

PUBLIC SERVICE COMMISSION

Reclamation Division

Memorandum

TO: Commissioners Kalk, Christmann and Fedorchak
Illona Jeffcoat-Sacco - General Counsel
Darrell Nitschke - Executive Secretary

FROM: *JJ* *DKM* *GW*
Jim Deutsch, Dean Moos and Guy Welch

DATE: July 23, 2014

SUBJECT: Final Order for Case No. RC-14-313, NOV-1401 issued to Dakota Westmoreland Corporation

Summary: Notice of Violation (NOV) 1401 was issued to Dakota Westmoreland Corporation (DWC) on June 5, 2014, following a May 28, 2014 inspection of the Beulah Mine. NOV-1401 was issued for failure to properly implement and maintain water management plans in Permit KRSB-8603 at the Beulah Mine. DWC did not request an informal conference or formal hearing in the matter. Therefore, the Reclamation Division recommends that the Commission adopt the attached order to affirm the violation and assess a \$1,250 penalty.

Discussion: During a May 28, 2014 inspection of the Beulah Mine, Guy Welch noticed that a bale dike had washed out and that sediment laden water was flowing over reclaimed land located in the SE1/4 of Section 16, T143N, R88W, in Permit KRSB-8603. The water that was flowing over the reclaimed land was being pumped from the west end of the Gold Pit. It was later determined that a berm that was supposed to direct this pit water to a sump located in the SW1/4 of Section 15 had failed and this resulted in sediment laden pit water flowing over reclaimed land. About an acre of reclaimed land located in the SW1/4 of Section 16 was covered with a thin layer of grey sediment.

During this same inspection, runoff from a graded area in the SE1/4 of Section 18 that was partially respread with subsoil and topsoil was flowing westward down a reconstructed county road ditch rather than to a sediment pond located to the south resulting in sediment deposition in the road ditch. DWC rebuilt a section of county road in this area this spring and the road was diverting runoff westward down the ditch because a culvert had not been installed as indicated in the reclamation plan for this area. DWC was advised to put a culvert in this road during an inspection on March 26th. An improperly constructed bale dike had been placed at the disturbance boundary in this road ditch but runoff was passing under this bale dike so it was not properly functioning as a best management practice.

NOV 1401 was issued to DWC on June 5, 2014 for failure to implement and maintain water management plans at the Beulah Mine as required by NDAC 69-05.2-16-04(1)(a) and NDAC 69-05.2-16-08. The NOV was terminated on June 27, 2014 after staff determined that all of the required remedial action items were satisfactorily completed. Most of the required remedial action items were completed prior to the issuance of the NOV. DWC did not request an informal conference or a formal hearing in this matter.

Since an informal conference or hearing was not requested, the Commission needs to assess a civil penalty and adopt a final order in this 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-1401 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. This violation did cause some minor environmental damage, primarily sediment deposition on adjacent reclaimed and undisturbed areas. 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 placing a culvert in reconstructed county road to direct runoff from a portion of the watershed to a nearby sediment pond; however, this culvert was not installed even after they were advised by a PSC inspector to place a culvert at this location in an earlier inspection. In addition, they did not discontinue pumping pitwater after a berm had failed causing sediment laden water to flow across a reclaimed area. A penalty based on negligence due to lack of diligence and reasonable care is warranted.

Recommended penalty assessment for negligence - \$1,250

Good Faith: The Commission may deduct up to \$1,000 per day from the total civil penalty when a permittee takes extraordinary measures to abate the violation in the shortest possible time following notification of the violation. No deduction can be made for normal compliance. DWC had taken appropriate measures to properly implement and maintain the necessary water management structures necessary to abate the violation. These measures were implemented even before the NOV was issued. Therefore, a deduction for good faith is warranted.

Recommended deduction for good faith – \$500

In conclusion, the Reclamation Division recommends that the Commission adopt the attached final order that affirms NOV-1401 and assesses a civil penalty in the amount of \$1,250 (\$500 for seriousness and \$1,250 for negligence, with \$500 deducted for good faith). The order also closes the case upon payment of the penalty. A proposed motion is also attached for your consideration at the July 30th Commission meeting.

Attachments