



Public Service Commission

State of North Dakota

COMMISSIONERS

Kevin Cramer
Tony Clark
Brian P. Kalk

Executive Secretary
Darrell Nitschke

600 E. Boulevard Ave. Dept 408
Bismarck, North Dakota 58505-0480
Web: www.nd.gov/psc
E-mail: ndpsc@nd.gov
Phone 701-328-2400
Toll Free 1-877-245-6685
Fax 701-328-2410
TDD 800-366-6888 or 711

June 3, 2010

Mr. Jay Volk
Environmental Services Supervisor
BNI Coal, Ltd.
2360 35th Ave SW
Center, ND 58530-9499

Dear Mr. Volk:

The Public Service Commission has proposed a civil penalty of \$1,250 (\$1,250 for seriousness, \$500 for negligence, and \$500 deduction for good faith) for Notice of Violation (NOV) No. 1001, Case No. RC-10-143, issued to BNI Coal, Ltd. (BNI). The proposed penalty assessment was made at this time because BNI requested an Informal Conference on this matter. The proposed penalty of \$1,250 must be paid to the Commission within thirty days of your receipt of this letter. The funds will be held in an escrow account pending final outcome of the Informal Conference.

Attached to this letter is a copy of the Notice of Informal Conference scheduling the conference for June 29, 2010, beginning at 1:30 p.m., CDT, in the Public Service Commission's Hearing Room, 12th Floor, State Capitol, Bismarck, ND.

As required by NDAC 69-05.2-28-12, the Commission considered the following four factors in determining the proposed penalty for NOV-1001.

History of Violations: The Commission may assess a civil penalty of up to \$3,500 per day on the history of previous violations at the mine where the violation is found. Generally, the history of violations within the preceding three years is considered and a penalty for history has not been recommended in the past if three or fewer violations have occurred in that three-year period. BNI has received only one NOV in the past three years, in June of 2007. Based on the criteria we have used in the past, BNI does not have a history of violations; therefore, a penalty assessment based on history is not warranted.

Proposed penalty assessment for history - \$0

Seriousness of the Violation: 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 fill around the culverts (road embankment) did not perform as designed and that resulted in erosion of material from the culvert, most likely due to improper compaction of materials around the culvert. Although limited sediment deposition was noted downstream of the culvert, the eroded material

contributed to suspended solids to water flows that entered Hagel Creek, which is downstream a short distance. The erosion of the section line road surface created a safety hazard for people using the section line road. When the erosion was discovered, staff noted that people using the infrequently traveled road had been going around the erosion feature. A penalty for seriousness is warranted.

Proposed penalty assessment for seriousness - \$1,250

Negligence: The Commission may assess a civil penalty of up to \$3,000 per day based on the degree of the 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. In this case, we believe that the NOV was caused by failure to properly compact the fill materials around the culvert. The failure to do so was due to lack of diligence and ordinary negligence. Therefore, we believe a penalty for negligence is warranted.

Proposed penalty assessment for negligence - \$500

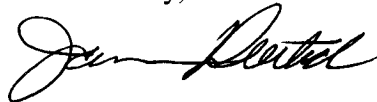
Good Faith: The Commission may deduct up to \$1,000 per day from the total civil penalty when a permittee takes extraordinary measures to abate the violation in the shortest possible time following notification of the violation. No deduction can be made for normal compliance. Upon discovery of the erosion, BNI took the necessary steps to protect the public and begin repair of the culverts. The compliance in this case was very prompt and special measures were taken to abate this violation.

Proposed deduction for good faith - \$500

In summary, a civil penalty of \$1,250 is proposed for NOV-1001, which must be paid within thirty days of the receipt of this letter. The proposed penalty can be discussed at the Informal Conference scheduled for June 29, 2010.

If you have any questions, please contact our office.

Sincerely,



James R. Deutsch
Director
Reclamation Division

Enclosure

Certified Mail

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**BNI Coal, Ltd.
Notice of Violation No. 1001
Violation**

Case No. RC-10-143

NOTICE OF INFORMAL CONFERENCE

June 2, 2010

Preliminary Statement

On May 4, 2010, the Public Service Commission's Reclamation Division issued Notice of Violation 1001 to BNI Coal, Ltd. for erosion around a culvert that they installed through a section line road between Sections 6 and 7, T141N, R84W, in Oliver County. This culvert is part of Diversion 6-1 which was constructed by BNI to divert water from a drainageway that previously flowed through a mine area.

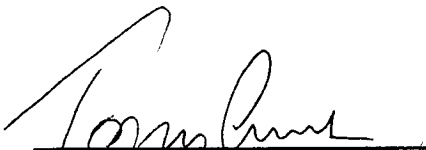
On May 18, 2010, the Commission received a request for an Informal Conference from BNI in the matter.

Notice of Informal Conference

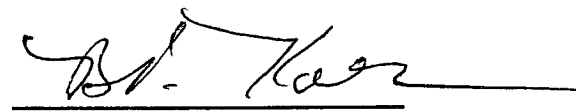
Notice is hereby given that the captioned matter is set for an Informal Conference, commencing at 1:30 p.m. CDT, on June 29, 2010, in the Public Service Commission's Hearing Room, 12th Floor, State Capitol, Bismarck, North Dakota.

If you require any auxiliary aids, such as readers, signers, or Braille materials, please notify the Commission, at (701) 328-2400, or Relay North Dakota TTY: 1-800-366-6888 at least 24 hours prior to the hearing.

PUBLIC SERVICE COMMISSION


**Tony Clark
Commissioner**


**Kevin Cramer
Chairman**


**Brian P. Kalk
Commissioner**