

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

BNI Coal, Ltd.
Revision No. 12, Permit BNCR-9401
Application

Case No. RC-12-186

**REVISION OF PERMIT TO ENGAGE IN SURFACE COAL
MINING AND RECLAMATION OPERATIONS**

April 9, 2014

Based on the application for **Revision No. 12 to Permit Number BNCR-9401** submitted by BNI Coal, Ltd. (BNI) for the Center Mine on May 4, 2012, and as revised through January 30, 2014 and all information and documentation contained therein, the North Dakota Public Service Commission (Commission) finds that the application meets all applicable requirements of Chapter 38-14.1 of the North Dakota Century Code (NDCC) and Article 69-05.2 of the North Dakota Administrative Code (NDAC). On the basis of the information set forth in the application or from that otherwise available and known by the applicant, the Commission finds that:

Finding No. 1. The permit revision application is accurate and complete and complies with the requirements of NDCC Chapter 38-14.1 and NDAC Article 69-05.2 [NDCC 38-14.1-21(3)(a)].

The applicant verified that all information included in the revision application is true and correct to the best of its knowledge. Revision No. 12 adds 181.54 acres to the permit, including about 30 acres of unleased federal coal in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8, T141N, R83W. With the approval of Revision No. 12, the total acreage in Permit BNCR-9401 will increase to 384.17 acres. Commission staff conducted completeness and technical reviews to ensure that the required information was provided and the mining and reclamation plans meet all applicable requirements. The Reclamation Division issued completeness and technical review letters to the applicant on June 6, 2012, August 14, 2012, October 23, 2012, November 19, 2012, February 27, 2013, June 13, 2013, September 10, 2013, November 15, 2013, December 27, 2013, and January 29, 2014. Responses to each letter were received and appropriate changes were made to the revision application to address the concerns that were noted. The Commission concludes that the revision application is now accurate and complete.

The applicant published the required notices in the Center Republican and Bismarck Tribune and the Commission sent notices to all surface owners that will be affected by Revision No. 12, as well as to numerous local, state and federal agencies. In addition, advisory committee members were provided copies of the application for their review and comment. No objections or requests for an informal conference were received on

this revision application and no major issues were raised during the review of this revision.

Finding No. 2. The applicant has demonstrated that reclamation as required by NDCC Chapter 38-14.1 and NDAC Article 69-05.2 can be accomplished under the reclamation plan contained in the revision application [NDCC 38-14.1-21(3)(b)].

Mining is being conducted in Permit BNCR-9401 solely to remove available lignite prior to the construction of disposal cells for flue gas desulfurization sludge from Minnkota Power Cooperative Inc.'s Milton R. Young Station. The North Dakota Department of Health issued Solid Waste Disposal Permit SP-159 to Minnkota Power Cooperative Inc. (MPC) for the disposal facility effective June 14, 1995 and renewed the permit for a second ten year term on August 2, 2005. The Commission approved an industrial postmining land use for the areas in Section 5 used for and in support of the disposal facility that is regulated by the North Dakota Department of Health. Three disposal cells have been constructed to date. MPC began operating disposal cell number 3 in 2013 with cells 1 and 2 currently undergoing closure and reclamation. Upon reaching capacity the cells will be capped with compacted clay, subsoil, and topsoil thicknesses necessary to meet the Department of Health disposal facility closure requirements. Disposal cells 1, 2 and 3 have been bond released as industrial areas and are now under the sole jurisdiction of the Department of Health. Cell number 4 is proposed for construction in 2020-2021 in the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 8 in acreage added with Revision No. 12 pending a future postmining land use change to industrial use and approval to mine the federal coal.

With the 181.54 acres added to Permit BNCR-9401 with Revision No. 12 in the N $\frac{1}{2}$ N $\frac{1}{2}$ of Section 5 and the NE $\frac{1}{4}$ of Section 8 of T141N, R83W, and the S $\frac{1}{2}$ S $\frac{1}{2}$ of Section 32 of T142N, R83W, the permit area will also support mining operations in pending Permit Application BNCR-1101 with a new haul road corridor through Sections 5 and 32 to the Milton R. Young Station. Permit BNCR-1101 encompasses 8,360 acres south of the Young Station with approval expected in 2014 and mining commencing in 2015. Permit BNCR-1101 will be the source of much of the Center Mine's coal production for the next 30 years.

Postmine land uses for the 384.17 acres in Permit BNCR-9401 with approval of Revision No. 12 include approximately 144 acres of industrial, 120 acres of cropland, 83 acres of native grassland, 18 acres of tame pastureland, and small acreages of stock ponds, woodlands, wetlands and other land uses. The applicant has demonstrated that sufficient soil materials are available to meet the soil redistribution requirements of NDAC 69-05.2-15 and the revegetation requirements of NDAC 69-05.2-22 for non-industrial land uses. Suitable plant growth material removed prior to mining in preparation of disposal cell construction is dedicated to disposal cell reclamation as required by the Department of Health. The post-mining topography proposed in areas not affected by the disposal activities is similar to the pre-mine topography and complies with the requirements of NDCC 38-14.1-24(3) and NDAC 69-05.2-21-02. The reclaimed land will be capable of supporting the pre-mine uses, or higher or better uses, that existed prior to mining.

The applicant provided lease documents indicating that they have the right to mine or disturb lands being added to the permit with Revision No. 12 with the exception of a coal lease for the 40 acre federal coal tract in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8, T141N, R83W. BNI applied for a lease by application for this and other federal coal tracts on March 2, 2011. Following the issuance of the federal coal lease, the Department of the Interior must also

approve a federal mining plan for this federal coal tract before any overburden and coal removal occurs. Coal removal from this tract is not projected until 2020-2021. Article V, Section B.7 of North Dakota's Cooperative Agreement with the Department of the Interior gives the Commission authority to issue permit revisions allowing surface disturbances on land containing unleased federal coal after consultation with Bureau of Land Management (BLM) through the Office of Surface Mining (OSM). This consultation ensures that actions taken by the Commission do not result in substantial or adverse effects to the federal mineral estate. On November 25, 2013, the Commission requested a determination from BLM that the proposed permitting of the 40 acre tract will not adversely affect the federal mineral estate. BLM stated in a response dated January 13, 2014 that the proposed permitting of the 40 acre tract will not adversely affect the federal mineral estate. Condition No. 1 is being attached to the approval of Revision No. 12 to prohibit overburden and coal removal on the federal coal tract until a lease is acquired and federal mine plan approval is granted; however, the condition allows soil removal and other activities on this tract to the extent that surface disturbances support mining operations on adjacent nonfederal lands.

Finding No. 3. Based on the assessment of the probable cumulative impact of all anticipated mining in the area, the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area [NDCC 38-14.1-21(3)(c)].

The Reclamation Division has made an assessment of the probable cumulative hydrologic impacts of all anticipated mining in the area of Permit BNCR-9401 as required by NDCC 38-14.1-21(3)(c) and the Commission finds that additional operations proposed with Revision No. 12 to BNCR-9401 have been designed to maintain the quantity, quality and hydrologic regime of surface and ground water systems within the cumulative impact area. Although the cumulative effects of all existing lignite mining and reclamation operations proposed in Permit BNCR-9401 should not damage the hydrologic balance and water availability within or near the permit areas, mining is being conducted in Permit BNCR-9401 solely to remove available lignite during construction of impoundment cells for a desulfurization sludge disposal facility that is operated by Minnkota Power Cooperative. Minnkota Power Cooperative had previously applied for and received a permit to construct and operate the facility from the North Dakota Department of Health in the early 1990's. Questions were raised by various state agencies about the facility's potential for surface and ground water contamination resulting from impoundment leakage at that time. The Reclamation Division, while not having regulatory authority over the design of waste disposal facilities, investigated the suitability of the proposed operation as an alternative post-mining land use. Minnkota Power Cooperative provided sufficient data and analysis to the Reclamation Division and Department of Health at the time of permit application to indicate that the facility design, geohydrologic setting and proposed monitoring of ground water and surface water resources is adequate to minimize the risk of ground or surface water pollution. Several phases of the multi-celled facility have been constructed, utilized, and are in various stages of post-closure or reclamation and there is no evidence or indication of ground water contamination. Any instances of contamination or evidence of increased risk of ground or surface water pollution will continue to be evaluated by the Reclamation Division and Department of Health in the future as part of permit renewals, midterm permit reviews and revision applications to ensure continued suitability of the facility as an alternative post-mining land use. A more detailed hydrologic impact assessment is on file with Permit BNCR-9401 at the Commission's offices.

Finding No. 4. Lands within the permit area are not within an area designated unsuitable for surface coal mining operations, nor within areas under study or administrative proceedings under a petition to have an area designated as unsuitable for surface coal mining operations [NDCC 38-14.1-21(3)(d)].

None of the lands being added to the permit with Revision No. 12 have been designated unsuitable for surface coal mining operations pursuant to NDCC 38-14.1-05, nor are they within an area under study or administrative proceedings under a petition to have an area designated as unsuitable for surface coal mining operations.

Finding No. 5. The proposed mining operation will not interrupt, discontinue, or preclude farming on alluvial valley floors that are flood irrigated or naturally sub-irrigated or materially damage the quantity or quality of water in surface or underground water systems that supply these alluvial valley floors [NDCC 38-14.1-21(3)(e)].

The original permit finding stated that, based on an examination of the geologic and geomorphic characteristics, soils, land use, and the water quality and quantity of streams occurring within or adjacent to the permit area, it was determined that there are no alluvial valley floors within or adjacent to the permit area. The original permit finding has been further validated by an alluvial valley floor study completed in 2011 for BNI prior to filing Permit Application BNCR-1101 that is contiguous to Permit BNCR-9401 in Sections 5, 8, and 9. It has been determined from the 2011 study that those areas along Square Butte Creek and Hagel Creek adjacent to the permit area do not constitute an alluvial valley floor. Detailed alluvial valley floor investigation reports and determinations are on file with the Commission.

Finding No. 6. In cases where the mineral estate has been severed from the surface estate, the applicant complied with the requirements of NDCC 38-18 [NDCC 38-14.1-21(3)(f)].

The applicant included the necessary leases and other documents in the revision application demonstrating compliance with the North Dakota Surface Owners Protection Act, NDCC 38-18. This documentation included the notice that was given to all surface owners before the application was filed with the Commission.

Finding No. 7. Lands within the permit area are not subject to the prohibitions or limitations of NDCC 38-14.1-07 except for areas that receive specific approvals after complying the applicable review procedures of NDAC Chapter 69-05.2-04 [NDAC 69-05.2-10-03(6)(a)].

Lands being added to the permit area are:

- a. Not on any lands within the boundaries of units of the North Dakota Park System, the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the National Wild and Scenic Rivers System, including study rivers designated under Section 5(a) of the Wild and Scenic Rivers Act, and national recreation areas.
- b. Not on any federal lands within the boundaries of any national forest.

- c. Not within 300 feet of any publicly owned park or places included in the State Historic Sites Registry or the National Register of Historic Places. A cultural resource survey and inventory of the original permit area was completed in 1992. Six cultural sites were identified within the original permit area, but none of these were determined to be significant by the State Historical Society. Cultural resource surveys and inventories of the areas being added to the permit with Revision 12 were conducted in 2008 and 2012. No additional cultural sites were identified with these areas.
- d. Not within 100 feet of the outside right-of-way line of public roads. The section line right of ways common to Sections 4 and 5 and Sections 5 and 8 have been closed by Oliver County.
- e. Not within 500 feet of any occupied dwelling, nor within 500 feet of any farm building.
- f. Not within 300 feet of any public building, school, church, community, or institutional building.
- g. Not within 100 feet of any cemetery.

Finding No. 8. With respect to prime farmland within the permit area, the post-mining land use for the pre-mining prime farmland will be cropland, the reclamation plan was reviewed by the Natural Resource Conservation Service and their suggestions were considered, operations will be conducted in compliance with NDAC 69-05.2-26 and NDCC 38-14.1, and the applicant has the technological capability to restore the productivity on reclaimed lands [NDAC 69-05.2-10-03(6)(c) and NDCC 38-14.1-21(6)].

The applicant included a prime farmland reclamation plan with the submittal of the original permit and with Revision No. 12 that satisfies the requirements of NDAC 69-05.2-09-15 and the performance standards of NDAC Chapter 69-05.2-26. The Natural Resource Conservation Service reviewed the prime farmland reclamation plan when the original permit was submitted, and again with the Revision No. 12, and determined that it is adequate to restore the productivity of the prime farmland. The area being added to the permit with Revision No. 12 contains prime farmland that is subject to the prime farmland standards. Prime farmland performance standards apply to approximately 29 acres within the permit area. The industrial postmine land use acreage within the permit limits the potential prime farmland respread areas. BNI has therefore proposed to reclaim about 9 acres of prime farmland in Section 5 of the permit, while reclaiming the remaining 20 acres of prime farmland in adjacent pending Permit BNCR-1101. Each landowner will receive the same acreage of reclaimed prime farmland as was present prior to mining. The reclamation methods that will be used by the applicant have been proven to be successful in the past; therefore, the Commission finds that BNI has the technological capability to restore the productivity of reclaimed land to a level that is equal to or greater than non-mined prime farmland in the surrounding area under equivalent management practices.

Finding No. 9. The operations will not affect the continued existence of threatened or endangered species or result in the destruction or adverse modification of their critical habitats [NDAC 69-05.2-10-03(6)(d)].

Surface coal mining and reclamation activities will not adversely affect the continued existence of threatened or endangered species or result in the destruction or adverse modification of their critical habitats. No federal threatened or endangered species or designated critical habitats were observed within or contiguous to the proposed permit area.

The permit area is located in the primary whooping crane (a listed species) migration corridor where mining and reclamation activities “may affect, but are not likely to adversely affect” this species. The likelihood of whooping cranes occurring in the study area is very low because desirable habitat does not exist. There are 0.3 acres of linear wetlands present in drainages within the permit area but these types of wetlands are not desirable whooping crane habitat. Since the small wetland acreage is not desirable as whooping crane habitat, the Commission finds that there is no suitable stop-over habitat for whooping cranes within the permit area. The permit and adjacent area do not contain habitat for other listed species including the Black-footed ferret, Pallid Sturgeon, Least Tern, Piping Plover or Western Prairie Fringed Orchid. The Gray Wolf could conceivably be an occasional migrant visitor to North Dakota and the permit area.

Specific surveys were completed during baseline wildlife inventory for the Dakota skipper butterfly and Sprague’s pipit. These are Candidate species under the Endangered Species Act. Sprague’s pipit was observed during the baseline wildlife surveys at several locations approximately one-half to one mile southeast of the permit boundary within adjacent pending Permit BNCR-1101. The Dakota skipper was not observed on or near the permit area and the permit area does not contain high quality habitat for this species. The permit and adjacent area do not contain habitat for the Greater Sage-grouse or Poweshiek Skipperling which are also Candidate species.

The fish and wildlife monitoring plan in the permit includes provisions to continue surveys for threatened, endangered and candidate species and NDAC 69-05.2-13-08(2) requires the permittee to promptly report to the Commission the presence of any threatened and endangered species. If any are reported, the Commission will then consult with the United States Fish and Wildlife Service and North Dakota Game and Fish Department to decide whether and under what conditions the operator may proceed. Therefore, this action will not likely have any adverse effects on listed species or designated critical habitat.

Finding No. 10. The applicant has submitted proof that all reclamation fees required by 30 CFR subchapter R have been paid [NDAC 69-05.2-10-03(6)(e)].

The applicant has paid all reclamation fees required by 30 CFR subchapter R. The Office of Surface Mining’s Applicant Violator System office in Lexington, Kentucky, was queried to verify that all fees have been paid.

Finding No. 11. The applicant has satisfied requirements for approving cropland as a post-mining land use [NDAC 69-05.2-10-03(6)(f)].

The applicant has satisfied the requirements for approval of a cropland post-mining land use under NDAC 69-05.2-22-01. Areas reclaimed to cropland will either be seeded directly to crops commonly grown in the area or to a tame grass/legume pre-cropland

mixture. The post-mining topography and soils are suitable for cropland in the areas that will be cropped.

Finding No. 12. An existing structure that will be used in support of mining activities meets the requirements of NDAC 69-05.2-09-03 [NDAC 69-05.2-10-04].

The area being added to the permit with Revision No. 12 includes a short segment of haul road that is on land occupied by MPC's Milton R. Young Station. This segment of road is the continuation of the current haul road in Permit BNCR-8106 that terminates at the mine-mouth power plant. Approved design plans for this road are included in Permit BNCR-8106. Sedimentation ponds, another haul road, and other facilities that are presently in adjoining Permit BNCR-8106 and original Permit BNCR-9401 will also support mining activities in the added area. These previously permitted structures have been found to meet the applicable design and performance standards.

Finding No. 13. No drill holes, boreholes or wells will be retained for other uses [NDAC 69-05.2-14-03].

The applicant has not proposed to retain any drill hole, borehole, or well for other uses.

Finding No. 14. No spoil in the permit area is known to cause toxic mine drainage [NDAC 69-05.2-16-11].

The chemical characteristics of the overburden materials in the area being added to the permit are such that they do not produce toxic mine drainage. The analysis of overburden samples included in the original permit application do not reveal any substances that would cause any chemical reactions or physical effects that are likely to kill, injure, or impair biota commonly present in the area.

Finding No. 15. The applicant will not conduct mining activities within or near perennial and intermittent stream channels that violate applicable water quality standards or adversely affect the quantity and quality of the water and other environmental resources of the stream [NDAC 69-05.2-16-20].

The activities proposed in Revision No. 12 will not disturb any areas within 100 feet of a perennial or intermittent stream.

Finding No. 16. The applicant does not propose to use any experimental practices in the federal coal tract area [NDAC 69-05.2-27-02].

There are no plans included in the revision application to use any experimental practices that may be allowed under NDAC 69-05.2-27-02.

Finding No. 17. The applicant does not control and has not controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations [NDAC 69-05.2-10-03(4)].

Commission records, and those in the Office of Surface Mining's Applicant Violator System, do not show that the applicant controls and has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations of NDCC

38-14.1 or of other states' laws that are based on P.L. 95-87 (the Federal Surface Mining Control and Reclamation Act), of such nature, duration, and with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of these laws.

Finding No. 18. Neither the applicant, nor any affiliated companies, have unabated violations or unpaid civil penalties [NDAC 69-05.2-10-03(1)].

Commission records, and those in the Office of Surface Mining's Applicant Violator System, do not indicate that the applicant, nor any affiliated companies, have any unpaid civil penalties or unabated violations of NDCC 38-14.1 or any other federal or state laws, rules, or regulations pertaining to air or water environmental protection. Staff at the North Dakota Department of Health also verified that the applicant has no unabated violations with regard to air and water environmental protection standards.

Finding No. 19. A performance bond in the amount of \$1,017,422 is sufficient for the proposed surface coal mining operations in the bond area of this permit [NDAC 69-05.2-12-07].

The Commission has determined that a total bond amount of \$1,017,422 is sufficient at this time to cover the required reclamation, restoration, and abatement work in the bond area of Permit BNCR-9401. The applicant has filed a stipulation to increase surety bond number 400 JR 3522 to \$1,017,422 for this permit and increase the bond area by 181.54 acres to include the area being added to the permit with Revision No. 12.


Subject to the right of any person with an interest that is or may be adversely affected to request a formal hearing under NDCC 38-14.1-30, **Revision No. 12 to Permit Number BNCR-9401** is hereby granted to **BNI Coal, Ltd.** to engage in surface coal mining and reclamation operations, on the following described areas subject to the applicable requirements of the original permit and conditions, Chapter 38-14.1 of the North Dakota Century Code, and the rules promulgated there under. (Attached is a copy of the metes and bounds description of lands being added to the permit area.)

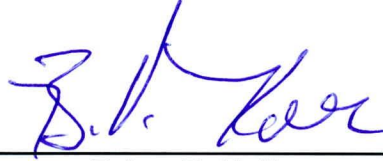
LOCATION

MINE	ADDRESS	Sections	Township	Range	County
Center	Center, ND	5, 8	141N	83W	Oliver
Center	Center, ND	32	142N	83W	Oliver

181.54 acres - Total Area Added

PUBLIC SERVICE COMMISSION


Randy Christmann
 Commissioner


Brian P. Kalk
 Chairman


Julie Fedorchak
 Commissioner

METES & BOUNDS OF PERMIT BNCR 9401
Revision No. 12 Additional Acres

A Tract of Land Lying In Section 32, Township 142 North, Range 83 West and Section 5, Township 141 North, Range 83 West and A Tract of Land Lying in Section 8, Township 141 North, Range 83 West of The Fifth Principal Meridian, Oliver County, North Dakota, Described as Follows:

TRACT 1

Commencing at the Northeast Corner of Section 5, Township 141 North, Range 83 West; (NAD 27-ND State Plane South Zone- US Foot- N: 511,901.7, E: 1,822,011.6);

Thence South 89°52'29" West, along the North line of Said Section 5, a distance of 1349.23 feet to the Point of Beginning;

Thence North 41°11'44" East, a distance of 482.90 feet;

Thence North 42°49'06" West, a distance of 102.90 feet;

Thence North 58°16'11" West, a distance of 385.15 feet;

Thence North 47°59'41" West, a distance of 70.72 feet;

Thence North 60°49'23" West, a distance of 127.22 feet;

Thence North 65°38'25" West, a distance of 98.39 feet;

Thence South 88°35'20" West, to a point on the East Permit line of BNCR 8106, a distance of 92.37 feet;

Thence South 21°20'31" West, along said East Permit line, a distance of 199.97 feet;

Thence North 67°55'57" West, continuing along said Permit line, a distance of 100.00 feet;

Thence South 16°23'03" East, a distance of 188.67 feet;

Thence South 45°02'08" West, a distance of 302.87 feet;

Thence South 82°44'57" West, a distance of 495.86 feet;

Thence South 06°02'23" West, a distance of 775.62 feet;

Thence South 35°19'12" East, a distance of 284.44 feet;

Thence South 13°22'38" East, a distance of 195.30 feet;

Thence South 33°56'42" West, a distance of 378.40 feet;

Thence South 89°56'58" East, a distance of 402.71 feet;

Thence North 45°03'02" East, a distance of 1163.16 feet;

Thence North 00°03'02" East, a distance of 388.32 feet;

Thence North 41°11'44" East, a distance of 152.60 feet to the Point of Beginning.

The Above Described Tract of Land Contains 42.46 Acres, More Or Less.

TRACT 2

Commencing at the Northeast Corner of Section 8, Township 141 North, Range 83 West; (NAD 27-ND State Plane South Zone- US Foot- N: 506,603.4, E: 1,822,015.8);

Thence South 00°05'21" West, along the East line of Said Section 8, a distance of 330.01 feet to the Point of Beginning;

Thence South 00°05'21" West, continuing along said East line, a distance of 2292.15 feet to the East quarter corner of said Section 8;

Thence North 89°47'19" West, along the East-West quarter line of said Section 8, a distance of 2638.38 feet to the center of said Section 8;

Thence North 00°06'48" East, along the North-South quarter line of said Section 8, a distance of 2300.91 feet;

Thence South 89°35'53" East, a distance of 2637.43 feet to the Point of Beginning.

The Above Described Tract of Land Contains 139.07 Acres, More Or Less.

Total Area Of The Two Parcels = 181.54 Acres, More Or Less.