


PUBLIC SERVICE COMMISSION

Reclamation Division

Memorandum

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

FROM:  Jim Deutsch, Dean Moos, Randy Kowalski

DATE: August 31, 2016

SUBJECT: Recommended penalty for NOV 1601 issued to Coyote Creek Mining Company, LLC, Case No. RC-16-547

Summary: Notice of Violation (NOV) 1601 was issued to Coyote Creek Mining Company, LLC (CCMC) on July 21, 2016, following July 12 and 18, 2016 inspections at the Coyote Creek Mine. NOV 1601 was issued for sediment deposition on undisturbed private and State lands outside of the permit area down gradient of several haul road drainage discharge points. We believe CCMC failed to prevent or minimize sediment deposition on undisturbed areas as required by our rules.

CCMC has requested an informal conference in the matter and also requested to have NOV 1601 vacated. Since an informal conference 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 \$2,500 as detailed below.

Discussion: During a routine inspection on July 12, 2016, an inspector noted significant erosion along portions of the mine haulroad north of County Road 12 and associated sediment deposition on undisturbed off-permit areas located down-gradient of the haulroad. Sediment deposition was observed down-gradient of each stormwater discharge point (14 total discharge points) located north of County Road 12. The erosion and sediment deposition was attributed to storms on July 3, 9, and 10. A follow-up inspection of the area was conducted on July 18th. Additional rainfall had been received on July 16th resulting in additional erosion and sediment deposition.

Although CCMC had implemented erosion and sediment control measures along this section of haulroad, many of erosion and control measures were not adequate to prevent erosion and sediment deposition. This portion of the haulroad is constructed out of overburden with some segments constructed of subsoil. The haulroad crosses several deep drainages and it consists of a series of cut and fill segments. The haulroad and associated ditches occupy nearly the entire permitted haulroad corridor thus creating limited areas for water management features. Many parts of the haulroad were constructed with coarse textured (sandy) materials that have proven

difficult to establish vegetation on. Portions of the haulroad corridor had been seeded several times this spring and early summer in an attempt to establish a vegetative cover that should be effective in controlling erosion. Generally, the vegetative cover on these areas was sparse and ineffective in controlling erosion. Other erosion control measures such as small sumps, silt fences, and rock or erosion control blanket lined channels were also utilized.

NOV 1601 was issued to CCMC on July 21 for sediment deposition on undisturbed off-permit lands, specifically, for the violation of NDCC 38-14.1-24(8), NDCC 38-14.1-24(15), NDAC 69-05.2-16-08(1)(a) and (d) and NDAC 69-05.2-24-01(2)(c) as well as plans in Section 3.2.1 of Permit NACC-1302. The required remedial actions included stabilizing the area by mulching of the road and fill slopes and other measures as necessary and providing a long-term slope stabilization of all haul road cut and fill slopes and improved water management structures/systems for all haul road discharge points. The remedial action plan also required CCMC evaluate the off-permit areas of sediment deposition on undisturbed areas in coordination with the property owners and develop a mitigation plan for dealing with areas of sediment deposition.

Prior to receipt of the NOV, CCMC had begun repair of the erosion features and stabilization of the haul road cut and fill segments. In addition, CCMC received approval to haul in topsoil from the Coyote Power Station to place a thin veneer of topsoil on the haulroad cut and fill slopes to enhance revegetation. CCMC continues to work on remedial actions and as a result the NOV has not yet been terminated.

Coyote Creek Mining Company, L.L.C. has requested an informal conference in this matter and asks the Commission to vacate the NOV. Since an informal conference was requested, the Commission needs to assess a proposed civil penalty because that can also be contested at the informal conference. 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 1601 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 third 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 sediment deposition

on adjacent undisturbed off-permit areas below the storm water discharge points. Sediment deposition ranged from a thin veneer to more than a foot. We estimate that about ___ acres of acres outside the permit have been affected by the sediment deposition. A penalty based on seriousness is warranted.

Recommended penalty assessment for seriousness - \$3000

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, CCMC had implemented erosion and sediment control plans for this area, but they were ineffective for the intense, short duration rainfall events that occurred in July. Although the erosion and sediment control measures failed, CCMC was diligent in the installation and maintenance of erosion and sediment control prior to the rainfall events. A penalty based on negligence due to lack of diligence and reasonable care is not warranted in this instance.

Recommended penalty assessment for negligence - \$0

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 promptly began repair of impacted best management practices, even prior to the issuance of the NOV. Therefore, a deduction for good faith is warranted.

Recommended deduction for good faith – \$500

In conclusion, the Reclamation Division recommends that the Commission assess a proposed penalty for NOV 1601 in the amount of \$2,500 (\$3,000 for seriousness with \$500 deduction for good faith). The motion for the proposed penalty and notice of informal conference are attached for your consideration at the September 7th Commission meeting. The informal conference is being scheduled for November 3rd beginning at 8:30 a.m. in the Commission Hearing Room. An administrative law judge from the Office of Administrative Hearing will preside over the informal conference and prepare a recommended order for Commission consideration.

Attachments