

PUBLIC SERVICE COMMISSION

Reclamation Division

Memorandum

TO: Commissioners Kalk, Christmann, Fedorchak
Darrell Nitschke, Executive Secretary
Illona Jeffcoat-Sacco, Ryan Norrell, Austin Lafferty

FROM: *JW DKM BG*
Jim Deutsch, Dean Moos, and Bill Gunnerson

DATE: July 3, 2013

SUBJECT: Proposed Penalty and Notice of Informal Conference for NOV-1301
issued to BNI Coal, Ltd., Case No. RC-13-334

SUMMARY - Notice of Violation (NOV) 1301 was issued to BNI Coal, Ltd. on May 29, 2013, for failure to properly construct and maintain a sump and silt fence used as sediment control measures to minimize sediment deposition on adjacent undisturbed areas. BNI has requested an informal conference in the matter and the Commission needs to propose a civil penalty for the NOV and issue a notice of informal conference in the matter. The Reclamation Division recommends that the Commission propose a civil penalty of \$1,000 for NOV-1301 and issue a notice of informal conference for August 19, 2013.

DISCUSSION: During a routine inspection on May 29, 2013, Commission inspectors observed spoil and overburden deposition on undisturbed land below an existing silt fence and sump located on the soil stripping edge near subsoil stockpile MI5-S07. During previous inspections, inspectors had pointed out the need for additional sediment control measures at this and another nearby location. Appropriate measures had been taken at the other location and that sediment control system performed satisfactorily. However, the same measures were not taken at this location and runoff from May rains resulted in the sediment deposition on the adjacent undisturbed area.

NOV-1301 was issued to BNI for failure to construct and maintain a sump and silt fence used as sediment control measures as necessary to minimize sediment deposition on undisturbed areas. Failure to properly construct and maintain the sump and silt fence caused overburden and spoil deposition on adjoining undisturbed land. The NOV alleges that the sediment control measures were not effective in minimizing erosion and sediment deposition as required by NDAC 69-05.2-16-08(1)(d).

The required remedial action required BNI to reconfigure the existing sump and silt fence to prevent additional sediment deposition on undisturbed land within ten days of receipt of the NOV and to remove the sediment from the undisturbed area as conditions allow within 45 days of receipt of the NOV. Subsequent inspections have indicated that the

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sump/silt fence have been adequately reconstructed but that the sediment has not been removed from the undisturbed area due to wet conditions. Once all of the required remedial actions have been completed as verified in a subsequent inspection, the NOV will be terminated.

Since BNI has requested an informal conference on NOV-1301, the Commission is required to propose a civil penalty prior to the informal conference. The amount of the proposed penalty can also be contested during the informal conference. Also, we must normally schedule, but not hold, an informal conference within 30 days of receipt of the request. All parties are available the afternoon of August 19 for the informal conference.

Four factors must be considered in determining the amount of a proposed 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. These factors and the recommended civil penalty under each with respect to NOV-1301 are discussed below:

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 last received NOV on May 4, 2010 and was not within the three-year period. 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.

Recommended 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. Approximately 2-4 inches of overburden-spoil sediment covered an area of approximately 1500 square feet of undisturbed land as a result of the failure of the upstream sump and silt fence that were used as best management practices. Although the degree of sediment deposition was not substantial and it is likely that the accumulated sediment can be removed without impacting the in-situ topsoil, a certain degree of environmental damage did occur and the potential for additional damage did exist. A penalty for seriousness is warranted.

Recommended penalty assessment for seriousness - \$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 \$3000 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 BNI's failure to take sufficient measures to maintain and strengthen the sump and silt

fence best management practices at this location. This concern had been pointed out to BNI staff on several previous inspections and actions taken by BN were limited to installing some straw bales behind the silt fence. We believe the failure to take more effective actions was due to lack of diligence. Therefore, we believe a penalty for negligence is warranted.

Recommended penalty assessment for negligence - \$750

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. The compliance in this case was considered normal. Therefore, no deduction for good faith is warranted.

Recommended deduction for good faith - \$0

In conclusion, the Reclamation Division recommends a civil penalty of \$1,000 (\$250 for seriousness and \$750 for negligence) for NOV-1301.

Attached is a Proposed Motion to assess a proposed penalty and to issue a notice of informal conference. The conference will be held in the Commission hearing room beginning at 1:30 p.m. CDT, August 19, 2013. Allen Hoberg from the Office of Administrative Hearings will preside over the informal conference and will issue a recommended order in the matter. The Notice of Informal Conference is also attached.

Attachments