

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

Case Number: 08-2015-CV-01056

Casey Voigt,  
  
Appellant,  
  
v.  
  
North Dakota Public Service  
Commission and Coyote Creek Mining  
Company, LLC,  
  
Appellees.

**ORDER**

**INTRODUCTION**

[¶1] The Appellant, Casey Voigt (Voigt), filed a Notice of Appeal and Specification of Errors, arguing the decision issued by Appellee, North Dakota Public Service Commission (PSC) is not in accordance with law, the findings of fact are insufficient and not supported by a preponderance of the evidence, and the conclusions of law are not supported by its findings of fact.

[¶2] Appellee, PSC, filed a brief, arguing it was correct in concluding the area in question is not an alluvial valley floor under federal and state mining regulations. Appellee, Coyote Creek Mining Company (CCMC), filed a brief supporting the PSC's assertion.

**BACKGROUND**

[¶3] This is an appeal from an administrative decision issued by the Public Service Commission affirming its earlier decision to grant a coal mining permit to Coyote Creek Mining Company for the operation of the Coyote Creek Mine in Mercer County, North Dakota. On November 1, 2013, CCMC applied for Surface Coal Mining Permit No. NACC-1302 for a new

mine approximately ten miles southwest of Beulah, North Dakota. The permit application covers 8,091.511 acres of land located in Mercer County, North Dakota. On October 22, 2014, the PSC conditionally approved Permit No. NACC-1302, allowing CCMC to engage in surface coal mining operations at the Coyote Creek Mine, subject to the right of any interested person to request a formal hearing on the decision.

[¶4] Casey Voigt requested a hearing, noting concerns with regard to the size of the permit area, the reclamation practices to be used and his loss of agricultural production. Voigt and his wife own and lease much of the land in the eastern half of the 8,092 acre permit area. The Voigts' land includes a ranching operation, native grassland used for livestock grazing, cropland used for hay production, and an occupied farmstead where their family resides.

[¶5] A hearing was held before the PSC December 19 and 23, 2014, and January 2, 2015. The following issues were considered at the hearing: (1) the appropriate size of the permit area; (2) the reclamation practices that would be used on land to be mined; and (3) Voigt's loss of agricultural production. The PSC made the following Conclusions of Law:

1. The Commission has jurisdiction over CCMC's planned mining and reclamation operations in North Dakota, including Permit No. NACC-1302.
2. CCMC's application for Surface Coal Mining Permit NACC-1302 meets all permit application standards under North Dakota Century Code Chapter 38-14.1 and North Dakota Administrative Code Article 69-05.2.
3. There is no basis for the Commission to rescind or revoke Permit No. NACC-1302.
4. It is reasonable to require Coyote Creek Mining Company to revise Permit NACC-1302 to describe the detailed methods that will be used to minimize compaction of topsoil and subsoil that is replaced on reclaimed lands and to provide a testing plan to determine if there is any excess compaction in the replaced topsoil and subsoil and describe measures that will be used to alleviate excessive compaction if detected.
5. It is reasonable to require Coyote Creek Mining Company to revise Permit NACC-1302 to state that Casey Voigt will be consulted when they select and establish management practices for undisturbed reference areas that will be used to demonstrate reclamation success on Mr. Voigt's reclaimed native grasslands.

6. The alluvium along Coyote Creek is not an alluvial valley floor as defined by subsection 1 of N.D.C.C. Section 38-14.1-02.
7. The Commission does not have any jurisdiction over coal or surface leasing terms, conditions or practices.
8. The Commission has no jurisdiction over the closure of county roads.

[¶6] Based on its conclusions of law, the PSC entered an Order affirming the conditional approval of Permit No. NACC-1302. The PSC also ordered CCMC to submit a revision application to Permit NACC-1302 to add plans for: (1) describing detailed methods used to minimize compaction on replaced subsoil and topsoil; (2) conducting testing to determine if excess compaction in topsoil and subsoil exists on reclaimed land and describe measures for alleviating potential compaction; and (3) consulting with Voigt in establishing management practices on reclaimed native grasslands owned by Voigt.

#### LAW AND DECISION

[¶7] The Administrative Agencies Practice Act governs this Court's review of an administrative agency's decision to grant a coal mining permit. *N.D.C.C. § 28-32-46* This Court must affirm the agency's decision, unless:

- (1) The order is not in accordance with the law;
- (2) The order is in violation of the constitutional rights of the appellant;
- (3) The provisions of this chapter have not been complied with in the proceedings before the agency;
- (4) The rules or procedure of the agency have not afforded the appellant a fair hearing;
- (5) The findings of fact made by the agency are not supported by a preponderance of the evidence;
- (6) The conclusions of law and order of the agency are not supported by its findings of fact;
- (7) The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant;
- (8) The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

*N.D.C.C. § 28-32-46*. “Courts exercise limited review in appeals from administrative agency decisions, and the agency’s decision is accorded great deference.” *Berger v. N.D. Dep’t of Transp*, 2011 ND 55, ¶ 5, 795 N.W.2d 707. This Court does not make “independent findings or substitute our own judgment for that of the agency.” *Dettler v. Sprynczynatyk*, 2004 ND 54, ¶ 10, 676 N.W.2d 799. “We instead determine only whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record.” *Id*

[¶8] Voigt argues the PSC’s order is not in compliance with N.D.C.C. § 38-14.1-21(3)(e) and N.D. Admin. Code § 69-05.2-08-13(1) because the 2009 AVF Study and 2009 AVF Field Review “include almost none of the information required by subsections (d), (e), (f) of [N.D. Admin. Code § 69-05.2-08-13(1)].” Chapter 38-14.1 of the North Dakota Century Code governs surface mining and reclamation procedures and the PSC has adopted rules implementing that law under chapter 69-05.2 of the North Dakota Administrative Code. Permit approval and denial standards are found at N.D.C.C. § 38-14.1-21, which states in relevant part,

(3) No permit or revision application may be approved unless the applicant affirmatively demonstrates and the commission finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval and made available to the applicant, that all the following requirements are met:

(e) The proposed surface coal mining operation, if located west of the one hundredth meridian west longitude, would:

(1) Not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated, . . .

or

(2) Not materially damage the quantity or quality of water in surface or underground water systems that supply these alluvial valley floors. . . .

*N D C C. § 38-14 1-21(3)(e)*. An "alluvial valley floor" is defined as:

the unconsolidated stream-laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of sediment from sheet erosion, deposits by unconcentrated runoff or slope wash, together with talus, other mass movement accumulation, and windblown deposits.

*N D C C § 38-14 1-02(1)*

[¶9] Section 69-05.2-08-13 of the North Dakota Administrative Code outlines the procedure the PSC and permit applicants must follow when determining whether an alluvial valley floor exists:

1. Before applying for a permit to conduct operations within a valley holding a stream or in a location where the adjacent area includes any stream, the applicant shall either affirmatively demonstrate, based on available data, the presence of an alluvial valley floor, or submit the results of a field investigation of the permit and adjacent areas. The investigations must include sufficiently detailed geologic, hydrologic, land use, soils, and vegetation studies on areas required to be investigated by the commission, after consultation with the applicant, to enable the commission to make an evaluation regarding the existence of the probable alluvial valley floor in the permit or adjacent area and to determine which areas, if any, require more detailed study in order to make a final determination regarding the existence of an alluvial valley floor. Studies performed during the investigation by the applicant or subsequent studies required of the applicant must include an appropriate combination, adapted to site-specific conditions, of:

a. Mapping of the probable alluvial valley floor including geologic maps of unconsolidated deposits, delineating the streamlaid deposits, maps of streams, delineation of surface watersheds and directions of shallow ground water flows through and into the unconsolidated deposits, topography showing local and regional terrace levels, and topography of terraces, floodplains, and channels showing surface drainage patterns.

b. Mapping of all lands included in the area used for agricultural activities, showing the different types of agricultural lands and accompanied by measurements of vegetation productivity and type.

c. Topographic maps of all lands that are or were historically flood-irrigated, showing the location of each diversion structure, ditch, dam, and related reservoir.

d. Documentation that areas identified in this section are, or are not, subirrigated, based on ground water monitoring data, representative water quality, soil moisture measurements, and measurements of rooting depth, soil mottling, and water requirements of vegetation.

e. Documentation, based on representative sampling, that areas identified under this subdivision are, or are not, flood irrigable, based on streamflow, water quality, water yield, soils measurements, and topographic characteristics.

f. Analysis of a series of aerial photographs, including color infrared imagery capable of showing any late summer and fall differences between upland and valley floor vegetative growth and of a scale adequate for reconnaissance identification of areas that may be alluvial valley floors.

*N.D. Admin. Code § 69-05.2-08-13(1).* After reviewing studies submitted by the permit applicant, the PSC will determine an alluvial valley floor exists when certain conditions are present:

2. Based on the investigations conducted under subsection 1, the commission will determine the extent of any alluvial valley floors within the study area and whether any stream in the study area may be excluded from further consideration. The commission will determine that an alluvial valley floor exists if:

a. Unconsolidated stream laid deposits holding streams are present;  
and

b. There is sufficient water to support agricultural activities as shown by:

(1) The existence of flood irrigation in the area or its historical use;

(2) The capability to be flood-irrigated, based on streamflow water yield, soils, water quality, and topography; or

(3) Subirrigation of the lands from the ground water system of the valley floor.

*N.D. Admin. Code § 69-05.2-08-13.*

[¶10] The rules require an applicant, prior to applying for a permit, to “affirmatively demonstrate, based on available data, the presence of an alluvial valley floor, *or* submit the results of a field investigation of the permit and adjacent areas.” *N.D. Admin Code § 69-05.2-08-13(1)*. If an alluvial valley floor exists, the PSC may impose additional restrictions or requirements on the permit applicant to preserve essential hydrologic functions of alluvial valley floors. *See N.D.C.C. § 38-14.1-24(8)(g)*.

[¶11] Prior to submitting its permit application in this case, CCMC submitted an Alluvial Valley Floor Evaluation Report prepared by Dr. David Bickel in 2013, wherein Bickel concluded, “[t]here is no evidence that the Knife River and Coyote Creek or other drainages within or adjacent to the AVF study area meet any of the criteria essential for determining them to be AVF.” (Doc ID #82). A 2013 Field Review conducted by the PSC also concluded the areas along the Knife River and Coyote Creek do not meet the criteria of an AVF. (Doc ID #101). The PSC also relied on an Alluvial Valley Floor Study conducted by Dakota Westmoreland Corporation in 2009, concluding the Coyote Creek stream valley does not contain an AVF. (Doc ID #48). A 2009 Field Review conducted by Dakota Westmoreland Corporation also concluded no AVF existed in the areas adjacent to the Coyote Creek. (Doc ID #66).

[¶12] Dr. Bickel testified sufficient data was available to make the AVF determination. All four of the available reports concluded no AVF existed in the Coyote Creek and Knife River areas. The PSC also considered testimony of Voigt’s expert, Charles Norris, a geologist/hydrologist with Geohydro, Inc. in Denver, Colorado. Norris testified more data should have been collected for the Coyote Creek AVF determination because some areas along

the Coyote Creek show subirrigation and is likely an AVF. Norris also testified he has never visited the site and said, "if subirrigation occurs and hay production is enhanced in that area, such an area would be considered an AVF." Although there was conflicting testimony as to whether sufficient information was available and whether an alluvial valley floor exists, the PSC considered all of the data available to it at the time. Thus, its decision finding no AVF exists in the permit application area was supported by the evidence and was in accordance with applicable laws.

[¶13] Voigt argues the PSC's order is not in accordance with law because it did not determine whether Voigt's lowland alfalfa fields were subirrigated, and therefore, the alluvial valley floor determination does not contain data necessary to identify "subirrigation" as defined by law. With respect to alluvial valley floors, "subirrigation" means, "the supplying of water to plants from a semisaturated or saturated subsurface zone where water is available for use by vegetation." *N.D. Admin Code § 69-05 2-01-02(103)*. Additionally, subirrigation may be identified by:

- a. Diurnal fluctuation of the water table, due to the differences in nighttime and daytime evapotranspiration rates;
- b. Increasing soil moisture from a portion of the root zone down to the saturated zone, due to capillary action;
- c. Mottling of the soils in the root zones;
- d. Existence of an important part of the root zone within the capillary fringe or water table of an alluvial aquifer; or
- e. An increase in streamflow or a rise in ground water levels, shortly after the first killing frost on the valley floor.

*Id.*

[¶14] The PSC considered testimony from Voigt and his expert, Charles Norris, in addition to considering testimony from CCMC's experts, David Bickel, Bruce Beechie, Dean Moos, and Sarah Flath. Specifically, the PSC stated in its findings of fact that Norris "believes subirrigation occurs along Coyote Creek and enhances the production of alfalfa on Mr. Voigt's hay field located on the Coyote Creek alluvium." The PSC also considered evidence submitted in Exhibit CV-7 regarding Voigt's hay yields in lowland fields along Coyote Creek and others in upland areas. Additionally, the PSC considered the OSM's AVF Study Guidelines, Exhibit CV-15, regarding water extraction depths for alfalfa. The PSC relied on a statement from page C-11 of the OSM AVF Study Guidelines that "subirrigation may provide enough water to maintain alfalfa but not enough to enhance its production."

[¶15] The PSC found "[n]one of the evidence presented at the hearing indicates that subirrigation significantly enhances hay production on Mr. Voigt's fields along Coyote Creek," but rather, determined "the overall higher hay production from those fields compared to his upland hay fields is due to the inherent high productivity of the Straw soils, which the NRCS classified as not subirrigated." The PSC considered the evidence and testimony presented to it and determined the evidence did not support a finding of subirrigation on Voigt's lowland alfalfa fields. Therefore, the PSC's findings on subirrigation were supported by the evidence and made in accordance with law.

[¶16] Voigt argues the PSC's conclusions of law numbers two and six are not supported by its findings of fact. The PSC concluded "CCMC's application for Surface Coal Mining Permit NACC-1302 meets all permit applications standards under North Dakota Century Code Chapter 38-14.1 and North Dakota Administrative Code Article 69-05.2." The PSC considered all available reports and studies. All four reports concluded no alluvial valley floor exists in the

Coyote Creek area. Before approving the permit application, the PSC was required to determine whether an alluvial valley floor exists in the permit application area, and if so, whether surface coal mining would disturb farming on alluvial valley floors or damage underground water systems that supply alluvial valley floors. *See Ch. 38-14.1, N.D.C.C., See Article 69-05.2, ND Admin. Code.* The PSC determined no alluvial valley floor existed and therefore, its conclusion that CCMC's permit application meets all permit application standards was supported by its findings of fact.

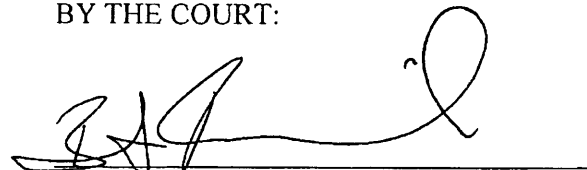
[¶17] The PSC also concluded "[t]he alluvium along Coyote Creek is not an alluvial valley floor as defined by subsection 1 of N.D.C.C. Section 38-14.1-02." Again, the PSC relied on all four reports made available to it in its findings of fact. Because all four reports concluded the minimal alluvium that exists in the Coyote Creek area did not amount to an alluvial valley floor, the PSC's conclusion is supported by its findings of fact.

#### CONCLUSION

[¶18] The PSC's decision was supported by the weight of the evidence from the record and the Order affirming the PSC's conditional approval of Permit No. NACC-1302 is **AFFIRMED**.

Dated January 19, 2016.

BY THE COURT:



Bruce Romanick  
District Judge

cc. Derrick Braaten  
Brian Bjella