

Hamre, John G.

From: Brinkman, Zanna A.
Sent: Monday, October 10, 2022 1:27 PM
To: Hamre, John G.
Subject: FW: Eisenbeis complaint and formal hearing order
Attachments: Order_9-27-22.pdf

Importance: High

John combine my email with attachment and save as \\coal\Mine Data\Freedom Mine\Formal Complaints\2022\OSM_email_with Order_10-4-22

Zanna Brinkman

*Director Reclamation & AML Divisions
ND Public Service Commission
600 E Blvd. Ave Dept. 408
Bismarck, ND 58505-0408*

(701) 328-3403

zbrinkman@nd.gov

From: Brinkman, Zanna A.
Sent: Tuesday, October 4, 2022 5:44 PM
To: Berry, David A <dberry@osmre.gov>; Fleischman, Jeffrey W <jfleischman@osmre.gov>; Sieving, John <jsieving@osmre.gov>
Cc: Schuh, John M. <jschuh@nd.gov>; Emmer, Jonathan W. <jemmer@nd.gov>; Welch, Guy A. <gwelch@nd.gov>; Hamre, John G. <jghamre@nd.gov>
Subject: Eisenbeis complaint and formal hearing order

Dave, Jeff, and John,

Attached is the Commission's order that was issued within 30 days after the formal hearing on the Eisenbeis complaint as required by North Dakota Century Code 38-14.1-30. We emailed the parties the order on September 28th and we sent hard copies of the order to all parties on October 3rd by certified mail.

Mr. Eisenbeis's 2022 complaint included the same issues as the 2019 complaint plus a few new allegations.

As a quick refresher, in response to Mr. Eisenbeis's concerns in 2018 we met with him, conducted an inspection with him, and we reviewed the hydrology modelling that was done with Revision 30 in 2007 to affirm that no adverse impacts would occur in the permit or on adjacent lands due to the topo and watershed changes approved with Revision 30. We sent Mr. Eisenbeis a written response on July 23, 2018.

Mr. Eisenbeis filed a formal complaint concurrently with PSC and OSMRE on May 15, 2019 alleging violations of the reclamation laws and rules and he cited North Dakota Administrative Code 69-05.2-28-01 (Inspection and enforcement-Requests for inspections) and 69-05.2-28-02 (Inspection and enforcement – Review of decision not to inspect or enforce – Review of adequacy and completeness of inspections). Again, we reviewed the hydrology modelling that was done with Revision 30 in 2007 to affirm that no adverse impacts would occur in the permit or on adjacent lands due to the topo and watershed changes approved with Revision 30. We processed the 2019 complaint as an informal review pursuant to NDAC 69-05.2-02 and responded to Mr. Eisenbeis with a letter on June 13, 2019. The letter included several

attachments, including our July 2018 letter. The 2019 letter is too large to email; however, we used it as PSC Exhibit 9 during the hearing and it is available at psc.nd.gov. All of the formal hearing documents and recordings are available by doing a case search for RC-22-339 on our website. I should note that we did inform Mr. Eisenbeis about his options for an informal hearing or formal hearing in our 2019 letter and several times since. He wanted the Commissioners to be present but he did not want to retain an attorney so there was no “closure” to the 2019 complaint. Mr. Eisenbeis contacted us in May 2022, and we again explained his options. He requested a formal hearing and represented himself.

Please let me know if you need additional information, help doing a case search on our website, or need me to set up a file transfer.

Zanna Brinkman

Director Reclamation & AML Divisions

ND Public Service Commission

600 E Blvd. Ave Dept. 408

Bismarck, ND 58505-0408

(701) 328-3403

zbrinkman@nd.gov

John, combine this email with attachment and file as Freedom Mine\Formal Complaints\2022\Order_email_OSM_10-4-22

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
Clyde Eisenbeis
Complaint

Case No. RC-22-339

September 27, 2022

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Appearances

Commissioners Julie Fedorchak, Randy Christmann, and Sheri Haugen-Hoffart

Clyde Eisenbeis, 2819 Hogan Dr, Bismarck, North Dakota 58503, on behalf of Clyde Eisenbeis, Allen Eisenbeis, and JoAnn Crabtree.

Wade Mann, Attorney-at-Law, 100 West Broadway, Suite 250, Bismarck, North Dakota 58501, on behalf of Coyote Creek Mining Company, L.L.C.

John Schuh, General Counsel, Public Service Commission, State Capitol, Bismarck, North Dakota 58505, advisory counsel to the Public Service Commission.

Hope Hogan, Administrative Law Judge, Office of Administrative Hearings, 2911 N 14th Street – Suite 303, Bismarck, North Dakota 58503, as Procedural Hearing Officer.

Preliminary Statement

On April 3, 1996, the Public Service Commission (Commission) issued Surface Coal Mining Permit No. NACT-9501 (Permit) to allow Coteau Properties Company (Coteau) to conduct surface mining and reclamation operations at the Freedom Mine.

On August 28, 2007, Coteau submitted the application for Revision No. 30 to the Permit. The revision proposed changes to the post-mine topography and watershed boundaries in NE1/4 of Section 34. The Reclamation Division (Division) reviewed the Revision No. 30 application and inspected adjacent properties. Revision No. 30 was approved by the Commission on January 14, 2009.

On October 27, 2016, the Division received initial contact from Mr. Eisenbeis. He emailed his concerns about NW1/4 of Section 34, T146N, R88W property adjacent to the Freedom Mine regarding surface water runoff from mined lands adversely affecting his property.

On October 27, 2016, the Division responded that they were aware of the issues he communicated. The response also provided an explanation of the Property's history and reclamation of land to similar pre-mine use and watershed size.

On July 23, 2018, the Division responded to communications from Mr. Eisenbeis with a letter addressing the issues that he brought forth.

On May 15, 2019, the Commission received a filing from Mr. Eisenbeis alleging mining activities outside of the approved permit area and offsite impacts to his farmland. He also stated that his informal email complaints and other verbal communications with the Division were not an adequate response.

The Commission reviewed the May 15, 2019 filing and responded that due to the lack of clarity in the filing and confusion in citation it would be processed as an informal review. The Commission reviewed the response of the Division and provided a response to Mr. Eisenbeis on June 13, 2019. The response provided that Mr. Eisenbeis may request a formal review under N.D.C.C. § 38-14.1-30 and that a citizen's suit was still available under N.D.C.C. § 38-14.1-40. It also provided a document to assist in making a formal complaint filing.

On August 3, 2022, the Public Service Commission received a 45-page complaint from Clyde Eisenbeis (Mr. Eisenbeis). His complaint was subsequently revised on August 4, 2022. His specific complaints are summarized as the following:

1. Coteau modified the farmland by disturbing the land surface area without a permit.
2. Pond water overflowed onto the Property which resulted in gullies, loss of topsoil, and loss of crop income.
3. Pond water was discharged into the Property creek which resulted in "flooding" the southwest corner of the Property and resulted in the loss of crop income without landowner consent.
4. Pond water discharged into the Property creek resulting in standing water on the Property causing trees to grow in the deepened road ditch from a high water table.
5. Coteau constructed a deep diversion ditch on the Property which displaced farmland without landowner consent.
6. Coteau installed a path for water to flow from Freedom Mine land to the Property.
7. Coteau modified the Mercer County road ditch, which blocks access to the Property, without landowner consent or Mercer County Permit.
8. Coteau pond water is seeping into the ground via ponds and is discharging water into the farmland creek, resulting in contamination of the aquifer with sulfur.
9. Coteau discharged pond water in 2020 from a mining operation between one and two miles south of the Property without landowner or Commission consent.
10. Coteau sent a dishonest letter to the Commission which may have affected the Commission's decision regarding Mr. Eisenbeis' original filing.
11. Coteau sent a threatening letter to Mr. Eisenbeis.
12. Mr. Eisenbeis has spent hundreds of hours investigating, emailing, documenting, researching, writing, and meeting with Coteau, the county, the sheriff, ND water board, the Commission, the Office of Surface Mining Reclamation and Enforcement, the ND Attorney General's office, and the ND Ethics Commission.

On August 5, 2022, Mr. Eisenbeis filed a request for a Formal Hearing. The Notice of Formal Hearing was published once a week for two consecutive weeks in the Bismarck Tribune and the Beulah Beacon.

A Formal Hearing was held, as noticed, on September 1, 2022, in the Commission Hearing Room, 12th Floor, State Capitol, 600 E. Boulevard Avenue, Bismarck, ND 58505.

Having allowed all interested persons an opportunity to be heard and having heard and considered all the testimony and evidence presented, the Commission makes the following:

FINDINGS OF FACT

1. On April 3, 1996, the Commission issued the Permit to allow Coteau to conduct surface mining and reclamation operations at the Freedom Mine.
2. Mr. Eisenbeis' property is located off-permit and adjacent to the Freedom Mine. Mr. Eisenbeis' property is located in NW1/4 of Section 34 T146N, R88W (Property). The adjacent E1/2 of Section 34 was permitted and portions of it were mined and reclaimed.
3. On August 28, 2007, Coteau submitted the application for Revision No. 30 (Revision) to the Permit. The Revision proposed changes to the post-mine topography and watershed boundaries in the NE1/4 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 pre-mine), 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 (14-14 and 14-15) increased by a total of 127 acres. The Revision also proposed some land use changes for the NE1/4 of Section 34 including changing the post-mine land use of a portion of the watersheds from cropland to native grassland.
4. The Division reviewed the Revision application and inspected Mr. Eisenbeis' property adjacent to the permit. The mine updated the surface water probable hydrologic consequences (PHC) and the Revision was approved by the Commission on January 14, 2009. During the Revision, the Division was aware of the existence of a diversion.
5. An original diversion was constructed on the Property many years prior to mining and reclamation. It is unknown who constructed the original diversion and when it was constructed. The condition or functionality of the existing diversion on the Property was not evaluated during the Revision since the Division found that the Revision would not result in adverse effects on downstream areas. The Reconstructed Diversion was installed in 2012.

Permitted Area and Surface Water Flow

6. Mr. Eisenbeis alleged that Coteau modified the farmland by disturbing the natural land surface without a permit by constructing the diversion on his property. Mr. Eisenbeis argues that the Property should be permitted and that Coteau should be required to restore the diversion ditch to its original state and have the ditch reseeded.
7. Mr. Eisenbeis also alleges that Coteau added a water path from the Freedom Mine to his Property which resulted in farmland erosion. Mr. Eisenbeis stated that Coteau should be

required to move the path and install a concrete berm on Coteau land for the full length of the diversion ditch to divert water to flow into the road ditch instead of onto the farmland. In addition to the restoration of the diversion to its original state, Mr. Eisenbeis testified that the concrete berm is necessary because the mining activity disturbed the native prairie grass that used to absorb large amounts of water and keep it off his property.

8. The property is located in the Beulah trench, which is broad, flat, and fertile cropland. All areas bordering the Beulah trench are watersheds that contribute surface water runoff to the farmland creek that runs down through the center of the Beulah trench and the Property. The watersheds contribute to runoff to the farmland creek prior to mining and continue to do so after reclamation. Ms. Sarah Flath, environmental manager for Coteau, testified that there were well-defined erosion patterns in the Property well before the area was permitted, mined, and reclaimed.

9. Mr. Guy Welch, Commission staff environmental scientist, described the pre-mine watershed and drainages through Mr. Eisenbeis' property and testified that the entire watershed area drains towards the Property and through Mr. Eisenbeis' cropland field in the Beulah Trench. Mr. Welch also testified that there was evidence of water moving across the field and erosion on the Property prior to permitting and mining.

10. There is evidence of a long-term erosion problem on the Property. Historical aerial photographs provide evidence of erosion, watershed, and drainages prior to mining and reclamation. The historical aerial photographs also show the same erosion and drainage patterns that are the subject of Mr. Eisenbeis' complaint. Jonathan Emmer, Commission staff engineer, testified that the post-mine flow and direction of surface water runoff in the watersheds east of the Property are very similar to the pre-mine condition.

11. There is evidence that the original diversion was constructed as an attempt to minimize runoff and reduce erosion well before the adjacent land was permitted, mined, and reclaimed. The runoff from upstream areas was routed around Mr. Eisenbeis' property during mining and reclamation activities from upstream areas. A reconstructed diversion would likely be considered a benefit to a landowner or lessee prior to the restoration of watersheds to pre-mine conditions through the Property.

12. The land east of the Property was reclaimed to native grassland and is very similar to the pre-mine condition with one exception. A portion of the watershed was converted from cropland to native rangeland which increased the amount of vegetation and increased the amount of water infiltration and decreases runoff. Furthermore, the slopes are gentler than pre-mine reducing the runoff from the watershed.

13. Areas to be mined or affected by mining activities must be permitted. The Revision studied the PHC in the permit based on post-mine topography changes submitted with the Revision. The PHC demonstrated no adverse impacts on or off the permit area will occur to the hydrologic balance. As a result, the Property was not subject to permitting.

14. In response to concerns expressed by Mr. Eisenbeis, the Division reviewed the flow modeling in the PHC provided by Coteau and determined the parameters and assumptions used were appropriate and reflected the actual conditions. This review affirmed the PHC results and was reflected in the July 23, 2018 letter to Mr. Eisenbeis. The PHC was again reviewed to

respond to Mr. Eisenbeis on June 13, 2019. The Staff found that there would be no adverse effects on the Property because of the changes proposed in the Revision.

15. Ms. Flath reviewed the filings, responses, and testified that the existing erosion ditch was not mining related because the PHC shows that flows are diminished from mining and reclamation.

16. The Division also contracted an independent evaluation from Houston Engineering, Inc. related to the watersheds above Mr. Eisenbeis' property. The evaluation provides that the results of the PHC were consistent with engineering standards and practices at the time the permit was submitted, and no notable variations or deficiencies were identified. Houston Engineering, Inc. found that the PHC results from Coteau and the Division were conservative and consistent with their analysis. The evaluation states that the changes in peak flows and runoff have been reasonably mitigated under the post-mine conditions. Lastly, Houston Engineering also finds that the reconstructed diversion is a net benefit to the landowner at the expense of a portion of the cropland being converted to use for the diversion channel.

17. Mr. Emmer testified that he reviewed the PHC done by previous staff and agrees with Coteau's PHC. He testified that he independently modeled the watersheds above Mr. Eisenbeis' property and the results reaffirm the PHC originally submitted with the Revision and subsequent responses to Mr. Eisenbeis. Mr. Welch agreed that the Property should not have been permitted because the flows from the watershed above Mr. Eisenbeis' property are less than prior to mining.

18. Mr. Emmer testified that his modeling was conservative and did not take into consideration the stockponds in the permitted area and that would decrease the amount of runoff to the Property. The modeling also did not include the existence of a diversion. As a result, the mining operations had no hydrologic impacts on the Property and the Property should not be subject to permitting. Furthermore, he also agreed that the private arrangement to reconstruct the diversion should be a benefit to the landowner when evaluating hydrologic consequences.

19. Mr. Eisenbeis did not provide evidence or testimony regarding the evaluations of hydrologic consequences. Mr. Eisenbeis did testify that he would like a concrete berm along the side of his property to prevent any water from crossing his property.

20. Regarding the request to have a concrete berm installed Ms. Flath and Mr. Welch both testified that installing a concrete berm on the east side of the Property would not restore the pre-mine watershed conditions and is not a practical alternative. Ms. Flath testified that it would be harmful to the drainage and would cause the water to dam.

21. Based upon the testimony, the Commission finds installing a concrete berm on the east side of the Property would not restore the pre-mine condition and would not be a practical alternative.

22. Based upon the testimony and evidence presented, the Commission finds that there are no negative hydrologic consequences to the Property.

Diversion Ditch

23. On August 18 and 31, 2011, the Division inspected the Property and reported that a diversion was installed years prior to the mining to divert water around a crop field but had deteriorated over the years. During mining, the watersheds leading to this diversion had been cut off by upstream sedimentation ponds which were pumped through PVC pipe into a ditch or unnamed drainage. Only when the pond overflowed from a large rainfall event in excess of design standards or snow blockage did it flow through the diversion. After the ponds are removed, the runoff will again flow into the diversion from upstream reclaimed lands. A December 6, 2012, report noted the diversion was reconstructed by a contractor on the Property at the landowner's request.

24. Mr. Eisenbeis provided in his complaint that the Property was owned by Esther Eisenbeis from September 6, 2011 to June 18, 2016. Mr. Eisenbeis submitted that he, Allen Eisenbeis, and JoAnn Crabtree have been the owners since June 18, 2016. Wayne Eisenbeis, cousin of Mr. Eisenbeis, had farmed the Property for a number of years with permission from Esther Eisenbeis.

25. Mr. Eisenbeis had last observed the property when he left for college in the mid-1970s prior to returning to North Dakota in 2016, after the reconstruction of the diversion. He could not testify for certain whether there was a diversion prior to his return, but he expressed that there appeared to be a buffer of prairie grass between the mine and the Property from his review of the photographs.

26. Sarah Flath testified that there was a diversion prior to the reconstruction of the diversion. She testified that there was flow and erosion at multiple locations throughout the Property historically and some flow and erosion occurred despite the old diversion.

27. Ms. Flath testified that Coteau was approached by Wayne Eisenbeis in 2010, on behalf of Esther Eisenbeis with concerns regarding erosion in the Property's field. Coteau hired a contractor to repair the erosion in 2011. Following the erosion repair, Coteau was approached in 2011 in a similar fashion to improve the existing diversion. She testified that the company agreed to construct the approach as a good neighbor and that she was told that Mr. Eisenbeis provided input in the design of the reconstructed diversion.

28. Mr. Eisenbeis alleges that his mother had dementia and had given him power of attorney in 2011, prior to the construction of the diversion. Mr. Eisenbeis expressed his concerns about dementia in an email to Guy Welch of the Division on November 5, 2016. Mr. Eisenbeis alleges that Bill Kirk from Coteau also knew that his mother had dementia and that the issue of the diversion was discussed in November 2015. Mr. Eisenbeis states that he told them not to rebuild the diversion over the phone.

29. Mr. Eisenbeis' testimony was from his own personal recollection, much of which occurred in his absence until he returned in 2016. He did not call any additional witnesses, family, or persons who operated the land as witnesses. He did not provide documentation that substantially corroborated his allegations. Similarly, much of the testimony provided by Coteau regarding permissions was from recollections of discussions with personnel no longer with Coteau. Regardless of whether the Commission believes this was appropriately handled by the

mine, or correctly recalled by either party, the Commission finds that this is a private arrangement, not a mining-related action.

Property Access and Road Ditch

30. Mr. Eisenbeis alleges that the deepened county road ditch blocks access to his farmland and that he lost farmland because of the widened road ditch. Mr. Eisenbeis expressed concern regarding the erosion that has occurred in the road ditch. Mr. Eisenbeis requested that Coteau be required to install an approach that is large enough to accommodate a semi grain truck and to restore the road ditch to its original width to recover the lost farmland.

31. The county road ditch is a portion of the reconstructed diversion installed in 2012. Coteau and Mr. Eisenbeis previously negotiated how to resolve the approach issue.

32. The June 28, 2022 inspection report by the Division documents that the concrete matting placed in the road ditch dips down about 3 feet below the surface elevation of the adjacent cropland and Mr. Eisenbeis alleges that the access is inferior to what existed prior to the reconstruction. The inspection report also noted that the reconstructed diversion occupies an additional one acre of cropland based on digital measurements of aerial photography.

33. On May 18, 2016, Coteau submitted a request to the Commission for the off-permit use of overburden. Coteau requested 450 to 500 yards of overburden to build an approach on land owned by Esther Eisenbeis on the Property. This request to use overburden from Permit NACT-0201 to construct an off-permit equipment access approach on the Property was authorized pursuant to N.D. Admin. Code § 69-05.2-30-01.

34. In April and May 2017, numerous emails were exchanged between Mr. Eisenbeis and Coteau on the field approach and Mr. Eisenbeis provided written authorization to construct the approach. Eisenbeis copied the Division on his emails to Coteau. However, upon request by Coteau, Mr. Eisenbeis was unwilling to execute an indemnification agreement for the new approach.

35. Ms. Flath testified that she was aware of the interaction and that Coteau's engineers studied the impacts of the requested approach. She testified that the company determined that if they constructed the approach as requested that there would be negative impacts and maintenance issues in the future. As a result, although they were willing to construct the approach for Mr. Eisenbeis, they would only do so if they would not subject to continual future maintenance.

36. Ms. Flath testified that access to the Property is not blocked. The former tenant, Wayne Eisenbeis, on behalf of Esther Eisenbeis, was consulted on the low water crossing that was installed. Ms. Flath stated that the new tenant has larger equipment and while access may not be ideal, the farmland is accessible and is being cropped regardless.

37. Ms. Flath also testified that the diversion, the approach, and erosion in the ditch are not mining related. Furthermore, the PHC shows that flows are diminished from pre-mine conditions and there is no adverse impact from mining and reclamation. Ms. Flath also testified that property maintenance is needed, including maintenance of manmade structures — and

maintenance is a landowner's responsibility. She asserted that when Coteau does non-mining related actions as a good neighbor, they expect the landowner to maintain the improvements.

38. Mr. Welch testified that the Commission did not require the diversion to be rebuilt, that the Division did not approve it, and was not involved. He further testified that it is the Division's position that the diversion was not mining related and, therefore, not within the Commission's jurisdiction. He also expressed that if Coteau constructed a diversion east of the Property on permitted land, Mr. Eisenbeis may be adversely impacted by an inability to maintain or retain the diversion in the future or upon future divestment of the property by Coteau.

39. Mr. Welch testified that it was not unusual for mines to do work for a surface owner outside the permit area. He reiterated that the work is not mining related and that he has observed other mines doing non-mining-related work for nearby landowners on occasion to build goodwill. He stated that the mines notify the Division when they are engaged in activities off-permit doing "good neighbor" work, but it is not regulated.

40. The reconstruction of the diversion, deepening of the road ditch, and the approach are a private arrangement between Coteau and the landowner and the Commission finds that it is not a mining-related matter.

Pond Water Discharges, Pond Overflows, and Surface Water Flow

41. Mr. Eisenbeis alleges that pond water overflowed onto the Property, resulting in gullies, loss of topsoil, and loss of crop income. Mr. Eisenbeis also alleged that Coteau pond water was seeping into the ground via ponds and discharging into the creek causing flooding in the southwest corner of the Property, trees in the road ditch, raised the groundwater table, and contaminated the aquifer with sulfur. He also alleges that Coteau discharged pond water in 2020 one to two miles south of the Property without his consent or Commission approval.

42. Mr. Eisenbeis requests reimbursement and restoration of soil in the southwest corner of the Property, reduction of the water table elevation to the level it was prior to 2011, removal of trees and root masses from the road ditch, and landowner's written approval prior to discharge of the pond into the creek. He also discussed his belief that a nearby landowner, Lucille Sailer's groundwater levels are being impacted by pond water discharge.

43. In support of his claim regarding pond overflow, Mr. Eisenbeis testified that "pond water netting" was found on his property. He considered the pond water netting proof of the pond overflow onto his property, but he does not know where it came from.

44. Mr. Eisenbeis did not provide expert testimony, witnesses, or corroborating data and largely relied upon his personal views of the water discharges, pond overflows, and surface water flows. Mr. Eisenbeis provided no substantial evidence to support his allegations that the pond water is seeping into the ground via ponds, discharges causing flooding, the mining activities raised the water table, or that there was contamination of the aquifer.

45. Sedimentation ponds P-H34-04 and P-H34-05 were constructed in the NE1/4 of Section 34 upstream of the Property in 1999 and 2004, respectively. The purpose of the sedimentation

ponds is to detain surface runoff from mine disturbance areas until it meets the required effluent or discharge standards.

46. During active mining operations, Coteau routed discharges from these ponds around Ms. Eisenbeis' property through pipes to the main drainage channel through the Property. Only when these ponds overflowed did they flow through the old field-engineered diversion and/or across the Property. Sedimentation pond P-H34-04 was removed and reclaimed in 2013 and sedimentation pond P-H34-05 was removed and reclaimed in 2015.

47. The Division was aware of and Coteau was required to document the pond discharges and overflows. The 2011 overflows were likely due to snow blocking the diversion channel and the other followed a significant rainfall event in excess of design standards. In 2014, the diversion overtopped during a significant rain event in excess of the design standards. The events with associated erosion were repaired by Coteau.

48. The water in sedimentation ponds is eventually discharged when it meets the required North Dakota Department of Environmental Quality effluent standards. The effect of the sedimentation ponds on hydrologic balance is to delay the timing of the flow event in the downstream drainage. The sedimentation ponds do not necessarily increase the volume of water that flows through the drainage system, only the timing of the flow event.

49. Ms. Flath testified that there were pre-existing erosion channels on the Property, and Wayne Eisenbeis approached Coteau about erosion concerns on the Property. As a result, Coteau seeded a grassed waterway and installed erosion control fabric to mitigate naturally occurring erosion. The purpose of erosion control fabric is to hold soil in place until the vegetation is established. Wayne Eisenbeis farmed around this grassed waterway and erosion control fabric. In 2016, Mr. Boeshans (a new renter) farmed through the grassed waterway which was where they encountered what they believed to be "pond netting".

50. Ms. Flath testified that Coteau has a permit from the Department of Environmental Quality and has the legal right to discharge ponds down the natural drainage. Landowner consent is not required, although often they will provide notification as a courtesy.

51. Jeff Roerick, Commission staff surface water specialist, testified that pond overflows were managed correctly and within the alternative limitations related to the pond overflow granted by the North Dakota Department of Health (currently Department of Environmental Quality).

52. Preston Ripplinger, staff hydrologist, testified and presented the hydrographs and potentiometric maps that demonstrated changes in groundwater elevations are largely in response to precipitation events — not the discharge of water into the "farmland creek". Mr. Ripplinger testified using his exhibits that the temporary drawdown of the aquifer occurred as expected during mining, which is a known consequence. He also described how the aquifers responded to climactic conditions. The recharge increased faster than normal with increased precipitation and lowered in response to drought.

53. Mr. Ripplinger discussed the potentiometric maps and the hydraulic gradient as relevant to the Property and demonstrated the groundwater did not impact the surface of the Property.

He also discussed the cross-section to groundwater elevation and how this refuted Mr. Eisenbeis' allegations. He briefly discussed the allegations as it relates to Ms. Lucille Sailer's property which is low, flat, and historically mapped as a wetland.

54. Mr. Ripplinger also testified that the normal fluctuations groundwater elevation is not flooding Mr. Eisenbeis' land in the southwest corner.

55. Ms. Flath, Mr. Roerick, and Mr. Ripplinger refuted the claim that the aquifer was contaminated by sulfur. Specifically, Mr. Ripplinger stated that sulfide is not a measured parameter in water because at atmospheric conditions it dissipates into the air. In the event that Mr. Eisenbeis was referring to sulfate, Mr. Ripplinger testified that the water is tested, and the sulfate levels have stayed within acceptable levels. Mr. Eisenbeis did not provide any information to substantiate his claim.

56. Mr. Ripplinger also discussed that the trees growing in the road ditch are not related to raising water tables and that trees were found in the drainages of the area before mining.

57. Mr. Welch testified that surface water runoff from the pre-mine secondary drainages located in the east and southeast of the Property passes through the east side of the Property, and the drainage on the west side of the Property receives runoff from undisturbed lands on the west side of the Property. Mr. Welch testified that none of the surface water discharges from coal mining activities pass into the drainage in the southwest corner of the Property.

58. Only a small fraction of the discharges from the Freedom Mine flow through the Property. There have been no mine pond discharges through the southwest portion of the Property. The flows across the western drainage are from watersheds undisturbed by mining and not within the permit area.

59. Consistent with the testimony provided and evidence presented, the Commission finds that Coteau has minimized disturbances to the hydrologic balance at the mine site and associated off-site areas and finds no adverse off-site impacts from the mining operations on the Property.

Dishonest Letter, Threatening Letter, and Complaint Regarding Hours of Investigation

60. Mr. Eisenbeis alleges that Coteau sent a dishonest letter to the Commission that affected the decision on his initial filing and requested that they be held accountable. Although Mr. Eisenbeis subjectively believes the letter was dishonest, no basis for the Commission to address the allegation or grant Mr. Eisenbeis relief was provided.

61. In addition to the above-listed complaints, Mr. Eisenbeis alleges that Coteau sent him a threatening letter and requested that they be held accountable. Whether or not he subjectively views the letter describing his baseless allegations as threatening, no basis was provided for the Commission to address this allegation or grant Mr. Eisenbeis relief.

62. Mr. Eisenbeis alleges that he spent 2,000 to 3,000 hours investigating, emailing, documenting, researching, writing, and meeting with Coteau, the county, the sheriff, the ND water board, the Commission, the Office of Surface Mining Reclamation and Enforcement, the ND Attorney General's office, and the ND Ethics Commission and requests compensation.

Findings of Fact, Conclusions of Law and Order

RC-22-339

Page 10

While the Commission may assess a sum reasonably incurred by a party in connection with a proceeding against a party that the Commission deems proper, the Commission does not find that the allegations presented by Mr. Eisenbeis provide a basis for the requested relief.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over Surface Coal Mining Permit No. NACT-9501 to allow Coteau to conduct surface mining and reclamation operations at the Freedom Mine.
2. Mr. Eisenbeis' property is located off-permit. N.D.C.C. § 38-14.1-24 requires that mining companies minimize disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas and to the quality of water in surface and ground water systems both during and after surface and coal mining operations and during reclamation. Based upon the evidence presented, Mr. Eisenbeis failed to prove adverse impacts to the downstream areas of the specified Property and therefore failed to prove that the Property should be permitted. The re-evaluation of the PHC affirms the Commission's previous determination that the changes to the post-mine topography and watersheds above the Property did not adversely impact the Property.
3. The Commission concludes that the reconstruction of the diversion is a private matter between Coteau and the landowner, and therefore not a mining-related matter subject to Commission jurisdiction.
4. Mr. Eisenbeis did not prove that Coteau's pond water was discharged or overflowed in violation of permitting or alternative limitations related to pond discharges.
5. Mr. Eisenbeis did not prove that Coteau's discharge resulted in flooding of the southwest corner of the farmland.
6. Mr. Eisenbeis did not prove that the pond water discharge by Coteau resulted in standing water and increased the water table which resulted in trees growing in the deepened road ditch.
7. The displacement of farmland from the reconstructed diversion is the subject of a private dispute that is non-jurisdictional to the Commission.
8. Mr. Eisenbeis did not prove that the water flow from the mining operations created adverse impacts on the off-permit Property.
9. The modified road ditch and approach are part of the reconstructed diversion and is the subject of a private dispute that is non-jurisdictional to the Commission.
10. Mr. Eisenbeis provided no evidence that the aquifer is contaminated by sulfur. Testimony by Coteau and Staff experts demonstrated there was no basis for Mr. Eisenbeis' allegation.

11. Pond water discharge was subject to permitting by the North Dakota Department of Health (now Department of Environmental Quality). Mr. Eisenbeis did not provide evidence demonstrating that the pond discharges were not in compliance with required permitting or alternative limitations.
12. Mr. Eisenbeis did not demonstrate that Coteau provided the Commission with a dishonest response or provide a basis for relief.
13. Mr. Eisenbeis provided no basis for the Commission to address the complaint that Coteau sent him a threatening letter or relief that may be granted.
14. N.D.C.C. § 38-14.1-36 provides that some costs and expenses may be assessed against a party that have been reasonably incurred in connection with the party's participation in the proceedings. Such costs may be assessed in favor of the prevailing party. Since Mr. Eisenbeis is not the prevailing party in the current proceeding, the request for costs and expenses is denied.
15. Coteau conducted mining and reclamation activities in relation to Mr. Eisenbeis' Property in accordance with North Dakota's surface coal mining laws and regulations.

From the foregoing Findings of Facts and Conclusions of Law, the Commission now makes its:

ORDER

The Commission Orders:

1. Mr. Eisenbeis' August 4, 2022, Revised Formal Complaint is dismissed with prejudice.
2. The Commission's Findings of Fact, Conclusions of Law, and Order shall be submitted to the Office of Surface Mining Reclamation and Enforcement for review.

PUBLIC SERVICE COMMISSION


Randy Christmann
Commissioner


Julie Fedorchak
Chair


Sheri Haugen-Hoffart
Commissioner