

Jeffcoat-Sacco, Illona

From: Blaine Johnson <bjohnson@crowleyfleck.com>
Sent: Tuesday, June 09, 2015 4:04 PM
To: Jeffcoat-Sacco, Illona; JJ England; Mann, Wade C.; Furey, Casey A.
Cc: Brian R. Bjella
Subject: Case No. RC-14-846, Informal Conference: Proposed Order of Coyote Creek Mining Company, LLC
Attachments: Coyote Creek FOF COL and Order - to Revision No 1 (6-8-15).doc

Judge Mann & Counsel:

Attached for filing in the above case is the proposed Findings of Fact, Conclusions of Law and Oder on behalf of Coyote Creek Mining Company, LLC.

As mentioned at the informal conference, the summer construction season has begun and the mine has construction activities planned for facilities that are the subject of this informal conference.

It is our understanding that the next scheduled regular meeting of the Public Service Commission is set for Wednesday June 17.

Judge Mann, if at all possible, Coyote Creek Mining Company respectfully requests that your recommended order be submitted to the Public Service Commission prior to June 17. Thank you for consideration of this request.

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Proposed Findings of Fact, Conclusions of Law and Order

C R O W L E Y F L E C K

Coyote Creek Mining Company, LLC

Blaine T. Johnson, Crowley Fleck PLLP

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**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NORTH DAKOTA**

Coyote Creek Mining Company, LLC
Revision No. 1
to Permit NACC-1302
Approval

Case No. RC-14-846

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER
DATED JUNE _____, 2015**

Appearances

J.J. England, Attorney at Law, 109 North Fourth Street, Suite 100, Bismarck, North Dakota 58501, on behalf of Casey Voigt and Dakota Resource Council.

Brian R. Bjella and Blaine Johnson, Attorneys at Law, Crowley Fleck, PLLP, 100 West Broadway, Suite 250, Bismarck, North Dakota 58501, on behalf of Coyote Creek Mining Company, LLC.

Casey Furey and Illona Jeffcoat-Sacco, Attorneys at Law, Public Service Commission, State Capitol, Bismarck, North Dakota 58505, on behalf of the North Dakota Public Service Commission.

Wade C. Mann, Administrative Law Judge, Office of Administrative Hearings, 1701 North Ninth Street, Bismarck, North Dakota 58501-1882, as Substantive Hearing Officer.

Preliminary Statement

On December 17, 2014, the Public Service Commission (“Commission”) received the application for Revision No. 1 to Surface Coal Mining Permit NACC-1302 from Coyote Creek Mining Company, LLC (“CCMC”) to add 352.105 acres to the permit for a primary haul road and a coal processing facility for its Coyote Creek Mine located south of Zap in Mercer County, North Dakota.

On March 17, 2015, the Commission deemed the application complete and directed CCMC to begin publishing the newspaper notices as required by North Dakota Century Code § 38-14.1-18.

On May 11, 2015, the Commission received comments and requests for an informal conference by attorneys on behalf of Casey Voigt and by the Dakota Resource Council (“DRC”).

The Notice of Informal Conference dated May 11, 2015, was issued by the Commission setting an informal conference to commence at 9:00 a.m., CDT on June 2, 2015, in the Commission’s hearing room on the 12th Floor, State Capitol, Bismarck, North Dakota.

The informal conference was held as scheduled, commencing at 9:00 a.m. CDT on June 2, 2015.

FINDINGS OF FACT

1. On October 22, 2014, the Commission issued Surface Coal Mining Permit No. NACC-1302 to allow CCMC to conduct surface coal mining and reclamation operations at the Coyote Creek Mine, a new mine that will supply coal to the Coyote Power Station beginning in May 2016.
2. On December 17, 2014, CCMC filed its Revision No. 1 to the Mining Permit, seeking to add 352.105 acres to the permit for a primary haul road and a coal processing facility required to deliver coal to the Coyote Power Station.
3. In the letter from Mr. Voigt’s attorney dated May 9, 2015, it stated in part that he “is concerned that Coyote Creek’s application does not contain standards that will ensure that all surface areas will be effectively controlled for dust and other air

pollution and that this may impact his ranch's productivity, his livestock's health, and the health of his family and neighbors." He requested "that the PSC add particularized standards to this permit to ensure that air quality is protected as required by SMCRA."

4. In the letter from the DRC dated May 9, 2015, it is asserted that "the permit application does not comply with air quality rules that apply to western coal mines;" that "the permit application does not explain how CCMC will comply with the Clean Air Act and other air quality rules as required by law;" and that "CCMC's fugitive emissions will have important impacts on human health, agricultural productivity, and the environment." The DRC asserted that "the PSC must deny this permit application and should only accept this permit for further review when these important errors have been resolved."
5. Mr. Voigt's and the DRC's letters make several references to SMCRA, being the federal Surface Mining Control and Reclamation Act of 1977, 30 USC § 1201 et seq.
6. In its letter the DRC makes reference to 30 CFR § 816.95(a), and asserts in part that CCMC is required, pursuant to this regulation, to submit an air quality plan for fugitive dust and also an air quality monitoring program. However, the current version of 30 CFR § 816.95 does not make such requirements and provides in relevant part that "all exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion." 30 CFR § 816.95.

7. In its letter, the DRC also cites 30 CFR § 780.15, being a regulation promulgated by the federal Office of Surface Mining Reclamation and Enforcement (“OSM”). This regulation provides in part that for surface mining activities with projected production exceeding 1 million tons per year and located west of the 100th Meridian West Longitude, that the application should contain an air pollution control plan which includes an air quality monitoring program and a plan for fugitive dust control. However, this and other regulations were the subject of several lawsuits, including the case of *National Wildlife Federation vs. Hodel*, 839 F.2d 694 (Ct. App. D.C.). The Court stated that SMCRA only required that mining operators “stabilize and protect all surface areas including spoil piles affected by the surface coal mining and reclamation operations to effectively control erosion and attendant air and water pollution. SMCRA § 515(b)(4).” Thus, the Court found that only pollution occasioned by erosion is regulated by SMCRA. *Id.* at 764. The Court further found that “neither the plain meaning of the statute nor the legislative history of the Act indicate that Congress intended the Secretary to regulate all air pollution attendant to mining operations.” *Id.* The Court recognized that the Environmental Protection Agency has the authority under the Clean Air Act to regulate fugitive dust from coal mines. *Id.*
8. Pursuant to the foregoing court decision, the regulation cited by the DRC at 30 CFR § 780.15 is not effective or enforceable.
9. CCMC asserted at the informal conference that the DRC does not have standing under the mining law to request an informal conference. North Dakota Century Code § 38-14.1-18(5) provides in part that “any person having an interest which is

or may be adversely affected, including state agencies other than the Commission, has the right to file written comments or objections to the application for a proposed initial or revised permit and to submit a request for an informal conference pursuant to § 38-14.1-19 . . .” Thus, the DRC must have an “interest which is or may be adversely affected” in order to have standing. In its letter the DRC states that “our membership includes persons who are directly and adversely affected by the proposed Coyote Creek Coal Mine.” However, the DRC does not identify who these persons might be.

In the case of *Dakota Resource Council vs. Stark County Board of County Commissioners*, 817 N.W.2d 373 (N.D. 2012), the North Dakota Supreme Court established what is necessary for “associational standing.” The Court indicated that there is a three-part test, the first being that the “association must demonstrate that at least some of its members would have standing to bring the action in their own right.” *Id.* at ¶ 7. The Court indicated it is critical that the association identify members which would have had standing. *Id.* The Court found that the association had standing as two individuals were identified as members who would have had standing to appeal the decision in their own right. *Id.* at ¶ 11.

In this proceeding, the DRC has not identified any of its individual members who would have had standing. As a result, the DRC does not have standing and thus is not a proper party to this proceeding. Further, as a result of the DRC’s lack of standing, the comments and assertions raised in its letter of May 9, 2015, cannot be considered in this proceeding.

10. Pursuant to SMCRA, states can submit proposed state regulation programs to OSM for approval, which if granted, gives the states primacy to regulate surface coal mining and reclamation operations. On December 15, 1980, the North Dakota state program was approved by the OSM. To be a state approved program, the State of North Dakota had to adopt laws and regulations similar to SMCRA and OSM regulations promulgated under SMCRA. North Dakota has done so by promulgation of North Dakota Century Code Chapter 38-14.1 and the regulations set forth in North Dakota Administrative Code Chapter 69-05.2. These laws and regulations were reviewed and approved by OSM.
11. With respect to what an applicant must specify in its mining permit application or revision with respect to air quality, the Commission adopted North Dakota Administrative Code § 69-05.2-09-05 which provides as follows:

Permit Applications – Operation Plans – Air Pollution Control.

The applicant shall specify the measures to comply with the air pollution control requirements of the State Department of Health and any other measures necessary to effectively control wind erosion and attendant air pollution.

12. In order to comply with NDAC § 69-05.2-09-05, CCMC by application dated September 9, 2014, applied to the North Dakota Department of Health for an air quality permit to construct its proposed surface coal mine and coal processing facility.
13. Pursuant to North Dakota law, the North Dakota Department of Health is charged with and given jurisdiction over permitting of air quality in North Dakota pursuant to the Clean Air Act. *See*, North Dakota Century Code Chapter 23-25, entitled Air Pollution Control.

14. Pursuant to the authority granted to the Department of Health by NDCC Chapter 23-25, the Department of Health has adopted numerous air quality regulations which include but are not limited to Chapter 33-15-14 “Designated Air Contaminant Source, Permit to Construct, Minor Source Permit to Operate, Title V Permit to Operate”; and Chapter 33-15-17 “Restriction of Fugitive Emissions.” That, for example, under NDAC § 33-15-14-01 “Designated Air Contaminate Sources” includes as stationary sources capable of or causing or contributing to air pollution “coal mining” and “coal handling and processing.” NDAC § 33-15-14-01(4)(h) and (i).
15. The Department of Health, having considered CCMC’s application, and pursuant to the laws and regulations set forth above, issued Air Pollution Control Permit to Construct to CCMC on January 7, 2015, being No. PTC15001. With respect to control of fugitive dust, the air permit provides in part that the permittee shall control fugitive dust as follows:
 1. Control fugitive particulates from land clearing, topsoil and overburden removal, and other material handling operations using strategies such as watering, revegetation, delay of topsoil disturbance until necessary, surface compaction, and sealing unless natural moisture is sufficient to control emissions.
 2. Use fugitive dust preventive measures, such as watering, covering, shielding, or enclosing stockpiles, both active and inactive, as necessary to control emissions unless natural moisture is sufficient to control emissions.
 3. Fugitive dust preventative measures such as frequent watering, addition of dust palliatives, detouring, paving, closure, speed control, or surface treatment shall be used for on-site haul roads unless natural moisture is sufficient to control emissions.

4. Construct, protect, or treat all conveyors, transfer point, crushers, screens, and dryers to minimize particulate matter emissions.
16. That by obtaining Air Pollution Control Permit to Construct No. PTC15001, CCMC satisfied that portion of the requirement of the mining regulation, NDAC § 69-05.2-09-05 specifying compliance with the air pollution control requirements of the Department of Health.
17. That as a part of Revision 1, CCMC submitted to the Commission its Fugitive Dust Control Plan as found at § 3.1.1.2. This section sets forth in detail measures used to control fugitive dust from facility operations; which includes provisions on haul road dust, open coal storage pile dust, stabilization of disturbed areas, measures to be implemented at the coal processing facility, and training of employees. That by submittal of § 3.1.1.2 of Revision No. 1 to the Commission, CCMC has complied with the second requirement of NDAC § 69-05.2-09-05 by specifying measures necessary to effectively control wind erosion and attendant air pollution.
18. That as North Dakota has a state-approved program, the Commission must apply North Dakota mining law and regulations with respect to coal mining and reclamation operations in this state.
19. That the North Dakota Department of Health has sole and exclusive jurisdiction over air quality permitting pursuant to North Dakota Century Code Chapter 23-25.
20. That North Dakota Century Code § 23-01-36 pertains to appeals from North Dakota Department of Health proceedings. That this section provides in part that

an appeal from the issuance of a permit under Chapter 23-25 may be made by the person who filed the permit application, or by any person aggrieved by the permit application decision, provided that person participated in or provided comments during the hearing process for the permit application. This section further provides in part that an appeal must be taken within 30 days after the final permit application is mailed to the permit applicant and to any interested person who has requested a copy of the final permit determination during the permit hearing process. This section goes on to provide in part that any challenge to the Department of Health's issuance of a permit "must be made in the permit hearing process and may not be raised in any collateral or subsequent legal proceeding, and the applicant and any aggrieved person may raise on appeal only issues which were raised to the Department in the permit hearing process." (emphasis added.)

21. That the attorneys for Mr. Voigt and the DRC received copies of CCMC's air quality permit application and the permit to construct from the Department of Health on January 29, 2015, being within the 30 day appeal period.
22. That the letters of Mr. Voigt and the DRC, insofar as they seek to question air pollution control requirements, constitute a collateral attack upon the Department of Health's authority and upon the permit to construct.
23. That the Commission does not have authority or jurisdiction to regulate air quality at coal mines in North Dakota, which jurisdiction and authority is vested solely in the North Dakota Department of Health.
24. That CCMC has fully complied with North Dakota's mining law, in particular with respect to North Dakota Century Code § 38-14.1-24(4) which requires the

permit applicant to “stabilize and protect all surface areas, including spoil piles affected by the surface coal mining and reclamation operations, to effectively control erosion and attendant air and water pollution.”

It should be noted that this language is very similar to the language of the OSM regulation at 30 CFR 816.95(a) which requires that “all exposed surface areas should be protected and stabilized to effectively control erosion and air pollution attendant to erosion.”

25. The DRC alleged in part that CCMC failed to comply with the Environmental Protection Agency’s New Source Performance Standards (“NSPS”) as set forth in Code of Federal Regulations at Title 40, Part 60, Subpart Y. In the air permitting process at the Department of Health, CCMC indicated it will meet the requirements of Subpart Y as it will install a passive enclosure containment system to prevent particulate emissions from forming from the crushing and conveying operations at the mine. CCMC further demonstrated that this is an Environmental Protection Agency preferred approach to comply with the NSPS. Further, CCMC demonstrated that the haul road and any open piles of unprocessed coal are not regulated by NSPS Subpart Y, as the coal entering into the first crusher is the beginning of the coal preparation and processing activities subject to Subpart Y.
26. The DRC’s allegations with respect to application of NSPS Subpart Y to the Coyote Creek Mine also constitute a collateral attack upon the Department of Health’s jurisdiction and upon the permit to construct which it issued. As

previously demonstrated, the Commission has no jurisdiction or authority in this regard, and this is not the proper forum to hear such matters.

27. At the informal conference neither Mr. Voigt nor the DRC offered any suggestions as to what specific additional dust control measures they believe should be added to Section 3.1.1.2 of Revision 1.

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

CONCLUSIONS OF LAW

1. That the Commission has jurisdiction over CCMC's planned mining and reclamation operations in North Dakota, including Permit No. NACC-1302, and Revision No. 1 thereto.
2. That CCMC's Revision No. 1 application to surface coal mining Permit NACC-1302 meets all permit revision standards under North Dakota Century Code Chapter 38-14.1 and North Dakota Administrative Code, Article 69-05.2.
3. That no basis has been established for the Commission to reject or to seek amendments to Revision No. 1 with respect to the comments and issues raised by Mr. Voigt or the DRC.
4. That CCMC has complied with North Dakota Century Code § 38-14.1-24(4) and North Dakota Administrative Code § 69-05.2-09-05 by obtaining the Air Pollution Control Permit to Construct No. PTC15001, from the Department of Health and by submittal to the Commission of § 3.1.1.2 of Revision No. 1.
5. That pursuant to the North Dakota Supreme Court decision in *Dakota Resource Council vs. Stark County Board of County Commissioners*, 817 N.W.2d 373 (N.D. 2012), the DRC does not have standing in this proceeding as it has not

demonstrated that any of its members would have had standing to request this informal conference in their own right.

6. That the letters of Mr. Voigt and the DRC, insofar as they assert noncompliance with air quality laws and regulations constitute a collateral attack upon the authority and jurisdiction of the Department of Health to regulate air quality under NDCC Chapter 23-25; and upon the Permit to Construct as issued by the North Dakota Department of Health. *Consolidated Telephone Cooperative vs. Western Wireless Corporation*, 637 N.W.2d 699, 707 (N.D. 2001), *State of North Dakota by Workforce Safety and Insurance vs. JFK Raingutters*, 733 N.W.2d 248, 255 (N.D. 2007), and *Application of Carl M. Hvidsten*, 72 N.W.2d 524, 528 (N.D. 1955).
7. That the federal mining regulations cited by the DRC in its letter are not applicable as North Dakota has an approved state mining regulatory program, and thus North Dakota's mining law and regulations are applicable to this proceeding.
8. That the federal mining regulations cited by the DRC in its letter have either been substantially modified, being 30 CFR § 816.95(a); or have been rendered ineffective pursuant to litigation, being 30 CFR § 780.15(a).
9. That jurisdiction and authority to regulate air quality in North Dakota is solely within the purview of the North Dakota Department of Health pursuant to NDCC Chapter 23-25, and other air quality statutes.
10. That CCMC has complied with North Dakota's mining law and mining regulations in its submittal of Revision No. 1 with respect to the comments and issues raised by Mr. Voigt and the DRC.

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

ORDER

The Commission orders:

1. That the DRC does not have standing and thus is dismissed from this proceeding with prejudice.
2. That Revision No. 1 as submitted by CCMC, with respect to the comments and issues raised by Mr. Voigt and the DRC, fulfills the requirements of North Dakota's mining law and mining regulations.

PUBLIC SERVICE COMMISSION

Wade C. Mann
Substantive Administrative Law Judge