

**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**

**September 28, 2015**

**Appearances**

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

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

Brian R. Bjella, and Tony Ford, Attorneys-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, Special Assistant Attorney General, Boppre Law Firm, PLLC, 2151 36<sup>th</sup> 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 14<sup>th</sup> 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 directly downstream of the 60-inch low flow culvert in the Coyote Creek Mine shop access road. The area of the violation was described as, "The area below the Coyote Creek culvert outlet located in the SE1/4 of Section 30, T143N, R88W" and referenced in Permit Number NACC-1302. NOV 1502 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 for CCMC 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 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.

On July 31, 2015 the Commission also 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, 12<sup>th</sup> 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 the remedial measures undertaken by CCMC in regard to NOV 1502 were adequate, pursuant to a follow up inspection conducted on July 9, 2015.

CCMC paid the proposed penalty of \$3000 and the Commission placed the funds 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, 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. 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 NACC-1301 and NACC-1302 issued by the Commission.
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. In spring and early summer of 2015 CCMC commenced construction of an access road running from its shop area to mining areas to the west. As a part of the construction of the access road, CCMC had to construct a crossing of Coyote Creek.
5. 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.

6. 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.

7. 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.

8. On April 13, 2015, the Reclamation Division staff conducted a routine inspection of Coyote Creek mine. During this inspection staff observed 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 there were also several modifications to the low flow culvert being installed, including a larger size culvert (original 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. Mr. Dean Moos, Assistant Director of the Reclamation Division, testified from April 15, 2015 until July 3, 2015, all flows in Coyote Creek were diverted through the 60-inch low flow culvert.

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 which was located further west of the previously approved location. CCMC included its plan for removing the "island" feature on the opposite bank of the culvert outlet.

13. CCMC witness Mr. Gregory Thompson, civil engineer for Houston Engineering, testified in order to protect the shop access 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.

14. Mr. Donn Steffen, Engineering and Environmental Manager for CCMC, testified in order 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 vegetated and contained virgin material. Mr. Steffen testified 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. Mr. Steffen testified this plan worked well during nineteen days of increased flows prior to the June 22 event.

15. CCMC witnesses also testified Vegetation, such as that found on the island, is considered a Best Management Practice ("BMP") for controlling erosion. Vegetation can provide adequate erosion control in grass lined channels when water is flowing over the vegetation in the channel.

16. Under low flow conditions, no additional erosion control measures may have been needed on the opposite bank. 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.

17. According to reports issued by the Reclamation Division staff the erosion triggering the issuance of NOV 1502 occurred after areas upstream of the shop access road received significant rainfall. The first inspection report mentions two separate rain events on June 19, 2015 and June 21, 2015.

18. The June 21 rainfall, based on testimony from both CCMC and Reclamation Division witnesses, was a more significant event resulting in floodwaters that overtopped the shop access road and flooded the box culvert construction area. 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.

19. CCMC witness Mr. Steffen testified when CCMC recognized the June 21 precipitation event could be significant, mine employees attempted to discern the magnitude of the inflows that would be coming down the creek. CCMC contacted the Reclamation Division staff on the morning of June 22 to inform them of this precipitation event and 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.

20. Mr. Steffen testified after 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 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 if the east section was left in place it could erode.

21. Mr. Steffen further testified 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.

22. On June 25, 2015, the Reclamation Division inspectors conducted an inspection of the Coyote Creek Mine. They inspected the box culvert construction site and Coyote Creek upstream and downstream of the construction site. They observed 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 flooding had taken place in the box culvert construction area and repair work in that area had taken place.

23. On June 25, 2015, the Reclamation Division also conducted its annual flyover inspection of all the active mines, including the Coyote Creek Mine. Photographs and video were taken of the Coyote Creek Mine flyover inspection.

24. Mr. Randy Kowalski, Environmental Scientist for the Reclamation Division, testified the photographs and video of the Coyote Creek Mine June 25, 2015 flyover inspection were subsequently reviewed by Reclamation Division staff. It was during this review, staff observed what appeared to be a large erosion feature on the stream bank opposite the low flow culvert. Staff decided a follow-up inspection was warranted.

25. On June 30, 2015, the Reclamation Division staff inspected the site. They observed a large erosion feature on the opposite bank of the low flow culvert outlet known as the island area. The topsoil and subsoil that naturally occurred on this affected area had washed downstream. There was no evidence any additional erosion control materials other than naturally occurring vegetation had existed or been installed on this bank.

26. On July 7, 2015, the Reclamation Division staff issued NOV 1502 to CCMC 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.

27. On July 13, 2015, Mr. Steffen submitted a letter on behalf of CCMC to Reclamation Division staff in regard to NOV 1502 issued to CCMC on July 7, 2015. Mr. Steffen stated the abatement measures required by NOV 1502 had been completed and removal of the island and downsizing of the coffer dam occurred on July 8, 2015.

28. On August 10, 2015, the Reclamation Division terminated NOV 1502.

29. Bruce Johnson, P.E., a Geological Engineer with the Reclamation Division, provided modeling evidence demonstrating the exit velocities of the low flow culvert

outlet during the June 22, 2015 event were erosive and vegetation alone would be inadequate to prevent or control erosion at those velocities.

30. CCMC's witness Mr. Steffen testified 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 on the island stream bank opposite the culvert outlet.

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

32. CCMC asserts the shop access road was not yet certified at the time of the erosion event and therefore it was not a primary road at the time of the erosion event. Consequently, CCMC argues North Dakota Administrative Code section 69-05.2-24-03(5)(b) is not applicable because it only applies to primary roads.

33. North Dakota Administrative Code section 69.05.2-24-03 states 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*).

34. North Dakota Century Code section 38-14.1-24(15) also requires "the construction, maintenance, and postmining conditions of the haulroads and access road into and across of operations will control or prevent erosion." (*emphasis supplied*).

35. The laws and rules state erosion must be controlled at all times during the construction, use, maintenance, and reclamation of all primary and ancillary roads.

36. CCMC witness Mr. Thompson also testified that CCMC's Storm Water Pollution Prevention Plan (Exhibit # CC-9) states, "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."

37. CCMC implemented some measures to protect the shop access road and box culvert installation site when CCMC knew large creek flows were imminent, CCMC did not provide erosion protection on the steep stream bank opposite from the culvert outlet.

38. The reclamation laws and rules are specific in that erosion control must be provided for all mining related disturbances.

39. 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.”

40. 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.”

41. 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.

42. 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.

43. 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.

44. CCMC was assessed a proposed penalty of \$3000, composed of \$1500 for seriousness, \$1500 for negligence, \$0 for history of violations and \$0 for good faith consistent with the penalty recommended at the hearing by Reclamation Division Advocacy Staff.

45. It is undisputed environmental damage occurred, including the loss of topsoil and subsoil, as a result of the erosion event that occurred to the island bank area opposite the low flow culvert outlet.

46. CCMC objected to any penalty for negligence. CCMC maintains it used BMPs in its efforts to control erosion. CCMC's expert witness, Mr. Thompson, testified CCMC's plan helped to reduce overall erosion.

47. CCMC's use of BMPs in the shop access road and culvert outlet area was a reasonable approach for preventing erosion and successfully worked until the June 22, 2015 event.

48. The use of vegetation alone as a BMP was reasonable under the circumstances but was insufficient to protect the bank opposite the low flow culvert from the June 22, 2015 event.

49. The facts do not justify a penalty component for negligence because of the low probability of a precipitation event occurring that would result in a flood event that would cause velocities from the low flow culvert exceeding that which the natural vegetation on the stream bank channel could withstand.

50. A penalty component for negligence is not warranted.

51. The Commission's rules provide for a penalty deduction upon a showing of good faith in attempting to achieve compliance after notice of the violation. CCMC completed remedial action specified in NOV 1502 in rapid compliance.

52. Based on these facts, it is appropriate to assess a penalty of \$1500 for seriousness, \$0 for negligence, \$0 for history of violations, and a good faith deduction of \$500.

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. CCMC violated North Dakota laws and rules by failing to control erosion at the culvert outlet.
4. Good cause to vacate the NOV is not warranted.
5. CCMC's Request to Vacate is denied.
6. 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).
7. A civil penalty for this violation is warranted.
8. A penalty in the amount of \$1500 for seriousness is warranted.
9. CCMC did not act negligently.
10. A penalty for negligence is not warranted and the proposed \$1500 negligence penalty component has been removed.
11. A penalty deduction of \$500 for good faith on behalf of CCMC is warranted.

## Order

The Commission orders:

1. Notice of Violation No. 1502 is affirmed.
2. The proposed penalty is modified and CCMC is assessed a total civil penalty of \$1000.
3. \$2000 of the \$3000 funds remitted by CCMC in payment of the proposed penalty to the Commission shall be refunded to CCMC.

### PUBLIC SERVICE COMMISSION

		
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<b>Randy Christmann</b> Commissioner	<b>Julie Fedorchak</b> Chairman	<b>Brian P. Kalk</b> Commissioner