

PUBLIC SERVICE COMMISSION

Reclamation Division

Memorandum

TO: Commissioners Kroshus, Fedorchak, and Christmann
John Schuh - General Counsel
Steve Kahl - Executive Secretary

FROM: *Dkm* *ZAB* *GW*
Dean Moos, Zanna Brinkman and Guy Welch

DATE: January 2, 2020

SUBJECT: Order for Case No. RC-19-282, NOV 1901 issued to Dakota Westmoreland Corporation

Summary: Notice of Violation (NOV) 1901 was issued to Dakota Westmoreland Corporation, (DWC) on July 18, 2019 following a July 9, 2019 Beulah Mine inspection during which an uncontrolled surface water discharge was observed flowing from Pond 85. The discharge was sampled and lab analysis results showed total suspended solids (TSS) at 225 mg/L which exceeds the maximum allowed (70 mg/L) by the North Dakota Pollutant Discharge Elimination System (NDPDES) Permit. DWC did not request an informal conference or formal hearing regarding this NOV. The Reclamation Division therefore recommends that the Commission adopt the attached order to affirm the violation and assess a \$1,500 penalty.

Discussion: Pond 85 was originally designed as a clean water pond (used as a source of water for dust suppression) and was not designed to function as a sediment pond since mining was not planned within its watershed at the time it was constructed. Once mining was planned within its watershed, DWC designed and constructed Pond 85 Sump directly upstream of Pond 85. Pond 85 Sump was created in a dragline pit in the NW1/4 of Section 22 of Permit KRSB-8603 and had a capacity of 45 acre-feet of water. When Pond 85 Sump was full, it would overflow to Pond 85 and the two structures together provided adequate capacity to contain a 10-year/24-hour event from the upstream watershed.

DWC failed to maintain Pond 85 Sump during mining and reclamation activities. DWC inadvertently backfilled and rough graded the pit/sump and Pond 85 did not have adequate capacity for several years while the Pond 85 Sump had been removed. The Reclamation Division became aware of DWC's failure to maintain Pond 85 Sump in the fall of 2018 and subsequently requested that DWC reconstruct the sump as quickly as possible, or install new water management features to replace the sump. DWC failed to reconstruct the sump or install replacement water management features that met applicable water management performance standards.

During the time that Pond 85 Sump was not available, DWC attempted to manage water in Pond 85 by pumping to other sediment ponds and they indicated that Pond 85 had not had any uncontrolled discharges (overflows). Pond 85 was inspected July 9, 2019 after the area had received approximately 2.5 inches of rain during the preceding 20 hours. The water level of Pond 85 was at spill elevation and an uncontrolled discharge was occurring at a rate of approximately 25gpm. Debris around the pond's riser (discharge point) indicated that higher flows had recently occurred. The uncontrolled discharge and water in the pond appeared to be carrying a heavy load of suspended solids. A discharge sample was taken for laboratory analysis and was submitted to the ND Department of Environmental Quality. The laboratory analysis indicated a total suspended solids (TSS) level of 225 mg/L which exceeds the maximum TSS of 70 mg/L allowed by the North Dakota Pollutant Discharge Elimination System (NDPDES) Permit.

NOV 1901 was issued July 18, 2019 after lab results were obtained for the discharge sample. The remedial action required that DWC install approved water management features in the drainageway above Pond 85 to contain runoff from a 10-year/24-hour rainfall event as required by NDAC 69-05.2-16-09 by August 1, 2019. DWC needed additional time to construct a new sump and install diversions. Additional time was also needed to prevent runoff from passing through a culvert under a ramp. NOV-1901 was terminated on November 20, 2019 after staff deemed the remedial actions were adequate.

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 1901 are as follows:

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 two other violations 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 turbid water was discharged and flowed off-permit into Brush Creek. 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 construct and maintain sediment ponds to handle runoff from a 10-year/24-hour rainfall event. 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 1901 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 January 8th Commission meeting is also attached for your consideration.

Minedata/Beulah/Violations/2019/NOV-1901/NOV_1901_Termination_memo_1-2-20