

PUBLIC SERVICE COMMISSION

Reclamation Division

Memorandum

TO: Commissioners, Christmann, Haugen-Hoffart, and Fedorchak
John Schuh - General Counsel
Steve Kahl - Executive Director

FROM: ^{ZB} Zanna Brinkman, ^{JE} Jonathan Emmer, and ^{SN} Shawn Nixon

DATE: January 11, 2023

SUBJECT: Order for Case No. RC-22-228, NOV 2201 issued to Westmoreland Beulah Mining, LLC.

Summary: On May 25, 2022, the Reclamation Division of the Public Service Commission (Commission) issued Notice of Violation (NOV) 2201 to Westmoreland Beulah Mining LLC (Beulah Mine) for failure to provide adequate surface water runoff storage in the Gold Pit watershed/drainage area and for pumping surface water from the Gold Pit watershed into the watershed controlled by Pond 81 which caused a breach of the embankment of Pond 81 and resulted in an uncontrolled discharge into an undisturbed drainage located in Section 15, T143N, R88W. The uncontrolled discharge exceeded the maximum total suspended solids allowed by the North Dakota Pollutant Discharge Elimination System (NDPDES) permit and caused sediment to be deposited in an undisturbed drainage. The total suspended solids (TSS) of the discharge was 1020 mg/L and the maximum TSS allowed by the NDPDES permit is 70 mg/L. The Reclamation Division recommends that the Commission adopt the order to affirm the violation and assess a penalty.

Discussion: NOV 2201 was discovered during the mine inspection on April 28, 2022. Prior to the inspection, mine personnel stated they were not discharging any ponds offsite and they were pumping water from Pond 85 in the Gold Pit area into Pond 86. Pond 86 is located immediately upstream of Pond 81 and mine personnel reported that Pond 81 was nearly dry. During the field inspection, Reclamation staff confirmed that runoff from Pond 85 was being pumped to Pond 86, that the capacity of Pond 86 had been exceeded, and water was overflowing to Pond 81. Inspection of Pond 81 revealed that a portion of the embankment near the spillway riser had been breached and the pond was overflowing into an undisturbed drainage. Upon discovery of the Pond 81 embankment breach, the pump diverting water from Pond 85 to Pond 86 was shut off. A sample of the water discharging from Pond 81 was collected and sent to Missouri Valley Testing Laboratory (MVTL) to determine the total suspended solids (TSS) concentration. The total suspended solids concentration from the sample exceeded the maximum TSS concentration allowed by the North Dakota Pollutant Discharge Elimination System (NDPDES) permit.

On May 11, 2022, the Beulah Mine informed the Reclamation Division that they were pumping water from Pond 86 to Pond 82 (located in a different watershed/drainage area). On May 17, 2022, the mine informed the Reclamation Division that the embankment of Pond 82 had been breached.

The Beulah Mine did not follow their approved surface water management plan in Permit KRSB-8603 and did not construct sediment Ponds 112 and 113 as scheduled in 2021. North Dakota received a large amount of snow from a blizzard in mid-April and temperatures rose in late April causing rapid snow melt. Since Ponds 112 and 113 had not been constructed, runoff storage in the Gold Pit area was inadequate to contain the runoff. The mine managed excess water from the Gold Pit area by pumping it to other ponds that were not designed to contain runoff from the Gold Pit area, and they failed to inspect and monitor the

capacity and integrity of the ponds receiving water from the Gold Pit area. Ponds 86, 81, and 82 were already receiving rapid runoff from each of their respective drainages due to the rapid snow melt. The extra water from Pond 85 exceeded the capacity of Pond 86 and caused it to overflow to Pond 81. The embankment of Pond 81 was breached causing an uncontrolled discharge and sediment deposition in the undisturbed drainage. Since Pond 86 was over capacity, the mine started pumping water from Pond 86 to Pond 82 until the embankment of Pond 82 was breached. The mine's failure to provide adequate water management in the Gold Pit area negatively impacted four watersheds/drainage areas. NOV 2201 included violations in the Gold Pit drainage area (failure to construct and maintain adequate water management structures), a violation in the Pond 81 drainage area (embankment breach and uncontrolled discharge over the NDPDES limit and deposition in an undisturbed drainage), and a violation in the Pond 82 drainage area (embankment breach and likely uncontrolled discharge to an undisturbed drainage).

The remedial actions outlined in the NOV required WBM to (1) construct sediment Ponds 112 and 113 for surface water management in the Gold Pit area, (2) submit a plan and reconstruct the embankments and spillways for sediment Ponds 81 and 82, (3) maintain the water level of Ponds 81 and 82 below the eroded area of the embankments to minimize additional erosion until the embankments are repaired, and (4) investigate the cause of the embankment failures.

NOV 2201 required the construction and certification of Pond 112 within 90 days and the construction of Pond 113 within 180 days. The Beulah Mine requested two modifications to NOV 2201. On July 26, 2022, the Reclamation Division approved WBM's request to complete the construction and certification of Pond 112 within 180 days and the construction of Pond 113 within 90 days from the date NOV 2201 was issued. On August 23, 2022, the Reclamation Division approved WBM's request to extend the completion date for Pond 113 by two weeks and to reduce the construction time for Pond 112 by two weeks. The Beulah Mine completed the embankment repairs of sediment Ponds 81 and 82 on June 16, the construction of sediment Pond 113 on September 6, and the construction of sediment Pond 112 on November 1, 2022. The Beulah Mine completed all remedial actions specified in the notice of violation within the prescribed time periods.

The Commission needs to assess a civil penalty and adopt an order in this matter because the Beulah Mine 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 our recommended civil penalty with respect to NOV 2201 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. A penalty for history is usually not assessed unless more than three violations are issued within three years. NOV 2201 is the third violation issued to the Beulah Mine within three years for water management violations and it is the second violation issued within 3 years for failure to construct and maintain adequate water management in the Gold Pit area. NOV 2201 included violations in three watersheds/drainage areas at the mine. The Reclamation Division chose to write one composite violation instead of a violation for each watershed. A penalty assessment based on history is warranted.

Recommended penalty assessment for history - \$1,000

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 the duration of potential or actual damage in terms of impact on the public or the environment. Repeated failure to maintain adequate surface water management in one watershed and diverting water to other watersheds caused the breach of two sediment pond embankments and an uncontrolled discharge into an undisturbed drainageway. A penalty based on seriousness is warranted.

Recommended penalty assessment for seriousness - \$1,500

Negligence: The Commission may assess a civil penalty of up to \$3,000 per day based on the degree of 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. The Beulah Mine had been informed numerous times and over several years that surface water runoff was not being managed in accordance with the approved surface water management plan. The violation was due to a lack of diligence, lack of reasonable care, and reckless conduct. A penalty for negligence is warranted.

Recommended penalty assessment for negligence - \$2,500

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. The compliance in this case was considered normal. Therefore, no deduction for good faith is warranted.

Recommended deduction for good faith - \$0

The Reclamation Division recommends that the Commission adopt the attached order that affirms NOV 2201 and assesses a civil penalty in the amount of \$5,000 (\$1,000 for history, \$1,500 for seriousness, and \$2,500 for negligence). The order also closes the case upon payment of the penalty. A proposed motion for the January 11, 2023 Commission meeting is attached for your consideration.