

**PUBLIC SERVICE COMMISSION**

Reclamation Division

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Memorandum

TO: Commissioners Kalk, Christmann and Fedorchak  
Illona Jeffcoat-Sacco - General Counsel  
Darrell Nitschke - Executive Secretary

FROM: *JL* Jim Deutsch, *DKM* Dean Moos and *AW* Guy Welch

DATE: October 30, 2014

SUBJECT: Final Order for Case No. RC-14-712, NOV-1402 issued to BNI Coal, Ltd.

**Summary:** Notice of Violation (NOV) 1402 was issued to BNI Coal, Ltd. (BNI) on September 9, 2014, following a September 3, 2014 inspection of the Center Mine. NOV-1402 was issued for failure to properly mark the permit boundary for Permit BNCR-1101 at the Center Mine and for conducting surface mining related activities outside the permit boundary. BNI did not request an informal conference or formal hearing in the matter. Therefore, the Reclamation Division recommends that the Commission adopt the attached order to affirm the violation and assess a \$2,000 penalty.

**Discussion:** During a September 3, 2014 inspection of the Center Mine, Guy Welch observed that some topsoil had been stockpiled on an area that is outside of the approved permit boundary and that heavy equipment was traveling on a closed county road that is only partially located within the permit along the south and east section lines of Section 6, T141N, R83W. At the time of the inspection, permanent permit boundary markers were not in place in this area and it appeared that temporary wooden stakes had been recently placed to mark the permit boundary. Workers were relocating the portion of the topsoil stockpile that was located off-permit onto the permitted area.

NOV 1402 was issued to BNI on September 9, 2014 for failure to properly mark the boundary of the permit area as required by NDAC 69-05.2-14-04(4) and for conducting mining operations outside of the approved permit boundary (prohibited by NDCC 38-14.1-25(2)). The NOV was terminated on October 6, 2014 after staff determined that all of the required remedial action items were satisfactorily completed. BNI did not request an informal conference or a formal hearing in this matter.

Since an informal conference or hearing was not requested, the Commission needs to assess a civil penalty and adopt a final order in this matter. The Commission must consider four factors in determining the amount of a 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 recommended civil penalty with respect to NOV-1402 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 has received one other NOV in the last three years. Based on the criteria we have used in the past, BNI does not have a history of violations that requires a penalty to be assessed.

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. This violation did cause some minor environmental damage, namely the stockpiling of topsoil off-permit and the soil compaction resulting from the heavy equipment traversing the undisturbed area. A penalty based on seriousness is warranted.

Recommended penalty assessment for seriousness - \$500

**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, BNI had not yet placed the permit boundary markers even though the permit was issued 3 months earlier. As a result of not clearly marking the permit boundary, mining related activities took place outside of the permit boundary. A penalty based on negligence due to lack of diligence and reasonable care is warranted.

Recommended penalty assessment for negligence - \$1,500

**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. In this case, the remedial action taken to abate the violation was normal. Therefore, a deduction for good faith is not warranted.

Recommended deduction for good faith – \$0

In conclusion, the Reclamation Division recommends that the Commission adopt the attached final order that affirms NOV-1402 and assess a civil penalty in the amount of \$2,000 (\$500 for seriousness and \$1,500 for negligence). The order also closes the case upon payment of the penalty. A proposed motion is also attached for your consideration at the November 6<sup>th</sup> Commission meeting.

Attachments