



# Public Service Commission

## State of North Dakota

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July 11, 2013

Dr. Jay Volk  
Environmental Manager  
BNI Coal, Ltd.  
2360 35<sup>th</sup> Ave SW  
Center, ND 58530-9499

Dear Dr. Volk:

The Public Service Commission has proposed a civil penalty of \$1,000 (\$250 for seriousness and \$750 for negligence) for Notice of Violation (NOV) No. 1301, Case No. RC-13-334, 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 \$1,000 must be paid to the Commission within thirty days of your receipt of this letter. The funds will be placed 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 August 19, 2013, beginning at 1:30 p.m., CDT, in the Public Service Commission Hearing Room, 12<sup>th</sup> 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 last received an NOV on May 4, 2010 and that NOV is 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.

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. 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 to prevent sedimentation on the downstream undisturbed areas.

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.

Proposed 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 \$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 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 action was due to lack of diligence. Therefore, a penalty for negligence is warranted.

Proposed 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.

Proposed deduction for good faith - \$0

In summary, a civil penalty of \$1,000 is proposed for NOV-1301, 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 August 19, 2013.

If you have any questions, please contact our office.

Sincerely,



James R. Deutsch  
Director  
Reclamation Division

Enclosure

Certified Mail