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January 25, 2011

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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 following:

1. The Coteau Properties Company's Reply Brief,
2. Proposed Findings of Fact, Conclusions of Law and Order.

Please call should you have any questions.

Very truly yours,



BRIAN R. BJELLA

bw
Enc.

cc: Mark Gruman – *via mail*

76 RC-10-598 Filed: 1/25/2011 Pages: 19
**Reply Brief and proposed Findings of Fact,
Conclusions of Law and Order**

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

**REPLY BRIEF OF
THE COTEAU PROPERTIES COMPANY**

The Coteau Properties Company (“Coteau”) hereby replies to the Brief of the Reclamation Division of the North Dakota Public Service Commission dated January 11, 2011.

Reclamation Division Inspector Berg inspected the Freedom Mine on September 2, 2010. During this inspection he only viewed the south ditch of the haulroad. The Inspection Report subsequently issued (Coteau Exhibit No. 11, page 4), states that “vegetated overburden as well as the subsoil respread edge, acting as a sump, was collecting sediment prior to the water flowing down a reclaimed drainageway.” As the inspector only inspected the south ditch, these comments only pertain to the south ditch. The inspector stated at the hearing that what he observed on September 2 did not constitute a violation of any regulation (Hearing transcript pages 61, 62).

Bill Kirk testified on behalf of Coteau that the sediment evidenced during the September 2 inspection had not been removed as the soil was too wet (Hearing transcript page 115). Mr. Kirk stated that the vast majority of the sediment contained in the south ditch as depicted on PSC Staff Exhibit No. 3 came from the south ditch but was never removed. (Hearing transcript page 134.)

Coteau does not dispute that it is likely the September 9 rainfall event caused sediment to be deposited below the culvert in the south ditch. However, as the prior sediment was never

removed, then the prior sediment still constitutes a majority of the sediment depicted in PSC Staff Exhibit No. 3.

The only person who testified at the hearing with knowledge of where the sediment came from was Bill Kirk. He stated at the hearing that the majority of the sediment in the south ditch as depicted on the exhibit came from the south ditch. (Hearing transcript page 134.) He further testified that there was no erosion gully in the north ditch prior to September 9. (Hearing transcript page 128.) The Reclamation Division had no evidence to prove the origin of the sediment shown in PSC Staff Exhibit No. 3.

Inspector Mike Berg stated at the hearing that “it (the sediment) has to come from some place.” (Hearing transcript page 47). Although, the Reclamation Division has no proof of any erosion in the north ditch prior to September 9, it still chose to issue the NOV asserting the sediment came from the north ditch.

The Reclamation Division states erroneously in its brief regarding Mr. Kirk’s testimony citing the origin of sediment in the south ditch, that Coteau’s “conclusion is not logical” because “the south side had been stabilized as early as July 2010”, “there was no discussion as to whether this sediment was removed during the mid July 2010”, and therefore “the gross majority of the sediment observed on September 2, 2010 on the south side of the culvert could have only come from within the north haulroad ditch” (Hearing transcript pages 15-16). The Reclamation Division is in effect stating that because there was no testimony that the sediment had not been removed between mid July and September 2, 2010, that it’s only logical to assume that the sediment had indeed been removed. And that the sediment the inspector observed in the south ditch on September 2 was not there in mid July, but was new sediment that had eroded into the

south ditch from the north ditch between mid July and September 2. This speculative conclusion is based on unsupported assumptions and lack of any evidence.

Mr. Kirk testified that the sediment observed on September 2 came from the south ditch. The reason that he never testified whether the sediment had been removed from the south ditch after the mid July ditch repairs was because the sediment had never been removed. He had to have known this to testify as to the origin of the sediment observed on September 2. (Hearing transcript page 134.)

Knowing its true origin, Coteau found no need “to conduct further research as to the source of this sedimentation” following the September 2 inspection (Reclamation Division brief page 3). Indeed, the testimony of Mr. Kirk answers the question posed to Mr. Berg: “Wouldn't it seem logical then, the company would then figure out where this was coming from and go do some investigative work?”(Hearing transcript pp. 62-63). Coteau knew where the sediment was coming from in July 2010. In July 2010 Coteau determined that the sediment came from the south ditch, and repairs were made to this ditch. Mr. Kirk testified that after these repairs there was very little additional sediment deposited in the south ditch (Hearing transcript pp 160-162). Although the south ditch was repaired in July 2010, and erosion was drastically minimized, the sediment was never cleaned out between mid July and September 2. (Hearing transcript page 115.) The sediment Mr. Berg observed in the south ditch on September 2 was basically the same sediment that Coteau saw in July 2010. Contrary to the Reclamation Division’s brief, this is the only logical conclusion which is supported by the evidence and testimony presented at the hearing.

On page 3 of the Reclamation Division’s brief it is stated in part that after the September 2 inspection by Mr. Berg, that his observations should have “put Coteau on implicit notice to

conduct further research as to the source of this sedimentation.” However, Coteau did not have to conduct any investigation as to the source of the sediment, because as testified by Mr. Kirk, Coteau knew the source of the majority of the sediment was from the south ditch. (Hearing transcript page 134.)

The statement of the Reclamation Division that Coteau should have been put on “implicit notice” after the September 2 inspection is quite remarkable. Coteau does not have the ability to read the inspector’s mind. If the Reclamation Division inspector suspected on September 2 that the sediment in the south ditch was coming from the north ditch, and that there was a potential violation in the north ditch, he should have inspected the north ditch located only approximately 90 feet away. If somehow the inspector’s observations on September 2 gave “implicit notice” to Coteau to conduct further research, then it gave actual notice to the Reclamation Division inspector. However, the inspector did not act on this actual notice and conduct an inspection of the north ditch. Had he done so, the Reclamation Division would not be in the current position of having to speculate that a substantial erosion gully existed in the north ditch prior to the September 9 rain event. (Hearing transcript page 47.) We have only one witness who testified at the hearing as to the status of the north ditch prior to September 9, and that was Mr. Kirk who testified that there was no erosion gully in the north ditch prior to September 9. (Hearing transcript page 128).

The sediment seen by the inspector in the south ditch on September 2 and again on September 30 as evidenced in PSC Staff Exhibit No. 3 does nothing to establish that there was substantial erosion (or any erosion) in the north ditch prior to September 9.

The Reclamation Division is attempting to use conjecture and supposition, and a photograph taken of the south ditch after the September 9 rainfall event to prove its case. PSC

Staff Exhibit No. 3 is a “red herring” as it distracts from the real issue. The NOV was issued due to erosion in the north ditch. The Reclamation Division has no evidence as to any erosion in the north ditch prior to the September 9 rainfall event.

Neither at the hearing nor in its Brief, does the Reclamation Division attempt to explain why it did not consider the significance of the September 6 and 9 rain events and its Ten-Year/Six-Hour precipitation event standard for construction of haulroad ditches prior to issuing the NOV. Nor did it offer any evidence to contradict the testimony of Coteau’s expert on engineering and hydrology, Steve Hoetzer, as to the magnitude of the rainfall event on September 9. Coteau has proven that the rainfall event on September 9 exceeded the Ten-Year/Six-Hour precipitation event design standard. The Reclamation Division does not dispute this and has offered no evidence to the contrary. On page 17 of its Brief the Reclamation Division states that there was “an already malfunctioning erosion control system” in the north ditch, with absolutely no proof of it. It must have proof of substantial erosion causing the gully prior to September 9 to prove the allegations in the NOV. The Reclamation Division cannot do so.

The Reclamation Division’s own soil test indicated that the soil eroded from the north ditch bottom was of topsoil quality. (Hearing transcript page 78.) This, taken together with the Reclamation Division testimony that the sediment contained large amounts of vegetative material, supports Coteau’s position that the ditch bottom was well protected by the presence of mulch and vegetation prior to the September 9 storm.

In addition, the statement by the Reclamation Division at the hearing that the NOV would not have been issued if additional BMP’s had been in place (even if they would have failed in the September 9 storm), implies that specifying erosion control measures for the Ten-Year/Six-Hour

precipitation standard is not good enough and that additional measures are required. (Hearing transcript page 50.) That is not what the regulations state, as it requires mining companies to design measures to that event, not beyond.

Mining regulations do not mandate that there can be no erosion. This would be impossible and impractical. Rather, NDAC § 69-05.2-16-08(1)(c) provides in part that appropriate sediment control measures must be designed, constructed, and maintained using the best technology currently available to minimize erosion to the extent possible.

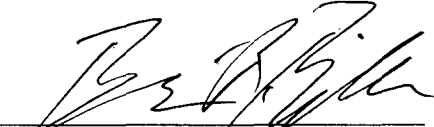
Mr. Kirk testified that the majority of erosion that Coteau was experiencing in the south ditch came from the south ditch, and was corrected by installation of the BMP's. However, the sediment was never removed. The Reclamation Division is attempting to use the statement of Mr. Kirk that there was minor rilling in the north ditch to prove its case. (Reclamation Division Brief at page 19.) If minor rilling is all it takes to cause a violation, then it is likely that every ditch in every mine located in North Dakota is in violation. Mr. Berg testified at the hearing that what he observed on September 2 did not constitute a violation. How then does essentially the same sediment in the south ditch seen a few weeks later provide evidence of a violation?

The only difference between September 2 and September 30 is the major rainfall event of September 9. It caused substantial erosion in the north ditch. That rain event was the "game changer" between no notice of violation being issued on September 2 and one being issued after September 30. Coteau is not negligent as the September 9 precipitation event exceeded the Ten-Year/Six-Hour precipitation design event.

The NOV should be vacated and dismissed in all respects.

Dated this 25th day of January, 2011.

CROWLEY FLECK PLLP
Attorneys for
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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 25th day of January, 2011, mailed to the following:

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


BRIAN R. BJELLA

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Coteau Properties Company
Notice of Violation No. 1004

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

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

Appearances

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

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

Mark E. Gruman, Attorney at Law, North Dakota Public Service Commission, 600 East Boulevard, Department 408, Bismarck, North Dakota 58505, on behalf of the Reclamation Division of the Public Service Commission.

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

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, and subsequently issued an Inspection Report.

On September 30, 2010, Reclamation Division Inspector Mike Berg and Assistant Director Dean Moos inspected the Freedom Mine. They subsequently issued an Inspection Report.

On October 4, 2010, the Reclamation Division issued Notice of Violation No. 1004 to Coteau (“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 subsequently 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.”

The PSC issued a Notice of Formal Hearing dated November 24, 2010, scheduling a formal hearing to commence at 9:00 a.m. on December 17, 2010, in the Public Service Commission’s Hearing Room on the 12th Floor of the State Capitol.

The 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. The hearing was continued to permit the parties to submit briefs and recommended decisions. Coteau and the Reclamation Division have submitted respective briefs, reply briefs, and recommended decisions.

Findings of Fact

1. As directed by Administrative Law Judge Allen Hoberg, the burden of persuasion in this matter rests with the Reclamation Division to prove the allegations of the NOV by the greater weight of the evidence.

2. North Dakota Administrative Code § 69-05.2-24-03(5) provides in part 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.”

Hereinafter the “Ten-Year/Six-Hour Design Standard.”

3. In the NOV the Reclamation Division asserts 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.”

4. NDAC § 69-05.2-24-01(2)(a) provides in part that haulroads must be designed, constructed, and maintained 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.

5. Reclamation Division witnesses were Inspector Mike Berg and Assistant Director Dean Moos.
6. The haulroad which is the subject of the NOV, has both a north and south ditch. The NOV was issued with respect to the north ditch.
7. Mr. Berg testified that he inspected the south ditch on September 2, 2010. He stated that he noticed a large area of sedimentation in the south ditch and instructed Coteau personnel that the area needed to be cleaned up and silt fences needed to be installed. Mr. Berg testified that he did not inspect the north ditch at that time.
8. Mr. Berg testified that Coteau had notified the Reclamation Division that on September 9 the mine had received a large rainfall event.
9. No evidence was presented by the Reclamation Division to indicate the source of the sediment seen on either September 2 or 30, or that any sediment had ever been removed from the south ditch.
10. Mr. Berg acknowledged that silt fences in other road ditches within the mine did wash out during the September 9 rainfall event.
11. Mr. Berg stated 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. Assistant Director Moos confirmed that the Reclamation Division has no evidence of any kind which demonstrates how the north ditch appeared on September 2.
12. Both of the Reclamation Division's witnesses stated that in their opinion Coteau should have installed additional best management practices such as silt fences in the north ditch to control erosion.

13. Mr. William Kirk, Coteau employee and civil engineer, stated that he utilized the Ten-Year/Six-Hour Design Standard in designing the haulroad and ditches. The haulroad which is the subject of this NOV was designed pursuant to the Ten-Year/Six-Hour Design Standard, and was approved by the Reclamation Division.
14. Mr. Kirk indicated that the best management practice utilized for the north ditch to control erosion was seeding with grass followed by mulching and crimping to establish a vegetative cover. The Reclamation Division acknowledged that this is considered a best management practice.
15. It is undisputed that an erosion gully was evident in the north ditch after the September 9 rainfall event. Coteau introduced photographs indicating that substantial vegetation existed in the north ditch after September 9 except for the gully. Coteau also submitted a vegetative cover survey completed after the September 9 rainfall event indicating that with the exception of the gully, that the total basal cover was measured at 77.9%. Reclamation Division Policy Memorandum No. 19 indicates that for removal of sedimentation ponds and pond site reclamation, that a minimum of 73% total basal cover is indicative of sufficient vegetation in order to remove sedimentation ponds.
16. Mr. Kirk stated that he viewed the north ditch prior to September 9, and there was no gully. He stated that after the September 9 rainfall event there was a gully.
17. Soil tests of the sediment in the north ditch taken by the Reclamation Division on September 30 indicate that the sediment was of topsoil quality.
18. Coteau indicated that a professional survey of the north ditch was completed after the September 9 rainfall event, indicating that 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 .89%. With respect 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. While Assistant Director Moos stated in his visual estimation the grades were as high as three to six percent, the survey as prepared by Coteau indicates the slopes were much less.

19. Coteau entered into evidence a letter from the North Dakota Department of Health dated September 7, 2010, with respect to its North Dakota Pollutant Discharge Elimination System permit, concerning effluent limitations from sedimentation ponds. The Health Department granted Coteau a variance for alternate effluent limitations by virtue of rainfall events experienced in early September and again on September 9, indicating that Coteau had experienced rain events which exceeded the design capacity of the mine's sedimentation ponds.
20. Coteau also entered into evidence an emergency declaration issued by the Mercer County Board of County Commissioners. The emergency declaration indicates that Mercer County suffered damages from the September 9 precipitation event causing road damage and fence loss.
21. Reclamation Division regulation directs that mine operators are to minimize erosion and sedimentation to the extent possible. This regulation does not require that mine operators eliminate all erosion or sedimentation, which normally occurs after a substantial rainfall.
22. Mr. Steve Hoetzer, an expert in engineering and hydrology, testified on behalf of Coteau. He stated that the Reclamation Division's Ten-Year/Six-Hour Design Standard assumes that soil moisture conditions are in what is known as Antecedent Moisture Condition II; that 1.4 to 2.1 inches had fallen in the previous five days. He stated that the watershed

adjacent to the north ditch received 2.7 inches of rainfall on September 6 in a 24-hour period. This rainfall event elevated the soil moisture condition in the north ditch watershed prior to September 9 to Antecedent Moisture Condition III, meaning the ground was very wet to saturated.

23. Mr. Hoetzer further stated 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. This exceeds the Ten-Year/Six-Hour Design Standard. He further stated that while the Ten-Year/Six-Hour Design Standard would generate 13.4 acre feet of runoff, the September 9 event generated 27.5 acre feet of runoff, or twice the runoff anticipated by the design standard. He further stated that in the west segment of the north ditch the design event would have an anticipated flow of 7.4 cubic feet per second, but that 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 Standard 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 standard.
24. Mr. Hoetzer further stated with respect to installation of best management practices, that the vegetation as utilized by Coteau in the north ditch was proper as he did not observe any type of major channel change or slope change in the north ditch that would have indicated that additional best management practices would be necessary.

25. Mr. Dave Schouweiler testified on behalf of Coteau as an expert in coal mine engineering. He stated that the erosion that occurred as evidenced by the gully in the north ditch appeared to have been caused by a precipitation event.
26. Mr. Schouweiler stated that the Ten-Year/Six-Hour Design Standard did two things; it established the design standard so mining companies could prepare designs for their structures which would be approved by the Reclamation Division. In addition, the design standard 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 mining law and regulation.
27. Mr. Schouweiler further indicated that after a detailed review of the haulroad design that the haulroad and ditches were properly designed.
28. Mr. Schouweiler further indicated that by virtue of his experience in the mining industry, that the best management practice utilized by Coteau of seeding, mulching and crimping to establish a vegetative cover was the best management practice for the north ditch. He further indicated that the vegetative cover in the north ditch after the September 9 rainfall event, with the exception of the gully, was excellent.
29. Mr. Schouweiler stated that the water velocity and turbulence generated from the September 9 rainfall event was so significant so as to create the gully in the north ditch.
30. The majority of the sediment as shown on Reclamation Division Exhibit #3 was in existence prior to the September 9 rainfall event, and occurred due to erosion in the south ditch. Coteau undertook substantial efforts to control erosion in the south ditch by

installation in July 2010 of concrete matting and erosion control blankets. These best management practices virtually eliminated further erosion of the south ditch.

31. That due to wet soil conditions Coteau had not been able, at any time, to remove the sediment below the culvert in the south ditch.
32. While additional sediment was likely deposited below the culvert of the south ditch after the September 9 rainfall event, this sediment was caused by a rainfall event which exceeded the Ten-Year/Six-Hour Design Standard resulting in a substantial erosion feature in the north ditch.
33. The September 9 rainfall event, which was preceded three days by substantial rainfall creating Antecedent Moisture Condition III, was the cause of the erosion as evidenced in the north ditch by the gully and the resulting sediment deposit adjacent to the culvert in the north ditch.
34. That there were no known reasonable or appropriate precautions or actions which Coteau could have undertaken to prevent the erosion and sediment deposition.
35. That Coteau was not negligent.
36. That the Reclamation Division has failed to carry its burden of proof with respect to the allegations set forth in the NOV by the greater weight of the evidence.

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

Conclusions of Law

1. The Commission has jurisdiction over Coteau's mining and reclamation operations at the Freedom Mine.
2. That Coteau designed, constructed and operated the north ditch of the haulroad pursuant to the Ten-Year/Six-Hour Design Standard.

3. That the best management practice utilized by Coteau for the north ditch of establishing a vegetative cover complied with North Dakota Administrative Code § 69-05.2-24-01(2)(a).
4. That the establishment of a vegetative cover in the north ditch by Coteau was an appropriate erosion control measure and did minimize erosion to the extent possible, and thus was in compliance with North Dakota Administrative Code § 69-05.2-16-08(1)(c).
5. That the rainfall event experienced on September 9 at the Freedom Mine exceeded that anticipated by the Ten-Year/Six-Hour Design Standard creating a gully in the north ditch.
6. That as a result Coteau cannot be found negligent for erosion and sedimentation which occurs by virtue of a precipitation event which exceeds the Ten-Year/Six-Hour Design Standard. The erosion and sediment deposition which occurred as a result of the September 9 rainfall event was unavoidable.
7. That the Reclamation Division failed to carry its required burden of proof with respect to the allegations of the NOV by the greater weight of the evidence.

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

Order

The Commission orders that NOV 1004 be in all things vacated and dismissed, and the proposed civil penalty of _____ as deposited with the Commission be returned to Coteau.

Dated this _____ day of January, 2011.

PUBLIC SERVICE COMMISSION

Tony Clark
Commissioner

Kevin Cramer
Commissioner

Brian Kalk
Commissioner