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September 18, 2015

Mr. Darrell Nitschke
Executive Secretary
NORTH DAKOTA
PUBLIC SERVICE COMMISSION
600 East Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480



Dear Mr. Nitschke:

RE: Coyote Creek Mining Company, LLC
Case No. RC-15-495
Our File No. 21-919-019

Enclosed please find for filing Coyote Creek Mining Company, LLC's Proposed Findings of Fact, Conclusions of Law and Order, along with Affidavit of Service indicating mailing and emailing of the above document to the attorneys of record.

Please call should you have any questions.

Very truly yours,

A handwritten signature in dark ink, appearing to read "BJELLA", with a long horizontal flourish extending to the right.

BRIAN R. BJELLA

bw
Enc.

cc: Judge Wade C. Mann
Illona Jeffcoat-Sacco
Casey Furey

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 copies of Coyote Creek Mining Company, LLC's Proposed Findings of Fact, Conclusions of Law and Order were on the 18th day of September, 2015, mailed and emailed to the following:

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By _____


BRIAN R. BJELLA (#03549)

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

Case No. RC-15-495

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER
DATED September ___, 2015

Appearances:

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

Casey Furey, Special Assistant Attorney General, State Capitol Building, 12th Floor, Bismarck, North Dakota 58505, as advisor to the North Dakota Public Service Commission.

Brian R. Bjella and Tony Ford, Attorneys at Law, Crowley Fleck PLLP, 100 West Broadway, Suite 250, Bismarck, North Dakota 58501, on behalf of Coyote Creek Mining Company, LLC.

Illona A. Jeffcoat-Sacco, General Counsel, Public Service Commission, State Capitol Building, 12th Floor, Bismarck, North Dakota 58505, on behalf of the North Dakota Public Service Commission Reclamation Division.

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

Preliminary Statement

Coyote Creek Mining Company, LLC (“CCMC”) is the owner and operator of the Coyote Creek Mine located near Zap, North Dakota. CCMC operates the mine under various permits issued by the North Dakota Public Service Commission (“Commission”).

On July 7, 2015, the Reclamation Division of the Commission issued Notice of Violation No. 1502 (“NOV 1502”) to CCMC, for an erosion feature that occurred in the area below a 60-

inch culvert outlet, located in the SE¼ of Section 30, Township 143N, Range 88W, installed as part of construction of a haul road across Coyote Creek.

On July 28, 2015 the Commission received a request for a formal hearing from CCMC. CCMC asserted that no violation occurred.

On July 31, 2015, the Commission issued a Notice of Formal Hearing, scheduling the public hearing at 8:30 a.m. CDT, on August 27, 2015, in the Commission Hearing Room, 12th Floor, State Capitol, Bismarck, North Dakota.

On July 31, 2015, the Commission assessed a proposed penalty of \$3,000 for NOV 1502. The penalty included an assessment of \$0 for history of violation, \$1,500 for seriousness of violation, \$1,500 for negligence, and a deduction of \$0 for good faith.

The proposed penalty of \$3,000 was paid by CCMC and the funds were placed in escrow by the Commission pending the final outcome of the case.

The hearing was held as scheduled on August 27, 2015, 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. CCMC is engaged in surface coal mining operations under permits issued by the Commission.
2. In the spring and early summer of 2015 CCMC commenced construction of a haul road running from its shop area to mining areas to the west.

3. As a part of construction of this haul road, CCMC had to construct a crossing of Coyote Creek, a perennial stream. The crossing of the creek required installation of both box culverts and a 60-inch low flow diameter culvert.
4. The construction of a haul road across a flowing perennial stream, such as Coyote Creek, is not typically done in coal mines in North Dakota.
5. CCMC intended to construct the haul road from the west side of the creek using a crossing just upstream of the construction site. However, due to a rainfall event in the fall of 2014, that crossing was washed out. As a result, CCMC was forced to begin construction from the east side of the creek.
6. In order to protect the haul road during construction, several erosion control measures were implemented. This included silt fences at several locations; rock rip rap at two of the silt fences; and construction of a coffer dam in the creek channel to prevent water from the creek entering the area where the box culverts were being assembled.
7. To provide a more stable coffer dam, a portion of what is termed the "island" was used as a middle portion of the coffer dam. The island was well vegetated and contained virgin material. Incorporation of the island into the coffer dam resulted in a more stable coffer dam, that was less prone to erosion during periods of high water flows. Vegetation, such as that found on the island, is considered a Best Management Practice ("BMP") for controlling erosion. It worked well during nineteen days of increased flows prior to the June 22 event.
8. According to reports issued by the Reclamation Division staff, after inspection of the mine site on June 25, 2015, and June 30, 2015, the erosion that triggered the issuance of NOV 1502 occurred after areas upstream of the haul road received significant rainfall.

The first inspection report mentions two separate heavy rain events, June 19, 2015, and June 21, 2015. The June 19 rainfall caused the flow of the stream to increase substantially, but there is no evidence that any erosion occurred as a result.

9. The June 21 rainfall was, based on testimony from both CCMC and the Reclamation Division witnesses, a more significant event resulting in flood waters that overtopped the haul road and flooded the box culvert construction area. Flood waters traveled through the partially constructed box culvert and re-entered the stream near the outlet of the 60-inch culvert, in the area where the erosion feature occurred on the island.
10. According to testimony provided at the hearing, the rainfall event that occurred on June 21 increased the volume of water flowing in Coyote Creek from a typical 2-4 cfs to approximately 1700 cfs.
11. For CCMC to have installed rip rap on the island it would have had to first remove topsoil and subsoil. This would likely have rendered the island insufficient as an effective erosion control measure.
12. CCMC used Best Management Practices in its efforts to control erosion, and the installation of BMPs at the creek crossing as a whole held back more sediment than it contributed to Coyote Creek. Testimony at the hearing indicated approximately 100 cubic yards of sediment was eroded from the island. However, other erosion control measures retained approximately 300 cubic yards of sediment. This sediment was retained in the disturbed area of the construction site. As a result, the retention of sediment in the construction area improved the downstream water quality of Coyote Creek, and likely reduced further erosion.

13. CCMC also obtained from the North Dakota Department of Health under the North Dakota Pollutant Discharge Elimination System (“NDPDES”) General Permit, authorization to discharge stormwater associated with mining activities to the waters of the state, provided all conditions of the permit are met. The permit provides in part that “(a) combination of Best Management Practices (“BMPs”) and structural controls shall be implemented as appropriate to reduce pollutant contributions in stormwater.” *Id.* at page 10 (emphasis added). Thus, the permit does not require CCMC to prevent all pollutant contributions to stormwater, but it must take measures to reduce them.
14. CCMC’s expert witness, Mr. Gregory Thompson, is employed as a civil engineer. He is also a certified flood plain manager. Mr. Thompson testified that he believes that CCMC’s plan to leave the island intact was successful in minimizing erosion. He further testified that the coffer dam, which included the island, was only a temporary component and was later to be removed. By having this coffer dam, it prevented erosion to the west bank of Coyote Creek. He further indicated that the placement of the outlet of CCMC’s 60-inch culvert helped to reduce overall erosion, as it directed flows to the coffer dam rather than at the west bank.
15. Mr. Thompson further testified that the BMP plan implemented by CCMC for the creek crossing worked well.
16. Pursuant to NOV 1502, CCMC was directed to provide a stabilization and protection plan, or a removal plan for the island where the erosion feature occurred. However, prior to issuance of the NOV, on July 3, 2015, CCMC installed rip rap in the area of the erosion feature on the island as a temporary stabilization measure.

17. The NOV was issued on July 7, 2015. One day later, on July 8, 2015, CCMC removed the island, which included the erosion feature.
18. When CCMC recognized that the June 21 participation event could be significant, mine employees attempted to discern the significance of the inflows which would be coming down the creek. Having determined that the flows would be significant, CCMC contacted the Reclamation Division staff on the morning of June 22 to let them know of this precipitation event and that the resulting runoff would likely flow over the haul road which was still under construction. CCMC was not required to notify the Reclamation Division staff of such an event.
19. Recognizing the significance of the flows which would soon reach the mine, CCMC directed the construction company to remove construction materials from the immediate area of the box culverts so that they would not hinder flow or create additional debris, or add sediment to the flow. In addition, CCMC removed the east section of the coffer dam. The mine was concerned that if the east section was left in place it could erode.
20. The construction area acted as a sump or stilling basin, which held a large volume of water and trapped sediment which did not leave the site.
21. A "primary road" pursuant to Commission regulations is defined in part as "any road which is used for transporting coal or spoil." Further, PSC regulations provide that all primary roads must be built pursuant to certain construction and design standards. NDAC § 69-05.2-24-01. The haul road being constructed by CCMC was not yet a "primary road" as construction had not been completed.
22. No NOV was issued following the June 25, 2015, inspection by the Reclamation Division staff. NOV 1502 was issued after the June 30, 2015, inspection. However, testimony

from both CCMC and the Reclamation Division staff indicated that there was no change in either further precipitation events or erosion between the June 25, 2015, inspection and the June 30, 2015, inspection.

23. That as the island was well vegetated and was only to be a temporary BMP; CCMC did not disregard or overlook consideration of effective erosion control measures.
24. CCMC used Best Management Practices in its plan to control erosion at the installation of the haul road crossing of the creek. The installation of these BMPs demonstrated that reasonable care was taken.
25. That while an erosion feature did occur to the island, mine operators are not required to prevent all erosion or sedimentation which normally occurs after a substantial rainfall event.
26. There was no change in either precipitation or erosion between the inspections by the Reclamation Division on June 25, 2015, and June 30, 2015. The only intervening factor being a letter from an attorney for Mr. Casey Voigt dated June 25, 2015, requesting an inspection be made as a result of recent rainfall, which letter was addressed to the federal Office of Surface Mining Reclamation and Enforcement ("OSM"). The PSC was copied on this letter, which was followed up by a phone call from OSM to the Reclamation Division.
27. The June 25, 2015, inspection made no mention of any concern with regard to erosion control measures on the island. The PSC inspector indicated to the environmental manager of CCMC that he did not see any violation.

28. That as vegetation can be an effective BMP, and as the well vegetated island was incorporated into the coffer dam as an erosion control measure, CCMC was not negligent in not installing additional BMPs on the island.
29. That CCMC completed the remedial action specified in NOV 1502 in rapid compliance therewith.
30. That good cause exists for NOV 1502 to be vacated.

CONCLUSIONS OF LAW

1. NOV 1502 cited CCMC for failure to control erosion at the culvert outlet citing North Dakota Century Code § 38-14.1-24(15) and North Dakota Administrative Code § 69-05.2-24-03(5)(b).
2. That North Dakota Century Code § 38-14.1-24(15) provides that permittees must: “Ensure that the construction, maintenance, and post-mining conditions of haul roads 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 other habitat, or public or private property.”
3. That North Dakota Administrative Code § 69-05.2-24-03(5)(b) provides as follows:
In accordance with the approved plan, all primary roads must:
...
b. 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. (emphasis added)
4. In order to justify issuance of the NOV after the June 30 inspection, the Reclamation Division must establish that there was some intervening event or condition which occurred between the June 25 and June 30 inspections in order to establish a prima facie case that CCMC was not in compliance. There is no evidence that between those dates

CCMC failed to take reasonable steps to control erosion. As a result, a decision to issue the NOV was arbitrary and capricious. *Hidden Valley Coal Company v Utah Board of Oil, Gas and Mining*, 866 P.2d 564 (Ct. App. Ut. 1993).

5. In NOV 1502, CCMC was cited for failure to control erosion pursuant to North Dakota Administrative Code § 69-05.2-24-03(5)(b). This regulation pertains to primary roads which are defined in part to be “any road which is used for transporting coal or spoil.” NDAC § 69-05.2-24-01(1)(a).
6. It is undisputed that CCMC was still in the construction phase of this road when it received the NOV. However, the Reclamation Division is attempting to cite CCMC for violation of a regulation which deals with “primary roads” that have been designed, constructed and certified to be in compliance.
7. OSM has a similar definition of primary roads. In comments in the Federal Register to a proposed rule regarding definition of roads, it was noted that the proposed rule excluded pioneer roads which were described as “temporary routes used for constructing access or haul roads”. OSM stated that that it “has reviewed the issue and believes that pioneer roads are not a separate, discreet category or roads, but are merely part of the process of constructing primary and ancillary roads. Therefore, pioneer roads are subject to the performance standards of this rule applicable to the construction process but not to those that specify standards applicable to completed primary or ancillary roads.” 53 FR 45190-01 at 45192 (November 8, 1988). The haul road being constructed by CCMC was a pioneer road, not a primary road.
8. PSC regulations require in part that before a haul road is completed and deemed a primary road, it must first be certified by a registered professional engineer. NDAC § 69-

05.2-24-03(1). This haul road being constructed by CCMC has not yet been certified as a primary road as it is still under construction.

9. An unfinished and uncertified haul road cannot be a primary road. As a result, CCMC did not violate this regulation. *Westmoreland Resources, Inc.*, 183 IBLA 77, IBLA 2012-51 (November 20, 2012).
10. CCMC was cited for a violation of actions not yet due. Thus, the NOV was unreasonable and premature. As CCMC had not completed construction of the haul road and had it certified as a primary road, it was improper to cite it under the aforementioned regulation. *Southern Appalachian Mining Co. v Office of Surface Mining Reclamation and Enforcement*, 153 IBLA 312, IBLA 98-133 (September 29, 2000).
11. North Dakota Administrative Code § 69-05.2-28-05(2) provides in part that the “Commission or its authorized representative may modify, vacate, or terminate a notice of violation for good cause.”
12. There is precedent by this Commission for terminating NOVs for good cause, in particular when the NOV was issued due primarily to a large precipitation event.
13. In Case No. 10,703 Indian Head Mine was issued an NOV for failure to control erosion. It was undisputed that prior to the erosion occurring, the area had experienced a significant rainfall event. At the time of the precipitation event the mine’s erosion control measures of seeding and installation of straw bales had yet to be completed. The precipitation resulted in a loss of approximately 300 cubic yards of suitable plant growth material. However, it was found that the installation of the straw bales would not have prevented or significantly lessened the soil loss, as there were no known reasonable or appropriate precautions or actions which could have been undertaken to prevent erosion

due to the large precipitation event. As a result, this Commission found that there was no violation and the NOV was vacated.

14. In Case No. RC-10-598 The Coteau Properties Company was issued a violation for erosion following a significant precipitation event. As a result of the precipitation event, a road ditch partially washed out causing sediment deposition. An NOV was issued as the Reclamation Division asserted that Coteau should have installed additional Best Management Practices, such as silt fences, in the road ditch in order to control erosion. Findings of Fact No. 30 states "Reclamation Division regulation directs that mine operators are to minimize erosion and sedimentation to the extent possible. This regulation does not require that a mine operator eliminate all erosion or sedimentation, which normally occurs after a substantial rainfall." It was further found that this precipitation event exceeded the ten year/six hour design standard set forth in the regulation. As a result, this Commission found that good cause existed to vacate the NOV.
15. In the Reclamation Division's letter to CCMC dated August 10, 2015, it stated in part that "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."
16. As previously stated under the Findings of Fact, CCMC's erosion control plan of implementation of numerous Best Management Practices was reasonable. In addition, CCMC abated the violation even before the NOV was issued.

17. North Dakota Century Code § 38-14.1-32(1) provides in part that a permittee who violates this chapter or regulations implementing this chapter may be assessed a civil penalty. In determining the amount of the penalty, consideration must be given to whether the permittee was negligent, and whether the permittee demonstrated good faith in an attempt to achieve rapid compliance after notification of the violation.

18. With respect to determination of a civil penalty, Commission regulations provide in part as follows:

Negligence. The Commission may assess a civil penalty of up to \$3,000.00 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 lead to the notice or order, 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.

NDAC § 69-05.02-28-12(3)(a). (emphasis added).

19. In the Reclamation Division's letter to CCMC dated August 10, 2015, there was no recommended deduction for good faith. In this regard, mining regulations provide in part as follows:

Good Faith in Attempting to Achieve Compliance. The Commission may deduct up to \$1,000.00 per day from the total civil penalty assessed based on the demonstrated good faith of the operator or permittee 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.

NDAC § 69-05.2-28-12(4)(a).

20. Negligence is not defined either in mining law, North Dakota Century Code Chapter 38-14.1, or in Commission regulations. However, the mining regulation uses terminology such as "due to indifference, lack of diligence, lack of reasonable care, or the failure to

abate the violation due to indifference, lack of diligence, or lack of reasonable care.”
NDAC § 69-05.2-28-12(3)(b).

21. The Reclamation Division has referenced to an OSM Directive dated September 4, 1987, entitled “Conference Officer Operations Manual”. This provides in part as follows:

A no negligence situation is where the operator acted prudently but a violation occurred anyway due to either an Act of God or vandalism. While the permittee cannot prevent the occurrences it can become negligence if the operator does not fix it promptly. When no negligence on the permittee’s part can be discerned, no points should be given. *Id.* at 57. (emphasis added)

22. Said OSM Directive with respect to good faith provides in part that “rapid compliance means that measures were taken to abate the violation in the shortest possible time and abatement was achieved before the time allowed for abatement.” It goes on to provide in part that “considerations of good faith would be the examination of initiative, consistency, and commitment of resources, to determine if extraordinary measures were employed in addition to the rapid abatement. Initiative would be how quickly or thoroughly the operator began to work to abate the violation.” *Id.* at 59.

23. With respect to awarding points for good faith, said OSM Directive provides that consideration can be given (1) to initiative, that is how quickly the operator began to abate the violation; and (2) consistency, once the abatement began, how consistently did the operator work. *Id.* at 63.

24. The OSM has updated the Directive of September 4, 1987, by a Directive dated December 9, 2008, as found on OSM’s website at www.osmre.gov/lrg/directives.shtm. There, the updated Directive can be found under the category Financial Management at FIN-1-1. This updated Directive is entitled Change Notice – Civil Penalty Conference Officers Manual. The Directive defines “no negligence” as follows:

“No negligence” means an inadvertent violation that was unavoidable by the exercise of reasonable care. (For instance, the permittee acted prudently but a violation occurred anyway due to an unpredictable event.) While the permittee cannot prevent the occurrence of the violation, points can be assigned for negligence if a permittee does not promptly abate the violation. When no negligence on the permittee’s part can be discerned, no points should be given. *Id.* at A-18.

25. In addition, said updated OSM Directive with respect to good faith indicates that OSM “will consider the good faith of the permittee in attempting to achieve rapid compliance by using extraordinary measures after notification of a violation. Rapid compliance means that measures were taken to abate the violation in the shortest possible time and abatement was achieved before the time allowed for abatement.” *Id.* at A-19.
26. When a violation has occurred as a result of an action of an outside source, being a third party or by nature, without fault of the permittee, there is no negligence on the part of the mine operator. *Red River Coal Company v Brown*, 9 Va. Cir. 249, 1987 WL 889318 (Cir. Ct. Va. 1987); and *Lone Star Steel Co. v Office of Surface Mining Reclamation and Enforcement*, 98 IBLA 56, IBLA 86-101 (1987).
27. In Case No. RC-09-316 involving The Falkirk Mining Company, good cause to vacate an NOV was found to include uncontrollable circumstances and Acts of God.
28. CCMC was not negligent. CCMC acted prudently as the erosion control measures that were put in place were reasonable, including the use of a portion of the island in the coffer dam.
29. That the erosion occurred due to a significant precipitation event.
30. That CCMC demonstrated good faith in abating the NOV by rip rapping the island before the NOV was issued, and by removal of the island one day after the NOV was issued.
31. That good cause exists to vacate NOV 1502.

32. That no penalty should be assessed and the funds deposited 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 1502 is vacated.
2. The funds remitted by CCMC in payment of the proposed penalty shall be refunded to CCMC.

PUBLIC SERVICE COMMISSION

Randy Christmann
Commissioner

Julie Fedorchak
Chairman

Brian P. Kalk
Commissioner