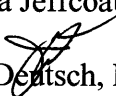



PUBLIC SERVICE COMMISSION
Reclamation Division

Memorandum

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

FROM:  Jim Deitsch, Dean Moos and Mike Berg 

DATE: December 19, 2012

SUBJECT: Final Order for Case No. RC-12-786, NOV-1201 issued to the Dakota Westmoreland Corporation

Summary: Notice of Violation (NOV) 1201 was issued to Dakota Westmoreland Corporation (DWC) on October 30, 2012, following the October 23 and 25, 2012 inspections of the Beulah Mine. The NOV was issued for failure to construct two sedimentation ponds (Sumps 99E and 99W) before removing topsoil from an area to be mined in a portion of the watershed that drains to the ponds. DWC did not request an informal conference or formal hearing in the matter; therefore, the attached order will affirm the violation and assess a \$2,000 penalty.

Discussion: During the October 23rd inspection of the Beulah Mine, Guy Welch and Mike Berg noted that topsoil had been removed from an area before the required sedimentation ponds had been constructed in the E½ of Section 20, T143N, R88W, in Permit KRSB-8603. A follow-up inspection occurred on October 25th to measure the areas that had been disturbed by the topsoil removal activities and to further review the matter. It was determined that topsoil had been removed from about 25 acres that would drain to the approved location of the two ponds. While it appeared no runoff from the disturbed areas carried sediment unto the downstream areas, the potential of that happening was very high had there been a significant rainfall event. Runoff water carrying sediment could have easily gone down a tributary that flows into Coyote Creek.

NOV-1201 was issued to DWC for failure to construct sedimentation ponds (Sumps 99E and 99W) according to plans in the approval permit before beginning surface mining activities in a drainage area as required by NDAC 69-05.2-16-04(1)(e). The NOV was terminated on December 17th after staff determined that the two ponds are constructed to the extent they have more than the required capacity for storing runoff from the contributing watersheds. Other sediment control measures were also installed shortly after the NOV was issued. DWC did not request an informal conference or a formal hearing in the matter.

Since an informal conference or hearing was not requested, the Commission needs to assess a civil penalty and adopt a final order in the matter. The Commission must consider four factors in determining the amount of a civil penalty. These factors are (1) History of previous violations, (2) Seriousness of the violation, (3) Negligence, and (4) Good Faith in attempting to achieve rapid compliance. These factors and recommended civil penalty with respect to NOV-1002 are discussed below:

History of Violations: The Commission may assess a civil penalty of up to \$3,500 per day on the history of previous violations at the mine where the violation is found. Generally, the history of violations within the preceding three years is considered and a penalty for history has not been recommended in the past if three or fewer violations have occurred in that three-year period. DWC has received one other NOV in the last three years. Based on the criteria we have used in the past, DWC does not have a history of violations that requires a penalty to be assessed.

Recommended penalty assessment for history - \$0

Seriousness of the Violation: The Commission may assess a civil penalty of up to \$3,500 per day based on the seriousness of the violation. Factors to be considered in seriousness are the extent and the duration of potential or actual damage in terms of impact on the public or the environment. While this violation did not cause any environmental damage, the potential for downstream sedimentation was high had a precipitation event occurred that resulted in runoff from the areas where topsoil had been removed. A penalty based on seriousness is warranted.

Recommended penalty assessment for seriousness - \$500

Negligence: The Commission may assess a civil penalty of up to \$3,000 per day based on the degree of the fault of the permittee. However, a violation caused by negligence, but not through reckless, knowing or willful conduct may be assessed a penalty of up to only \$1,500 per day. A penalty of up to \$3,000 per day may be assessed for a violation which occurs through a greater degree of fault than negligence, or through reckless, knowing or intentional conduct. In this case, DWC had approved plans for constructing the two impoundments and associated diversions, but failed to do so before removing topsoil for a portion of the affected watershed. Therefore, negligence was a factor in this violation. A penalty based on negligence due to lack of diligence and reasonable care is warranted.

Recommended penalty assessment for negligence - \$1,500

Good Faith: The Commission may deduct up to \$1,000 per day from the total civil penalty when a permittee takes extraordinary measures to abate the violation in the shortest possible time following notification of the violation. No deduction can be made for normal compliance. The compliance in this case was considered normal. Therefore, no deduction for good faith is warranted.

Recommended deduction for good faith – \$0

In conclusion, the Reclamation Division recommends that the Commission adopt the attached final order that affirms NOV-1201 and assesses a civil penalty in the amount of \$2,000 (\$500 for seriousness and \$1,500 for negligence). The order also closes the case upon payment of the penalty. A proposed motion is also attached for your consideration at the December 21st Commission meeting.

Attachments

Caselib/120786/memo