

**Public Service Commission
Reclamation Division**

Memorandum

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

From: Jim Deutsch, Dean Moos, and Bill Gunnerson

Date: October 9, 2015

Subject: Order for Case No. RC-15-605, NOV 1503 issued to BNI Coal, Ltd.

Summary: Notice of Violation (NOV) 1503 was issued to BNI Coal, Ltd. (BNI) on July 29, 2015 following a July 9, 2015 Center Mine inspection for conducting topsoil removal and stockpiling operations in a section line (public road) right of way prior to obtaining Oliver County Commission approval to close the section line. BNI did not request an informal conference or formal hearing in the matter. The Reclamation Division therefore recommends that the Commission adopt the attached order to affirm the violation and assess a \$1,000 penalty.

Discussion: During a July 9, 2015 Center Mine inspection, Bill Gunnerson noticed that topsoil removal and stockpiling operations had occurred in the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 28, within the Section 28 and 29 section line right of way, and in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 29 (T 142N, R 84W) in Permit BNCR-9702 as depicted on Figure 1. Item No. 44 of the February 9, 2015 pre-renewal review letter for Permit BNCR-9702 asked BNI to obtain or document Oliver County Commission approval to close the one-half mile segment of the north-south section line between the SW $\frac{1}{4}$ of Section 28 and the SE $\frac{1}{4}$ of Section 29.

BNI responded that they had not yet obtained the necessary approval to close the section line. In addition, Item No. 15 in staff's June 26th technical review letter for Revision No. 38 to Permit BNCR-9702 requested that BNI discuss plans to obtain approval from the Oliver County Commission to close the one-half mile segment of the north-south section line between the SW $\frac{1}{4}$ of Section 28 and the SE $\frac{1}{4}$ of Section 29 before expanding mining operations westward from Section 28 into Section 29.

BNI's July 8th response to that item stated a request for closure of the section line between Sections 28 and 29 will be submitted to the Oliver County Commissioners in the near future.

NOV 1503 was issued to BNI for conducting topsoil removal and stockpiling operations in the north-south section line right of way between the SW $\frac{1}{4}$ of Section 28 and the SE $\frac{1}{4}$ of Section 29 (T 142N, R 84W) in Permit BNCR-9702 prior to obtaining Oliver County Commission approval to close the section line in violation of NDAC 69-05.2-04-01.3(2)(b). The notice for the August

6th Oliver County Commission hearing for BNI's petition to temporarily close the section was published July 16th in the *Center Republican*. On August 6th the Oliver County Commission granted approval to close the section line and that became effective September 10th with the publication of the meeting minutes in the *Center Republican*. NOV 1503 was terminated September 22, 2015 after staff deemed the remedial actions were adequate to terminate the violation.

The Commission needs to assess a civil penalty and adopt an order in this matter because BNI did not request an informal conference or a formal hearing. The Commission considers the following four factors in determining the amount of any civil penalty: (1) history of previous violations; (2) seriousness; (3) negligence; and (4) good faith in attempting to achieve compliance. These factors and recommended civil penalty with respect to NOV 1503 are as follows:

History of previous violations: The Commission may assess a civil penalty of up to \$3,500 per day based on the history of previous violations by the operator or permittee at the particular operation. Generally, the history of violations within the preceding three years is considered and a penalty for history has not been recommended if three or fewer violations have occurred in that three-year period. BNI has received two other violations within the preceding 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: 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 duration of potential or actual damage in terms of impact to the public or the environment. This violation did not cause any environmental damage but it did cause potential impact to the public. NDAC 69-05.2-01-02(82) defines a public road in part as all land located within two rods (10.06 meters) on each side of all section lines. Pursuant in part to NDCC 38-14.1-07(4) and NDAC 69-05.2-04-01.1(3), surface coal mining operations are prohibited within 100 feet of the outside right-of-way line of any public road unless the Commission or the appropriate public road authority with jurisdiction over the road allows the road to be relocated or closed, or the area within the protected zone to be affected by the surface coal mining operation. NDAC 69-05.2-04-01.3(2)(b) required BNI to obtain Oliver County Commission approval prior to closing the road. Although this short segment of section line right-of-way was not closed prior to disturbance, the remainder of the section line right-of-way was closed and public safety was not an issue. A penalty based on 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 \$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. The Reclamation Division requested that BNI obtain or document approval from the Oliver County Commission to close the section line in the February 9, 2015 pre-renewal review letter for Permit BNCR-9702. In spite of this warning, the section line right-of way was disturbed prior to obtaining the proper approval. A penalty based on negligence due to lack of diligence is warranted.

Recommended penalty assessment for negligence - \$750

Good faith in attempting to achieve compliance: 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 which is abatement of the violation within the time set for abatement. Oliver County Commission approval to close the section line became effective September 10, 2015. A deduction for good faith is not warranted.

Recommended deduction for good faith - \$0

The Reclamation Division recommends that the Commission adopt the attached order that affirms NOV 1503 and assesses a civil penalty in the amount of \$1,000 (\$250 for seriousness and \$750 for negligence). The order also closes the case upon payment of the penalty. A proposed motion for the October 14th Commission meeting is also attached for your consideration.

Attachments

Minedata/Center/Violations/2015/NOV-503/NOV_1503_memo_10-9-15

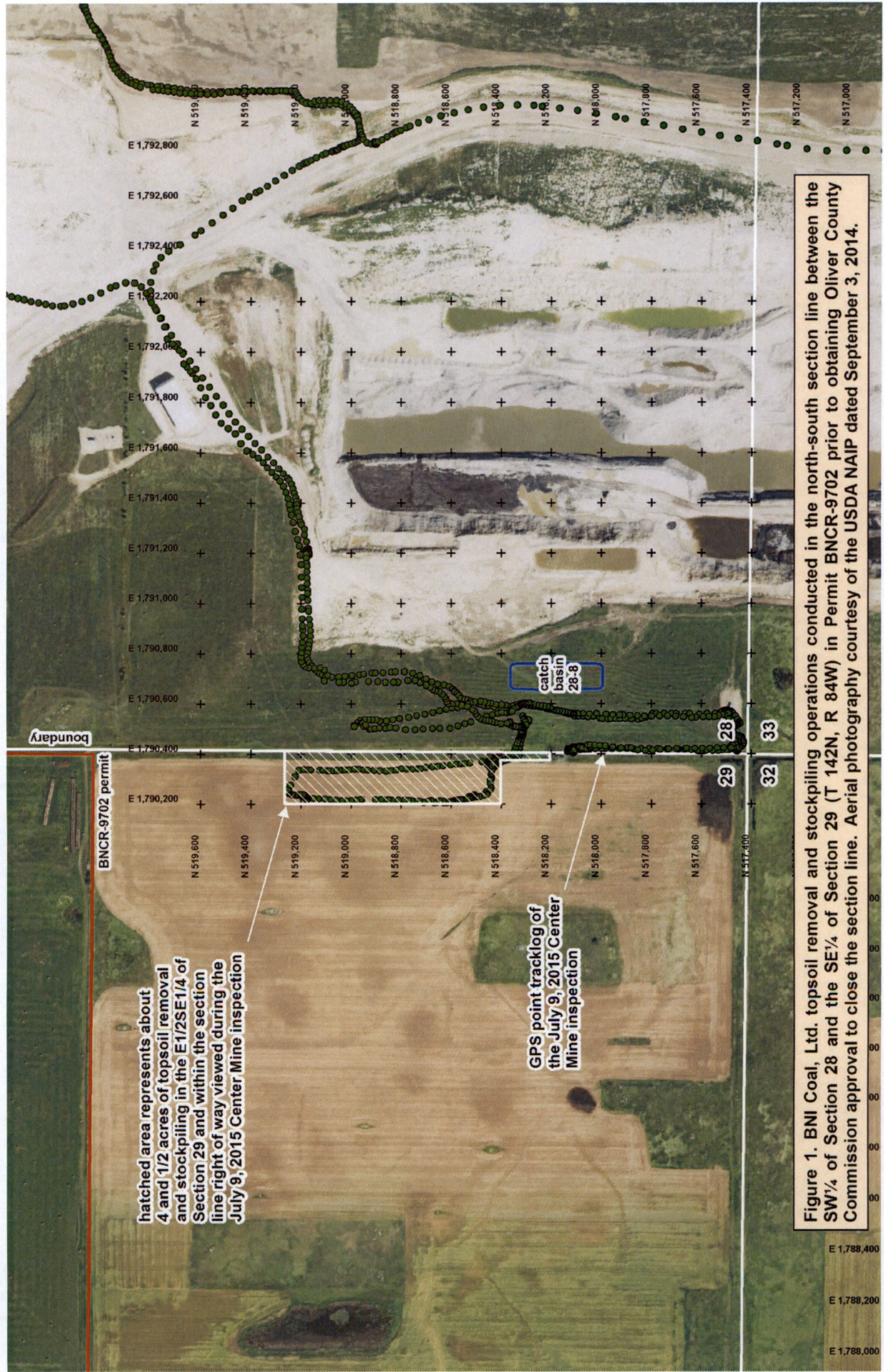


Figure 1. BNI Coal, Ltd. topsoil removal and stockpiling operations conducted in the north-south section line between the SW 1/4 of Section 28 and the SE 1/4 of Section 29 (T 142N, R 84W) in Permit BNCR-9702 prior to obtaining Oliver County Commission approval to close the section line. Aerial photography courtesy of the USDA NAIP dated September 3, 2014.