


**PUBLIC SERVICE COMMISSION**

Reclamation Division

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Memorandum

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

FROM: Jim , Dean Moos, Randy Kowalski

DATE: July 31, 2015

SUBJECT: Recommended penalty for NOV 1502 issued to Coyote Creek Mining Company, LLC, Case No. RC-15-495

**Summary:** Notice of Violation (NOV) 1502 was issued to Coyote Creek Mining Company, LLC (CCMC) on July 7, 2015, following June 25 and 30, 2015 inspections at the Coyote Creek Mine. NOV 1502 was issued due to a significant erosion feature that was created on the stream bank immediately across from the outlet of a 60-inch diameter low flow culvert that is part of the shop access road crossing Coyote Creek. CCMC failed to prevent or control erosion at the culvert outlet as required by our rules.

CCMC has requested a formal hearing in the matter and is seeking to have NOV 1502 vacated. Since a formal hearing has been requested, a proposed penalty needs to be assessed and the Reclamation Division recommends that the Commission assess a proposed penalty in the amount of \$3,000 as detailed below.

**Discussion:** Casey Voigt, the landowner of the affected tract, had contacted the Reclamation Division on June 24, 2015 about heavy rains upstream of the mine's shop/office area that caused flows in Coyote Creek to overtop the shop access road that was under construction at that time. He also requested an unannounced inspection of area. The inspection took place on June 25<sup>th</sup>. Coincidentally, our annual flyover inspection of the large active mines, including the Coyote Creek Mine, was also conducted that day.

Photos and video taken during the June 25<sup>th</sup> mine flyover revealed what appeared to be a large erosion feature on the bank opposite of the outlet of the 60-inch low flow culvert installed in the shop access road. All flows in Coyote Creek were directed through this low flow culvert during the installation of four 10-foot x 10-foot concrete box culverts in the access road a short distance upstream of the 60-inch low flow culvert. During the June 30<sup>th</sup> inspection, the erosion feature found on the stream bank opposite of the 60-inch culvert was estimated to be 15-20 feet wide, 15-20 feet long and about 10 feet deep. No special erosion control or stabilization measures

were in place near the culvert outlet, particularly on the steep stream bank directly across from the culvert outlet.

NOV 1502 was issued to CCMC on July 7<sup>th</sup> for the erosion observed on the stream bank of Coyote Creek directly across the culvert outlet and for CCMC's failure to take measures to prevent or control erosion as water exited this large culvert. Specifically, the NOV was written for the violation of road performance standards under NDAC 69-05.2-24-03(5)(b) and NDCC 38-14.1-24(15).

The required remedial action items were satisfactorily completed. Most of these actions were completed within a day of issuance of the NOV. The actions taken in response to the NOV were inspected on July 9, 2015, by the Reclamation Division.

Coyote Creek Mining Company, L.L.C. has requested has requested a formal hearing in this matter and wants the Commission to vacate the NOV. Since a hearing was requested, the Commission needs to assess a proposed civil penalty because that can also be contested at the hearing. 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 1502 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. This is the second NOV that the Coyote Creek Mine has received. Based on the criteria we have used in the past, CCMC 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 environmental damage, primarily the loss of topsoil and subsoil as well as adding sediment to a perennial stream. Approximately 80-130 cubic yards of material (topsoil, subsoil, and underlying substratum) were eroded and carried away by the stream. A penalty based on seriousness is warranted.

Recommended penalty assessment for seriousness - \$1500

**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, field plan changes instituted by CCMC during the culvert installation did not include the appropriate erosion control measures to protect areas near the culvert outlet. A penalty based on negligence due to lack of diligence and reasonable care is warranted.

Recommended penalty assessment for negligence - \$1500

**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. CCMC did stabilize the area and removed the remaining soil and other earthen materials located opposite of the culvert soon after the NOV was issued as required by the remedial action; however, this was considered normal compliance. Therefore, no deduction for good faith is warranted.

Recommended deduction for good faith – \$0

In conclusion, the Reclamation Division recommends that the Commission assess a proposed penalty for NOV 1502 in the amount of \$3,000 (\$1500 for seriousness and \$1500 for negligence, with no deduction for good faith). The motion for the proposed penalty and notice of formal hearing are attached for your consideration at the July 31<sup>st</sup> Commission meeting. The hearing is being scheduled for August 27<sup>th</sup> beginning at 8:30 a.m. in the Commission Hearing Room.

Attachments