



May 18, 2010

Mr. James Deutsch
Director, Reclamation Division
North Dakota Public Service Commission
600 East Boulevard Avenue
Bismarck, ND 58505-0480

RE: Notice of Violation 1001

Dear Mr. Deutsch,

This letter is in response to the Notice of Violation (NOV) 1001 that BNI received on 5-5-2010. In this notice, the PSC request was twofold: 1) Stabilize the road surface within 5 days of the receipt of notice, and 2) Re-install the culvert within 20 days of the receipt of notice. As our 5-7-10 email indicated, prior to receiving NOV 1001 BNI already had in place the appropriate signage, cones, and lathe properly securing the area from unwarranted traffic. Additionally, sediment fence was installed to protect the area prior to and during the repair project. BNI's measures taken to stabilize the road surface prior to receiving your letter should exceed the requirements dictated in the abatement portion of the NOV. Also as noted in the 5-7-10 email the repair project was underway but was delayed because of the recent rains, it is however scheduled to be completed by May 21st, weather permitting. Work thus far was field verified by PSC and OSM staff on a 5-10-10 complete inspection of the Center Mine.

To briefly summarize the history and need of diversion 6-1, it directs flows from an unnamed tributary to Hagel Creek before it becomes in contact with mining operations. The construction of diversion 6-1 was built in 2003 in conjunction with raising the elevation of the county road located between sections 5 and 6, TWP: 141N – R84W. This plan was approved by the Oliver County Commissioners prior to implementation and the roadway/diversion embankment was constructed in accordance with Oliver County's current standards for roadway construction. Following construction in 2003 the diversion was seeded and put into use in late 2004 or early 2005 following the diversion becoming properly vegetated to withstand flows without excessive erosion to the channel (BNCR-9702).

The NOV as written states, "Earthen material that had eroded from the sides and bottom of a 60-inch culvert located in Diversion 6-1 between Sections 6 and 7, TWP 141N, R84W, in which the eroded material then contributed suspended solids to flows in the drainage way downstream of the culvert and left a small amount of deposition on undisturbed areas in Section 7". The notice states that we violated; **NDCC 38-14.1-24(4)** – Failure to stabilize and protect surface areas to effectively control erosion and attendant water pollution, **NDAC 69-05.2-16-06(3)** – The culvert that is part of Diversion 6-1 was either not constructed or maintained to prevent additional contributions of suspended solid to stream flow to the extent possible using the best technology currently available, and **NDAC 69-05-2-16-08(1)(c)&(d)** - Sediment control measures were not effective in minimizing erosion or deposition of sediment on undisturbed areas. We do not agree.

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First and foremost BNI does not agree with the three separate areas being cited in NOV 1001. Per the three cited provisions or rules in which the proposed NOV violated all three are in content the same. The regulations as cited in NOV 1001 and as written within the “Rules Governing Surface Mining and Reclamation Operations” and/or ND Century Code are as follows:

NDAC 69-05-2-16-08(1)(c)&(d) states, “Appropriate sediment control measures must be designed, constructed, and maintained using the best technology currently available to (c) Minimize erosion to the extent possible, and (d) Minimize the deposition of sediment on undisturbed areas”.

NDAC 69-05.2-16-06(3) states “Diversion must be designed, constructed, and maintained to prevent additional contributions of suspended solids to stream flow and to runoff outside the permit area to the extent possible using the best technology currently available. Appropriate sediment control measures for these diversions may include maintenance of appropriate gradients, channel lining, revegetation, roughness structures, and detention basins”.

NDCC 38-14.1-24(4), which states, “Stabilize and protect all surface areas, including spoil piles affected by the surface coal mining and reclamation operation, to effectively control erosion and attendant air and water pollution”.

As the NOV was written BNI had violated **NDAC 69-05-2-16-08(1) (c) & (d)**, “Sediment control measures were not effective in minimizing erosion or deposition of sediment on undisturbed areas”. We do not agree. First, this diversion has been established and used for over 5 years and has functioned properly in years ranging from no flows, minimal flows, and high flows as seen in 2009. During this period no issues or potential issues were noted in design, maintenance, vegetative stands, or any other potential failure areas in BNI inspections or PSC inspection reports. Throughout the years this culvert has been inspected multiple times by BNI staff, by multiple if not all PSC staff, and State Water Commission personnel; never with any notes to potential failure areas or areas of concern. Secondly, in a sudden unforeseen failure as this there were no other measures that could have been in place to further protect the area. Although approximately 4-6 yards of soil was eroded, no evidence was found of deposition on the undisturbed portion of section 7. Additionally, at no point did the PSC illustrate to us in the field, which consisted of multiple inspections of the area, that any deposition was found, nor was removal of deposition listed in the abatement of the NOV itself. During the three specific PSC inspections starting with the April 20th inspection that first looked at this area, to the April 23rd inspection with multiple inspectors that focused exclusively on this issue, to the May 10th complete inspection that included multiple inspectors and a OSM employee looking at this area; none of these brought up any discussions/evidence of any deposition.

Secondly, as the NOV was written BNI had violated **NDCC 38-14.1-24(4)**, “Failure to stabilize and protect surface areas to effectively control erosion and attendant water pollution”. We do not agree. First, this rule from the ND Century Code is a generalized rule that is more specially

covered in the cited **NDAC 69-05-2-16-08(1) (c) & (d)**, which is from the specific regulations governing surface mines. BNI does not agree this should have been cited in NOV 1001 or that it addresses any further regulation than within **NDAC 69-05-2-16-08(1) (c) & (d)**. Furthermore, we do not agree we had violated the rule as written per the previous statements regarding **NDAC 69-05-2-16-08(1) (c) & (d)**.

Finally, as the NOV was written BNI had violated **NDAC 69-05.2-16-06(3)**, “The culvert that is part of Diversion 6-1 was either not constructed or maintained to prevent additional contributions of suspended solids to stream flow to the extent possible using the best technology currently available”. We do not agree. The culvert was obviously designed properly as it was submitted, reviewed, and PSC approved to be built. The construction process of building this culvert, or any culvert for that matter, was consistent with the approved methods of installing a culvert. Additionally, the time frame this culvert has been in place and stable, the range of flows it has passed, and the multiple inspections that have been performed by BNI, State, and/or Federal inspectors, none in which have raised any concerns on the construction or maintenance of this culvert; all illustrating this culvert was stable and functioning properly until a unforeseen, yet very common (county and state wide) failure occurred. No further or better technology could have been in place to limit the minimal soil that was eroded.

BNI prides itself on its commitment to environmental protections and sees itself going above and beyond the regulatory laws to protect our resources. Although a culvert failure occurred no deposition was documented and the minimal sediment load that was added would have been quite small given the size of the watershed, amount of water flowing, or relative to TSS levels consistently seen during times of higher flows; ultimately no environmental impacts resulted.

We request that you schedule an informal conference to discuss the items identified in the NOV 1001.

Sincerely,



Jay M. Volk, PhD
Environmental Supervisor