



Public Service Commission

State of North Dakota

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18 September 2015

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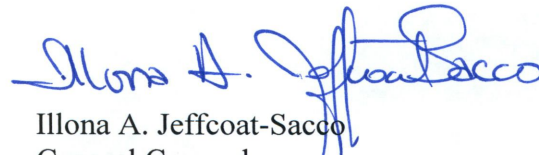
via e-mail only

Re: Coyote Creek Mining Company, LLC
Notice of Violation No. 1502
Violation
Case No. RC-15-495

Dear Mr. Nitschke:

Attached is North Dakota Public Service Commission Advocacy Staff's Proposed Findings of Fact, Conclusions of Law and Order for the captioned case.

Best regards,


Illona A. Jeffcoat-Sacco
General Counsel

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Coyote Creek Mining Company, LLC
Notice of Violation No. 1502
Violation

Case No. RC-15-495

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

September ____, 2015

Appearances

Commissioners Julie Fedorchak, Randy Christmann, and Brian P. Kalk.

Illona Jeffcoat-Sacco, General Counsel, North Dakota Public Service Commission, State Capitol, 12th Floor, 600 East Boulevard Avenue, Bismarck, North Dakota 58505, on behalf of the North Dakota Public Service Commission Reclamation Advocacy Staff.

Brian R. Bjella, Attorney-at-Law, Crowley Fleck, PLLP, 100 West Broadway, Suite 250, Bismarck, North Dakota 58502-2798, on behalf of Coyote Creek Mining Company, LLC.

Casey Furey, Attorney-at-Law, Boppre Law Firm, PLLC, 2151 36th Avenue SW, Unit B, Minot, ND 58701, Advisory Counsel on behalf of the North Dakota Public Service Commission.

Wade Mann, Administrative Law Judge, Office of Administrative Hearings, 2911 North 14th Street, Suite 303, Bismarck, North Dakota 58503, as Procedural Hearing Officer.

Preliminary Statement

On July 7, 2015, the Public Service Commission's Reclamation Division issued Notice of Violation No. 1502 (NOV 1502) to Coyote Creek Mining Company (CCMC). The Notice of Violation was issued for failure to control erosion at a culvert outlet resulting in erosion directly downstream of the outlet of the 60-inch low flow culvert in the Coyote Creek Mine shop access road. The area of violation was described as "The area below the Coyote Creek culvert outlet located in the SE¼ of Section 30, T143N, R88W" and referenced Permit Number NACC-1302. The NOV directed CCMC to submit a plan within 5 days of receipt of the NOV for stabilization and protection of the outlet area of the low flow culvert and/or removal of the stream bed island for review and approval by the Reclamation Division and to implement the plan within 10 days of approval of the plan.

On July 28, 2015, CCMC filed a Request to Vacate Notice of Violation, or in the Alternative, Application for Formal Hearing (Request to Vacate) under North Dakota Century Code section 38-14.1-30.

On July 31, 2015, the Commission assessed a proposed penalty of \$3000 (\$1500 for seriousness and \$1500 for negligence) for NOV 1502 and issued a Notice of Formal Hearing, scheduling the formal hearing for 8:30 a.m. CDT, on August 27, 2015, in the Commission Hearing Room, 12th Floor, State Capitol, Bismarck, North Dakota. The notice specified the issue to be considered is whether the NOV should be vacated.

On August 10, 2015, the Reclamation Division issued the Termination of Notice of Violation to inform CCMC that the remedial measures undertaken by CCMC pursuant to NOV 1502 were adequate, pursuant to a follow up inspection conducted on July 9, 2015.

On September 8, 2015, CCMC paid the proposed penalty and the funds were placed in an escrow account at the Bank of North Dakota pending the final outcome of the formal hearing.

The formal hearing was held as scheduled on August 27, 2015.

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. Coyote Creek Mining Company (CCMC) is the owner and operator of the Coyote Creek Mine located near Zap, North Dakota. CCMC operates the mine under two permits issued by the North Dakota Public Service Commission.
2. CCMC is engaged in surface coal mining operations under permits issued by the Commission. These are Surface Coal Mining Permit NACC-1301 and Surface Coal Mining Permit NACC-1302.
3. Section 3.2.5.1 of Surface Coal Mining Permit NACC-1302 contains design plans for the Coyote Creek diversion channel for the shop-access road located in the SE¼ of Section 30, T143N, R88W.
4. As originally approved in Permit NACC-1302, the Coyote Creek crossing would consist of four concrete box culverts, each ten feet by ten feet, and a 36-inch corrugated steel low flow culvert to be installed in different locations within the Coyote Creek stream channel.

5. Design details for the Coyote Creek diversion channel changed several times during the Reclamation Division's review of the original permit application and subsequent Revision No. 1 to Permit NACC-1302.
6. As originally proposed in CCMC's Permit Application in NACC-1302, the box culverts would have flowed directly into the opposite bank of Coyote Creek. Reclamation Division staff raised concerns during the review of the permit application that this configuration would cause erosion of the opposite stream bank. CCMC responded by modifying the box culvert outlets such that the box culverts would discharge into a straight stretch of Coyote Creek.
7. As originally approved in Permit NACC-1302, a 36-inch low flow culvert would discharge into a natural bend of Coyote Creek. This same configuration was also depicted in the March 10, 2015 version of the application for Revision 1 to Permit NACC-1302; however, a slight angle bend in the culvert had been removed without changing the proposed outlet location.
8. During a routine inspection of the Coyote Creek Mine on April 13, 2015, the Reclamation Division staff observed that the installation of the low flow culvert was in progress, but the installation of the box culvert had not yet begun. The order of the culvert installation was in reverse order from that in the approved permit. Under approved plans in the permit, the box culvert was to be installed first followed by the installation of the low flow culvert.
9. Reclamation Division staff later noted that there were also several modifications to the low flow culvert being installed, including a larger size culvert (permit indicated the low flow culvert would be 36 inches in diameter but the culvert being installed was 60 inches in diameter). It was also noted that the culvert outlet was shifted to the west from the outlet location shown by design plans in the approved permit.
10. The inspection report for the April 13, 2015, inspection included a warning to CCMC, on page 4, of the serious environmental risks posed by reversing the order of the culvert installation.
11. From April 15, 2015 until July 3, 2015, all low flows in Coyote Creek were diverted through the 60-inch low flow culvert. This time period is typically a time of high flow in Coyote Creek as May and June are peak rainfall months. In recent years Coyote Creek has flooded several times. The watershed of Coyote Creek above the shop-access road is quite large, 65,765 acres.
12. On May 15, 2015, CCMC submitted its responses to staff's technical review of Revision No. 1 to Permit NACC-1302. In that response, CCMC also updated Section 3.2.5.1 of the permit to show the as-built low flow culvert outlet location (as already

constructed, and located further west of the previously approved location), and added its plan for removing the "island" feature on the opposite bank of the culvert outlet.

13. The Reclamation Division inspectors conducted an inspection of the Coyote Creek Mine on June 25, 2015. They inspected the box culvert construction site and Coyote Creek upstream and downstream of the construction site. They observed that flows in Coyote Creek had been high, but for the most part did not overtop the banks of the Coyote Creek stream channel. They also observed that flooding had taken place in the box culvert construction area and that repair work in that area had taken place.

14. Also on June 25, 2015, the Reclamation Division conducted its annual flyover inspection all of the active mines, including the Coyote Creek Mine. Photographs and video of the Coyote Creek Mine flyover inspection were subsequently reviewed by Reclamation Division staff. In this review, staff observed what appeared to be a large erosion feature on the stream bank opposite the low flow culvert. Staff decided that a follow-up inspection was warranted.

15. The Reclamation Division staff inspected the site on June 30, 2015. They observed a large erosion feature on the opposite bank of the low flow culvert outlet. The topsoil and subsoil that naturally occurred on this affected area had washed downstream. There was no evidence that any erosion control materials had been installed on this bank.

16. The Reclamation Division staff issued NOV 1502 to CCMC on July 7, 2015 for failure to control erosion at the culvert outlet as required by North Dakota Century Code section 38-14.1-24(15) and North Dakota Administrative Code section 69-05.2-24-03(5)(b). The NOV required Coyote Creek to submit a plan for stabilization and protection of the outlet area of the low flow culvert and/or removal of the stream bed island for review and approval by the Reclamation Division. Once the plan was approved, Coyote Creek was required to implement the plan within 10 days.

17. On July 13, 2015 CCMC submitted a letter stating that the abatement measures required by NOV 1502 have been completed. Abatement consisted of removal of the island feature and stabilization of the low flow and box culvert outlets.

18. The Reclamation Division terminated NOV 1502 on August 10, 2015.

19. Reclamation Division Advocacy Staff testified that erosion was not controlled on the opposite bank of the low flow culvert outlet and that it appeared there had been no attempt to control erosion at that location. From April 15 to July 3, 2015, except for the late June flows that overtopped the box culvert construction area, the entire flow of Coyote Creek was diverted through the low flow culvert.

20. Under low flow conditions, no additional erosion control measures may have been needed on the opposite bank; however, under high flow conditions, more protective erosion control measures were needed. Staff pointed out that the stream bank opposite the culvert outlet was very steep and that under high flow conditions, water exiting the low flow culvert would flow directly into this bank increasing the likelihood of erosion. Under high flow conditions, high velocity water flows from the low flow culvert would hit the opposite bank of the stream and then have to make a sharp ninety degree turn to rejoin the original stream channel, thus increasing the likelihood of erosion and scouring.

21. Bruce Johnson, P.E., a Geological Engineer with the Reclamation Division, provided modeling evidence demonstrating that the exit velocities of the low flow culvert outlet during this runoff event were erosive and that vegetation alone would be inadequate to prevent or control erosion at those velocities.

22. Vegetation can provide adequate erosion control in grass lined channels when water is flowing over the vegetation in the channel. Here, the opposite bank of the stream channel was not lined with a thick stand of grass. Rather, it was a near vertical face. Water from the low flow culvert flowed directly into, not over the steep stream bank. The bank basically served as an unprotected barrier for high outflows from the culvert.

23. For all of these reasons, CCMC knew or should have known that additional erosion control measures were necessary. In other words, CCMC had a duty to take some action to control the potential erosion from the installation of the low flow culvert.

24. CCMC's witness Donn Steffen, Engineering and Environmental Manager, testified that the island feature served as a best management practice and was also needed to serve as an anchor point for the coffer dams that were necessary during the construction of the box culverts. He testified he believed that no erosion protection other than vegetation was needed.

25. Mr. Steffen further testified that additional sediment was trapped or accumulated directly upstream of the shop-access road during the high runoff event. He also testified that the additional trapped sediment more than offset or compensated for the material that was eroded away opposite the low flow culvert.

26. Coyote Creek asserts that since the shop access road was not yet certified at the time of the erosion event and that therefore it was not a primary road at the time of the erosion event. Consequently, they argue that North Dakota Administrative Code section 69-05.2-24-03(5)(b) is not applicable and cannot provide a basis for finding a violation, since it only applies to primary roads.

27. We disagree. North Dakota Administrative Code section 69.05.2-24-03 states that primary roads must meet the requirements of North Dakota Administrative Code section 69-05.2-24-01. Section 69-05.2-24-01(2) states that "Each road must be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to: (a) Control or prevent erosion." (*emphasis supplied*). In addition, North Dakota Century Code section 38-14.1-24(15) requires that "the construction, maintenance, and postmining conditions of the haulroads and access road into and across of operations will control or prevent erosion." (*emphasis supplied*). The laws and rules clearly state that erosion must be controlled at all times during the construction, use, maintenance, and reclamation of all primary and ancillary roads. Whether or not the road in question is a primary road is irrelevant to this case.

28. CCMC witness Greg Thompson testified that the Coyote Creek watershed received approximately two inches of rain in six hours prior to the event that resulted in this erosion. However, Donn Steffen, another CCMC witness, testified that the mine site itself received very little rain from the storm events that caused the flooding. Only a portion of the upstream watershed received significant rainfall, not the entire watershed above the shop access road.

29. The rules require that culverts safely pass a 10 year-6 hour storm event (2.36 inches). CCMC modeled the box culverts to pass a 50 year-6 hour event (3.54 inches). CCMC never modeled the low flow culvert since the original plan was to install the box culverts first, then the low flow culvert. If the installation had occurred as proposed and approved, the capacity of the low flow culvert would have been irrelevant because the box culverts would have safely passed the required design storm event.

30. Mr. Thompson also testified that CCMC's Storm Water Pollution Prevention Plan (Exhibit # CC-9) states that "Because vegetation is a highly effective means to control erosion, efforts will be made to delay disturbance of vegetation for topsoil and subsoil salvage until necessary for construction." (p.3, *emphasis supplied*) In this instance, that provision is irrelevant because the construction had already taken place. This same document continues "In some cases, such as a long slope susceptible to significant sheet flow, high velocity or concentrated flows, CCMC may utilize various products or combinations of products to minimize erosion. These products include erosion control blanket, engineering fabric, articulated concrete mats, and rock riprap." (p.3) CCMC had not installed any of these products on the bank opposite the low flow culvert outlet.

31. The requirements for CCMC's stormwater pollution prevention plan are outlined in CCMC's North Dakota Pollutant Discharge Elimination System Permit NDR32-0772 (Exhibit # CC-4) for stormwater discharges. Appendix 1 (page 27 of 34) of that document outlines requirements for designing, implementing and maintaining erosion and sediment controls. Item A.6 of that appendix states that "Pipe outlets shall be provided with temporary or permanent energy dissipation within 24 hours of connecting to a surface water." Based on this requirement, CCMC should have known that erosion

measures were needed at the outlet of the low flow culvert to reduce the velocity of the water exiting the culvert during significant runoff events.

32. While CCMC implemented some measures to protect the shop access road and box culvert installation site when CCMC knew large creek flows were imminent, CCMC failed to provide the necessary erosion protection at the low flow culvert outlet, particularly on the steep stream bank opposite from the culvert outlet. This was an area vulnerable to erosion because the entire 65,765 acre upstream watershed of Coyote Creek was diverted through a single 60-inch culvert from April 15 to July 3, 2015, at a time when it is reasonable to expect high flows or flooding. In addition, Coyote Creek has history of flooding several times in recent years.

33. The low flow culvert outlet location was changed during the installation of the culvert. Coyote Creek neither sought nor received Commission approval prior to installing the culvert with the outlet directly across from the steep channel bank.

34. The reclamation laws and rules are specific in that erosion control must be provided for all mining related disturbances. The laws and rules contain no "banking" provisions to allow a mining company to trap a certain amount of sediment in one area, and then allow a certain volume to be eroded in another area.

35. North Dakota Century Code section 38-14.1-24(15) requires permittees/operators to "Ensure that the construction, maintenance, and postmining conditions of haulroads and access roads into and across the site of operations will control or prevent erosion and siltation, pollution of water, damage to fish or wildlife or their habitat, or public or private property."

36. North Dakota Administrative Code section 69-05.2-24-03(5)(b) requires that "In accordance with the approved plan, all primary roads must have drainage pipes and culverts installed as designed. Both must be maintained in a free and operating condition and erosion at inlets and outlets must be prevented or controlled."

37. CCMC violated North Dakota laws and rules by failing to control erosion at the culvert outlet. We find no good cause to vacate the NOV.

38. North Dakota Century Code section 38-14.1-32 provides:

38-14.1-32. Penalties - Unclassified.

1. Any operator or permittee who violates this chapter, or any permit condition or regulation implementing this chapter may be assessed a civil penalty not to exceed ten thousand dollars per day of such violation except that if such violation leads to the issuance of a cessation order, a civil penalty must be assessed. Each day of

continuing violation may be deemed a separate violation for purposes of penalty assessments. In determining the amount of the penalty, consideration must be given to:

- a. The operator's or permittee's history of previous violations at the particular surface coal mining operation;
- b. The seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public;
- c. Whether the operator or permittee was negligent; and
- d. The demonstrated good faith of the operator or permittee charged in attempting to achieve rapid compliance after notification of the violation.

39. In addition, North Dakota Administrative Code section 69-05.2-28-13 provides the rules that govern implementation of the penalty provisions. It states:

69-05.2-28-12. Inspection and enforcement - Determination of amount of civil penalty - Factors. In determining the amount of any civil penalty assessed under subsection 1 of North Dakota Century Code section 38-14.1-32, the commission will consider the following:

1. **History of previous violations.** The commission may assess a civil penalty of up to three thousand five hundred dollars per day based on the history of previous violations by the operator or permittee at the particular operation.
 - a. If a violation is under review or if the time for review has not yet expired, the violation will not be considered.
 - b. No violation for which the notice of violation or cessation order has been vacated is considered.
 - c. Each violation is considered without regard to whether it led to a civil penalty.
2. **Seriousness.** The commission may assess a civil penalty of up to three thousand five hundred dollars per day based on the seriousness of the violation, including any irreparable harm to the environment and any hazard to public health or safety. The commission will consider:

- a. The probability of the occurrence of the event which a violated standard is designed to prevent.
 - b. The extent of the potential or actual damage, in terms of area and impact on the public or environment.
 - c. The extent to which enforcement is obstructed by the violation.
 - d. The actual or potential duration of the damage or the impact on the public or the environment.
3. **Negligence.** The commission may assess a civil penalty of up to three thousand dollars per day based on the degree of fault of the operator or permittee in causing or failing to correct the violation, condition, or practice which led to the notice or order, either through act or omission.
- a. A violation which occurs through no negligence, or, an inadvertent violation that was unavoidable by the exercise of reasonable care, is not considered.
 - b. A civil penalty of up to one thousand five hundred dollars per day may be assessed for a violation caused by negligence, or the failure of an operator or permittee to prevent the occurrence of any violation of his permit or any requirement of North Dakota Century Code chapter 38-14.1 or this article, due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate the violation due to indifference, lack of diligence, or lack of reasonable care.
 - c. A civil penalty of up to three thousand dollars 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.
4. **Good faith in attempting to achieve compliance.** The commission may deduct up to one thousand dollars per day from the total civil penalty assessed based on the demonstrated good faith of the operator or permittee charged in attempting to achieve rapid compliance after notification of the violation.

- a. "Rapid compliance" means that the operator or permittee took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set for abatement.
- b. No deduction will be made for normal compliance, which is abatement of the violation within the time set for abatement.

40. CCMC was assessed a proposed penalty of \$3000, composed of \$1500 for seriousness and \$1500 for negligence, consistent with the penalty recommended at the hearing by Reclamation Division Advocacy Staff.

41. CCMC objected to any penalty for negligence. However, under the Commission's rules, a zero penalty for negligence is only appropriate when the violation occurs through no negligence, or the violation was unavoidable through the exercise of reasonable care. Advocacy staff asserts neither circumstance applies here. The Office of Surface Mining Reclamation and Enforcement *Conference Officer Operations Manual* (Exhibit # PSC-14) states that "As the regulations establish what is considered the standard of reasonable care, almost every violation involves some degree of fault." The circumstances in the instant case do not justify a zero penalty component for negligence.

42. North Dakota Administrative Code section 69-05.2-28-12 states that the Commission may assess a civil penalty of up to \$1500 per day when the permittee or operator failed to prevent the violation due to indifference, lack of diligence, or lack of reasonable care. This is the basis on which the Advocacy Staff recommends a negligence penalty component.

43. With regard to the proposed penalty assessment for negligence, Reclamation Division Advocacy Staff recommended that CCMC was negligent because "field 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." (Exhibit # PSC-13)

44. The *Conference Officers Operations Manual* provides additional guidance on this matter. It states that "Assessing this criterion [negligence] involves a determination of the permittee's degree of fault in committing a violation, either through an act or a failure to act. The regulations specify the standard of reasonable care for permittees. It is the permittee's responsibility to learn and follow the regulations". It further states that "A no negligence situation is where the operator acted prudently but the violation occurred anyway due to either an Act of God or vandalism."

45. The event that precipitated the erosion clearly does not meet the Act of God or vandalism exemption. The rainfall or storm event that resulted in the erosion was less than the required design event and was not unusual for that time of the year.

46. CCMC argues the island served as a best management practice and that the vegetation provided adequate erosion control. While the vegetation may have been adequate for erosion control under low flow conditions, it was totally ineffective in controlling erosion under high flow conditions that would reasonably be expected at this time of the year.

47. CCMC asserts that the violation was not the result of knowing or willful conduct and Advocacy Staff agrees. The *Conference Officer Operations Manual* states that "Knowing or willful conduct is when the permittee is aware there is, or will be, a violation of the regulations and fails to correct or avoid the situation." It further states "the legal definition of recklessness is disregard of known or obvious high risk. A permittee is reckless where it would have been obvious to a reasonable operator that the course of action (an action or failure to take action) was likely to cause a serious amount damage or harm, and the operator followed the course anyway". Neither situation applies here.

48. CCMC had a duty to comply with the applicable laws and rules and failed to take action to meet that duty. While CCMC's degree of fault may be low, it is not zero, and some penalty assessment for negligence is warranted.

49. The Commission's rules provide for a penalty deduction upon a showing of good faith in attempting to achieve compliance. The deduction is warranted when the permittee or operator takes extraordinary measures to abate the violation in the shortest time possible and abatement is achieved before the deadline provided in the notice. The rules provide that there will be no deduction for normal compliance, which is defined as abatement within the time set for abatement. Advocacy Staff testified that compliance was normal considering the circumstances in this instance.

50. The Commission finds that a deduction for good faith is not warranted in this case. Even though CCMC immediately began to stabilize the erosion feature, the compliance in this case is normal, not extraordinary. No extraordinary measures were required or taken to abate this violation. The island feature was removed shortly after the NOV was issued. The approved design plans for the shop access road indicate that this island feature was to be removed as part of the approved plan. It should have been removed when the low flow culvert was installed. Compliance with the approved plan cannot be considered extraordinary.

51. Based on these facts, it is appropriate to assess a penalty of \$1500 for seriousness and \$1500 for negligence

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

Conclusions of Law

1. The Commission has jurisdiction over this proceeding.
2. North Dakota Administrative Code section 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. There is no showing of good cause to vacate NOV 1502.
4. CCMC’s Request to Vacate is denied.
5. CCMC violated North Dakota Century Code section 38-14.1-24(15) and North Dakota Administrative Code section 69-05.2-24-03(5)(b).
6. A civil penalty for this violation is warranted.
7. Penalty components in the amounts of \$1500 for negligence and \$1500 for seriousness are warranted.
8. A penalty deduction for good faith is not warranted.

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

Order

The Commission orders:

1. Notice of Violation No. 1502 is affirmed.
2. Coyote Creek Mining Company is assessed a total civil penalty of \$3000.

PUBLIC SERVICE COMMISSION

Randy Christmann
Commissioner

Julie Fedorchak
Chairman

Brian P. Kalk
Commissioner

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Coyote Creek Mining Company, LLC
Notice of Violation No. 1502
Violation

Case No. RC-15-495

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Advocacy Staff's **PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** was, on 18 September 2015, served on the following by electronic mail:

Brian R. Bjella (bbjella@crowleyfleck.com)
Casey A. Furey (cfurey@bopprelawfirm.com)

Dated this 18 September 2015.



Illona Jeffcoat-Sacco
General Counsel
North Dakota Public Service Commission

Attorney for Advocacy Staff