

**Public Service Commission  
Reclamation Division**

**Memorandum**

To: Commissioners Christmann, Fedorchak, and Kroshus  
Illona Jeffcoat-Sacco and John Schuh  
Darrell Nitschke - Executive Secretary

From: *DAM* *ZAB* *BC*  
Dean Moos, Zanna Brinkman, and Bill Gunnerson

Date: December 13, 2017

Subject: Order for Case No. RC-17-172, NOV 1701 issued to Dakota Westmoreland Corporation

**Summary**

Notice of Violation (NOV) 1701 was issued to the Dakota Westmoreland Corporation (DWC) on April 3, 2017 for failure to maintain a haul road at the Beulah Mine to control or prevent erosion and siltation. DWC did not request an informal conference or formal hearing in response to the notice. The Reclamation Division therefore recommends that the Commission adopt the attached order to affirm the violation and assess a \$1,500 civil penalty.

**Discussion**

NOV 1701 was issued to DWC on April 3, 2017 for failure to maintain the north side of the haul road in the S½SW¼ of Section 15 (T143N-R88W) in Permit KRSB-8603 at the Beulah Mine to control or prevent erosion and siltation observed during the March 22, 2017 inspection. Location of the haul road erosion and siltation cited in the notice where the sediment Pond 85 embankment functions as the intermittent stream haul road crossing is labeled on Figure 1. Failure to maintain the haul road to control or prevent erosion and siltation was in violation of statute and rule provisions as follows: North Dakota Century Code Subsection 38-14.1-24(15) (Failure to control erosion from a haul road.); North Dakota Administrative Code Subdivision 69-05.2-24-01(2)(a) (Failure to maintain haul road to control or prevent erosion and siltation.); and North Dakota Administrative Code Subsection 69-05.2-24-01(5) (Failure to maintain road to meet the performance standards of Chapter 69-05.2-24.).

Remedial actions to abate the violation required DWC to repair or reconstruct the haul road drainage system to control and convey haul road runoff to Pond 85, repair and stabilize the erosional gully on the north side of the haul road, and add haul road runoff control narrative and design plans to Permit KRSB-8603 with the application of Revision No. 31 that is currently under review. Subsequent Beulah Mine inspections confirmed that the haul road drainage system to control and convey haul road runoff to Pond 85 had been repaired to function as designed, and the erosional gully on the north side of the haul road had been repaired and stabilized. Haul road runoff control narrative and design plans were added to the application of Revision No. 31 to Permit KRSB-8603 with DWC's November 22, 2017 second technical review response. NOV 1701 was terminated on December 6, 2017 when the remedial actions were deemed adequate to terminate the violation.

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### Civil Penalty Assessment

The Commission needs to assess a civil penalty and adopt an order for the violation because DWC did not request an informal conference or formal hearing on the violation. As required by North Dakota Administrative Code Section 69-05.2-28-12, the Commission considers the following four factors in determining the amount of any civil penalty: (1) history of previous violations; (2) seriousness; (3) negligence; and (4) good faith in attempting to achieve compliance. These factors and recommended civil penalty with respect to NOV 1701 are addressed as follows:

1. **History of previous violations:** The Commission may assess a civil penalty of up to \$3,500 per day based on the history of previous violations by the operator or permittee at the particular operation. Generally, the history of violations within the preceding three years is considered and a penalty for history has not been recommended if three or fewer violations have occurred in that three-year period. DWC has received one other violation within the preceding three years. Based on the criteria we have used in the past, DWC does not have a history of violations that requires a penalty to be assessed.

Recommended penalty assessment for history - \$0

2. **Seriousness:** 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 duration of potential or actual damage in terms of impact to the public or the environment. Failure to maintain the haul road to control or prevent erosion and siltation created an erosional gully in undisturbed land and caused attendant siltation in an intermittent stream. Accumulated sediment altered the streambed and damaged vegetation, and the potential for additional damage did exist. Streambed sediment removal is not practicable until the life of mine haul road and pond embankment is reclaimed. A penalty based on seriousness is warranted.

Recommended penalty assessment for seriousness - \$500

3. **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. Runoff from the haul road segment crossing the intermittent stream should be controlled by conveying runoff south to Pond 85 by way of a drainage grate culvert inlet along the haul road's north berm and through a culvert under the haul road to an outlet at Pond 85 as indicated in Figure 1. Haul road runoff bypassed the drainage grate culvert inlet and breached the north haul road berm during a runoff event, or repeated runoff events, creating an erosional gully in undisturbed land and causing attendant siltation in an intermittent stream. Aerial photography indicated that the haul road runoff erosion and siltation was not a recent development. We believe that the failure to take effective action was due to a lack of diligence; a penalty for negligence is therefore warranted.

Recommended penalty assessment for negligence - \$1,000

4. **Good faith in attempting to achieve compliance:** 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 which is abatement of the violation within the time set for abatement. DWC's abatement of the NOV was normal. A deduction for good faith is not warranted.

Recommended deduction for good faith - \$0

The Reclamation Division recommends that the Commission adopt the attached order that affirms NOV 1701 and assesses a civil penalty in the amount of \$1,500 (\$500 for seriousness and \$1,000 for negligence). The order also closes the case upon payment of the penalty. A proposed motion for the December 20<sup>th</sup> Commission meeting is also attached for your consideration.

#### Attachments

Minedata/Beulah/Violations/2017/NOV-1701\_memo\_12-13-17

