

PUBLIC SERVICE COMMISSION

Reclamation Division

Memorandum

TO: Commissioners Christmann, Haugen-Hoffart, and Kringstad
Brian Johnson - Special Assistant Attorney General
Steve Kahl - Executive Director

FROM: ^{JE} Jonathan Emmer and ^{JK} Preston Ripplinger

DATE: July 29, 2025

SUBJECT: Recommended penalty for Notice of Violation 2501 issued to Westmoreland Beulah Mining LLC, Case No. RC-25-192

Summary: On May 20, 2025, Notice of Violation (NOV) 2501 was served to Westmoreland Beulah Mining LLC (WBM) following an inspection on April 24, 2025, and a follow-up inspection on May 7, 2025. NOV-2501 was issued for failure to protect topsoil during Suitable Plant Growth Material (SPGM) respread on reclaimed cropland in the SE¼ of Section 22, T143N, R88W of Surface Coal Mining Permit KRSB-8603 which resulted in a loss of topsoil. Spoil material was mixed with topsoil on approximately 3.5 acres. Prior to removing the contaminated topsoil, Reclamation Division staff sampled the material and delivered the sample to Minnesota Valley Testing Laboratories (MVTL) for analysis in accordance with N.D.A.C. 69-05.2-08-10(1)(a). The analysis showed that the sample had a sodium adsorption ratio (SAR) of 19.3, and an SAR of less than 4 is required for topsoil.

WBM did not request an informal or formal conference on the matter. Therefore, the Reclamation Division recommends that the Commission adopt the order to affirm the violation and assess a penalty in the amount of \$6,000 as detailed below.

Discussion: On April 23, 2025, WBM met with the Reclamation Division to discuss possible contaminated topsoil on a grade approved area and how this area should be addressed. During that meeting, it was mentioned that a small area had possibly been contaminated but was relatively small in size. The area had been contained with silt fence to prevent further contamination, and four soil samples were collected on the morning of April 23, 2025 by WBM staff. WBM suggested that all samples appeared to be topsoil, but they did not have the sample results. On May 1, 2025, WBM provided the topsoil sample results they collected on April 23, 2025. The samples exhibited an SAR ranging from 1.06 to 3.06, a near-neutral pH of approximately 7, organic matter content between 2.5% and 3.0%, electrical conductivity (EC) values from 1.59 to 1.99 mmhos/cm, and cation concentrations within acceptable limits.

Following the meeting with WBM, the Reclamation Division conducted an inspection on April 24, 2025, and NOV-2501 was discovered. One sample of the contaminated topsoil was collected and delivered to MVTL for analysis. The analysis showed that the sample had an SAR of 19.3, and an SAR of less than 4 is required for topsoil. The Reclamation Division concluded that WBM selectively sampled topsoil without contamination which misrepresented the extent of contamination in the respread topsoil.

A follow-up inspection was conducted on May 7, 2025 to fully understand the extent of the contamination. Additional samples were taken, and the affected area was flown with a drone to record and take photographs to determine the extent of the contaminated area. Samples were taken from six sites, and the spoil-like material extended to a depth of approximately 4 inches to 6 inches. It was estimated that 1,100 cubic yards of topsoil was affected.

NOV-2501 was issued to WBM on May 20, 2025 for failure to protect topsoil on private land, which resulted in topsoil being commingled with spoil on approximately 3.5 acres of reclaimed cropland within the Gold-01-2024 grade approval in the SE¼ of Section 22, T143N, R88W in Permit KRSB-8603. NOV-2501 cited violation of NDCC 38-14.1-24(5), NDAC 69-05.2-15-02(1), and NDAC 69-05.2-15-03(2).

The remedial actions outlined in the NOV required WBM to contain the contaminated area to prevent contamination of SPGM on adjacent areas, remove the apparent spoil material from the respread topsoil and place it in an area approved by the Reclamation Division, and provide the quantity of contaminated topsoil. WBM was also required to submit a remediation plan to the Reclamation Division for approval to include: (1) a plan for testing the remaining respread topsoil to determine whether it meets the requirements of NDAC 69-05.2-08-10, (2) measures to alleviate compaction caused by the removal of the contaminated topsoil, (3) the source from which additional topsoil will be obtained to replace the contaminated material, (4) a plan to notify Reclamation Division staff prior to respreading topsoil to provide an opportunity for inspection, and (5) a description of the measures that will be implemented to prevent future topsoil contamination. WBM complied with all of the remedial actions outlined in NOV-2501 within the required timelines; therefore, NOV-2501 was terminated on May 30, 2025.

The Commission needs to assess a civil penalty and adopt an order in this matter because WBM 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. The criteria and our recommended civil penalty with respect to NOV-2501 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 issued to WBM on May 25, 2022, consolidated three violations that encompassed areas 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. Therefore, a penalty assessment based on history is warranted.

Recommended penalty assessment for history - \$2,500

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 contaminated topsoil within the grade approved area is considered lost and cannot be replaced. Based on the amount of topsoil loss, a penalty based on seriousness is warranted.

Recommended penalty assessment for seriousness - \$2,000

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 should have noticed the spoil-like material while topsoil was being respread on the grade approved area, and the work should have been stopped immediately. A penalty for negligence is warranted.

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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-2501 in the amount of \$6,000 (\$2,500 for history, \$2,000 for seriousness, and \$1,500 for negligence). The motion for the proposed penalty is attached for your consideration during the August 7, 2025 Commission meeting.

Beulah Mine (Dakota Westmoreland)\Violations\2025\NOV-2501_memo_7-29-25