a silt fence was never installed next to the culvert inlet on the north road ditch near the center of Section 18. Sediment deposition in this road ditch was also noted during the September 2, 2010 inspection, but Coteau failed to install any silt fences or sediment control measures in the north ditch after that inspection.

The failure to install the erosion and sediment control measures is due to lack of diligence and ordinary negligence. Therefore, we believe a penalty for negligence is warranted.

Recommended penalty assessment for negligence - \$1,250

**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. Even though Coteau immediately began repair of the erosion feature and installed erosion control measures, 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 \$1,500 (\$250 for seriousness and \$1,250 for negligence) for NOV-1004.

Attached is a Proposed Motion to assess a proposed penalty and to issue a notice of formal hearing. The hearing will be held in the Commission hearing room beginning at 9:00 a.m. CST, December 17, 2010. Allen Hoberg from the Office of Administrative Hearings will preside over the formal hearing as the procedural hearing officer. The Notice of Formal Hearing is also attached.

Attachments

Caselib\100598\memo