

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

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

**Case No. RC-10-143**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

**July 28, 2010**

**Preliminary Statement**

On May 4, 2010, the Reclamation Division of the Public Service Commission (Commission) issued Notice of Violation (NOV) No. 1001 to BNI Coal, Ltd. (BNI) following an inspection of the Center Mine on April 20, 2010. The violation was issued for the erosion of fill material around a culvert through a section line road. The 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 letter from BNI requesting an informal conference on NOV-1001. In the same letter, BNI also addressed the status of the required remedial action items.

On June 2, 2010, the Commission assessed a proposed civil penalty of \$1,250 and scheduled an informal conference for June 29, 2010. On June 25, 2010, the Commission received a \$1,250 check for the proposed penalty and BNI also filed a letter withdrawing the request for the informal conference.

BNI completed the prescribed remedial measures in the NOV within the abatement time as specified and the NOV was terminated on July 14, 2010.

**Findings of Fact**

1. BNI is engaged in surface coal mining operations under permits issued by the Commission.
2. NOV-1001 stated, and the Commission finds, that BNI violated North NDCC 38-14.1-24(4) for failure to protect all surface areas affected by surface coal mining from erosion and attendant air and water pollution; NDAC Section 69-05.2-16-06(3) for failure to construct or maintain the diversion to prevent additional contributions of suspended solids to stream flow to the extent possible; and, NDAC Section 69-

05.2-16-08(1)(c) and (d) for failure of the sediment control measures to minimize erosion or deposition of sediment on undisturbed areas.

3. BNI requested an informal conference on NOV-1001 on May 18, 2010.
4. BNI completed all of the remedial actions specified in the notice of violation within the prescribed time.
5. BNI's request for an informal conference required the Commission to assess a proposed penalty.
6. NDAC Section 69-05.2-28-12 requires the Commission to consider four factors in determining the amount of civil penalty. These factors are: 1) history of previous violations; 2) seriousness of the violation; 3) negligence; and, 4) good faith in attempting to achieve rapid compliance.
7. The Commission finds that assessment of a civil penalty based on the history of previous violations at BNI's Center Mine is not warranted. With this violation, BNI has only received two violations within the past three years and this does not constitute a history of violations.
8. The Commission finds that BNI's present violation was serious in that some environmental damage occurred. The erosion contributed to suspended solids to downstream flows and the erosion of the section line road surface created a safety hazard for people using the road. A penalty based on seriousness is warranted.
9. The Commission finds that BNI's violation was not due to reckless or willful conduct. However, the failure of the fill material around the culvert was likely due to lack of diligence and ordinary negligence since material around the culvert had not been properly compacted when the diversion was constructed approximately seven years ago. A penalty based on negligence due to lack of diligence and reasonable care is warranted.
10. The Commission finds that BNI's compliance was very prompt in that they took the necessary steps to protect the public and begin repair of the culvert. A deduction for good faith is warranted.
11. Based on these facts, the Commission proposed a penalty of \$0 for history, \$1,250 for seriousness, and \$500 for negligence, and \$500 deduction for good faith, totaling \$1,250, for NOV-1001.
12. The proposed penalty of \$1,250 was paid by BNI.
13. BNI withdrew its request for an informal conference on June 25, 2010, and the conference that had been scheduled for June 29<sup>th</sup> was not held.

14. The Commission terminated NOV-1001 on July 14, 2010.

From the foregoing findings of fact, the Commission now makes its:

**Conclusions of Law**

1. The Commission has jurisdiction over surface coal mining and reclamation operations conducted in North Dakota by BNI.
2. BNI violated the provisions of NDCC 38-14.1-24(4) and NDAC Sections 69-05.2-16-06(3) and 69-05.2-16-08(1)(c) and (d).
3. The Commission should assess a civil penalty for NOV-1001.

From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

**Order**

The Commission orders:

1. Notice of Violation No. 1001 is affirmed.
2. BNI Coal, Ltd. is assessed a total civil penalty of \$1,250 (\$0 for history, \$1,250 for seriousness, and \$500 for negligence, and \$500 deduction for good faith) for the violation.
3. The proceeding is closed since the request for the informal conference was withdrawn.

**PUBLIC SERVICE COMMISSION**

  
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**Tony Clark**  
**Commissioner**

  
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**Kevin Cramer**  
**Chairman**

  
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**Brian P. Kalk**  
**Commissioner**