Clyde Eisenbeis
2819 Hogan Dr
Bismarck, ND 58503
641-691-0110
cte677@gmail.com

15-May-2022

PSC Commissioner Julie Fedorchak
PSC Commissioner Randy Christmann
PSC Commissioner Sheri Haugen-Hoffart
600 E. Boulevard Ave., Dept. 408
Bismarck, ND 58505-0480

RE: Request

This is a request to allow the people, who file a Complaint, to speak at the PSC Commissioner meeting that discusses the Complaint.

The Eisenbeis family Complaint about North American Coal was discussed at the 12 Jun 2019 PSC Commissioner meeting.

Enclosed are:

1) The questions not allowed at that PSC Commissioner meeting.

2) The PSC final decision letter.

3) The North American Coal dishonest letter.

I know I can file a second formal complaint. We don't want to spend our retirement savings on an attorney. I'd like to meet with you to discuss this at an informal meeting.

I look forward to hearing from you.

Best Regards,

The PSC Commissioner Meeting, 12 Jun 2019, Questions not allowed.

15-May-2022

These are the questions Clyde Eisenbeis was not allowed to ask at the 12 Jun 2019 PSC Commissioner Meeting to discuss the Eisenbeis family complaint about North American Coal (NAC).

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11 Jun 2019

1) Why did the PSC take photos of Esther Eisenbeis farmland, in 2011 and 2014, if it was not coal mining related?

2) Why did the PSC state it is not coal mining related if pond water netting was found on the Esther Eisenbeis farmland?

3) Why was the NAC letter, dated 19 Jun 2018, not given to Clyde Eisenbeis until a year later on 10 Jun 2019? The PSC Commissioner meeting was on 12 Jun 2019.

4) Why did the PSC not question the contents of that NAC letter? The PSC photos dated 8 Oct 2008, prove the ditches were not filled with sediment.

5) Why did the PSC not question the missing statements about the mining sedimentation pond water overflowing onto the Esther Eisenbeis farmland?

6) Why did the PSC not ask Clyde Eisenbeis if he was involved in the design and layout of the proposed diversion ditch? He did not. He lived in Iowa.

7) Why did the PSC not ask Clyde Eisenbeis to verify the accuracy of that NAC letter? There are false statements in that letter. Does the PSC classify this as ok?

8) Will NAC be held accountable for a dishonest letter that was used to make a PSC final decision?

9) Why does the PSC not question NAC why NAC deepen the road ditch if it is not mining related? Did NAC deepen the road ditch to penalize the Eisenbeis family because they did not allow NAC to discharge more pond water from the south mine into the farmland creek?

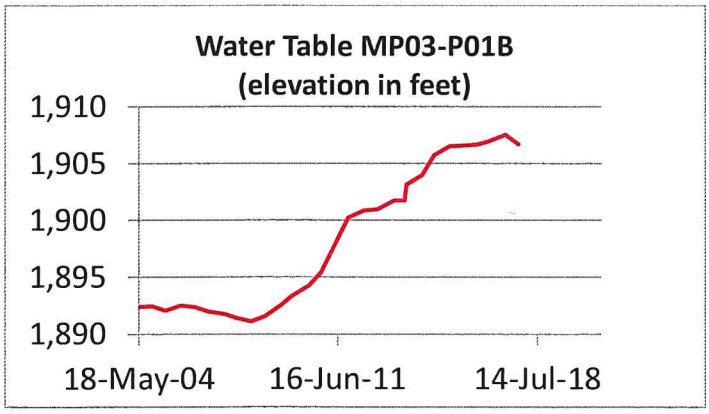
10) NAC falsely stated they did not have written authorization to install an approach. Later, they admitted they did have written authorization. Why did the PSC not question this?

11) Why does the PSC allow NAC to block access to farmland? The NDCC laws are to protect people and their property.

12) The PSC final decision letter states that the Eisenbeis family formal complaint was "unclear". If the Eisenbeis family formal complaint was "unclear", why was Clyde Eisenbeis not asked to clarify?

13) Why does the PSC think the pond water discharge into the farmland creek did not also flow south? The ground in that area is quite level. Water discharged into the farmland creek will flow north and south. It caused Wayne Eisenbeis to get often get stuck in his field (south of the Esther Eisenbeis farmland) after pond water was discharged into the farmland creek.

14) Why does the PSC ignore the water table elevations increasing to the farmland elevation (a half mile south of the Esther Eisenbeis farmland) during the years that pond water was discharged into the farmland creek? This eventually flooded part of the Esther Eisenbeis farmland. This is mining related.



15) Why does the PSC ignore?

a) North Dakota Century Code 38-14.1-02 (35 b) - pdf document - "Surface coal mining operations means: … The areas upon which such activities occur or where such **activities disturb the natural land surface**. Such areas shall also include any **adjacent land** the use of which is incidental to any such activities"

b) North Dakota Administrative Code 69-05.2-01-02 (1) - pdf document - "**Adjacent area** means land located **outside** the affected area or **permit area**"

c) PSC Memorandum 6 to Mine Operators, March 8, 1995 - pdf document, March 8, 1995 - "Listed below are specific activities and types of disturbances which are included under the scope of 'Surface Coal Mining Operations,' as defined in NDCC Section 38-14.1-02(33). These **activities and disturbances** must be conducted **within the boundaries** of a **surface coal mining permit**."

16) Why was NAC not required to apply for a permit before they dug on the Esther Eisenbeis farmland? NAC needs a permit to dig on land NAC owns. Does NAC need a permit to dig on land someone else owns?

17) Clyde Eisenbeis met at the farmland with Jerry Becker, NAC, and Bill Kirk, NAC, on 13 Apr 2016. The farmland renters, Jerome Boeshans and Jayne Boeshans were there too. Jerry Becker stated NAC would install an approach, within a few weeks, at that meeting. Later, NAC wanted permission to discharge pond water into the farmland creek from mining to the south of the farmland. Clyde Eisenbeis

did not approve of this, as the farmland was already flooded. That is when NAC reneged on building an approach. Clyde Eisenbeis does not trust anything else Jerry Becker or other NAC employees say. Since then, everything is in writing via documents and emails.

Road ditch on 8 Oct 2008

Road ditch on 3 Jun 2021

Diversion ditch on 8 Oct 2008

Diversion ditch on 16 Sep 2014

After the meeting Clyde Eisenbeis requested PSC photos of the NAC land. The PSC states they do not have photos of the NAC land.

a) Did the PSC take photos of the NAC land on those days? The PSC response has been they don't have photos.

   The PSC never states they did not take photos.

b) Why would the PSC take photos Esther Eisenbeis farmland but not take photos of NAC land?

PSC Formal Complaint Decision Letter - Appendix A

These are additional comments **(brown font)**, after the PSC final letter (dated 13 June 2019) was sent to me.

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My original comments on this letter **(blue font)** were emailed to Dean Moos on 11 Jun 2019, before the PSC Commissioner meeting. Dean Moos forwarded this letter, with my comments, to the PSC Commissioners on 11 Jun 2019.

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One of the PSC Commissioners had this letter, with my comments, at the meeting. I could see the blue font from a distance. My comments were not mentioned during the 12 Jun 2019 PSC Commissioners Meeting.

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The comments on a **brown font** are corrections to my mistakes.

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I was not allowed to speak at the 12 Jun 2019 PSC Commission Meeting.

Contents of the Formal Citizen Complaint (FCC) are referenced below.

June XX, 2019

1) 12 Jun is tomorrow.

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2) Is tomorrow an informal review or formal review?

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3) Why am I not allowed to verbally participate in this review?

The Formal Citizen Complaint is addressed to the Commissioners. What part is unclear?

Definitions:

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NAC: North American Coal / Coteau

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PSC: ND Public Service Commission

Mr. Clyde Eisenbeis
2819 Horgan Drive
Bismarck, ND 58503

Dear Mr. Eisenbeis:

The North Dakota Public Service Commission (Commission) has reviewed your filing, dated May 15, 2019, regarding your land located in the NW¼ of Section 34, T146N, R88W.

Upon review of your filing, the requested manner to process this filing is unclear. However, based upon the Reclamation Division's July 23, 2018 response and the filing's citation (69-05.2-28-01 and 69-05.2-28-02), the Commission is administratively processing this as a request for informal review. On June 12, 2019, the Commission informally reviewed and discussed your filing during the administrative matters portion of its regular meeting and asked me to respond to you.

Why was I not asked to clarify?

Your property is located off-permit and adjacent to Surface Coal Mining Permit NACT-9501 at the Coteau Properties Freedom Mine. The E½ of Section 34 is part of Surface Coal Mining Permit NACT-9501. Portions of the permitted area in the E½ of Section 34 were mined and reclaimed. Sedimentation ponds P-H34-04 and P-H34-05 were also constructed in the NE¼ of Section 34 upstream of your property in 1999 and 2004, respectively. The purpose of sedimentation ponds is to detain surface runoff from mine disturbance areas until it meets the required effluent or discharge standards. During active mining operations, Coteau routed discharges from these ponds around your property through pipes to the main drainage channel in the NW¼ of Section 34. Sedimentation pond P-H34-04 was removed and reclaimed in 2013 and sedimentation pond P-H34-05 was removed and reclaimed in 2015.

Many of the points in your filing were previously addressed in the Reclamation Division's July 23, 2018 letter to you. A copy of that letter is attached (Attachment 1) and serves as part of our response; however, each of your specific complaints is addressed below. Also in response to your earlier concerns, we requested additional information from Coteau (see Attachment No. 2)

1) I am unaware of any pipe. Are there photos?

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2) The FCC photos show pond discharge erosions in the field and around the field (not possible with pipe).

I had never been told there was a pipe for pond water discharge.

regarding the diversion/road ditch and erosion on your property. Coteau's response is provided in Attachment No. 3.

Complaint No. 1: *Constructed a diversion ditch on farmland creating a new affected area outside the permit area without a PSC permit revision and without Landowner consent, no associated reclamation plan or performance bond, and resulted in loss of crop income.*

north

Reclamation Division staff noted on several occasions an existing diversion located on the east side of your property in the NW¼ of Section 34 (off-permit). We are uncertain who constructed this diversion or when it was constructed; however, it was in place well before the adjacent area was permitted, mined, and reclaimed. This diversion flowed to the north until it intercepted the south road ditch of the road between the NW¼ of Section 34 and the SW¼ of Section 27.

On August 28, 2007, Coteau submitted the application for Revision No. 30 to Surface Coal Mining Permit NACT-9501. This revision proposed changes to the postmine topography and watershed boundaries in the NE¼ of Section 34. The size of watershed 14-14 (most of the area controlled by sediment pond P-H34-04) decreased slightly (5 acres smaller than premine) but the size of watershed 14-15 (most of the area controlled by sediment pond P-H34-05) was increased by 132 acres. The combined area of watersheds (14-4 and 14-15) increased by a total of 127 acres. Revision No. 30 also proposed some land use changes for the NE¼ of Section 34 including changing the postmine land use of a portion of the watersheds from cropland to native grassland. Attachment 1 includes maps depicting pre- and post-mine watersheds 14-14 and 14-15.

Due to the changes proposed by Revision No. 30 (increased watershed size and changes to the post mine topography), Coteau was asked to provide additional documentation that downstream areas would not be adversely affected by the increased watershed size of watershed 14-15. Coteau updated the Probable Hydrologic Consequences (PHC) section of the permit to address these concerns. Their analysis compared the premine watershed characteristics to those proposed in Revision 30. A standard and commonly accepted watershed flow model was used to predict runoff velocity and volumes from the revised watershed areas and these values were compared to the premine conditions using the same models. Attachment 1 includes the results of that modeling (Table 3 of Section 2.2.5 of Permit NACT-9501).

The model predicted the peak discharge rate (velocity measured in cubic feet per second or cfs) and total runoff volume measured in acre-feet (ac-ft). Three different rainfall events were modeled: a 2-year, 24 hour rainfall event (1.93"), a 10-year, 24 hour rainfall event (3.12"), and a 25-year, 24 hour rainfall event (3.63"). Peak discharge and total runoff volumes were calculated at the control point (the point where the sedimentation ponds would have discharged) for each watershed and then for the combined flow of both watersheds. The combined total discharge rate and flow volume is simply the sum of the two watersheds. While the calculated peak

If it rained 100,000 gallons of water, the rain water would soak into the ground. If a 100,000 gallon tank were discharged through one valve in the tank (over the same time span), it would result in erosion.

discharge and total runoff volume of watershed 14-15 increased over premine conditions, the peak discharge and total runoff volume of watershed 14-14 decreased, and the sum total peak discharge and total runoff volume for both watersheds (or that which would flow in the diversion) actually decreased.

As part of our review of Revision No. 30, Reclamation Division staff have reviewed the flow modeling provided by Coteau and have determined the parameters and assumptions used were appropriate and reflected the actual conditions. In response to your concerns, staff again modeled both watersheds and the results of our independent modeling are similar to those provided by Coteau in Revision 30. The results of our modeling are also included in Attachment 1.

Photos are more accurate than models.

Water table elevation measurements are more accurate than models.

Our analysis shows that even though the total combined watershed size increased after reclamation, the expected total flow rates and volumes are less than the premine condition. This is due to a number of reasons but is primarily due to the reclaimed or postmine watersheds being less steep than the premine watersheds. The premine average slope of watershed 14-15 was 12.7% and the postmine average slope is 4.4%. In addition, the soils with a higher runoff potential (shallow and claypan soils) that were common in the premine watershed were replaced with deeper, loamy soils with higher infiltration rates and lower runoff potential. In addition, there is less cropland and more native grassland in the reclaimed watershed than in the premine watershed. The perennial native grassland vegetation generally has a lower runoff potential than cropland.

North Dakota Century Code 38-14.1-24(8) requires that mining companies "minimize disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation." As part of Revision No. 30, the Reclamation Division determined that although the combined watershed size increased following mining and reclamation, the combined peak discharges and total runoff volume decreased or was near premine conditions. Therefore, there would be no adverse effects to the downstream areas as a result of the changes proposed in Revision No. 30. Revision No. 30 was approved on January 9, 2009.

As previously stated, the original diversion was constructed many years prior to mining and reclamation. At the time that Revision No. 30 to Permit NACT-9501 was approved, Coteau demonstrated that the changes proposed by Revision No. 30 would not have adverse effects on downstream areas and the Reclamation Division concurred. The condition or the functionality of the existing diversion on your property was not evaluated at that time since the Reclamation Division found that the actions proposed by Revision 30 would not result in adverse effects to downstream areas, i.e., the calculated combined flows of reclaimed watersheds 14-14 and 14-15

NAC deepened the original diversion ditch. PSC Memorandum 6 to Mine Operators, March 8, 1995: "Listed below are specific activities and types of disturbances which are included under the scope of 'Surface Coal Mining Operations,' as defined in NDCC Section 38-14.1-02(33). These activities and disturbances must be conducted within the boundaries of a surface coal mining permit."

NDCC Chapter 38-14.1-01 (1) ... disturbances of surface areas ... by damaging the property of citizens --- NDCC 38-14.1-02 (35 b) includes adjacent land.

NAC deepened the diversion ditch because the mining pond water overflowed onto the Esther Eisenbeis farmland. The mining pond is mining related. Pond netting was found in numerous places on the farmland.

NAC modified the diversion ditch. NAC is not allowed to disturb land outside the permit area.
1) NDCC 38-14.1-02 (35 b) includes adjacent land.
2) NDCC 38-14.1-24 (8 g) requires avoiding natural channel deepening.

are less than the premine condition. Our re-analysis of this finding in response to your concerns reaffirms our original finding made in 2009 when Revision No. 30 was approved.

The Reclamation Division was not involved in the reconstruction of this diversion and continues to view this issue as a matter between Coteau and the landowner. We do not view reconstruction of the diversion as a mining related matter and therefore, it is not subject to our jurisdiction nor was it an activity that required to be permitted.

Complaint No. 2: *Discharged more than 7 billion gallons of surface coal mine disturbed area pond water from within the permit area onto the adjacent farmland which resulted in gullies, loss of topsoil, and loss of crop income from the farmland without a PSC permit revision and Landowner consent.*

This is my mistake, based on my misunderstanding of information from the ND Water Board.

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The PSC never informed me of any mistakes I had made in the Complaint

I was told by the ND Dept of Health this was from the ponds P-H34-04 and PS-H34-05. What are the correct numbers and dates?

It appears that the pond discharges listed on Appendix F of your complaint are **all** of the pond discharges from the Freedom Mine for the time period of January 1, 2011 through June 25, 2018. Currently there are 68 active discharge points (sediment ponds) at the Freedom Mine and only a small portion of the discharge points drain to your property. A total of eight discharge points, discharge points no. 38 (Sump S-I02-01), 47 (Pond P-I02-02), 50 (Pond P-I03-01), 59 (Pond P-H34-01), 61 (Pond P-34-04), 85 (Pond P-H34-05), 148 (Pond P-W11-01), and 155 (Pond P-W03-04), are the only discharge points/ponds that could have discharged to your property, all of the other discharge points/ponds discharged to other watersheds. Of the 8 discharge points/ponds, all have been reclaimed with the exception of Ponds P-W11-01 and P-W03-04. As previously stated, pond discharges from sedimentation ponds P-H34-04 and P-H34-05 were routed around your property via a pipe discharge during mining and reclamation. Only when these ponds overflowed, did they flow through the old field-engineered diversion and/or across your property.

This is incorrect. When the farmland creek is filled, water flows north and south. The land elevation is almost level.

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For proof, look at the increase in water table elevation increases a half mile south of the farmland (the opposite direction of Lake Sakakawea) beginning in 2011.

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Coal mining pond water is coal mining related.

It should be noted any pit water (i.e., groundwater) encountered in the west mine area of the Freedom Mine is pumped to the legal drain/Antelope Creek which flows to the south, away from your property. It should also be noted that sedimentation ponds only detain surface runoff that would otherwise have flowed down the natural drainages had the ponds not been in place. Generally, the water in the sedimentation ponds is eventually discharged when it meets the required North Dakota Department of Environmental Quality discharge standards. So the effect of the sedimentation ponds on hydrologic balance is to delay the timing of the flow event to the downstream drainage. Sedimentation ponds do not necessarily increase the volume of water that flows through a drainage system, it only affects the timing of the flow event.

There is evidence that there has been a long-term erosion problem in the NW¼ of Section 34. Historical aerial photographs provide evidence of erosion prior to mining and reclamation. Google Earth contains aerial photos dating back to 1995, prior to any mining having taken place in the watersheds above your property. The 1995 aerial photo shows the same erosion and

Coal mining pond water discharge into the farmland creek spans two miles of flooding from from Wayne Eisenbeis farmland (south of the Esther Eisenbeis farmland) to Lucille Sailer farmland (north of the Esther Eisenbeis farmland). Over a span of more than 100 years, this had never happened before.

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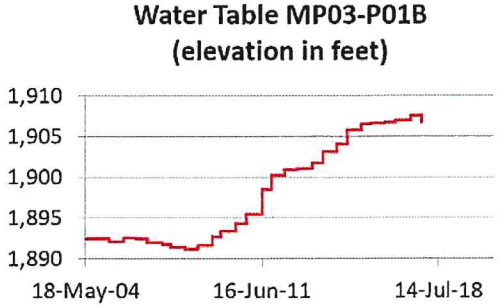
This happened because NAC discharged water from coal mining ponds into the farmland creek.



While LIDAR may not have "absolute accuracy" (not exact elevation) it does have "relative accuracy" (does have accurate elevation changes). On FCC page 10, the red lines may not be exactly at an elevation of 1890, 1900, and 1910, but the changes in elevation are accurate.

The NAC image, dated 1977, is almost identical to FCC Page 9, If the NAC photo were taken in 1977, the image would show solid prairie grass on the NAC land, not NAC changes to the land.

drainage patterns as pointed out on Page 9 of 17 of the PSC and OSMRE Complaint: Eisenbeis Farmland. In addition, Attachment No. 4 includes aerial photos from 1977 and 1996 that show similar erosion and drainage patterns. We believe the field-engineered diversion was constructed as an attempt to minimize runoff and reduce erosion well before the adjacent area was permitted, mined, and reclaimed. As previously pointed out, runoff from the upstream areas was routed around your property during mining and reclamation activities via pipe discharges to natural drainage at the north end of property. Runoff from upstream areas continues to be routed around property via the reconstructed diversion.

On page 10 of 17 of the complaint, you provide a map showing elevations of your property in 1970 and 2015. You allege that the differences between the two surveys is due to erosion on your property. Although there are some slight differences in elevation, we believe this is most likely due to differences in technology. Please note that the 1970 contours (red color) are on a ten-foot elevation contour, i.e., there is ten feet of elevation difference between elevation contours. The 2015 contours are on a 2-foot elevation contour and were most likely derived from LIDAR, a much more sophisticated and accurate method of producing surface contour maps. The index contours (elevations 1890, 1900, 1910, and 1920) for the two surveys actually align very well. We believe that the slight differences between the two surveys is the result of different survey methodologies and accuracies and not the result of erosion.

The only time when there would have been flows across your property from the upstream areas east of your property during mining and reclamation is when the ponds overflowed due to a significant runoff event in excess of the design standards. The ponds were designed to contain a 10-year/24-hour storm event. Pond overflows are acceptable provided that water levels of the ponds are maintained at a level below which an adequate amount of water storage is provided to contain a 10-year/24-hour storm event.

We are aware that the rebuilt diversion overflowed twice, both times in 2014. One overflow event took place on the south end of the reconstructed diversion and was likely due to snow blocking the diversion channel making it non-functional during a snowmelt event. The other overflow event took place in August 2014 following a significant rainfall event in excess of the design standard that caused sediment pond P-H34-05 to overflow. The watershed 14-15 outlet into the reconstructed diversion washed out causing the diversion to overtop. The pond overflow was not considered a violation since adequate storage was provided in sediment pond P-34-05 to contain a 10-year/24-hour event. We are aware that the erosion associated with these events was repaired by Coteau.

Any erosion that has taken place while the diversion has been functioning as intended (i.e., taking runoff water from upstream areas around the east side of your property), is not likely to have been caused by runoff from the upstream watersheds. Simply put, the diversion prevents runoff from the areas above the diversion from flowing across your property. Therefore, the

1) This contradicts the PSC photos and reports. The diversion overflowed in 2011, 2014, and 2017. See FCC photos on pages 8 and 9 and in the PSC Inspection Report dated 26 Apr 2018 (Appendix C at Beulah.FoxPing.com).

The PSC took photos in 2011 and 2014. If there was no pond water overflow why did the PSC take photos of the Esther Eisenbeis farmland? Where are the photos of NAC land? The PSC took photos of the adjacent, but not of NAC land?

There were many clumps of pond water netting at many locations on the farmland. Mining pond water did flow onto the farmland.

I had never been told there was a pipe for pond water discharge.

1) I am unaware of any pipe. Are there photos?

2) The FCC photos show pond discharge erosions in the field and around the field (not possible with pipe).

There is an erosion path directly to the ponds FCC pages 8 and 9.

The PSC took photos of the farmland erosion on 31.Aug.2011 and on 16.Sep.2014. This is mining related.

erosion observed on the cropland portion of your property is not caused by runoff from the upstream portions of the watershed as the runoff from the upstream areas (Coteau property) is intercepted by the diversion and does not flow across the cropland portion of your property.

The Reclamation Division has determined that Coteau conducted mining and reclamation activities in the watersheds above your property in the NW¼ of Section 34 in accordance with our surface coal mining laws and regulations. The Commission cannot require Coteau to repair erosion that is not the result of mining and reclamation activities.

This is my mistake, based on misunderstanding of info from the ND Water Board.

Complaint No. 3: *This same 7 billion gallons of surface coal mine disturbed area pond from within the permit area water entered the farmland creek which resulted in flooding the southwest corner of the farmland which caused the loss of crop income (impact outside the permit area, without a PSC permit revision and without Landowner consent).*

The creek was dry most of the time for more than 100 years. There was no flooding of farmland, and there were no cattails. After the pond water discharge started, the creek was filled with water all the time, farmland was flooded, and cattails appeared.

As stated in our response to Complaint No. 2, only a small fraction of the discharges from the Freedom Mine listed in Appendix F actually flowed through your property. Water discharged from ponds P-H34-04 and P-H34-05 while they were in place would not have affected the drainage channel through your property as these ponds were discharged via pipe around your property and entered the natural drainage at the very north edge of your property and continued to flow to the north through the natural drainage to Lake Sakakawea. Currently, only discharges from ponds P-W11-01 and P-W03-04 would flow through your property and those discharges flow through the natural drainage that runs through the center portion of your property.

NAC pond water discharge filled the farmland creek. This water seeped into the ground and raised the water table located 0.5 miles south of the farmland (the creek flowed north). That water table elevation increased to the same elevation as the farmland, which flooded the southwest corner of the farmland. The pond water discharge also flooded Lucille Sailer's farmhouse basement (less than 0.25 miles from the creek).

To date, there have been no mine pond discharges to the western-most drainage channel (the cattail area is located in or near this drainage channel) through your property. Flows in the western-most drainage channel are from an entirely undisturbed watershed located south and west of your property. A significant portion of this watershed is not even within the permit area.

Complaint No. 4: *Modified a Mercer County road ditch making it deeper in order to convey the large volume of water discharge away from the coal mine that resulted in blockage of historical direct ramp access to the farmland (such construction was done outside the permit area without a PSC permit revision, without Landowner consent, and without a Mercer County permit)*

Similar to the construction of the diversion, we view the deepening of the road ditch and property access as a matter between Coteau and the landowner. We do not view it as a mining related matter and as such is not jurisdictional to the Commission.

NDCC Chapter 38-14.1-01 (1) ... disturbances of surface areas ... by damaging the property of citizens --- NDCC 38-14.1-02 (35 b) includes adjacent land --- NDCC 38-14.1-24 (8 g) requires avoiding natural channel deepening.

Although mining and reclamation activities modified the watersheds upstream of your property, we believe the demonstration has been made that Coteau has minimized disturbances to the prevailing hydrologic balance at the mine site and associated offsite areas as required by North Dakota Century Code 38-14.1-24(8). Any erosion on your property that was the result of mining

NAC modified the diversion ditch. NAC is not allowed to disturb land outside the permit area.
1) NDCC 38-14.1-02 (35 b) includes adjacent land.
2) NDCC 38-14.1-24 (8 g) requires avoiding natural channel deepening.

NAC deepened the original diversion ditch. Per PSC Policy Memorandum 6: Activities covered by coal mining => ... specific activities and types of disturbances ... as defined in NDCC 38-14.1-02(33) ... disturbances must be conducted within the boundaries of a surface coal mining permit.

or reclamation activities (overtopping of the diversion) has been repaired. Staff continues to monitor this area during routine mine inspections. At this time, we do not believe that a joint inspection is necessary.

This informal review does not affect an opportunity to request a formal review under North Dakota Century Code section 38-14.1-30, or to a citizen's suit under North Dakota Century Code section 38-14.1-40. If the intent was to file a formal complaint subject to an adjudicative process, please see the attached document, "Filing A Formal Complaint" (Attachment No. 4).

1) I am not a permitee.
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2) If allowed, I request a formal review.

Please feel free to contact our office if you have any questions.

Can NAC provide any written authorization docs?

Sincerely,

Dean K. Moos
Director, Reclamation Division

Attachments: 1) July 23, 2018 Letter to Mr. Eisenbeis w/ Attachments
2) May 14, 2018 Letter from the Reclamation Division to Coteau
3) June 19, 2018 Response Letter from Coteau to the Reclamation Division
4) Document "Filing a Formal Complaint"

cc: Jeff Fleischman
David Berry
Sarah Flath

One day has not been enough time for me to thoroughly review the docs you attached (received your docs yesterday evening). However, the two relevant docs have my initial review comments. Please forward this to the Commissioners before tomorrow's meeting.
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The 7 billion gallons of water comes from the ND Dept of Health. If this is incorrect, everything else in the Formal Citizen Complaint is correct.
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The bottom line is that NAC did disturb the land adjacent to the permit area land being mined. See https://Beulah.FoxPing.com/ for details, including links to relevant ND laws.

North American Coal Response Letter - Appendix B

25 Apr 2021

Definitions:
NAC: North American Coal / Coteau
PSC: ND Public Service Commission
Eisenbeis: Clyde Eisenbeis

This 19 Jun **2018** **NAC** letter was an attachment to the 10 Jun **2019** **PSC** letter responding to my Formal Citizen Complaint. **Eisenbeis** had not seen the **NAC** letter before. This letter has errors and is dishonest.

THE COTEAU PROPERTIES COMPANY
A SUBSIDIARY OF THE NORTH AMERICAN COAL CORPORATION

FREEDOM MINE
204 County Road 15
Beulah, North Dakota 58523-9475
(701) 873-2281 • Fax (701) 873-7226

June 19, 2018

It's important to note that NAC is not allowed to move dirt on their own land without a permit. Likewise, NAC is not allowed to move dirt on someone else's land without a permit.

Mr. Dean K. Moos
Director Reclamation Division
Public Service Commission
600 East Boulevard Avenue
Department 408
Bismarck, ND 58505-0480

Dear Mr. Moos:

This letter is in response to your letter dated May 14, 2018. Provided are responses to each of the following questions or requests.

1. ***What was the condition of the pre-existing north/south diversion between the NE¼ and NW¼ of Section 34 and the pre-existing road ditch on the south side of the road between the NE¼NW¼ of Section 34 and the SE¼SW¼ of Section 27 prior to reconstruction? Were these features in functional condition and capable of handling the flows from the premine watershed?***

The diversion ditch was not in poor condition. It was not filled with sediment. This can be verified by the **PSC** photo dated 8 Oct 2008.

The diversion was in poor condition. It was silted in areas and blown out in others. There were also small trees or shrubs growing in the diversion channel. There was little to no elevation difference between the field and diversion bottom and between the field, ditch bottom, and the road top. The ditch had filled in with sediment over the years and when water did flow in this area, it mostly flattened out over a broad area and flooded into the adjoining field.

The ditches were not filled with sediment, verified by the **PSC** photos dated 8 Oct 2008.

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The road ditch has always been relatively flat, close to the elevation of the Farmland. A farm truck could always drive over it. That is why no approach was needed.

The diversion was not capable of handling pre-mining flows. This is evident by the erosion shown in Figures 1 and 2, attached. Figures 1 and 2 are aerial photographs of the field from 1977 and 1996 respectively.

2. ***Was the original diversion capable of handling the flows from the upstream areas during and following mining and reclamation activities?***

No. As indicated above, the diversion was not capable of handling pre-mining flows and it was not capable of handling flows during mining and reclamation activities even though runoff was controlled during mining and reclamation activities. From 1999 to 2015, a large portion of runoff from the watershed above the diversion was captured by sedimentation ponds P-H34-04 and P-H34-05. While in place, these ponds were discharged around the downstream cropland through HDPE poly pipe into the main channel flowing through the center of the NW¼ of Section 34. This was done to avoid exacerbating the erosion that was already occurring regularly on the east side of the crop field prior to and during mining

There is no adjoining field. The Farmland is next to a road.

activities. Therefore, it can clearly be concluded that if erosion was occurring when runoff was captured, the existing diversion would not have had the capacity to handle the flows when the ponds were removed.

It should be noted that flows during mining and following mining are less than the flows which occurred pre-mining. It should also be noted that erosion and flooding occurred in the subject field long before mining, as can be shown by viewing aerial photos, including Figures 1 and 2, dating back several decades prior to Coteau entering the area.

3. ***Is there evidence that the original diversion overtopped during mining and reclamation (i.e., prior to being reconstructed)?***

The producer approached Coteau in both 2010 and 2011 about aiding in repairing erosion in the field while the sediment ponds were in place and functioning. Additionally, Figure 3 is the original ground topography survey prior to reconstruction of the diversion. As can be seen in the drawing, there are several areas that show erosion west or below the diversion. Figure 3 includes two cross-sections of the existing diversion, one at the entrance of watershed 14-14 and one at the entrance of watershed 14-15. Both cross-sections indicate that runoff would flow across the diversion to the west uninterrupted. This survey was collected on November 29, 2011, after installation of the sedimentation ponds, but prior to the reconstruction of the diversion or removal of any sedimentation ponds.

Mining operations did not cause increased flows and erosion was already occurring prior to any mining operations in the area. As noted above, flows were less during and following mining than the flows pre-mining.

7. ***Please explain why the diversion and road ditch were reconstructed.***

As noted in a December 6, 2012, PSC inspection report the diversion was redesigned and reconstructed at the landowner's request. The diversion was reconstructed for several reasons. Coteau was approached by the producer, Wayne Eisenbeis, in 2010 about erosion which was occurring in the field. This erosion was occurring even with the sedimentation ponds in place and their discharges being routed around the field through HDPE pipe. Wayne Eisenbeis asked if Coteau could help him fill in the erosion using the washed material near the main drain. Soil in this area had accumulated to the extent that he was getting stuck when farming. Coteau hired an outside contractor to repair the erosion in the field. In the following year, 2011, additional erosion occurred in the field and Wayne Eisenbeis again approached Coteau about repair, and also asked that the diversion be improved to prevent future erosion. The owner at the time, Esther Eisenbeis, agreed with Wayne Eisenbeis's request. Wayne Eisenbeis is the nephew of Esther Eisenbeis. Even though he was not the current surface owner at the time, Clyde Eisenbeis, Esther Eisenbeis's son, became involved in the design and location of the proposed improved diversion. After several discussions with Bill Kirk from Coteau, and additional discussions with the PSC, Clyde Eisenbeis agreed the diversion should be reconstructed in its current location, as did Esther Eisenbeis. Over the years, washing from the existing diversion had filled the road ditch with sediment. The sediment needed to be removed in order for the diversion to function properly and not flood the north edge of the field.

Pond water overflow is not mentioned.

NAC repairing the Farmland erosion, proves **NAC** knew this was related to coal mining activity.

Eisenbeis was not involved with the design and current location. **Eisenbeis** lived in Iowa.

Esther Eisenbeis had Alzheimer's. She was incapable of making decisions.

Eisenbeis did not agree to the current diversion ditch location. **Eisenbeis** did request that the diversion ditch be placed east of the Farmland on **NAC** property.

The road ditch was not filled with sediment, verified by the **PSC** photos dated 8 Oct 2008.

Flooding the SW corner of the Farmland is not mentioned.

In the interest of being a good neighbor, Coteau engaged contractors to improve the pre-existing diversion with the hope it would alleviate the erosion issues that had plagued this tract for several decades.

5. ***Permit NACT-9501 includes design information for the two permanent grassed waterways that were constructed below sedimentation ponds P-H34-04 and P-H34-05 in the W½NE¼ of Section 34. Was the rebuilt diversion and road ditch designed and reconstructed to handle the combined flows from these two grassed waterways?***

   Yes, the diversion was sized to divert runoff from the reclaimed watersheds as well as the undisturbed area for a 10 year 24 hour storm event or 3.12 inches of rain in 24 hours. As noted above, flows from these new grassed waterways are less than flows prior to any mining activities.

6. ***Are the assumptions and conditions used in the Probable Hydrologic Consequences still valid and applicable? If not, what changes have occurred?***

   Yes, the PHC is still valid; however, it is conservative. For instance, Watershed 14-15 contains a stockpond, which was not considered when modeling. The stockpond would further reduce the amount of water as it will capture a portion of the runoff before overflowing. Additionally this causes the water to slow before entering the last reach of the channel. A second stockpond with a storage capacity of 5.5 acre-feet is planned for construction in the near future in the NE¼ of Section 34. This will further reduce flows as more water is captured.

   Secondly, native grassland in the post mining condition is considered as "fair" for modeling purposes. A visual inspection of the area will show that the vegetation is in much better condition than "fair." This will further reduce the Curve Number and the amount of runoff leaving the site, as more water will infiltrate the ground due to residue and plant uptake.

   Third, the cropland in the NE¼ of Section 34, which was located directly below the sedimentation ponds along the west side of this quarter, has now been converted to native grasslands, reducing the amount of runoff entering the diversion.

   Fourth, the cropland has been assumed to be 20% fallow and 80% crop. However, farming practices have changed and the use of fallow has been virtually eliminated in the area, thus reducing the amount of runoff from the ground.

   Finally, the Antecedent Moisture Condition II (AMC-II) was used in the modeling process. The use of AMC-II is conservative for this area according to a study conducted by Schroeder, Enz, and Larsen, which reports that AMC-I conditions, exist 95.1% of the time between April 1 and October 31 in the Beulah area.

   In conclusion, the PHC could be remodeled to reflect the items above, and doing so would show a reduction in the flows and volumes from what is currently shown.

7. ***How many times has the rebuilt diversion overtopped since being rebuilt and under what circumstances did it overtop?***

The Eisenbeis family did not authorize:
- Discharging pond water into the farmland creek which flooded the SW corner.
- Pond water overflow onto the land.
- Deepening the existing diversion ditch.
- Blocking access to the farmland by digging a deep road ditch.

To our knowledge, the diversion has overflowed twice, both times in 2014. The first overflow occurred in the spring of the year, near the south end of the diversion. This overflow was most likely caused by snow blocking the diversion and not allowing water to flow through.

This contradicts NDCC, NDAC, and **PSC** Memorandum.

The second overflow occurred later that year most likely due to a three-day rainfall event that began August 22, 2014. The rain gauge located in Section 22, T146N, R88W, approximately 1 mile north of the diversion, recorded 3.67 inches of rainfall from this three-day event. The majority of the rainfall occurred on August 23 with 3.19 inches falling in 14 hours. The intensity of the storm would equate to a 200 year/ 24 hour storm event.

These overtoppings were not caused by any mining or reclamation operations.

Pond water overflow is not mentioned.

This ditch/diversion issue is a private matter between Coteau and the Eisenbeis family. As demonstrated, mining operations were never the source or cause of erosion in Eisenbeis fields. Past and current owners have chosen to crop the entire field in the W½ of Section 34 despite being in an obvious downstream location below higher elevation watersheds to the east. These upland watersheds existed pre-mining and remain post-mining. Pursuant to established water law in North Dakota, downstream owners must accept flows which come from higher adjacent uplands. If a landowner chooses to crop through obvious waterways, he does so at his own risk.

Coteau has tried to work with Clyde Eisenbeis, including by making an offer to alleviate his concerns at no expense to him, and he did not accept that offer. Coteau is always open and willing to work with landowners.

If you have any questions, please contact this office.

Sincerely,

Sarah J. Flath
Environmental Manager
The Coteau Properties Company

cc: Chris Friesz

Not true. **NAC** did not request a written authorization initially. After delaying, more than a year, the installation of an approach, **NAC** decided they need a written authorization.

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After the request, **Eisenbeis did provide a written authorization immediately** allowing **NAC** to install an approach.

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Initially, **NAC** ignored the **Eisenbeis** written authorization. Later **NAC** acknowledged they received the written authorization.

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Why did **NAC** not require a written authorization to dig on the farmland in 2011?

This letter contradicts the **PSC** statement that the Farmland damage is not mining related. If it is not mining related, why did NAC offer to fix the problems?

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The **PSC** never sent this letter to **Eisenbeis** to substantiate the contents, "until" the **PSC** meeting to discuss the Eisenbeis family complaint.