

**Public Service Commission
Reclamation Division**

Memorandum

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

From: *DKM* Dean Moos, *ZAB* Zanna Brinkman, and *BAJ* Bruce Johnson

Date: August 30, 2018

Subject: Order for Case No. RC-18-226, NOV 1801 issued to Dakota Westmoreland Corp.

Summary: Notice of Violation (NOV) 1801 was issued to Dakota Westmoreland Corporation, (DWC) on July 3, 2018 following a June 29, 2018 Beulah Mine inspection for conducting mining operations (topsoil removal) within 100 feet of a cemetery. DWC did not request an informal conference or formal hearing in the matter. The Reclamation Division therefore recommends that the Commission adopt the attached order to affirm the violation and assess a \$1,500 penalty.

Discussion: During a June 27, 2018 Beulah Mine inspection, Bill Gunnerson noticed that the topsoil stripping edge in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 20 appeared to be less than 100 feet from the Emmaus Cemetery located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29. Mr. Gunnerson paced off the distance between the fence of the cemetery and the stripping edge and estimated the distance to be 80 to 90 feet. A follow-up inspection was conducted on June 29 by Bruce Johnson and Matt Fischer to measure the distance between the topsoil stripping edge and the cemetery with a steel tape and also a survey-grade RTK (Real Time Kinetic) GPS (Global Positioning System). Both methods of measurement confirmed topsoil had been removed within 85 to 88 feet of the north boundary of the Emmaus Cemetery. NDCC 38-14.1-07(5) prohibits surface coal mining operations within one hundred feet [30.48 meters] of a cemetery. As a result of this inspection, NOV- 1801 was issued to Dakota Westmoreland Corporation for conducting mining operations within 100 feet of a cemetery.

The remedial action consisted of respreading to topsoil and seeding the affected area and clearly marking the 100 foot buffer zone around the cemetery. NOV 1801 was terminated August 22, 2018 after staff deemed the remedial actions were adequate to terminate the violation.

The Commission needs to assess a civil penalty and adopt an order in this matter because DWC did not request an informal conference or a formal hearing. 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 1801 are as follows:

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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

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. This violation did cause some environmental damage because a small area of topsoil was removed. A penalty based on seriousness is warranted.

Recommended penalty assessment for seriousness - \$500

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. Mining companies are required to mark the boundaries of all zones in the field. In this case, the buffer zone had not been marked in the field. A penalty based on negligence due to lack of diligence is warranted.

Recommended penalty assessment for negligence - \$1000

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. 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 1801 and assesses a civil penalty in the amount of \$1,500 (\$500 for seriousness and \$1000 for negligence). The order also closes the case upon payment of the penalty. A proposed motion for the September 5th Commission meeting is also attached for your consideration.