

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**The Coteau Properties Company
Notice of Violation No. 1004**

Case No. RC-10-598

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

February 23, 2011

Appearances

Commissioners Tony Clark, Brian P. Kalk and Kevin Cramer

Mark Gruman, Legal Counsel, North Dakota Public Service Commission, State Capitol Building, 12th Floor, Bismarck, North Dakota 58505, on behalf of the North Dakota Public Service Commission Reclamation Staff.

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.

Christopher D. Friez, Attorney-at-Law, Crowley Fleck, PLLP, 400 East Broadway, Suite 600, Bismarck, North Dakota 58501, on behalf of the Coteau Properties Company.

Illona A. Jeffcoat-Sacco, General Counsel, Public Service Commission, State Capitol Building, 12th Floor, Bismarck, North Dakota 58505, as advisor to the North Dakota Public Service Commission.

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

Preliminary Statement

The Coteau Properties Company (Coteau) is the owner and operator of the Freedom Mine located near Beulah, North Dakota. Coteau operates the mine under various permits issued by the North Dakota Public Service Commission (Commission).

On October 4, 2010 the Public Service Commission's Reclamation Division issued Notice of Violation No. 1004 (NOV 1004) to Coteau. The Notice of Violation alleged 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." The area of violation

was described in the NOV as “[t]he north haulroad ditch located in the NW1/4SW1/4 of Section 18, Township 145N, Range 87W, Mercer County, ND” and referenced Permit Number NACT-8103 and Permit Number NACT-8203. The NOV further directed Coteau to remove sediment from the haulroad ditch, repair and stabilize the erosion features in the north haulroad ditch, and to install appropriate control measures in the north haulroad ditch.

On October 25, 2010 the Reclamation Division informed Coteau that NOV 1004 had mistakenly cited Permit Number NACT-8103, rather than NACT-8102.

On October 25, the Reclamation Division issued a Termination or Vacation of Notice of Violation informing Coteau that the remedial measures undertaken by Coteau pursuant to NOV 1004 were adequate, pursuant to a follow up inspection conducted on October 20, 2010.

On October 28, 2010 Coteau filed a Request to Vacate Notice of Violation, or in the Alternative, Application for Formal Hearing (Request to Vacate). 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.

On November 2, 2010 the Reclamation Division issued Modification of Notice of Violation 1004 correcting the cited Permit Number from NACT-8103 to NACT-8102 and correcting the legal description to “The haulroad near the center of Section 18, T145N, R87W, Mercer County, ND.”

On November 24, 2010, the Commission issued a Notice of Formal Hearing, scheduling a public hearing for December 17, 2010 at 9:00 a.m. CST, in the Public Service Commission’s Hearing Room, 12th Floor, State Capitol, Bismarck, North Dakota.

Also on November 24, 2010 the Commission assessed a proposed penalty for NOV 1004 of \$1500.00. The proposed penalty was made up of \$250.00 for seriousness and \$1250.00 for negligence.

On December 14, 2010 Coteau paid the proposed penalty. The funds paid by Coteau were deposited in an escrow account at the Bank of North Dakota pending a final decision after formal hearing.

The Formal Hearing was held as scheduled on December 17, 2010 in the Commission Hearing Room, State Capitol, Bismarck, North Dakota.

Having allowed all interested persons an opportunity to be heard, and having heard, reviewed, and considered all testimony and evidence presented, the

Commission makes the following:

Findings of Fact

1. Coteau is engaged in surface coal mining operations under permits issued by the Commission.
2. On September 17, 2009 Coteau, informed the Commission's Reclamation Division of construction of a haulroad within the boundary of Permit Number NACT-8102, Permit Number NACT-8203 and Permit Number NACT-8401 for the Freedom Mine (haulroad). The construction of the haulroad began on May 8, 2009, and was first used by Coteau on September 3, 2009.
3. The haulroad which is the subject of NOV 1004 has both a north and south ditch. The NOV was issued with respect to the north ditch
4. According to William R. Kirk, PE, staff mining engineer for Coteau, as of September 17, 2009 the haulroad required installation of storm water best management practices, such as disking and seeding of road ditch bottoms and slopes, and installation of silt fence adjacent to culvert installations to control erosion.
5. In mid July, 2010, Mr. Kirk observed sediment deposition on the north and south side of a culvert, located at the intersection of Permit Number NACT--8102, NACT-8203 and the haulroad (culvert). As a result of the sediment deposition below the culvert, Coteau installed engineering fabric and articulated concrete matting on the south side of the culvert. Due to erosion damage the configuration of the south ditch was required to be restored. Coteau also reseeded the south ditch location, and installed an erosion control blanket.
6. During cross examination Mr. Kirk admitted that, during the installation of concrete matting on the south side of the haulroad in mid July, 2010, he observed some sediment deposition and rilling on the inslopes, the ditch bottom and the backslopes of the north haulroad ditch.
7. On September 2, 2010 Mike Berg, PE, Reclamation Division staff, conducted a routine complete inspection of the Freedom Mine.
8. During the September 2, 2010 inspection of the Freedom Mine Mr. Berg noted a large accumulation of sediment deposition on the south side of the culvert. Mr. Berg stated that vegetated overburden, and the subsoil respread edge, was acting as a sump in this location, collecting sediment prior to the water flowing down the reclaimed drainageway. Mr. Berg immediately informed Coteau of his observations 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.

9. Mr. Kirk testified that the reason Coteau did not clean out the sediment in the south side of the culvert immediately after Mr. Berg's September 2, 2010 inspection was due to the September 6th and September 9th rainfall events, which prohibited the use of heavy equipment.

10. Mr. Berg testified that Coteau had notified the Reclamation Division that on September 9 the mine had received a large rainfall event.

11. Mr. Berg inspected the Freedom Mine on September 29, 2010. During this inspection Mr. Berg observed sediment deposition on the south side of the culvert, similar to what he had witnessed on September 2, 2010. Upon further examination on September 29th, Mr. Berg noticed sediment deposition on the north side of the same culvert, observing that some of the sediment deposition was on reclaimed lands.

12. After completing his inspection of the Freedom Mine on September 29, 2010, Mr. Berg consulted with Jim Deutsch, Director, and Dean Moos, Assistant Director of the Commission's Reclamation Division concerning Mr. Berg's Freedom Mine observations of September 2, 2010 and September 29, 2010.

13. On September 30, 2010 Mr. Berg and Mr. Moos travelled to the Freedom Mine to conduct a further inspection of the culvert location. After first observing the south side culvert location, Mr. Berg and Mr. Moos proceeded to the north side culvert location.

14. Utilizing his GPS track log Mr. Berg estimated the size of the sediment deposition on reclaimed land was approximately 2800 square feet in size and 4 to 8 inches in depth.

15. Mr. Berg took two samples of this sediment deposition and conveyed them to Minnesota Valley Testing Laboratories, Inc. for testing. The analysis indicated that the material was topsoil quality. Mr. Moos testified that these findings surprised him, due to his belief that the material was substantially comprised of spoil material. Mr. Moos contributed the materials' high organic content to the significant presence of vegetation debris and haulroad dust (coal fines) within the samples.

16. Mr. Berg and Mr. Moos inspected the north haulroad ditch, which runs parallel to the haulroad on the haulroad's north side. Mr. Berg and Mr. Moos also observed a gully, extending 450 southwest and 750 feet northeast of the culvert location, ranged between 6-24 inches wide and 6-18 inches deep.

17. No evidence was presented by the Reclamation Division to indicate the source of the sediment observed on either September 2 or 30, or that any sediment had ever been removed from the south ditch.

18. Mr. Berg acknowledged that silt fences in other road ditches within the mine did

wash out during the September 9 rainfall event.

19. 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.

20. 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.

21. Mr. William Kirk, PE, Coteau employee and civil engineer, stated that he used 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

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

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.

29. 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."

30. 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.

31. 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.

32. Mr. Steve Hoetzer, an expert witness 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.

33. 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. Although Mr. Hoetzer calculated flow rates, he failed to calculate the velocity of the water within the north haulroad ditch on either of the September 6 or September 9, 2010 storm events.

34. Mr. Dave Schouweiler testified on behalf of Coteau as an expert. 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.

35. Mr. Schouweiler further indicated that after a detailed review of the haulroad design that the haulroad and ditches were properly designed.

36. 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.

37. 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.

38. 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.

39. While additional sediment was likely deposited below the culvert of the south ditch after the September 9 rainfall event, this sediment was likely caused by a rainfall

event which exceeded the Ten-Year/Six-Hour Design Standard resulting in a substantial erosion feature in the north ditch.

40. The September 9 rainfall event, which was preceded three days by substantial rainfall creating Antecedent Moisture Condition III, could have caused the erosion as evidenced in the north ditch by the gully and the resulting sediment deposit adjacent to the culvert in the north ditch.

41. That the Reclamation Division has failed to carry its burden of proof by the greater weight of the evidence with respect to the allegations set forth in the NOV.

42. Coteau completed the remedial actions specified in the notice of violation within the prescribed time.

43. Reclamation Division Staff terminated NOV 1004 on October 25, 2010.

44. On November 2, 2010 Reclamation Division Staff issued a Modification of Notice of Violation 1004, correcting the permit number and legal description errors in NOV 1004.

45. It is not disputed that “good cause” existed for staff to modify NOV 1004 to correct the legal description, and permit number errors.

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

Conclusions of Law

1. The Commission has jurisdiction over this proceeding under North Dakota Century Code Chapter 38-14.1.

2. N.D. Admin. Code § 69-05.2-28-05(2) provides “[t]he Commission or its authorized representative may modify, vacate, or terminate a notice of violation for good cause.”

3. Public Service Commission Reclamation Division Staff are “authorized representatives” under the rule.

4. Good cause existed to modify NOV 1004.

5. The Reclamation Division’s November 2, 2010 Modification of Notice of Violation 1004 was proper. Coteau’s Request to Vacate should therefore be denied.

6. The burden to prove by a preponderance of evidence that Coteau violated N.D. Admin. Code § 69-05.2-24-01(2)(a) and N.D. Admin. Code § 69-05.2-16-08(1)(c) is on the Reclamation Division of the North Dakota Public Service Commission.

7. The Reclamation Division did not show, by a preponderance of the evidence, that Coteau violated N.D. Admin. Code § 69-05.2-24-01(2)(a) and N.D. Admin. Code § 69-05.2-16-08(1)(c). The Reclamation Division did not meet its burden.

8. NOV 1004 should be vacated

9. No final penalty should be assessed for NOV 1004, and the funds deposited by Coteau in payment of the proposed penalty should be refunded.

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

Order

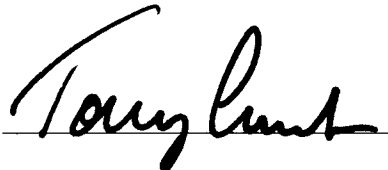
The Commission orders:

1. Notice of Violation Number 1004 is VACATED.
2. Funds remitted by Coteau in payment of the proposed penalty of \$1500 shall be REFUNDED to Coteau.
3. Coteau's October 28, 2010 Request to Vacate based on permit number and legal description errors in the October 4, 2010 Notice of Violation is DENIED.

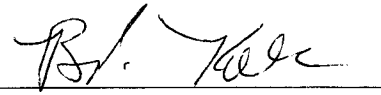
PUBLIC SERVICE COMMISSION



Kevin Cramer
Commissioner



Tony Clark
Chairman



Brian P. Kalk
Commissioner