

PUBLIC SERVICE COMMISSION
Reclamation Division

Memorandum

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

FROM: ^{JE} Jonathan Emmer and ^{MT} Monty Johnson

DATE: January 17, 2024

SUBJECT: Recommended penalty for Notice of Violation 2301 issued to Westmoreland Beulah Mining LLC, Case No. RC-23-355

Summary: On December 11, 2023, Notice of Violation (NOV) 2301 was issued to Westmoreland Beulah Mining LLC (WBM) following an inspection on November 9, 2023. NOV-2301 was issued for failure to install appropriate measures to prevent and control water erosion in a portion of a reclaimed drainageway in Section 22, T143N, R88W of Surface Coal Mining Permit KRSB-8603 which resulted in a loss of topsoil.

WBM has requested an informal conference on the matter. Since an informal conference has been requested, a proposed penalty needs to be assessed and the Reclamation Division recommends that the Commission assess a proposed penalty in the amount of \$3,000 as detailed below.

Discussion: NOV-2301 was discovered during a mine inspection on November 9, 2023. The inspector arrived for an inspection but discovered that mine staff were not on site due to the Veteran’s Day holiday on Saturday, November 11, 2023. He continued to inspect the mine from county roads and section line trails because the haul road conditions were not suitable for travel because of the recent snow event. Significant erosion of topsoil was discovered along the reconstructed drainageway within grade approval Gold-01-2022 in Section 22 of Permit KRSB-8603, which was approved on June 30, 2023. At the time of the inspection, the grade approval area had been respread with topsoil and subsoil. The grade approval area had not been mulched, but bales of hay were located adjacent to the respread area on graded spoil. Several fiber rolls had been placed perpendicular to the drainageway within the respread area, but surface water runoff was passing below them through erosional features.

Erosional features were present along the entire length of the reconstructed drainageway (approximately 150 feet in length and three to six inches deep) above a head cut. The head cut was approximately three feet deep and a gully below continued for approximately ten feet downstream to the edge of the grade approval area. The erosional features were inspected again on November 15, 2023 in follow-up to the November 9, 2023 inspection. The erosional feature within the drainageway was estimated to be one foot wide, nine inches deep, and extended the length of the reclaimed drainageway. The gully below head cut was estimated to be three feet deep, three to four feet wide, and eight feet in length.

The Reclamation Division requested additional information regarding the events that led up to the erosion of this area. According to WBM, the Gold-01-2022 grade approval was respread with subsoil in July 2023 and topsoil was respread from October 19th to October 23rd, 2023. They indicated that no water was passing through the drainageway while they were respreading Suitable Plant Growth Material (SPGM) on the grade approval. They also stated that the mine received approximately 13 inches of snow, which had a snow-water equivalent of 1.33 inches, from October 26th to October 27th. Additionally, 0.5 inches of

rain was received on November 6th. NDAC 69-05.2-15-04(5) requires appropriate measures to be taken to protect areas from water erosion and NDAC 69-05.2-22-05 requires that mulching or other stabilizing practices be used on all regraded and topsoiled areas to control erosion. WBM failed to properly stabilize the respread area to protect it from erosion, which resulted in a loss of topsoil.

NOV-2301 was issued to WBM on December 11, 2023 for failure to install appropriate measures to prevent and control water erosion in violation of NDCC 38-14.1-24(4), NDAC 69-05.2-15-04(5), NDAC 69-05.2-15-06, NDAC 69-05.2-16-08, and NDAC 69-05.2-22-05. The remedial actions outlined in the NOV required WBM to (1) remove topsoil from the reclaimed drainageway to prevent further loss of SPGM and stockpile the topsoil on a stable area that minimizes any loss of material, and (2) develop and submit a plan to the Reclamation Division for review to respread the drainageway that will not result in a loss of topsoil and a plan to stabilize the drainageway to prevent erosion.

Prior to receipt of the NOV, WBM removed topsoil from the reclaimed drainageway and mulched the reclaimed area to prevent the loss of topsoil. On December 14, 2023, WBM submitted a plan to the Reclamation Division for review to respread the drainageway that will not result in a loss of topsoil and a plan to stabilize the drainageway to prevent erosion — which was approved on December 19, 2023.

WBM has requested an informal conference on the matter. Since an informal conference has been requested, the Commission needs to assess a proposed civil penalty because that can also be contested at the informal conference. 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-2301 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 a particular operation. A penalty for history is usually not assessed unless more than three violations are issued within three years. This is the third NOV that WBM has received within the past three years. However, NOV-2201 was issued to WBM on May 25, 2022, which encompassed violations in watersheds/drainage areas for the Gold Pit, Pond 81, and Pond 82. Based on the criteria we have used in the past and that NOV-2201 consolidated three violations, WBM does have a history of violations. 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. The grade approved area where the erosion occurred had a total SPGM thickness of forty-nine inches with fourteen inches of topsoil. Based on the size of the erosional features and the SPGM thickness, 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 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. WBM's permit depicts the area where the violation occurred as an intermittent stream pre-mine and a restored wetland post-mine. Topsoil respread for this area was completed three days before the Beulah Mine received approximately 13 inches of snow. The

upcoming weather prior to topsoil respread should have been considered so the appropriate measures could be implemented to protect the respread area from erosion as required by NDAC 69-05.2-22-05. A penalty for negligence is warranted.

Recommended penalty assessment for negligence - \$1,500

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 assess a proposed penalty for NOV-2301 in the amount of \$3,000 (\$1,000 for history, \$500 for seriousness, and \$1,500 for negligence). The motion for the proposed penalty is attached for your consideration during the January 24, 2024 Commission meeting.