



# Public Service Commission

## State of North Dakota

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October 20, 2023

Karene M. Hall  
Permit Coordinator  
BNI Coal, Ltd.  
2360 35<sup>th</sup> Avenue SW  
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Dear Ms. Hall:

Revision No. 8 proposes to add 2,661.04 acres to the permit in Sections 11, 14, 15, 16, 22, and 23 of Township 141N, Range 84W. The revision also proposes to revise the postmining topography for portions of the existing permit area.

The Reclamation Division has conducted a 7<sup>th</sup> technical review of BNI Coal, Ltd's (BNI) Revision 8 to Permit BNCR-1101 at the Center Mine. As you are aware, we had deemed BNI's February 10, 2023 (6<sup>th</sup> technical) response adequate, and we were preparing to approve Revision 8 last spring, but the federal AVS system went down and we cannot approve significant revision applications without the required AVS information. We informed BNI to accept all changes in the 6<sup>th</sup> technical response dated February 10, 2023, and to provide us with final "clean copies". BNI provided clean copies dated May 11, 2023. When the AVS system was back online, we prepared to approve the revision in June. During the final administrative review of Revision 8, we discovered BNI's original public notice did not include BNI's intent to mine federal coal, so a revised notice had to be published once per week for four consecutive weeks and a 30-day public comment followed. Landowners David and Debra Berger and Brian Dresser requested an informal conference during the public comment period and the conference was held on August 17, 2023.

While reviewing the clean copies (dated May 11, 2023) of the Revision 8 application provided by BNI, we noted the clean copies were not consistent with BNI's 6<sup>th</sup> technical response dated February 10, 2023. The clean copies included new information/changes which were not reviewed or approved by the Reclamation Division. As discussed during our September 29, 2023 meeting, I restarted the 120-day review period for this revision to allow reclamation staff adequate time to review the entire application and compare all six technical responses.

The following items must be adequately addressed before the Reclamation Division will recommend Commission action on the Revision 8 application.

### **Section 1 – Legal and Financial**

1. Please review and update Appendix 1-1, Revision Summary and List of Changes, to ensure all proposed changes are included in the List of Changes and the Revision Description should

mention BNI's plans for mining federal coal. NDAC 69-05.2-05-02(6) requires that all changes to the original and approved narratives be displayed in an underline-strikethrough format until the application is approved by the Commission. (GAW)

### **Section 3.4 – Surface Water**

2. Several watershed acreages depicted on Plate 3.4-3 (Post-Mining Watersheds) do not correspond with the Pre-Mine/Post-Mine Watershed Comparison Table on pages 12 and 13 in Section 3.4 (Surface Water). Please review and revise accordingly. (JAR)

### **Section 3.5 – Pre-mining Land Use**

3. The narrative on page 4 of Section 3.5 (Pre-mining Land Use) erroneously states that “Haylands found within the permit boundary consists of 4974.47 acres.” According to Table 3.5-1A (Pre-mine Land Use Acres BNCR 1101 Permit Rev. 8 04/12/22), the hayland acreage should be 494.47. Please review and revise accordingly. (MLJ)
4. Table 3.5-2 (Premine Shelterbelt Conditions) found within the narrative on page 7 of Section 3.5 (Pre-mining Land Use) does not fit the page as some of the table footnotes are illegible. Adjust the table so that all information can be viewed. (MLJ)

### **Section 3.7 – Prime Farmlands**

5. Page 4 of Section 3.7 (Prime Farmlands) lists a duplicate of Table 2a, which is found on page 3, with incorrect acreage totals at the bottom of the table. Page 4 also includes Table 2b which appears to not include the entire table. Please address these issues. (MLJ)

### **Section 3.8 – Soil Resources**

6. Please update the third paragraph on page 3 of Section 3.8 (Soil Resources) to address how SPGM stockpiles will be shaped to facilitate seeding equipment and how the subsoil stockpile south of the Berger farmstead in the NE¼ of Section 11, T141N, R84W will be stabilized to effectively control erosion and attendant air and water pollution. Please clarify the timeline this pile is expected to be an active stockpile, provide measures that will be taken annually to protect the pile from wind and water erosion during its active status, and provide an estimated date when this subsoil stockpile site will be reclaimed. NDAC 69-05.2-15-03(2), NDAC 69-05.2-09-11(4), and NDCC 38-14.1-24(4). (GAW)
7. Please add section numbers to the Soils Map, Plate 3.8-1. (JAR)

### **Section 4.1 – Operations Plan**

8. Plate 4.1-1 (Pit Layout and Facilities Map) depicts features and facilities within 500 feet of occupied dwellings in Sections 13, 14, and 24, T141N, R84W and Sections 18 and 19, T141N, R83W. This would include sediment ponds and overburden stockpiles within 500 feet of the Jesse Lackman residence in W½ of Section 14 and pits affecting the David and Karen Porsborg, Kent Reuther, and Charles and Doris Kuether farmsteads in the N½ of Section 24 and S½ of Section 19, respectively. Please update the map by removing all mining activities within 500 feet of these dwellings or provide landowner agreements that authorize BNI to conduct mining activities within 500 feet of any occupied dwelling. NDCC 38-14.1-07(5) prohibits disturbance

within 500 feet of any occupied dwelling unless approved by the dwelling owner. Section 4.2 (Existing Structures) indicates that BNI is planning to acquire appropriate landowner agreements to allow mining within 500 feet of these dwellings. These agreements need to be secured prior to depicting disturbance within 500 feet of an occupied dwelling on Plate 4.1-1. Please revise the maps and narrative in the permit accordingly. (GAW/JAR/JWE/BSM)

9. Please revise the location of SPGM stockpile SE11T03 on Plate 4.1-1 (Pit Layout and Facilities Map), which is depicted in the SE¼ of Section 11, so it is not within the 500-foot setback from an occupied dwelling. (JWE)
10. Please update Section 4.1 (Operations Plan) to clarify how BNI is planning to shape and stabilize box cut spoil that is planned to be placed along the east side of the 2027-757 pit in E½ of Sections 11 and 14, T141N, R84W to effectively control erosion and attendant air and water pollution NDCC 38-14.1-24(4). (GAW)

#### **Section 4.2 – Existing Structures**

11. According to Plate 4.2-2 (Existing County Road Infrastructure Photos) and the associated photo directory, no photos have been taken of the existing county road infrastructure along 37<sup>th</sup> Ave SW, the county roads, or trails located within the C1 addition area. Please provide photos and data information of the existing county road infrastructure within the C1 addition area that may be impacted by mine-related activities so they can be properly characterized. BNI needs to document pre-mine road and trail conditions, so it is clear what needs to be replaced post-mine. Furthermore, please update Plate 4.2-2 (Existing County Road Infrastructure Photos) to depict where the latest photos were taken. (BSM)
12. Review and update the narrative for occupied dwellings and unoccupied buildings that are not within the permit boundary in Section 4.2. Stating “the farmstead is located outside the permit boundary and no setback limit is required” is misleading and an insufficient explanation of why no setback limit is required. (ZAB)
13. Review the narrative for Mark Dagley and Kenneth Reinke farmsteads in the occupied dwellings and unoccupied buildings that are not within the permit boundary in Section 4.2. It appears the last sentence of the Reinke narrative was intended for the Dagley farmstead. Update the narrative so it is accurate and explains why a dwelling outside the permit boundary requires a 500 foot setback. (ZAB)
14. Review the occupied dwellings, unoccupied buildings, and cemeteries within the permit boundary narrative in Section 4.2. The current narrative is inaccurate, misleading, and implies BNI does not need landowner consent to purchase or remove buildings. Revise the narrative to be consistent with the Surface Owner Protection Act (NDCC 38-18-03, 38-18-06, and 38-18-07) and the terms of BNI’s leases with landowners. In addition, North Dakota’s regulatory program has primacy; therefore, the vague references to SMCRA and “illustrating SMCRA laws were met” in this section are misleading and should be removed. The revision application should cite North Dakota Century Code and North Dakota Administrative Code. NDCC 38-14.1-07(5) prohibits disturbance within 500 feet of any occupied dwelling unless approved by the dwelling owner. BNI must provide appropriate landowner agreements prior to including plans for disturbance within 500 feet of an occupied dwelling in the permit. Update the narrative in Section 4.2 accordingly. (ZAB)

*Note: We recently sent a pre-renewal letter for Permit BNCR-1101 and BNI should submit all landowner agreements necessary for the next 5 year permit term with the upcoming renewal/revision.*

#### **Section 4.4 – Blast Plan**

15. The Blasting Survey Notification Letter included on page 7 of Section 4.4, Blasting Plan, references blasting that is to occur in the W½ of Section 21 within permit BNCR-9702 rather than blasting that is to occur within Permit BNCR-1101. For compliance with NDAC 69-05.2-17-02 (1), please revise to include a copy of all the notification letters that were sent for Permit BNCR-1101 and include a copy of the letters sent to landowners within 1 mile of the Revision 8 Addition Area. (GAW)
16. Changes were noted in Section 4.4 (Blasting Plan) of BNI's "clean version" dated May 11, 2023, compared to BNI's technical review 6 response (February 10, 2023). A paragraph was added that related to the maximum weight of explosives to be detonated, and a table was added that related to the distance from blasting sites, maximum allowable peak particle velocity, and modified scaled-distance factors. Changing the permit without an explicit explanation of the changes being made is not in accordance with NDAC 69-05.2-05-02(6). Please replace Section 4.4 (Blasting Plan) with the February 10, 2023 version which includes the original approved language with underline and strikethrough formatting changes. (JWE/BSM/SMN)
17. Please update Section 4.4 (Blasting Plan) to include narrative that corresponds with Order No. 2, Case No. RC-20-438 from the informal conference dated September 14, 2023. Order No. 2, states "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 to landowners, so they may be present when the monitoring takes place." (BSM)

#### **Section 4.5 – Transportation Plan**

18. Page 6 in Appendix 4.5-2 (Culvert Information Sheets) contains design information for Culvert ID 6 in the "clean version" dated May 11, 2023, but this information was not included in the February 10, 2023 response to technical review 6. Please explain why this culvert was added or remove it from Appendix 4.5-2. (JWE)
19. Please review and revise Appendix 4.5-2 (Culvert Information Sheets) verifying that location information and Design Information for all culverts are accurate and correspond with their delineation on Plate 4.5-1 (Transportation Plan) and the Appendices for Haul Road Sections A, B, C, D, E, and F. (BSM)
20. Please revise Plate 4.5-2 (Typical Road Section) to reflect any updates to future haul road width requirements as was provided in the pending Revision No. 18 to permit BNCR-9401. Furthermore, please revise the narrative within the subsection "General Construction Practices" within Section 4.5 (Transportation Plan) to correspond with any changes to Plate 4.5-2. (BSM)

#### **Section 4.9 – Reclamation Schedule**

21. Please revise the Variance Area No. 7 discussion on page 4 of Section 4.9 (Reclamation Schedule) to clarify how BNI is planning to shape and stabilize Variance Area No. 7 to effectively control erosion and attendant air and water pollution. NDCC 38-14.1-24(4). (GAW)

**Section 4.10 – Regrading Plan**

22. The pre-mining area and post-mining area in the Slope Analysis Comparison table within Plate 4.10-2 (Post-Mining Slope Analysis) do not match. Please update the table so the acreages are consistent and accurate. (JAR)
23. It appears that Table 4.10-1 (Post Mining Topography Mass Balance) in Section 4.10 has been replaced. Please provide a summary of the changes made to this table. (SMN)

**Section 4.11 – SPGM Removal and Replacement**

24. Values in Table 4.11-1 (SPGM Respread Depths by Ownership within the Mining Disturbance Boundary) have changed between the sixth technical response and the clean copy dated May 11, 2023 (e.g. SPGM Surplus/Deficit total volume increased from 3,056,473 cubic yards to 3,266,826 cubic yards). Please explain why this table has been edited. (SMN)

Please contact us with any questions.

Sincerely,



Zanna A. Brinkman  
Director  
Reclamation Division

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