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January 11, 2011

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HAND DELIVERY

PUBLIC SERVICE COMMISSION

Mr. Darrell Nitschke
Executive Director
NORTH DAKOTA PUBLIC
SERVICE COMMISSION
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480

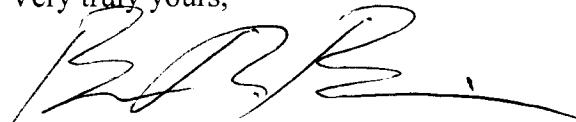
Dear Mr. Nitschke:

In re: The Coteau Properties Company
Case No. RC-10-598
Our File No. 21-784-005

Enclosed for filing are original and five copies of The Coteau Property Company's Brief.

Please call should you have any questions.

Very truly yours,



BRIAN R. BJELLA

bw
Enc.
cc: Mark Gruman

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Brief

BILLINGS BISMARCK BOZEMAN HELENA KALISPELL

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Coteau Properties Company

Brian Bjella, Crowley Fleck, PLLP

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Coteau Properties Company
Notice of Violation No. 1004

Case No. RC-10-598
OAH File No. 20100364

BRIEF OF THE COTEAU PROPERTIES COMPANY

I. Preliminary Statement

The Coteau Properties Company (“Coteau”), is the operator of the Freedom Mine located approximately seven miles north of Beulah, North Dakota. Coteau operates the Freedom Mine under permits issued by the North Dakota Public Service Commission (“PSC”), including Permit Nos. NACT-8102 and NACT-8203.

The PSC’s Reclamation Division is charged with the responsibility of administering North Dakota’s program regulating the surface mining of coal.

On September 29, 2010, Reclamation Division Inspector Mike Berg inspected the Freedom Mine. He subsequently issued an Inspection Report (PSC Staff Exhibit No. 14).

On September 30, 2010, Reclamation Division Inspectors Mike Berg and Dean Moos inspected the Freedom Mine. They subsequently issued an Inspection Report (PSC Staff Exhibit No. 15).

On October 4, 2010, the Reclamation Division issued Notice of Violation No. 1004 to Coteau (PSC Staff Exhibit No. 18) (hereinafter “NOV”). The NOV alleges that Coteau “failed to install the appropriate measures to control or prevent erosion and siltation from a segment of haulroad constructed in 2009. Failure to install appropriate sediment control measures in the haulroad ditch caused erosion to the ditch bottoms and the deposition of sediment on reclaimed mine lands.”

Coteau then filed with the PSC its Request to Vacate Notice of Violation, or in the Alternative, Application for Formal Hearing, dated October 28, 2010. Coteau requested that the PSC vacate and dismiss with prejudice the NOV for alleging violations in lands where no haulroad is located, asserting that as there is no haulroad on the lands described in the NOV, there can be no violation. Coteau further requested that if the NOV is not vacated or dismissed, that this matter be set for formal hearing.

The Reclamation Division subsequently issued Modification of Notice of Violation dated November 2, 2010, correcting one of the permit numbers from NACT-8103 to NACT-8102. The Reclamation Division further amended the NOV with respect to the legal description correcting it to read: "The haulroad near the center of Section 18 T145N, R87W, Mercer County, ND." (PSC Staff Exhibit No. 19). Coteau shall refer to the original NOV and the modified NOV collectively as "NOV."

A formal hearing was held before the Commissioners of the PSC on December 17, 2010.

The hearing officer, Administrative Law Judge Allen Hoberg, conducted the formal hearing. Coteau submits this brief pursuant to the briefing schedule established by Judge Hoberg.

II. Burden of Proof by a Preponderance of the Evidence

Judge Hoberg directed at the outset of the hearing, that the burden of proof or burden of persuasion in this matter rests with the Reclamation Division to prove the allegations of the modified Notice of Violation 1004 by the greater weight of the evidence (Hearing Transcript page 18).

The ALJ is correct that the Reclamation Division has the burden of proof in this matter. In an administrative hearing for review of proposed action by an agency, the proponent of the

action is the moving party. In this case, the Reclamation Division is the moving party as it issued the NOV. “It is well settled (that) the moving party has the burden of proof in administrative hearings.” *North Central Good Samaritan Center vs. North Dakota Department of Human Services*, 611 N.W.2d 141, 145 (N.D. 2000).

In administrative hearings under the Administrative Agencies Practices Act, NDCC Chapter 28-32, an agency’s findings of fact must be supported by a preponderance of the evidence, its conclusions of law must be supported by the findings of fact, and the decision must be in accordance with the law. *Walton vs. North Dakota Department of Human Services*, 552 N.W.2d 336, 338 (N.D. 1996).

As a result, the Reclamation Division has the burden of proof in this case. The Reclamation Division’s action to issue an NOV must be supported by a preponderance of the evidence. *Sjostrand vs. North Dakota Workers Compensation Bureau*, 649 N.W.2d 537 at 547, 548 (N.D. 2002). That is, the factual conclusions reached by the Reclamation Division must be proved by the weight of the evidence from the entire record. *Rennich vs. North Dakota Department of Human Services*, 756 N.W.2d 182, 185 (N.D. 2008).

The North Dakota Supreme Court has defined preponderance of evidence as “evidence more worthy of belief, or the greater weight of evidence, or testimony that brings the greater conviction of truth.” *Jimison vs. North Dakota Workmen’s Compensation Bureau*, 331 N.W.2d 822, 824 (N.D. 1983). The Supreme Court has consistently focused on the phrase “proved by the weight of the evidence,” to determine whether the agency’s actions were supported by the preponderance of the evidence. *Id.* at 825.

The Reclamation Division has the burden of proof that the allegations contained in the NOV have been proven by the preponderance of the evidence. Coteau submits that the

Reclamation Division has failed to carry its burden of proof as the overwhelming weight of the evidence substantiates that the erosion and siltation observed by the Reclamation Division inspectors on September 29 and 30, 2010, were caused by unprecedented rainfall events which exceeded the Reclamation Division's own design standards for precipitation events for haulroad ditches.

III. Haulroad Constructed Pursuant to Design Standards With Appropriate Best Management Practices

Surface coal mining in North Dakota is extensively regulated by the Reclamation Division pursuant to North Dakota Century Code Chapter 38-14.1. The Reclamation Division has adopted numerous regulations, including those dealing with haulroad and ditch construction.

One of the principle regulations dealing with haulroad construction is NDAC § 69-05.2-24-03(5) which provides as follows:

In accordance with the approved plan, all primary roads must:

- (a) be constructed or reconstructed and maintained to have adequate drainage control, using structures such as bridges, ditches, cross drains, and ditch relief drains. The drainage control system must be designed to safely pass peak runoff from a ten-year, six-hour precipitation event, or greater event as specified by the Commission. (emphasis added)
(Coteau Exhibit No. 4), (hereinafter the "Ten-Year/Six-Hour Rule").

In the NOV the Reclamation Division has asserted that Coteau violated "NDAC 69-05.2-24-01(2)(a) which requires mine operators to control or prevent erosion and siltation from haulroads," and "NDAC 69-05.2-16-08(1)(c) which requires mine operators to use appropriate sediment control measures to minimize erosion to the extent possible."

Both of these regulations must be reviewed in more detail. NDAC § 69-05.2-24-01(2)(a) reads as follows:

Each road must be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to:

- (a) control or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust as well as dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices.
(Coteau Exhibit No. 9.)

It must be emphasized that the first measure listed in this regulation to control or prevent erosion and siltation is vegetation.

The second regulation alleged violated is NDAC § 69-05.2-16-08(1)(c). This regulation reads in part as follows:

1. Appropriate sediment control measures must be designed, constructed, and maintained using the best technology currently available to:
 - c. minimize erosion to extent possible.
(Coteau Exhibit No. 8.)

This regulation does not provide that mine operators are required to eliminate all erosion. Rather, it states that mine operators must minimize erosion to the extent possible.

Keeping in mind that the Reclamation Division must prove the alleged violations by the weight of the evidence, and in consideration of the regulatory provisions cited above, the case as presented by the Reclamation Division at the hearing must be examined.

Reclamation Division Inspector Mike Berg and Assistant Director Dean Moos testified on behalf of the Reclamation Division.

The NOV was issued for alleged violations in the north ditch of the haulroad located in Section 18.

Mr. Berg testified that he inspected the south haulroad ditch on September 2, 2010. He stated that he noticed a large area of sedimentation in the south ditch and instructed a Coteau

employee that the area needed to be cleaned up and silt fences needed to be installed. However, Mr. Berg testified that he did not inspect the north ditch at that time. (Hearing Transcript p. 31.)

Mr. Berg further stated that Coteau had notified the Reclamation Division that on September 9 the mine had received a large rain event. (Hearing transcript page 39.) However, no significance was given to the September 9 rainfall event in the Reclamation Division's Inspection Report of September 29, or in the NOV itself.

In fact, Mr. Berg stated that after his inspection on September 30, 2010, that there was no "extenuating circumstances" that he was aware of that would absolve Coteau of the NOV. (Hearing transcript page 47, 48.)

Mr. Berg was asked to review the Inspection Report of September 30, 2010 (PSC Staff Exhibit No. 15). In this exhibit, Mr. Berg wrote "although the September 9 storm contributed to the development of the erosion and sedimentation features, it appears that these features existed prior to the September 9 storm as evidenced by the sediment that was noted on the south side of the haulroad on the September 2, 2010, Inspection Report." (Hearing transcript page 54.) The ALJ inquired "does the word 'appears' mean that is what you saw?" Mr. Berg stated that he did not see erosion or sedimentation in the north ditch on September 2. (Hearing transcript page 55.) Mr. Berg also acknowledged that silt fences in other road ditches did wash out during the September 9 rainfall event. (Hearing transcript page 56.) He acknowledged that the Reclamation Division has no evidence as to the status of the north ditch on September 2 or prior to the rainfall event on September 9. (Hearing transcript page 56.)

Assistant Reclamation Director Mr. Moos then testified. He also admitted that with respect to the north ditch, that the Reclamation Division has no evidence of any kind which demonstrates how that ditch looked on September 2. (Hearing transcript page 91.)

Mr. Moos also testified that he took sediment samples from the north ditch and area surrounding the ditch on September 30. He indicated he was surprised the sediment sample came back as topsoil, being almost topsoil quality. He stated he was expecting it to have an overburden quality. (Hearing transcript page 78.) Overburden quality meaning the sediment likely would have come from the ditches. He further acknowledged that the topsoil quality test result is indicative that some of the sediment could have come from the entire watershed rather than just the ditches. He also acknowledged that some of the sediment could be erosion from the reclaimed areas above the north ditch. *Id.*

Mr. Moos further indicated that the Reclamation Division has no record of what erosion or sedimentation was occurring in the north ditch prior to September 2, if any. (Hearing transcript page 94, 95). Further, he acknowledged that he was making the inference, or the assumption that the gully in the north ditch as evidenced on PSC Staff Exhibit No. 8 taken on September 30 existed prior to the September 9 rainfall event. While he acknowledged that the September 9 rainfall event may have contributed to the gully, “probably contributed significantly to it,” he states that it was his assumption that the gully in the north ditch existed “over time, you know, throughout the summer, I’m guessing.” (Hearing transcript pages 91, 97, 98.)

This is pure speculation on the part of both inspectors Berg and Moos. Both inspectors acknowledged they have no evidence of the condition of the north ditch on September 2 or prior to the major rainfall events on September 6 and 9. The Reclamation Division has failed by the lack of any evidence to carry its burden of proof.

Mr. William Kirk, Coteau employee and engineer, then testified as to the Ten-Year/Six-Hour Rule established by Reclamation Division. Mr. Kirk stated that as a mining engineer, when designing haulroads, he utilizes the Ten-Year/Six-Hour Rule to design drainage systems for

haulroads, and that he did so when designing the haulroad in Section 18. (Hearing transcript pages 117, 121).

Mr. Kirk further indicated that the best management practice employed by Coteau for the north ditch to control erosion was seeding with grass, followed by mulching and crimping to establish a vegetative cover. Mr. Kirk indicated this was considered a best management practice by Reclamation Division regulation. (Hearing transcript page 119.) Reclamation Division Inspector, Mike Berg, also acknowledged that disking, seeding and mulching to establish a vegetative cover is considered a best management practice. (Hearing transcript page 55.)

However, the Reclamation Division, using only photographs taken on September 30 (PSC Staff Exhibits 6-8), surmised that the vegetation in the north ditch was inadequate to control erosion prior to the September 9 rainfall event. However, Mr. Kirk presented Coteau Exhibit No. 5, being a vegetative cover survey which was conducted on October 1, 2010, and thus after the September 9 rainfall event. This vegetative cover survey indicated that total basal cover was measured at 77.9% in the north ditch. Mr. Kirk further reviewed Coteau Exhibit No. 7, being Reclamation Division Policy Memorandum No. 19 to mine operators. The policy memorandum was prepared as guidance to mine operators for removing sedimentation ponds and pond site reclamation. The policy memorandum indicates that a minimum of 73% total basal cover is indicative of sufficient vegetation in order to remove sedimentation ponds. Mr. Kirk testified that the vegetative cover survey indicated there was still substantial vegetative cover in the north ditch after the September 9 rainfall event. (Hearing transcript pages 122-125.)

Mr. Kirk was questioned as to whether he observed the gully which was depicted in PSC Staff Exhibits 6-8 prior to the September 9 rainfall event. He stated that he did not. As to whether he observed the gully after the September 9 rainfall event, he stated that he did.

(Hearing transcript page 128.) Mr. Kirk then reviewed Coteau Exhibit No. 6, being a series of photos identified as 6-1 through 6-5 taken on September 30. Mr. Kirk stated these photos reinforced the results of the vegetative cover survey demonstrating that except where the actual erosion gully occurred, there was still good grass cover present after the September 9 rainfall event. (Hearing transcript page 130.)

Mr. Kirk further testified that the vast majority of sediment which was evident during the September 2 inspection came from the south ditch. He stated that sediment in the south haulroad ditch which was first noticed by Coteau in July of 2010, as coming primarily from the south side ditches. (Hearing transcript p. 134.)

Mr. Kirk indicated that in July, 2010, Coteau observed both segments of the south ditch had experienced heavy erosion, requiring repairs to the ditch and placement of erosion control measures. Coteau installed engineering fabric and articulated concrete mats, and also an erosion control blanket in the south ditch, which measures were very effective controlling erosion. The sediment control measures are evident in PSC Staff Exhibit No. 3, being a photograph of the south ditch. (Hearing transcript pages 135, 136, 160, 226).

The Reclamation Division inspectors, when reviewing the sediment in the south ditch, concluded it was coming from the north ditch because "it had to come from some place." (Hearing transcript page 32.) However, the majority of the sedimentation in the south ditch occurred before repairs were completed in July 2010. After completion of repairs and installation of erosion control measures, little additional sediment accumulated in the south ditch. (Hearing transcript pages 145, 146, 161, 162.)

On a related issue, Assistant Director Moos testified that he estimated the slope of the north ditch to be at a three to six percent grade. However, he acknowledged a survey was not

conducted by the Reclamation Division to determine the actual slope of the north ditch. (Hearing transcript pages 101, 108.) However, Mr. Kirk testified that Coteau did have a survey prepared of the north ditch. He indicated that a professional land surveyor conducted a survey of the ditches. With respect to the east segment of the north ditch, the initial slope from the culvert to 330 feet upstream was 2.72%, and from there upstream the slope dropped to only .89%. With regard to the west segment of the north ditch, the survey indicated that from the culvert inlet for approximately 520 feet the slope was 3.25%, and beyond that the slope flattened out to 1% or less. (Hearing transcript page 137.) This testimony is very significant as Assistant Director Moos's visual estimation that the grades were three to as high as six percent was directly contradicted by the professional survey conducted by Coteau indicating that the grade was at most 3.25%, and for the majority of the length of both east and west segments of the north ditch, the slope was much less. Thus, the surveyed ditch slopes were actually much gentler than estimated by Mr. Moos.

Mr. Kirk then reviewed Coteau Exhibit No. 12, being a letter from the North Dakota Department of Health dated September 7, 2010. The North Dakota Department of Health issued to Coteau a North Dakota Pollutant Discharge Elimination System permit, which regulates effluent limitations from sedimentation ponds. Mr. Kirk testified that the letter from the Health Department grants a variance for alternate effluent limitations to Coteau by virtue of the rainfall events experienced in early September and again on September 9. Coteau had rain events which exceeded the design capacity of the mine's sedimentation ponds. Mr. Kirk further reviewed Coteau Exhibit No. 13, being North Dakota Department of Health Regulation § 33-16-01-25. Pursuant to this regulation, the Department of Health has the ability to allow variances for situations such as acts of God or flood events over which a permittee has little or no control. Mr.

Kirk testified that this was the regulation that the Department of Health utilized to grant Coteau its variance from effluent limitations due to the September 9 rainfall and prior rainfall events. (Hearing transcript pages 139-140.)

Mr. Kirk also reviewed Coteau Exhibit No. 14, being a certified copy of an emergency declaration issued by the Mercer County Board of County Commissioners. This emergency declaration indicates that Mercer County had suffered damages from a September 9 precipitation event causing road damage and fence loss. The emergency declaration further indicates that one of the areas suffering damage was the rural Beulah area. Mr. Kirk testified that the Freedom Mine is located in Mercer County approximately seven miles northwest of Beulah. (Hearing transcript pages 138-141.)

Mr. Kirk also reviewed the Reclamation Division's Memorandum of November 18, 2010, with respect to its reasons for issuing the NOV (Coteau Exhibit No. 15). Mr. Kirk was asked if there was any mention in the memorandum of the rainfall events of September 6 and 9, and any consideration as to whether the rain events exceeded the Reclamation Division's design standards for precipitation events established by the Ten-Year/Six-Hour Rule. Mr. Kirk testified there was no mention of either of the rain events or of the design standard in the memorandum. (Hearing transcript pages 141, 142.) There is also no mention of the September 6 and 9 rainfall events or the Ten-Year/Six-Hour Rule in the NOV.

While Mr. Kirk testified that he did notice some minor erosion features called rills in the north ditch at the time Coteau was installing concrete matting in the south ditch, he stated it was not to the degree or significance of erosion and sedimentation observed in the south ditch. (Hearing transcript pages 157, 158.) He further testified that he observed no gully in the north ditch at that time, but that he did observe it after the September 9 rainfall event. (Hearing

transcript page 155.) He stated that, in his opinion, the installation of silt fences in the north ditch would have been counterproductive due to the fact that the ditch does not have much of a back slope, and is adjacent to a shallow broad valley. He testified that had silt fences been placed in the north ditch, that it was very possible that the eroded material generated from the watershed would have collected behind the silt fences, and then overtopped the ditch backslope and deposited sediment on reclaimed land. (Hearing transcript pages 145, 146.)

Reclamation Division regulations direct that mine operators are to minimize erosion and sedimentation to the extent possible. It does not require, nor can it be expected, that mine operators can eliminate all erosion or sedimentation which normally occurs after rainfall and snow melt. Mr. Kirk further testified that there were only minor erosion rills in the north ditch prior to September 9. It is significant to note that the Reclamation Division, in its inspection on September 2, focused exclusively on the south ditch and cleanup efforts that had to be undertaken. There is no mention of any efforts that needed to be undertaken in the north ditch which is on the opposite side of the road. While sediment was evident in the south road ditch during the September 2 inspection, this was not deemed to be in violation.

Mr. Berg testified that the sediment in the south ditch as depicted in the photo taken on September 30 (PSC Staff Exhibit No. 3), looked very similar on September 2. He further testified that a notice of violation was not issued on September 2 because this area was acting as a sediment sump, and most importantly, the sediment was deposited on overburden "which is okay." (Hearing transcript pages 61, 62). Further, Mr. Kirk testified that the sediment as noticed by Inspector Berg on September 2 had not yet been removed because the soil was too wet. (Hearing transcript page 115). As a result, PSC Staff Exhibit No. 3 cannot be used to establish

that there was additional sediment after September 2 in the south ditch, or as evidence as to the origin of the sediment.

Coteau does not dispute that at the time of the September 29 and 30 inspections that an erosion gully and sediment deposit existed in the north ditch. However, Coteau has conclusively shown that this erosion and sediment deposition occurred as a result of the September 6 and 9 rainfall events. The Reclamation Division asserts that its Exhibits 6-8, being photos of the gully in the north ditch after the September 9 rainfall event, somehow indicate there was a gully prior to that time. However, there is absolutely no evidence that this is the case. Minor erosion rills do not constitute the gully as shown on PSC Staff Exhibits 6-8, which were taken after the September 9 rainfall event. The Reclamation Division has absolutely no evidence of any erosion in the north ditch prior to the September 9 rainfall event.

IV. Rainfall Events Exceed Design Standards

Mr. Steve Hoetzer testified as an expert in engineering and hydrology. The purpose of his testimony was to discuss the rainfall events in early September.

He first noted that the Ten-Year/Six-Hour Rule assumes that the soil moisture conditions are in what is known as Antecedent Moisture Condition II; that 1.4 to 2.1 inches has fallen in the previous five days. However, he stated that on September 6 this watershed received 2.7 inches of rainfall in a 24 hour period. This rainfall event, occurring just three days before the September 9 storm, elevated the soil moisture condition in the north ditch watershed to Antecedent Moisture Condition III. Thus, the ground was very wet to saturated. As a result, any further rainfall would generate greater runoff. He further indicated that the wet conditions of Antecedent Moisture Condition III on September 6 would have contributed to higher runoff

volumes and higher flow rates than anticipated by the design event prescribed in the Ten-Year/Six-Hour Rule.

Mr. Hoetzer went on to testify that based upon his studies and modeling, that the 355 acre watershed contributing to the north ditch received 2.2 inches of rain in two hours on September 9, which equates to a twenty five-year/two-hour event. (Hearing Transcript pp. 188, 189).

Mr. Hoetzer noted that a critical item regarding the September 9 rainfall was how intense the rain was and the short time period in which the rain was received; and onto ground already in Antecedent Moisture Condition III status.

Mr. Hoetzer then reviewed Coteau Exhibit No. 21 which indicates that the ten-year/six-hour design event would generate 13.4 acre feet of runoff. However, the September 9 event generated 27.5 acre feet of runoff, or twice the runoff anticipated by the design standard. (Hearing Transcript p. 191.)

Mr. Hoetzer further indicated that based on Coteau Exhibit 22, that in the west segment of the north ditch the design event would have an anticipated flow of 7.4 cubic feet per second. However, the runoff from the September 9 storm was 28.4 cubic feet per second, or approximately four times the runoff rate generated by the design event. In the east segment of the north ditch, the ten-year/six-hour design event would have generated 32.7 cubic feet per second, but the September 9 storm produced 124.6 cubic feet per second, approximately four times the runoff rate anticipated from the design conditions. (Hearing Transcript pp. 191, 192).

Mr. Hoetzer, when questioned about the best management practice of vegetation as utilized by Coteau in preventing erosion in the north ditch, was asked if he thought Coteau utilized the best management practice. He stated that in his experience in designing and constructing road ditches that the best management practice and the one he commonly

recommends is exclusively vegetation. He indicated he was amazed at the amount of vegetative cover that was in the channel for the north ditch which was only one year old. (Hearing Transcript pages 194, 195). He further testified that he didn't see any type of major channel change or slope change in the north ditch that would have indicated to him that cable concrete matting would be necessary. (Hearing Transcript page 200).

Mr. Dave Schouweiler next testified on behalf of Coteau as an expert in coal mine engineering.

Mr. Schouweiler stated that he examined the north ditch after the September 9 rainfall event. He indicated he thought the ditch had a very good cover, especially considering it had been in place for only a little over a year. He further indicated that it appeared to him that the culvert was properly placed. He stated he didn't see any evidence of negligence by Coteau. He further indicated that the damage that occurred by the gully in the north ditch appeared to have been caused by a precipitation event. (Hearing Transcript pages 208, 209).

Mr. Schouweiler then discussed the significance of the Reclamation Division's Ten-Year/Six-Hour Rule. He stated that this rule did two things, it established a design standard so mining companies could prepare designs for their structures and have faith that they would be approved by the Reclamation Division. In addition, the Ten-Year/Six-Hour Rule provided mining companies with a level of protection, such that when a storm occurs that is in excess of the design event, and damage can be expected to occur, that mining companies would be presumed to be in compliance with state law and Reclamation Division regulations. (Hearing Transcript page 210).

Mr. Schouweiler further indicated that he was able to do a rather detailed review of the design of both the ditch and haulroad, and concluded that in his opinion the haulroad and ditches were properly designed. (Hearing Transcript page 211).

Mr. Schouweiler also indicated that by virtue of his extensive experience in the mining industry, that the best management practice used by Coteau of seeding, mulching and crimping to establish vegetation was the best management practice for this ditch. (Hearing Transcript page 212). He further indicated, similar to Mr. Kirk's testimony, that once vegetative cover has been established, that silt fences and bale dikes actually can get in the way by blocking water flow and forcing it into confined areas. He stated the idea is to provide a wide, uniform depth of flow where the water does not come in contact with the ground. (Hearing Transcript pages 213, 214).

He further stated that if there is a precipitation event which exceeds the ten-year/six-hour event, the velocity and turbulence from such events can be such that they will actually put friction on plants and cause them to be removed. He indicated that's what he felt happened in this circumstance due to the September 9 rainfall event. (Hearing Transcript pages 214, 215.)

Mr. Schouweiler stated the vegetative cover looked excellent even after the September 9 rainfall event; and that the rainfall event of September 9 was so overwhelming that it wouldn't have mattered even if the vegetation had been in place for five years. (Hearing Transcript pages 218, 219).

V. **No Negligence Of Mine Operator If Precipitation Events Exceed Design Standard.**

Coteau and other mining companies must design and construct haulroads and haulroad ditches to handle precipitation events up to and including ten-year/six-hour events. The haulroad ditch which is the subject of this NOV was designed pursuant to this standard, and the design

was approved by the Reclamation Division (Coteau Exhibits 1 and 2). It is dramatic that the Reclamation Division did not acknowledge this design standard in any of its inspection reports, its memorandum or the NOV itself. This is despite the fact that both Mr. Berg and Mr. Moos testified that Coteau had indicated to them that the September 9 rainfall event caused the erosion and sediment deposition. It is remarkable that the Reclamation Division would issue a Notice of Violation without having first considered the magnitude of the rainfall events and whether they exceeded the ten-year/six-hour design standard.

Pursuant to North Dakota law, not only are coal mine operators subject to certain road design standards, but so are townships, counties and the State Department of Transportation.

North Dakota Century Code § 24-03-06 specifically deals with the methods of construction of highway ditches. The statute states that when townships, counties and the Department of Transportation are constructing highway ditches that they must be “constructed in accordance with the stream crossing standards prepared by the Department and the State Engineer so as to avoid the waters flowing into and accumulating in the ditches to overflow adjacent and adjoining lands.” The statute goes on to provide that these entities are “not liable for any damage caused to any structure or property by water detained by the highway at the crossing, if the highway crossing has been constructed in accordance with the stream crossing standards prepared by the Department and the State Engineer.”

In addition, North Dakota Century Code § 24-03-08 deals with the determinations of surface water flow for highway construction. The statute provides in part that public entities constructing roads and ditches over a watercourse or draw which flows surface waters from farmlands, shall determine the design discharge that the crossing is required to carry “to meet the stream crossing standards prepared by the Department of the State Engineer.” The statute goes

on to provide that none of these public entities are “liable for any damage to any structure or property caused by water detained by the highway at the crossing if the highway crossing has been constructed in accordance with the stream crossing standards prepared by the Department of the State Engineer.”

The North Dakota Department of Transportation has established stream crossing standards as codified at North Dakota Administrative Code Chapter 89-14-01. It is stated therein that all highways constructed by townships, counties, and the Department of Transportation must be designed to meet the standards contained in this chapter. Further, that if any of these public entities fails to comply with these standards, it is not entitled to immunity. The actual standards themselves are set forth in NDAC § 89-14-01-03, and vary with the type of highway and structure to be constructed.

The North Dakota Supreme Court considered a case involving alleged negligence by the county in the construction of a culvert system and application of design standards in *Huber vs. Oliver County*, 602 N.W.2d 710 (N.D. 1999). While this case concerned application of North Dakota Century Code §§ 24-03-06 and 24-03-08 prior to insertion of the language referencing “stream crossing standards prepared by the Department and the State Engineer”; the Court noted that the North Dakota Department of Transportation had adopted design standards for stream crossings and considered them in the Court’s deliberation. *Id.* at 716.

The County contended that the flooding and damage to the Hubers were caused by an act of God in the form of unprecedented and extraordinary rainfalls. The Hubers stated that the damage that they experienced to their property was due to failure to install sufficient culverts under the roadway. The Hubers asserted that the County should have constructed culverts to withstand any type of flood event. However, the Court disagreed, stating that to adopt that

position would mean the state and its political subdivisions would be required to maintain the natural flow of water even for purposes of a 500 year flood event; and would be required to install costly drainage structures to maintain natural flows for every conceivable event. The Court felt this was an unreasonable and impractical construction of NDCC §§ 24-03-06 and 24-03-08. The Court stated it was not practical and feasible to provide drainage structures sufficient to cope with the most cataclysmic of events. The Court interpreted the statutes as imposing an obligation upon the County to maintain the natural flow and drainage of surface waters to the extent established standards or sound engineering design practices would require as prudent under the circumstances. *Id.* at 716. The Court then reviewed the design standards as adopted by the North Dakota Department of Transportation. They noted that for the type of road in question the design standards would require a structure capable of handling a 25 year flood event. The road in question was designed and constructed to this standard. As a result, the Supreme Court affirmed the District Court's judgment that the County was not liable. *Id.* at 717.

This Commission has faced a similar issue in another case occurring in 1985. The case was No. 10,703, with respect to Indianhead Mine. The Reclamation Division had approved a water management plan for the protection of respread suitable plant growth material along a slope of land. In May of 1985 the area experienced 3.8 inches of rain, which precipitation event exceeded a 25 year, 24 hour storm event. This rain was preceded by a half inch of rain one day earlier. It was noted that the precipitation events occurred at a vulnerable time, being prior to the germination of the previous fall seeding and immediately following the completion of the spring reseeding operation. The mine had intended to install straw dikes after reseeding was complete, but was unable to do so because of the untimely precipitation events. As a result of the precipitation events, a significant erosion feature developed. In addition, there was loss of

approximately 300 cubic yards of suitable plant growth material. This Commission reversed the notice of violation issued by the Reclamation Division, stating that “there were no known reasonable or appropriate precautions or actions which should have been undertaken to prevent the erosion and soil loss.” (See Findings of Fact, Conclusions of Law and Order in Case No. 10,703, attached hereto as Exhibit A.) This Commission determined that the erosion and unavoidable loss of suitable plant growth material did not constitute a violation of any mining regulation. The notice of violation was vacated and dismissed.

The experience of the Indianhead Mine in May of 1985 is very similar to the experience of the Freedom Mine of September 2010. Extremely large precipitation events, in excess of the design standards established by the Reclamation Division, caused significant erosion. Both events were beyond the control of the mine operator.

In addition, there are several Interior Board of Land Appeals decisions with respect to whether a notice of violation should be issued for a precipitation event when a mining company constructed a structure pursuant to the regulatory authority’s design standards. The issue in *Tennessee Consolidated Coal Co. vs. Office of Surface Mining Reclamation and Enforcement*, 141 IBLA 105, IBLA 95-81 (November 3, 1997) concerned an NOV issued for a coal mine. On a prior inspection, the Inspector noted that an inlet control structure was silt free, and then upon a later inspection he noticed it was filled with silt causing water to flow away from the structure without having gone through a sedimentation pond. The mining company was issued an NOV for failure to maintain a proper sedimentation control structure. *Id.* at page 107.

The Interior Board of Land Appeals (“Board”) noted that the mining company was subject to a design regulation requiring it to safely pass the peak runoff of a ten-year/six-hour precipitation event. *Id.* at 111, 112. The Board noted that a mine operator is not required to

protect against all conceivable events which might cause surface drainage from a permit area, but is required to protect against a reasonably foreseeable range of events which are defined in regulations as construction standards. The Board recognized the applicability of the ten-year/six-hour precipitation standard, and also noted that field conditions were too wet to allow removal of silt and replacement of the rock filtration system. The Board stated the evidence showed that during a 22 hour period, rainfall amounts of 5.2 inches fell in the area and this rainfall exceeded the design capacity established by regulation for this inlet control structure. The Board held that the breach was a result of an unusually heavy rainfall, not the mining company's failure to properly maintain its ditch. As a result, the NOV was vacated. *Id.* at 113, 114.

Another Interior Board of Land Appeals pertinent decision is found in *Turner Brothers, Inc. vs. Office of Surface Mining Reclamation and Enforcement*, 103 IBLA 124, IBLA 86-243, and 86-245 (July 19, 1988). The mining company was issued an NOV for failure to pass all surface drainage through a sedimentation pond before leaving the permit area, as required by regulation. However, it was noted that the inspector had not actually seen either surface drainage or had evidence of surface drainage leaving the permit area. *Id.* at 125.

A concern of the Board was the evidence required to support the factual determination that surface drainage was reasonably likely to leave the permit area in violation of the regulation. The Board was unable to conclude by the evidence presented at the hearing that there was a reasonable likelihood that surface drainage would flow off the permit area. *Id.* at 133. The Board noted that there was no evidence of the volume required, or that the area could receive (even in a 100 year storm) the required amount of snow or rainfall. *Id.* at 133. The Board found it significant that the Inspector testified that he did not see any surface drainage in the permit area on the day of his inspection, and did not give any testimony as to evidence of surface

drainage having flowed off the permit area in the past. The Board felt that such factors, along with the grade, the type of surface, and the amount of precipitation; all have a bearing on the likelihood that surface drainage would leave the permit area. Absent more specific information, the Board stated it could not conclude that the regulatory authority established a prima facie case that, under the conditions found at the mine site, there was a reasonable likelihood that surface drainage would leave the permit area. *Id.* at 134, 135. The Board stated that “additional evidence regarding the features of the mined area at the time of the inspection is necessary. Thus, the evidence presented in this case is not sufficient to support a finding that there is a reasonable likelihood that surface drainage from the disturbed area will leave the permit area.” *Id.* at 135, 136.

The Board recognized that a mine operator’s failure to observe mining standards can have severe environmental consequences, and that failure to construct a proper system for containing surface drainage could lead to a significant violation. However, the Board stated that “this does not mean, however, that every instance of such failure will result in a reasonable likelihood that surface drainage from the disturbed area will leave the permit area in violation of the requirement that be passed through a sedimentation pond.” *Id.* at 137. In this case, the regulatory authority failed to present evidence of the features of the mine as it existed at the time of the inspection. As a result, the Board reversed the NOV.

The same is true in this instance, as the Reclamation Division has no evidence of the features of the north ditch on September 2.

It is further instructive to review a footnote by the Interior Board of Land Appeals in the *Turner Brothers* case. It was noted that mine operators are required to construct surface coal

mining operations pursuant to precipitation design standards, such as sedimentation ponds which must contain a ten year/24 hour precipitation event. The Board stated as follows:

It would be incongruous to establish a standard requiring protection against a specific range of events, but then, when a diversion structure or sedimentation pond meeting the standard is breached or overflows, hold the operator responsible because it is assumed that there could be sufficient precipitation to allow surface water to reach the permit boundary. Such an assumption is tantamount to establishing a standard under which every operator is in continual violation of the regulation because, whatever the design and construction of a diversion structure or sedimentation pond, assuming a sufficient rainfall, there could be a breach or overflow and water would flow off the permit area. *Id.* at 137, footnote 4.

The same is true in this instance, as the Reclamation Division's failure to recognize and consider the ten-year/six-hour design standard in determining whether to issue this NOV makes Coteau liable for any damage caused by any precipitation event no matter how large.

VI. Conclusion

The Reclamation Division has promulgated a design standard for precipitation events for haulroads, being the Ten-Year/Six-Hour Rule. It has been established by Coteau, and not contradicted by the Reclamation Division, that the haulroad and ditch which are the subject of this NOV were constructed pursuant to this standard.

It has further been established, and not contradicted, that the rainfall event of September 9, combined with saturated ground conditions created by the September 6 rainfall event, caused the contributing watershed to generate 27.5 acre feet of runoff, or twice the runoff expected by the Ten-Year/Six-Hour Rule design standard of 13.4 acre feet. In addition, it has been established, and not contradicted, that the anticipated flow rate under the design standard for the west segment of the north ditch is expected to be 7.4 cubic feet per second, and that the flow rate resulting from the September 9 rainfall event was 24.8 cubic feet per second or almost four times the design standard. In the east segment of the north ditch the design standard is an expected

32.7 cubic feet per second, but the September 9 rainfall event generated 124.6 cubic feet per second, again approximately four times the design flow rate.


In addition, the Reclamation Division has no evidence of the features existing in the north ditch on September 2. It is mere supposition and conjecture that the erosion gully as depicted in the PSC Staff Exhibits 6-8 photos taken on September 30 existed prior to September 9. No one should be held liable on the basis of supposition and conjecture. The evidence presented by Coteau, and the only knowledgeable witness of the features of the north ditch prior to September 9, indicated that there was no gully present in the ditch. The majority of the sediment that existed in the south ditch originated from the south ditch prior to erosion repairs conducted by Coteau in July 2010. This sediment had not yet been removed, and was virtually unchanged between the September 2 and 30 inspections. PSC Staff Exhibit No. 3 offers no credible evidence that significant erosion was occurring in the north ditch prior to the September 9 extreme rainfall event. Further, Coteau's vegetative cover survey established, and the testimony of an expert hydrologist and an expert mining engineer both agreed, that the vegetative cover established in the north ditch prior to the September 9 event was in excellent condition.

Just as the Indianhead Mine was not negligent as the result of substantial erosion caused by precipitation events exceeding the Reclamation Division design standards; so too Coteau cannot be held liable or found negligent for erosion or sedimentation caused by a precipitation event which exceeded a ten-year/six-hour design standard.

The Reclamation Division has failed to meet the required burden of proof. Coteau is not negligent. It suffered from an extreme precipitation event greatly exceeding the ten-year/six-hour design standard. The NOV should never have been issued, and should be dismissed and vacated in all respects.

Dated this 11th day of January, 2011.

CROWLEY FLECK PLLP
Attorneys for Applicant
400 East Broadway, Suite 600
P.O. Box 2798
Bismarck, North Dakota 58502


By 
BRIAN R. BJELLA (#03549)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was on the 11th day of January, 2011, hand delivered to the following:

Mr. Darrell Nitschke
Executive Director
NORTH DAKOTA PUBLIC
SERVICE COMMISSION
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480

Mr. Mark Gruman
NORTH DAKOTA PUBLIC
SERVICE COMMISSION
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480


BRIAN R. BJELLA

PUBLIC SERVICE COMMISSION

STATE OF NORTH DAKOTA

BCP North Dakota Public Service)
 Commission, Complainant vs)
 North American Coal Corporation) CASE NO. 10,703
 (NOV8504 - Indianhead Mine))
 Respondent)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 14 and 15, 1985, the North Dakota Public Service Commission inspected the E 1/2 of Section 25, Township 144 North, Range 89 West, Mercer County, North Dakota. As a result, the Commission issued Notice of Violation No. 8504, citing North Dakota Administrative Code Section 69-05.2 - 15-04(4).

The Public Service Commission alleges in its Notice of Violation No. 8504, that North American Coal Corporation failed to adequately protect redistributed suitable plant materials from water erosion which resulted in loss of material.

On June 12, 1985, the North American Coal Corporation requested a formal hearing on the Notice of Violation No. 8504.

On July 10, 1985, the Commission assessed a proposed civil penalty of \$3,000.00, which was deposited with the Commission by the Respondent, to be held in escrow pending final Commission decision.

Hearing in this Case, was held before Robert W. Senger, Hearing Examiner for the Public Service Commission, Bismarck, North Dakota, on the 27th and 28th of August, 1985, and on the 4th and 10th of September, 1985, at the State Capitol, at which time the following appearances were made:

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

CASE NO. 10,703

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Members of the Public Service Commission present were:

Leo M. Reinbold, President of the Commission
Dale V. Sandstrom, Commissioner
Bruce Hagen, Commissioner

Ray H. Walton, Special Assistant Attorney General, State Capitol, Bismarck, North Dakota, representing the North Dakota Public Service Commission;

Ernest R. Fleck, Attorney at Law, Bismarck, North Dakota, representing the North American Coal Corporation; and

Kathleen Davison, Attorney at Law, Bismarck, North Dakota, representing the North American Coal Corporation.

The Commission having reviewed the evidence of record and being fully informed in the matter, makes the following:

FINDINGS OF FACT

I.

North American Coal Corporation (Respondent) has been and continues to be actively engaged in surface coal mining operations pursuant to permits issued by the North Dakota Public Service Commission. The area involved in this Case is a part of the mine area described by Permit No. 42.

II.

The current reclamation plan for the E 1/2 of Section 25, Township 144 North, Range 89 West, is contained in the Seventh Revision to Permit No. 42 which was submitted to the Commission on March 21, 1984. Subsequently, at the request of the Commission, the Respondent, in consultation with the U. S. Soil Conservation Service, developed a water management plan for the

protection of respread suitable plant growth material placed along the face of a slope located in the E 1/2 of Section 25, Township 144 North, Range 89 West. The water management plan (the "Plan") was then included as part of the Seventh Revision to Permit No. 42, and was submitted to the Commission on June 8, 1984.

III.

The Commission reviewed the Plan, subsequently requiring a post mining land use change, and unconditionally approved the Plan on August 15, 1984.

IV.

Prior to May 14, 1985, construction pursuant to the Plan was from time to time inspected and monitored by the Commission which voiced no objections as a result of said inspections.

V.

On May 11, 1985, the area experienced 3.8 inches of rain which precipitation event exceeded a 25 year, 24 hour storm event, and which was preceded by a 1/2 inch rainfall on May 10, 1985.

VI.

The unusual precipitation event occurred at a vulnerable time, being prior to the germination of the previous fall's seeding and immediately following the completion of the reseeding operation.

VII.

The Respondent has implemented the Plan in accordance

with all standards established by the Commission and in accordance with the provisions of the Plan. The Respondent has fulfilled all requirements of the Plan except the installation of straw bale dikes every 50 feet in the constructed waterway below the terrace diversions in the NE 1/4 of Section 25, Township 144 North, Range 89 West.

VIII.

The Respondent had intended to install such straw dikes after reseeding was complete but was unable to do so because of the untimely precipitation event.

IX.

The precipitation event resulted in a significant erosion feature below the constructed waterway and the loss of approximately 300 cubic yards of suitable plant growth material.

X.

Installation of the straw bale dikes would neither have prevented nor significantly lessened the soil loss, as the majority of soil loss occurred below the constructed waterway in which the dikes were to be placed.

XI.

All remedial work with respect to the erosion feature was accomplished expeditiously and in a matter acceptable to the Commission.

XII.

There were no known reasonable or appropriate precautions or actions which should have been undertaken to prevent the

erosion and soil loss.

From the foregoing Findings of Fact, the Commission makes the following:

CONCLUSIONS OF LAW

I.

The Public Service Commission has jurisdiction over the subject matter of the proceeding.

II.

The unavoidable loss of suitable plant growth material does not constitute a violation of North Dakota Administrative Code Section 69-05.2 - 15-04(4).

III.

No violation occurred, as alleged, in Notice of Violation No. 8504.

From the foregoing Findings of Fact, Conclusions of Law, the Commission makes the following:

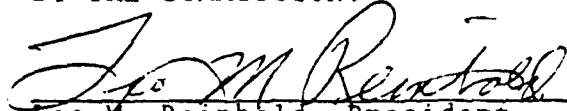
ORDER

IT IS ORDERED that Notice of Violation No. 8504, be in all things vacated and dismissed and that the proposed civil penalty of \$3,000.00, deposited with the Commission, be returned to the North American Coal Corporation.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
CASE NO. 10,703
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Dated at Bismarck, North Dakota, the 5th of November,
1985.

BY THE COMMISSION:

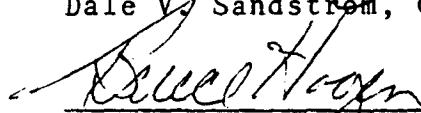


Leo M. Reinbold, President

(S E A L)

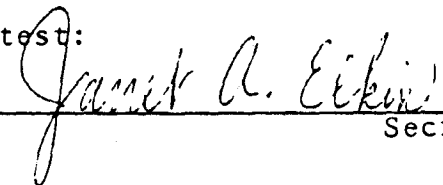


Dale V. Sandstrom, Commissioner



Bruce Hagen, Commissioner

Attest:



Secretary