

PUBLIC SERVICE COMMISSION

Reclamation Division

Memorandum

TO: Commissioners Fedorchak, Christmann, and Haugen-Hoffart
John Schuh - General Counsel
Steve Kahl - Executive Director

FROM: ^{ZAB} Zanna Brinkman and ^{JWE} Jonathan Emmer

DATE: July 20, 2022

SUBJECT: Order for Case No. RC-22-227, NOV 2202 issued to BNI Coal, Ltd.

Summary: Notice of Violation (NOV) 2202 was issued to BNI Coal, Ltd. (BNI) on May 25, 2022. The violation was noted during our review of the May 10, 2022, inspection report that BNI was removing overburden above federal coal without mine plan approval from the U.S. Department of the Interior in the NE $\frac{1}{4}$ of Section 20, T142N, R84W of Permit BNCR-9702. On May 18, 2022, the overburden removal area was inspected in the field to confirm that overburden was removed above federal coal NE $\frac{1}{4}$ of Section 20, T142N, R84W (**Figure 1**). It was estimated that 275,000 cubic yards of overburden were removed over federal coal in this area. BNI violated the special condition added to the permit that prohibits overburden and coal removal until mine plan approval is received from the U.S. Department of the Interior. BNI did not request an informal conference or formal hearing regarding this NOV. Therefore, the Reclamation Division recommends that the Commission adopt the attached order to affirm the violation and assess a \$5,000 penalty.

Discussion: The May 10, 2022, inspection report was conducted by Preston Ripplinger and Monty Johnson; their report noted that overburden was being removed from the NE $\frac{1}{4}$ of Section 20, T142N, R84W in Permit BNCR-9702. The area was re-inspected on May 18, 2022, to confirm that overburden had been removed above federal coal NE $\frac{1}{4}$ of Section 20, T142N, R84W. BNI estimated that 275,000 cubic yards of overburden were removed over the federal coal to facilitate the mining of privately owned coal in the NW $\frac{1}{4}$ of Section 21, T142N, R84W that is contiguous to the federal coal tract and to construct a dragline walkway to their existing dragline erection site.

BNI has obtained Federal Coal Lease NDM 105513 that includes the tract in the NE $\frac{1}{4}$ of Section 20, T142N, R84W and they plan to mine the federal coal once they receive mine plan approval from the U.S. Department of the Interior. A special condition was added to Permit BNCR-9702 with Revision 42 that states, "No overburden or coal removal may occur on federal coal tracts located within Section 20, T142N, R84W until the mine plan for the federal coal is approved by the U.S. Department of the Interior. Until the mine plan is approved by the Department of the Interior, surface disturbances on the federal coal tracts are limited to those activities that the Commission determines are necessary for carrying out mining on the adjoining tracts where BNI Coal, Ltd. has all of the rights necessary to mine the coal."

Overburden can be removed over federal coal without mine plan approval from the U.S. Department of the Interior if the mine submits a request to the Reclamation Division and we obtain concurrence from the Bureau of Land Management (BLM) through the Office of Surface Mining and Enforcement (OSMRE), but BNI did not submit a request or have concurrence at the time when the overburden was removed. BNI is familiar with the process of obtaining concurrence from BLM through OSMRE to remove overburden over federal coal. On March 25, 2022, BNI submitted a request to the Commission for

concurrence in Permit BNCR-9401 to remove overburden above federal coal where the mine plan has not been approved by the U.S. Department of the Interior.

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 2202 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 last received an NOV on July 29, 2015, and it is not within the three-year period. Based on the criteria we used in the past, BNI does not have a history of violations; therefore, a penalty assessment based on history is not warranted.

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 the duration of potential or actual damage in terms of impact on the public or the environment. Approximately, 275,000 cubic yards of overburden were removed over federal coal without mine plan approval from the U.S. Department of the Interior or concurrence from BLM through OSMRE which is in direct violation of the special condition added to Permit BNCR-9702 with Revision 42. A penalty based on seriousness is warranted.

Recommended penalty assessment for seriousness - \$2,000

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, we believe that the NOV was caused by reckless and knowing conduct since BNI is familiar with the process of obtaining concurrence to remove overburden above federal coal. A penalty based on negligence due to lack of diligence is warranted.

Recommended penalty assessment for negligence - \$3,000

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. The compliance in this case was considered normal. Therefore, no deduction for good faith is warranted.

Recommended deduction for good faith - \$0

The Reclamation Division recommends that the Commission adopt the attached order that affirms NOV 2202 and assesses a civil penalty in the amount of \$5,000 (\$2,000 for seriousness, \$3,000 for negligence). The order also closes the case upon payment of the penalty. A proposed motion for the July 27, 2022, Commission meeting is attached for your consideration.

Figure 1. Approximate location where overburden was removed in the NE ¼ of Section 20, T142N, R84W in Permit BNCR-9702 without mine plan approval from the U.S. Department of the Interior.

