

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

BNI Coal, Ltd.
Revision 8, Permit BNCR-1101
Application

Case No. RC-20-438
OAH No. 20230243

AFFIDAVIT OF SERVICE BY
ELECTRONIC MAIL

STATE OF NORTH DAKOTA

COUNTY OF BURLEIGH

Pamela J. Thompson deposes and says that she is over the age of 18 years and not a party to this action and on, the **6th day of September 2023**, she sent electronically to the parties listed below, the following:

- **Recommended Findings and Ruling and Recommended Order (proposed)**

The emails were addressed as follows:

Dave and Debra Berger
Landowners
dberger@westriv.com

Hope L. Hogan
Administrative Law Judge
hlhogan@nd.gov

Brian Dresser
Landowner
Dresser82@hotmail.com

Wade Mann
Crowley-Fleck, PLLP
wmann@crowleyfleck.com

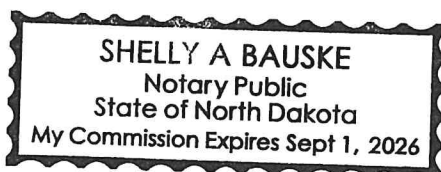
To the best of affiant's knowledge each email address shown is the respective addressee's last reasonably ascertainable email address.



Subscribed and sworn to before me
this **6th day of September 2023**



SEAL



**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**BNI Coal, Ltd.
Revision No. 8, Permit BNCR-1101
Application**

Case No. RC-20-438

OAH File No. 20230243

**RECOMMENDED FINDINGS AND RULING
AND RECOMMENDED ORDER**

September 5, 2023

Appearances

Dave and Debra Berger, Landowners, 2531 37th Ave SW, Center, North Dakota 58530

Brian Dresser, Landowner, 2574 37th Ave SW, Center, North Dakota 58530

Wade Mann, Attorney at Law, 100 W Broadway, Suite 250, Bismarck, North Dakota 58501, on behalf of BNI Coal, Ltd.

John M. Schuh, Special Assistant Attorney General, Public Service Commission, State Capitol, Bismarck, North Dakota 58505, on behalf of the Public Service Commission.

Hope Hogan, Administrative Law Judge, Office of Administrative Hearings, 2911 N 14th Street – Suite 303, Bismarck, North Dakota 58503, as Procedural Hearing Officer.

Preliminary Statement

On October 28, 2020, BNI Coal, Ltd. (BNI) filed the application for Revision No. 8 to Surface Coal Mining Permit BNCR-1101. Revision No. 8 adds 2,661.04 acres in Sections 11, 14, 15, 16, 22, and 23, T141N, R84W to the existing permit, adds plans to mine the 320-acre federal coal tract in the E $\frac{1}{2}$ NE $\frac{1}{4}$, the S $\frac{1}{2}$ SW $\frac{1}{4}$, and the SE $\frac{1}{4}$ of Section 14, T141N, R84W, and proposes to modify the postmining topography for 1,211 acres in the existing permit area. The revision updates nearly every section of the permit.

On May 5, 2021, the Public Service Commission (Commission) issued a Notice of Receipt of Revision Application for Revision No. 8 to Permit BNCR-1101 informing the public that written comments, objections, or requests for an informal conference must be filed with the Commission by July 6, 2021.

From July 19, 2021, through February 3, 2023, the Commission conducted six technical reviews of the Revision No. 8 to Permit BNCR-1101 and BNI updated the permit in response to each of these reviews. On March 7, 2023, the Commission sent a bond determination letter to BNI

that required a rider be submitted to add the revision addition area to the existing surety bond. BNI updated the business entity information section of the permit for an evaluation by the Office of Surface Mining's (OSM) Applicator Violator System (AVS).

On June 8, 2023, the Commission issued a Re-Notification of Receipt of Revision Application for Revision No. 8 to Permit BNCR-1101 informing the public that BNI intends to mine federal coal in Section 14, T141N, R84W in Permit BNCR-1101 and that written comments, objections, or requests for an informal conference must be filed with the Commission by July 31, 2023.

On July 18, 2023, Brian Dresser, filed comments, objections, and a request for an informal conference (Conference). Mr. Dresser expressed concerns about coal mining operations being conducted within five hundred feet of residences, the lack of design plans in the permit for the haul road crossing 37th Avenue SW, blasting damage to buildings, access to agricultural property, dust control, and lack of communication from BNI on past agreements and future mining plans.

On July 19, 2023, Dave and Debra Berger, filed comments, objections, and a request for an informal conference. The Bergers expressed concerns about the location and design of the haul road that will cross 37th Ave SW, dust, noise, blasting damage to wells and buildings, and lack of communication from BNI on past agreements and future mining plans.

On July 19, 2023, the Commission requested the designation of an administrative law judge (ALJ) to preside as a hearing officer at the Conference. The Office of Administrative Hearings designated Hope L. Hogan as a substantive ALJ to conduct the hearing and issue a recommended order.

On July 25, 2023, the Commission issued a Notice of Informal Conference for 9:00 a.m. CDT on August 17, 2023, in the Public Service Commission Hearing Room, 12th Floor, State Capitol, Bismarck, North Dakota. The issues listed in the notice were coal mining operations being conducted within five hundred feet of residences, the lack of design plans in the permit for the haul road crossing 37th Avenue SW, blasting damage to wells and buildings, possible at-grade county road crossing, access, noise, dust control, and lack of communication from BNI on past agreements and future mining plans.

The Conference was held as scheduled. Mr. Dresser and the Bergers appeared on their own behalf. BNI was represented by Wade Mann of Bismarck accompanied by Michael Heger, General Manager, Doug Scheetz, Manager of Health, Safety, and Environmental Services, and Jonathan Rudnick, Manager of Engineering. The Reclamation Division was represented by Attorney John Schuh accompanied by Zanna A. Brinkman, Director of the Reclamation Division, Jonathan W. Emmer, Assistant Director of the Reclamation Division, Brandon S. Myran, Environmental Engineer, and Preston J. Ripplinger, Hydrologist. Mr. Dresser and the Bergers were provided with the opportunity to express concerns regarding Revision No. 8. Mr. Dresser, the Bergers, and the Reclamation Division offered exhibits the ALJ made part of the Conference record.

N.D.C.C. § 38-14.1-19 requires the Commission to issue a ruling on this alternative public participation procedure within thirty days of the close of the Conference. N.D.C.C. § 38-14.1-20 provides for further review by the Commission at a formal hearing in accordance with N.D.C.C. § 38-14.1-30. N.D.C.C. § 38-14.1-30(3)(f) incorporates the restriction in the Surface Mining Control and Reclamation Act (“SMCRA”), Public Law 95-87, that no person who presides at an informal conference shall participate in the decision-making process at the appeal level. No Commissioner participated in the Conference to allow for their full involvement at a formal hearing should further review be requested.

During the Conference, Mr. Dresser and the Bergers presented several of the noticed issues. Based upon the presentations of the parties, the documentation included in the record, the applicable statutes, rules, and case law, support the following:

Findings

1. On May 28, 2014, the Commission conditionally approved Surface Coal Mining Permit No. BNCR-1101 to allow BNI to conduct surface mining and reclamation operations at the Center Mine. Special condition No. 4 requires BNI to provide copies to the Commission of the road authority’s approval documents to close or relocate any public road and other approval documents to conduct surface coal mining activities within one hundred feet of the outside right-of-way of any public road as required by N.D. Admin. Code § 69-05.2-04-01.3(4). These documents must be provided to the Commission within thirty days of the road authority’s approval and include written findings made by the road authority.
2. BNI filed the application for Revision No. 8 to Surface Coal Mining Permit BNCR-1101 on October 28, 2020. Revision No. 8 adds 2,661.04 acres in Sections 11, 14, 15, 16, 22, and 23, T141N, R84W to the existing permit, adds plans to mine the 320-acre federal coal tract located in the E½NE¼, the S½SW¼, and the SE¼ of Section 14, T141N, R84W, and proposes to modify the postmining topography for 1,211 acres in the existing permit area. The revision updates nearly every section of the permit.
3. Revision No. 8 to Surface Coal Mining Permit BNCR-1101 is currently under review by the Commission and it has not been approved.
4. At the Conference, Mr. Dresser and the Bergers presented the following issues: (a) blasting, (b) the proposed haul road location, which crosses 37th Ave SW and the lack of design plans in the permit, (c) proposed mining operations within five hundred feet of residences, (d) dust, (e) noise, and (f) lack of communication from BNI on past agreements and future mining plans.
5. At the conclusion of the Conference, Mr. Dresser and the Bergers requested (a) a requirement to have BNI submit blasting design plans to the Commission if blasting operations are conducted within two thousand feet of any dwelling, (b) if agreeable by the landowner, that BNI place a seismograph at an occupied dwelling if the dwelling is

within three thousand feet from a blast, (c) a requirement for BNI to have a dust mitigation plan, (d) a finalized the haul road design that crosses 37th Ave SW before approving the revision application, and (e) better communication from BNI to the landowners.

Blasting

6. Mr. Dresser expressed concern about blasting by BNI and recalled a large blast in 2014 that shook his house resulting in pictures falling off the wall. He also claimed that there had been damage to his house and that he lost water to one of his outside hydrants in the fall of 2017 from blasting. Mr. Dresser stated that he informed Jay Volk of BNI, Manager of Health, Safety, and Environmental Services, of damage to his house and that the mine hired Braun Intertec (Intertec) in 2014 to conduct a pre-blast survey of his house. Mr. Dresser stated that the pre-blast survey report was too generic and did not provide any determinations.
7. The Bergers stated that the blasting operations at BNI caused their well water to fizz after a blast. They also stated that the North Dakota Department of Environmental Quality (DEQ) samples his well water once a year to conduct an analysis of the water.
8. The Bergers also stated a well drilled in 1973 stopped working two years ago. A contractor repaired the well and determined that the well stopped working because part of the pipe was cracked at a depth around one hundred eighty feet. The well driller told Mr. Berger that he thought that the cracked pipe could have been caused by blasting.
9. The Bergers stated that numerous blasts over the years shook the house. They claimed that the blasting had caused damage to their home — including a crack in their granite countertop. The granite countertop was installed in 2013, but they did not recall exactly when the crack occurred.
10. The Bergers stated that they are pleased with BNI's recent communication regarding upcoming blasts. Beginning in either 2018 or 2019, BNI initiated a practice of sending text notifications to landowners approximately three hours prior to a scheduled blast.
11. Mr. Scheetz stated that BNI is aware of the blast in 2014 and that it should have been postponed because it was a low overcast cloudy day. This blast was conducted in Permit BNCR-9702 and was approximately three miles or more from the Berger's residence. BNI expressed that lessons were learned from the occurrence.
12. Mr. Scheetz referenced a January 21, 2019, post-blast survey prepared by Intertec for the Berger residence (Report). The Report outlines Intertec's findings regarding the existing conditions of the Berger residence. The report states that the conditions of the Berger residence have worsened since 2014; however, the conditions appear to be the result of continued differential settlement rather than the blasting.

13. Mr. Rudnick of BNI stated that the blasting limits set forth in regulation have not been exceeded to his knowledge.
14. Mr. Myran stated that he reviewed the blasting records provided to the Commission by BNI from 2015 to 2023 in Permit BNCR-1101 and none of the records indicated that BNI exceeded any blasting limits set forth in regulation. Mr. Myran also explained that the Commission can require an operator to conduct seismic monitoring of any or all blasts and may specify the location at which the measurements are taken so the effect at each occupied dwelling can be directly or more directly quantified.
15. Mr. Myran also stated that regulations currently require an operation to submit a blast design to the Commission if the blast is within one thousand feet of any building used as a dwelling. He also stated that if this requirement was extended to two thousand feet, the same review would be conducted by the Commission as if it was within one thousand feet of any building used as a dwelling.

Proposed Haul Road

16. Mr. Dresser and the Bergers expressed concern about the proposed haul road that will cross 37th Ave SW so BNI can mine the land being added with Revision No. 8. They are concerned because BNI is considering an at-grade crossing where the haul road meets 37th Ave SW. They stated that 37th Ave SW is a heavily used road, especially since Oliver County closed 35th Ave for BNI to mine through that road. They expressed that 37th Ave SW has become the main road farmers use to haul grain to the ADM Benson Quinn elevator in Hensler, North Dakota. Mr. Dresser and the Bergers expressed their belief that an at-grade crossing is a safety hazard during times of low visibility such as fog, dust, and blizzards and they would prefer an overpass.
17. Mr. Dresser is also concerned about where the haul road will be constructed and its location because it could remove his access to one of his hay fields.
18. Mr. Mann stated that approval to work within one hundred feet or close a public right-of-way is outside the jurisdiction of the Commission and requires county approval.
19. Mr. Scheetz stated that BNI will have to cross 37th Ave SW, but BNI will work with Mr. Dresser to ensure he has access to his hay fields. He also stated that BNI is in discussions with the county about the haul road crossing, but the designs have not been finalized.
20. Mr. Rudnick explained that, based on current plans, BNI intends to construct the haul road that crosses 37th Ave SW in 2026.
21. Mr. Emmer agreed with Mr. Mann that the approval to work within one hundred feet or close a public right-of-way is outside the jurisdiction of the Commission and requires

county approval. Working within one hundred feet of a public right-of-way is a prohibited area — unless it has been authorized by the proper road authority. He also stated that it is common practice for a mining company to include a proposed location of a haul road in a revision application without specific design plans. Once the design plans are finalized by an operator, a revision application is submitted to the Commission to include those plans.

22. No mining disturbance within one hundred feet of the outside right-of-way line of any public road may be disturbed within the Revision No. 8 addition area until BNI obtains approval from the proper road authority and the Commission. The Commission, with the approval of the proper road authority, may permit roads to be relocated or the area affected to lie within one hundred feet [30.48 meters] of such road, if after public notice and the opportunity for public hearing in the locality a written finding is made by the proper authority that the interests of the public and the landowners affected thereby will be protected (N. D. Century Code § 38-14.1-07(4)). The permit must include plans and drawings of each primary road as required by N.D. Admin. Code § 69-05.2-09-06, and the Commission must review and approve the plans and drawings before primary roads are constructed.

Mining Operations within 500 feet of Residences

23. Mr. Dresser and Mr. Berger expressed concerns about proposed mining operations being within the five-hundred-foot setback from their residences as depicted on the maps for Revision No. 8.
24. Mr. Rudnick clarified that the line depicted within the five-hundred-foot setback of the Berger residence is a watershed break line and not a field engineered diversion so there will be no mining related disturbance within five hundred feet of the Berger residence.
25. Mr. Emmer also pointed out that a portion of a topsoil stockpile in the SE¼ of Section 11, T141N, R84W is depicted within the five-hundred-foot setback from Mr. Dresser's residence on the Pit Layout and Facilities map and the stockpile location will be revised during the next technical review of Revision No. 8 application to Surface Coal Mining Permit No. BNCR-1101.
26. Ms. Brinkman also clarified that the Commission would require BNI to remove all mining disturbances within the five-hundred-foot setback from occupied dwellings that have not provided a written waiver with the next technical review of Revision No. 8 application to Surface Coal Mining Permit No. BNCR-1101.
27. The Bergers and Mr. Dresser expressed that they have not signed waivers allowing BNI to conduct surface mining disturbances within five hundred feet of their dwellings.

Dust

28. Mr. Dresser and the Bergers are concerned about dust for two main reasons. First, since Oliver County approved the temporary closure of 35th Ave in 2014 and 2017, the traffic on 37th Ave SW has increased. Second, as mining progresses westward there will be more dust that will impact their residences and quality of life.
29. The Bergers stated they cannot sit on their porch most of the time or use the clothesline because of dust impacting their home. They are concerned about the large subsoil stockpile proposed just south of their residence, because it will increase the amount of dust affecting their home. They provided that most of the dust was from 37th Ave SW rather than from the mine site.
30. Mr. Mann stated that the Commission has limited authority regarding dust and air quality and submitted that this authority is subject to DEQ jurisdiction. Mr. Mann also stated that the dust from 37th Ave SW is not considered mining related.
31. Mr. Scheetz stated that BNI utilizes two to three water trucks to control dust and equipment operators reduce their speed in dusty areas to minimize fugitive dust. Mr. Scheetz also explained that BNI limits the amount of suitable plant growth material stripping ahead of mining and they seed areas to minimize the amount of dust.
32. Mr. Emmer agreed with Mr. Mann that the Commission has limited authority over fugitive dust and air quality since it is within the jurisdiction of the DEQ. He explained that dust attendant to erosion is part of the Commission's authority, but the fugitive dust controls and plans related to mitigating dust created by moving equipment are under the jurisdiction of the DEQ.
33. BNI has complied with North Dakota Administrative Code § 69-05.2-09-05 by obtaining Air Pollution Control Permit to Operate No. 079004, from the DEQ.

Noise

34. The Bergers generally spoke about noise pollution from the mining operation, and they acknowledged that it is part of living in coal country, but the noise has become worse as the mining operations have moved closer to their home.
35. The requirements of air blast levels, which are measured in decibels, were discussed as it relates to noise in regards to the use of explosives.

Lack of Communication from BNI on Past Agreements and Future Mining Plans

36. The Bergers and Mr. Dresser expressed communication issues with BNI throughout the course of the informal conference. They stated that a lot of the issues discussed in the informal conference could have been avoided if BNI had regularly talked to the landowners and kept them apprised of their current mining plans.
37. The published Notice of Receipt of Revision No. 8 Application issued by the Commission stated that the revision application may be inspected at the Commission's office or the Oliver County Auditor's office.
38. The Bergers and Mr. Dresser also expressed concerns with BNI honoring past agreements made with BNI as it relates to land buyback agreements.
39. Mr. Scheetz and Mr. Heger acknowledged their concerns and stated that they will try to improve their communication with the landowners.
40. Ms. Brinkman stated that Mr. Berger requested an inspection of his property from the Reclamation Division because he was concerned about the buyback agreement and the Reclamation Division conducted the inspection. Ms. Brinkman provided that the Reclamation Division sent a letter to BNI stating that buyback agreements are outside our jurisdiction but encouraged communications between BNI and the landowners.

Ruling

1. The Commission has jurisdiction over BNI's planned mining and reclamation operations in North Dakota, including Permit No. BNCR-1101, and Revision No. 8 thereto.
2. BNI's Revision No. 8 application to Surface Coal Mining Permit BNCR-1101 is currently under review by the Commission and the comments or objections raised by the Bergers and Mr. Dresser will be taken into consideration during the review process of Revision No. 8.
3. Pursuant to N. D. Century Code § 38-14.1-21(4), the Commission may delete certain areas from a permit or revision application, reject the application, require the permit applicant to amend the application or any part of such application, including any mining plan, or require any combination of the foregoing, if the Commission finds that the proposed surface coal mining operation will constitute a hazard to a dwelling house, public building, school, church, cemetery, commercial or institutional building, public road, stream, lake, or other public or private property other than property subject to a coal or commercial leonardite

lease.

4. BNI's Revision No. 8 of Permit BNCR-1101 meets the statutory requirements of N.D. Admin. Code ch. 69-05.2-17 that outlines the requirements BNI must follow as it relates to the use of explosives.
5. Pursuant to N.D. Admin. Code § 69-05.2-17-06, the Commission may require an operator to conduct seismic monitoring of any or all blasts and may specify the location at which the measurements are taken and the degree of detail necessary in the measurement. The Commission concludes that additional monitoring is appropriate to protect the occupied dwellings.
6. Pursuant to N. D. Century Code § 38-14.1-07(4), mining is prohibited within one hundred feet [30.48 meters] of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the Commission with the approval of the proper authority may permit such roads to be relocated or the area affected to lie within one hundred feet [30.48 meters] of such road, if after public notice and the opportunity for public hearing in the locality a written finding is made by the proper authority that the interests of the public and the landowners affected thereby will be protected.
7. Special Condition No. 4 attached to Surface Coal Mining Permit BNCR-1101 states, "BNI Coal, Ltd. must provide copies to the Commission of the road authority's approval documents to close or relocate any public road and other approval documents to conduct surface coal mining activities within one hundred feet of the outside right-of-way of any public road as required by N.D. Admin. Code § 69-05.2-04-01.3(4). These documents must be provided to the Commission within thirty days from the road authority's approval date and include the written findings made by the road authority." BNI must have proper approval before conducting any surface coal mining operations or disturbances in the Revision No. 8 addition area, which is west of 37th Ave SW.
8. As required by N. D. Admin Code ch. 69-05.2-24 and N. D. Admin Code § 69-05.2-09-02(7), haul road design plans and their final location must be submitted to the Commission and approved before the haul road can be constructed. BNI must submit design plans to the Commission for the haul road crossing 37th Ave SW in a permit revision once the haul road is designed and they have received proper approval to conduct surface coal mining activities within one hundred feet of the outside right-of-way of any public road.
9. Pursuant to N. D. Century Code § 38-14.1-07(5) and N. D. Admin Code § 69-05.2-04-01.1(4), mining is prohibited within five hundred feet [152.4 meters] of any occupied dwelling unless the owner of the occupied dwelling has provided a written waiver consenting to surface coal mining operations within the protected zone as provided in section 69-05.2-04-01.4. Areas showing mining disturbances within five hundred feet of

an occupied dwelling, as shown in Revision No. 8, are not in compliance with N. D. Century Code § 38-14.1-07(5) and N. D. Admin Code § 69-05.2-04-01.1(4).

10. That jurisdiction and authority to regulate air quality in North Dakota is within the purview of the DEQ pursuant to N. D. Century Code ch. 23.1-06. The issues related to air quality and BNI's Fugitive Dust Control Plan and are therefore subject to the jurisdiction of the DEQ. The fugitive dust created from traffic on 37th Ave SW is not under the jurisdiction of the Commission.
11. The dust control measures outlined in BNI's Revision No. 8 of Permit BNCR-1101 meets the requirements of N.D. Admin. Code § 69-05.2-09-05 that requires BNI to specify the measures it will use to comply with the air pollution requirements of the Department of Environmental Quality and any other measures necessary to effectively control wind erosion and attendant air pollution.
12. The Commission does not have jurisdiction over noise except for blasting operations as allowed by N.D. Admin. Code § 69-05.2-17. It was not demonstrated that BNI exceeded the decibel level for blasting operations.
13. The Commission does not have jurisdiction to enforce the terms of lease agreements or buyback agreements specified during the Conference. The Surface Owner Protection Act, N. D. Century Code § 38-18, may require compensation to landowners for loss of agricultural production, including loss of production resulting from access, but this is not subject to Commission jurisdiction.
14. N. D. Century Code § 38-14.1-24(13) and N. D. Century Code § 38-18-06 outlines the notice requirements an operator must provide to landowners regarding the use of explosives and surface mining operations. Although additional communication is encouraged, BNI follows the specified requirements.
15. This ruling may be appealed to the Commission within thirty days of service of the Commission's ruling pursuant to N. D. Century Code §§ 38-14.1-19(6) and 38-14.1-20, for a formal hearing under N. D. Century Code § 38-14.1-30.

Recommended Order

1. BNI Coal, Ltd. must provide haul road design plans to access the Revision No. 8 addition area and plans for any other roads that may be necessary to transport mining equipment over 37th Ave SW. BNI Coal, Ltd. may not conduct surface coal mining activities where mining is prohibited until Oliver County Road Authority has provided authorization and BNI receives Commission approval.

2. BNI Coal, Ltd. must conduct seismic and air blast monitoring at or near all occupied dwellings within one mile from the nearest charged drill hole with advanced notice given to landowners so they may be present when the monitoring takes place.
3. BNI Coal, Ltd. must revise Revision No. 8 to remove all mining disturbances within the five-hundred-foot setback from occupied dwellings, unless approved by the owners thereof in writing which will be incorporated into the permit, before approval is recommended.