

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Westmoreland Beulah Mining LLC
Notice of Violation 2301
Violation

Case No. RC-23-355

OAH File No. 20240037

AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

Pamela J. Thompson deposes and says that:

she is over the age of 18 years and not a party to this action and, on the **27th day of February 2024**, she sent an electronic message to **four** addressees, each including an electronic copy in portable document format of:

- **Recommended Findings and Ruling and Recommended Order**

The electronic mail was addressed as follows:

Jesse Noel
Director of Environmental & Regulatory Affairs
Westmoreland Beulah Mining LLC
jnoel@westmoreland.com


Hope L. Hogan
Administrative Law Judge
Office of Administrative Hearing
hlhogan@nd.gov

Juris Ore
General Mine Manager
Westmoreland Beulah Mining LLC
jore@westmoreland.com

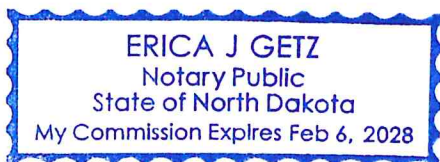
John M. Schuh
Special Assistant Attorney General
Public Service Commission
jschuh@nd.gov

The addresses shown are the respective addressee's last reasonably ascertainable electronic mail addresses.

Subscribed and sworn to before me
this **27th day of February 2024**.



SEAL



Notary Public

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Westmoreland Beulah Mining LLC
Notice of Violation 2301
Violation**

**Case No. RC-23-355
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**RECOMMENDED FINDINGS AND RULING
AND RECOMMENDED ORDER**

February __, 2024

Appearances

John M. Schuh, Special Assistant Attorney General, Public Service Commission, State Capitol, Bismarck, North Dakota 58505, on behalf of the Public Service Commission.

Jesse Noel, Director of Environmental and Regulatory Affairs, Westmoreland Beulah Mining LLC, Billings, MT 59102 and Juris Ore, General Mine Manager, Westmoreland Beulah Mining LLC., Beulah, ND 58523.

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

- [1] The Beulah Mine is a surface coal mine in Mercer County North Dakota. The mine is owned and operated by Westmoreland Beulah Mining LLC (WBM) and mine is operating under the following permits: KRSB-8802 and KRSB-8603. These permits were issued by the North Dakota Public Service Commission (Commission).
- [2] On December 11, 2023, the Public Service Commission’s Reclamation Division issued a Notice of Violation No. 2301 (NOV) to WBM. The NOV was issued for failure to install appropriate measures to prevent and control water erosion in a portion of a reclaimed drainageway, which was grade approved on June 30, 2023, located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 22, T143N, R88W in Permit KRSB-8603. The water erosion has resulted in a large headcut, a rill/gulley, and loss of Suitable Plant Growth Material (SPGM). The NOV directed WBM to remove topsoil from the reclaimed drainageway within 5 days of receipt. WBM was also directed to submit a plan to the Reclamation Division to respread the drainageway that will not result in a loss of

SPGM and a plan to stabilize the drainageway to prevent erosion within 14 days following receipt of the NOV.

- [3] On January 9, 2024, WBM filed a request to hold an informal conference to discuss the NOV under N.D.C.C. § 38-14.1-30.
- [4] On January 11, 2024, the Reclamation Division issued the Termination of Notice of Violation to inform WBM that the remedial actions outlined in the NOV were adequate.
- [5] On January 18, 2024, a Notice of Informal Conference was issued scheduling an Informal Conference to begin at 9:00 a.m., CST, on February 8, 2024 in the Commission's hearing room on the 12th Floor, State Capitol, Bismarck, North Dakota. On January 24, 2024, the Commission assessed a proposed penalty of \$3,000 for NOV 2301. The penalty included an assessment of \$1,000 for history of violations, \$500 for seriousness of violation, \$1,500 for negligence, and a deduction of \$0 for good faith.
- [6] The informal conference was held on February 8, 2024. Jesse Noel, Juris Ore, and Nettie Ore appeared on behalf of WBM. The Reclamation Division was represented by Attorney John Schuh accompanied by Jonathan W. Emmer, Director of the Reclamation Division, Shawn M. Nixon, Environmental Engineer, Guy A. Welch, Permit Administrator, and Preston J. Ripplinger, Hydrologist.

After consideration of the presentations of the parties and the exhibits provided at the informal conference, the following findings, rulings, and recommended orders are made.

Findings

- [7] WBM is the owner and operator of the Beulah Mine located near Beulah, North Dakota.
- [8] WBM is engaged in surface coal mining operations under Permits KRSB-8603 and KRSB-8802 issued by the Commission.
- [9] Section 2.3 (Groundwater Hydrology) of Permit KRSB-8603 describes the seep located in Section 22, T143N, R88W and the measures WBM will use to reduce erosion. Throughout the informal conference, the terms spring and seep were used interchangeably and are synonymous for the purpose of the recommended order.

- [10] Exhibit 12 (Water Supply Locations) of Permit KRSB-8603 depicts the location of the Schmidt et al. seep and Exhibit 10 (Water Management Plan Map) of Permit KRSB-8603 depicts the intermittent stream in the SW¼ of Section 22, T143N, R88W.
- [11] On June 13, 2023, WBM requested permission to respread topsoil and subsoil on a grade approval area referred to as Gold-01-2022 (Schmidt et. al.). The Commission granted permission for WBM to respread subsoil and topsoil on June 30, 2023.
- [12] Mr. Ore is a mining engineer with about 25 years of experience. Mr. Ore stated that he has worked on more than ten mining properties throughout North and South America. His roles and responsibilities have ranged from engineering, frontline supervision, and senior management. He has been employed with Westmoreland since 2018 and has been the site manager at the Beulah Mine since November 2023.
- [13] WBM received a Notice of Violation on December 11, 2023. The NOV indicated that WBM failed to install appropriate measures to prevent and control ground erosion in an area that WBM staff refers to as the Gold Pit Area. Mr. Ore disagreed with the allegations and believes, based on his industry experience, that appropriate measures were taken to control erosion in the area.
- [14] Mr. Ore stated that the post mining land use in the area would be a mix of cropland and native grassland. He also stated that the area was regraded in August and September of 2022. He also stated that the area was grade approved by the PSC on June 20, 2023.
- [15] Mr. Ore stated that the grade approval area was respread with subsoil during July of 2023 and topsoil during the week of October 19 through the 23 of 2023; however, he was not at the Beulah Mine while subsoil and topsoil were respread and the employees who performed the work stated that they never witnessed any water flowing from the spring while the subsoil and topsoil was being respread.
- [16] Mr. Ore expressed that since topsoil and subsoil had been respread relatively late in the year, WBM decided to protect and stabilize the drainageway using straw wattles, silt fencing, and hay bales. He believed the methods used were adequate, based on his experience, to protect the drainageway until the next active growing season when the area would be reseeded.
- [17] Mr. Ore summarized the erosion observations discovered during the November 9, 2023 inspection and stated that WBM was informed of the erosion during the inspection on November 15, 2023. Mr. Ore stated that the topsoil was removed from

the drainageway within 24 hours of being notified and the topsoil that had already eroded had been captured by silt fences and hay bales.

- [18] Mr. Ore stated that, after the issuance of the NOV, WBM promptly developed and submitted a remediation plan to the Commission. Mr. Ore stated that WBM has learned a lesson from this incident but expressed that the methods used were appropriate for the conditions in the drainageway and were effective in preventing any loss of topsoil from the permit boundary.
- [19] Mr. Noel emphasized that an important term cited in the NOV in the laws and rules is "control" and they believe WBM was effective in controlling the erosion. Mr. Noel stated that the best technologies employed prevented topsoil from leaving the permit area and that if topsoil had left the respread area, it would be captured by the sediment pond downstream.
- [20] Mr. Noel also stated that the unplanned spring caused some topsoil to erode but it was prevented from leaving the respread area by being pushed up against haybales, that were adjacent to the respread area, and this soil was recovered.
- [21] According to Exhibit 10 (Water Management Plan) in Permit KRSB-8603, the drainageway in the Schmidt et. al. grade approval is identified as an intermittent stream. Furthermore, Section 2.7.1 (Postmining Land Use) in Permit KRSB-8603 identifies the area of the intermittent stream in the Schmidt et. al. grade approval as a wetland.
- [22] Mr. Noel discussed N.D.A.C. § 69-05.2-15-06 in relation to the assessment and repair of rills and gullies that develop from water erosion. He stated that topsoil was removed from the drainageway as soon as practical after the erosion had been brought to the attention of WBM and that rule requirements were followed.
- [23] In relation to N.D.A.C § 69-05.2-15-04(5), Mr. Noel stated that the measures used were appropriate prior to the development of the upstream spring; therefore, they were in compliance with N.D.A.C § 69-05.2-15-04(5).
- [24] In relation to N.D.A.C. § 69-05.2-22-05, Mr. Noel stated that the area had been adequately mulched, and the erosion was caused by the unexpected redevelopment of the spring. He reiterated that WBM was diligent in removing the topsoil from the drainageway and he testified that they met the requirements of N.D.A.C. § 69-05.2-22-05 by mulching the respread area.

- [25] Mr. Noel asserted that erosion is inevitable and commonplace, and it is important to control it as quickly as possible. He stated that the administrative rules provide for controlling, but not prevention of erosion. As a result, Mr. Noel again stated that the applicable laws and rules had not been broken and WBM believes that the NOV should not have been issued.
- [26] When questioned why no measures were taken to repair the erosion before the mulch was placed, Mr. Noel and Mr. Juris could not provide a response due to the fact that they were not location.
- [27] Mr. Nixon discussed his inspection report and inspection he conducted at the Beulah Mine on November 9, 2023. Mr. Nixon stated the inspection was conducted without the accompaniment of WBM personnel because the mine was observing the Veterans Day holiday and that no WBM personnel were on site.
- [28] Mr. Nixon stated that significant topsoil erosion was discovered along the reconstructed drainageway within the Schmidt et. al. grade approval area.
- [29] Mr. Nixon also stated that straw mulch had not been placed within the drainageway. Several fiber rolls were observed perpendicular to the drainageway and surface water runoff was passing below them through erosional features.
- [30] A substantial headcut was observed near the downgradient SPGM respread edge. Mr. Nixon presented several photographs taken during the November 9, 2023 inspection (Exhibit 03). The photographs documented that water was flowing beneath the straw wattles / fiber rolls through erosional features. Mr. Nixon also indicated that the fiber rolls were not properly installed because the fiber rolls should have been trenched into the soil instead of just staking them on top of the soil. The photographs also documented the headcut at the downgradient edge of the topsoil / subsoil respread edge.
- [31] Mr. Nixon stated that he did not observe mulch in the reclaimed drainageway during his November 9, 2023 inspection, but he did observe erosion. He further provided that another inspection of this area was done on November 15, 2023, during which it was noted that the eroded drainageway was mulched, but the erosion was still not repaired.
- [32] On November 15, 2023 Mr. Welch conducted an inspection at the Beulah Mine along with Jeffrey Roerick and Alexis Craig. They were accompanied by WBM staff employee, Ethan Sharp.

- [33] Mr. Welch stated that they observed an active headcut and a rill / gully in the drainageway within the Schmidt et. al. grade approval area. He stated that the headcut had formed where the surface water runoff was passing from the respread topsoil and subsoil onto the adjacent graded spoil. The graded spoil was about four to five feet lower in elevation and he did not observe any measures in place to prevent headcutting.
- [34] Mr. Welch stated that a series of fiber rolls/straw wattles were observed in the drainage along with straw mulch. By that time the area was mulched quite heavily, and the mulch was obscuring the soil surface. As a result, he did not have a clear view of the rill / gully above the headcut.
- [35] Mr. Welch observed the headcut was on the downstream edge of the respread topsoil and subsoil area. The headcut was about three feet deep, three to four feet wide, and it was about eight feet in length. He stated that at least two feet of topsoil had been respread in the drainageway based on the observed color of topsoil and subsoil. Mr. Welch also stated that wet soil conditions can make it difficult to distinguish between topsoil and subsoil.
- [36] Mr. Welch stated that it was communicated to him that the surface owners did not have a soil mixing agreement and that soil was respread topsoil at a greater depth than planned in the drainage. Mr. Welch stated that the planned respread depth consisted of 14 inches of topsoil and 35 inches of subsoil.
- [37] Mr. Welch presented several photographs taken during the November 15, 2023 inspection (Exhibit 05). The headcut was clearly visible in the photos, but a large portion of the rills / gullies were obscured by heavy mulch that had been placed following the November 9, 2023 inspection. Water could be seen flowing beneath the straw wattles that had been placed within the drainageway.
- [38] Both Mr. Noel and Mr. Welch agreed that there were 11 springs in Permit KRSB-8603. Mr. Welch further provided that many of the springs depicted in the permit are outside of the mining disturbance boundary or mineral removal boundary. He explained that the coal seam is usually the aquifer for the springs/seeps and once the coal seam is removed, a spring generally will not redevelop in areas that were mined.
- [39] Mr. Welch further provided, in cases where the spring is supplied with water from an area that has not been disturbed by mining, the spring may not be affected or take little time to redevelop since its water supply was unaffected by mining. Mr. Welch referenced page 4 of Exhibit 15, which is a picture dated December 1, 2020 that

depicts water flowing from the spring above the Schmidt et. al. grade approval. He stated that this area below the spring is now a reclaimed drainageway.

- [40] Mr. Welch referenced the Schmidt et. al. grade approval letter (Exhibit 9) which stated that the area was approved for 14 inches of topsoil and 35 inches of subsoil. He restated that the topsoil layer could not be distinguished from the subsoil layer within the eroded area. He stated that once the topsoil and subsoil are eroded and commingled the topsoil has been lost.
- [41] Mr. Welch referenced an email from Nettie Ore (Exhibit 6), on November 29, 2023, which stated that less than one to two yards of topsoil had been lost and traveled to pond 113. He refuted this statement by stating that lost topsoil would have traveled to pond 112.
- [42] He also refuted the November 29, 2023, email response that subsoil had been respread during the end of July 2023, topsoil was respread in the end of October 2023, and an unplanned spring had developed after the area had been respread.
- [43] Mr. Welch provided his September 6, 2023 inspection report, during which it was observed that the drainageway within Schmidt et. al. had not been respread with subsoil and it appeared as though the Schmidt et. al. subsoil stockpile had been depleted.
- [44] Mr. Welch stated that during the November 15, 2023 inspection Mr. Sharp indicated that there appeared to be an extra amount of Schmidt et. al. topsoil. It was not definitive but possible that without the 35 inches of required subsoil, 49 inches of topsoil may have been placed within the drainageway. This would have resulted in an even greater amount of lost topsoil.
- [45] Mr. Welch also refuted the idea that an unplanned spring had developed by referencing WBM's Surface Water Management Plan Map (Exhibit 10), which depicts the drainageway within an intermittent stream. Mr. Welch clarified by stating that an intermittent stream is defined as a stream that flows continuously for 30 days periodically as a result of either ground water or surface water runoff. Mr. Welch also referenced WBM's Water Supply Locations (Exhibit 12) which depicts the location of the Schmidt et. al. seep located within the intermittent stream. He also stated that the approved post mine land use in the bottom of the drainage is a wetland and WBM is responsible for re-establishing a wetland within the intermittent stream.
- [46] Mr. Welch presented several photos, taken in 2019 and 2020, of the entrance to the drainageway (Exhibit 15) before it was reconstructed. The photos documented that the

Commission had observed water flowing into the southwest entry point of the drainageway before the drainageway had been reconstructed. Ice cascades had also been observed at the entry point during winter inspections.

- [47] Mr. Welch stated that WBM was not justified in its failure to use additional erosion control. Mr. Welch stated that because this drainageway was located in a known intermittent stream, with a fairly large drainage area, measures to prevent headcutting at the topsoil / subsoil respread edge should have been implemented.
- [48] Mr. Welch explained that water has flowed frequently through this drainageway since the area was originally permitted and that all parties should have expected flows during this time of the year considering frozen ground conditions and the large undisturbed watershed above the drainageway entry points.
- [49] Mr. Welch also commented on the timeframe in which the drainageway was reclaimed. Specifically, he took exception to topsoil being spread in the drainageway in advance of a predicted snowstorm. He also stated that in consideration of topsoil not being placed before late fall, and outside the growing season, WBM could have considered waiting to respread topsoil until next year.
- [50] When questioned about the potential for subsoil erosion, Mr. Welch stated that subsoil can sometimes be waived, depending on the circumstances, and loss of subsoil is not as severe as loss of topsoil. N.D.A.C. § 69-05.2-15-02(2) requires all topsoil be removed from all disturbed areas and that sufficient subsoil must be removed from disturbed areas to satisfy the redistribution requirements of N.D.A.C. § 69-05.2-15-04.
- [51] Mr. Welch referenced WBM's Revegetation Plan (Exhibit 13) which mentions erosion control fabric as one of many appropriate measures in reclaiming intermittent streams.
- [52] WBM received approval to respread topsoil and subsoil on June 30, 2023. Mr. Welch explained that he expected rock or some other suitable material to be placed against the topsoil and subsoil respread edge to prevent headcutting.
- [53] Mr. Welch indicated that erosion control fabric is the very minimum erosional control measure for the drainageway. Mr. Welch also explained that before the headcut occurred at the topsoil / subsoil respread edge, it was predictable that a headcut would form and progress upstream if the area was not stabilized with rock or other material.
- [54] Mr. Welch provided his opinion that he did not believe the chosen measures were effective and that if the measures had been effective the erosion would not have

occurred. Mr. Welch also stated that a violation exists if topsoil had eroded but not left the permit area and that a violation was appropriate because topsoil was lost.

- [55] Mr. Welch stated that adequate straw mulch was present during the November 15, 2023 inspection but was not effective in controlling erosion and that water was flowing underneath the mulch. He stated that straw mulch provides protection from wind and falling rain and is appropriate for areas outside of the drainageway.
- [56] When asked if the erosion control measures would have been appropriate without knowing that the drainageway was in fact an intermittent stream, Mr. Welch replied that the measures used were still not appropriate because there were no measures taken to prevent headcutting at the topsoil / subsoil respread edge.
- [57] Mr. Welch also indicated that since the eroded topsoil was likely comingled / mixed with subsoil, and potentially spoil material, that it is not able to be salvaged as topsoil because of the way topsoil and subsoil are required to be removed and segregated and the organic matter properties necessary to define a soil as topsoil. N.D.A.C. ch. 69-05.2-15 requires SPGM material to be removed separately and segregated. Regardless of whether deposition of topsoil did not leave the permitted area, the topsoil was comingled with subsoil and/or spoil when it left the respread area; therefore, the topsoil was lost since the recovered material could not be treated as topsoil.
- [58] Preston Ripplinger, Hydrologist for the Reclamation Division, described the Schmidt et. al. seep in the SW¹/₄ of Section 22 depicted in Exhibit 10. He testified that some seeps take time to recharge, but the Schmidt et. al. seep is unlike other seeps at the mine because it is recharged with water from the south which was unaffected by mining. Additionally, he stated that he would expect flow from this seep would resume immediately after mining. He also stated that the Beulah Mine installed a culvert to direct water from the seep into the pit when they were mining.
- [59] Mr. Ripplinger stated that flow would be expected after the seep was recharged from a precipitation event. Mr. Ripplinger also stated that there is usually a window in the fall when these seeps do not flow due to lack of precipitation, but they will start flowing again after a precipitation event – especially since the aquifer recharging this seep is shallow and there is always some amount of water stored within the aquifer.
- [60] Mr. Ripplinger stated that appropriate erosion control measures should have been installed in the reclaimed drainageway immediately after topsoil respread, as provided in Permit KRSB-8603, to prevent erosion since he would expect flows from the Schmidt et. al. seep.

[61] In Mr. Nixon's opinion, the permittee failed to install appropriate measures to prevent and control water erosion in a portion of a reclaimed drainageway and the water resulted in a large headcut, a rill, and gully, which resulted in a loss of topsoil that was not recoverable due to the comingling of topsoil with subsoil or spoil.

[62] Mr. Nixon stated that the Beulah Mine did not meet the requirements for N.D.A.C. § 69-05.2-16-08, which requires appropriate sediment control measures to be designed, constructed, and maintained to minimize erosion to the extent possible because the reclaimed drainageway was an intermittent stream prior to mining, it was designated as such after mining, the fiber rolls placed in this area after topsoil respread were not adequate to prevent erosion, and no measures were in place to prevent headcutting at the downstream area of the reclaimed drainageway.

When questioned whether the rules and laws apply to either the prevention or control of erosion, Mr. Nixon stated that the rules and laws relate to the prevention and control of erosion. As stated by N.D.A.C. § 69-05.2-15-04(5), appropriate measures must be taken to protect respread areas from wind and water erosion. The laws and rules require prevention of erosion in addition to controlling erosion.

[63] The reclaimed drainageway of the Schmidt et. al. grade approval is a known intermittent stream — as documented throughout Surface Coal Mining Permit KRSB-8603.

[64] Significant erosion occurred in the reclaimed drainageway of the Schmidt et. al. grade approval area and appropriate measures were not taken to protect areas from water erosion as required by N.D.A.C. § 69-05.2-15-04(5).

[65] WBM did not implement appropriate sediment control measures in the reclaimed drainageway, as required by N.D.A.C. § 69-05.2-16-08(1)(c), which resulted in erosion and a loss of topsoil.

[66] No measures were in place to prevent headcutting at the edge of the respread area.

[67] Topsoil was comingled with subsoil and/or spoil as a result of the erosion; therefore, the topsoil was lost since the recovered material could not be treated as topsoil. N.D.A.C. § 69-05.2-15 requires SPGM material to be separately removed and segregated.

[68] As documented by the November 9, 2023 inspection report (Exhibit 02), the Beulah Mine did not use appropriate measures to protect the respread area from water erosion

and the respread area was not mulched to control erosion as required by N.D.A.C. § 69-05.2-15-04(5) and N.D.A.C. § 69-05.2-22-05, respectively.

Ruling

- [69] The Commission has jurisdiction over WBM's planned mining and reclamation operations in North Dakota, including Permit No. KRSB-8603.
- [70] Pursuant to N.D.A.C. § 69-05.2-16-08(1)(c), WBM failed design, construct, and maintain appropriate sediment control measures using the best technology currently available to minimize erosion to the extent possible.
- [71] Pursuant to N.D.A.C. § 69-05.2-15-04(5), WBM did take appropriate measures to protect the areas from wind and water erosion following the respreading of suitable plant growth materials.
- [72] As required by N.D.A.C. § 69-05.2-15-06, WBM failed to stabilize and provide appropriate erosion mitigation measures.
- [73] Pursuant to N.D.A.C. § 69-05.2-22-05, the Commission concluded that mulching or other soil stabilizing practices must be used on all regraded and topsoiled areas to control erosion.

Recommended Order

- [1] Notice of Violation 2301 is affirmed.
- [2] WBM is assessed a total civil penalty of \$3,000.

Dated at Bismarck, North Dakota this ____ day of February, 2024.

By: _____

Hope L. Hogan
Administrative Law Judge
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Telephone: (701) 328-3200