

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

BNI Coal, Ltd.
Notice of Violation No. 1503
Violation

Case No. RC-15-605

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

October 14, 2015

Preliminary Statement

On July 29, 2015 the Reclamation Division of the Public Service Commission (Commission) issued Notice of Violation (NOV) No. 1503 to BNI Coal, Ltd. (BNI) following an inspection of the Center Mine on July 9, 2015. The violation was issued for conducting topsoil removal and stockpiling operations within 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 in Permit BNCR-9702 prior to obtaining Oliver County Commission approval to close the section line.

BNI completed the prescribed remedial measures within the required abatement time. The NOV was terminated on September 22, 2015. BNI did not request an informal conference or a formal hearing in the matter.

Findings of Fact

1. BNI is engaged in surface coal mining operations under permits issued by the Commission.
2. NOV 1503 states, and the Commission finds, that BNI violated NDAC Section 69-05.2-04-01.3(2)(b) by 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 (T142N, R84W) in Permit BNCR-9702 prior to obtaining the road authority's, the Oliver County Commission, approval to close the section line. NDAC Section 69-05.2-04-01.3(2)(b) requires that the applicant must obtain any necessary approvals from the authority with jurisdiction over the road before closing a public road which includes section line right of ways. 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.

4. BNI did not contest the notice of violation by requesting an informal conference or formal hearing in the matter.
5. Commission staff terminated NOV 1503 on September 22, 2015.
6. NDAC Section 69-05.2-28-12 requires the Commission to consider four factors in determining the amount of civil penalty. These factors are: 1) history of previous violations; 2) seriousness; 3) negligence; and, 4) good faith in attempting to achieve compliance.
7. The Commission finds that assessment of a civil penalty based on the history of previous violations at BNI's Center Mine is not warranted. BNI has received two other violations within the past three years. A penalty for history is usually not assessed unless three or more violations are issued within the preceding three-year time period.
8. The Commission finds that this violation was serious in that there was a potential impact to the public. 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. A penalty based on seriousness is warranted.
9. The Commission finds that BNI's violation was not due to reckless or willful conduct. Nonetheless, the NOV resulted from BNI's failure to obtain Oliver County Commission approval to close the section line prior to conducting surface coal mining operations within the section line right of way. 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 prior to any mining related disturbances within the right-of-way. Despite this request, the section line right-of-way was disturbed before it was closed by the Oliver County Commission. The failure was due to lack of diligence. A penalty based on negligence is warranted.
10. The Commission finds that BNI's abatement of the NOV was normal. A deduction from the penalty may be made when extraordinary measures are taken to abate a violation in the shortest possible time following notification of the violation. A deduction for good faith is not warranted.
11. Based on these facts, the Commission should assess a penalty of \$250 for seriousness and \$750 for negligence totaling \$1,000 for NOV 1503.

From the foregoing Findings of Fact, the Commission now makes its:

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Conclusions of Law

1. The Commission has jurisdiction over surface coal mining and reclamation operations conducted by BNI in North Dakota.
2. BNI violated the provisions of NDAC Section 69-05.2-04-01.3(2)(b).
3. A civil penalty for NOV 1503 is warranted.

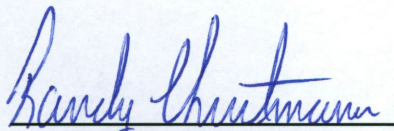
From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

Order

The Commission orders:

1. Notice of Violation No. 1503 is affirmed.
2. BNI Coal, Ltd. is assessed a total civil penalty of \$1,000 (\$250 for seriousness and \$750 for negligence) for the violation. The penalty must be paid within thirty days of receipt of this Order.
3. The proceeding is closed upon BNI's timely payment of the penalty.

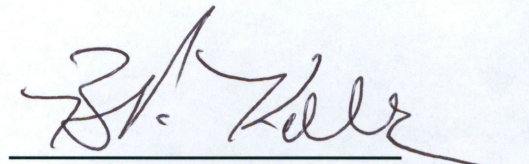
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