

## **Furey, Casey A.**

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**From:** Furey, Casey A.  
**Sent:** Tuesday, June 09, 2015 4:54 PM  
**To:** Mann, Wade C.; Jeffcoat-Sacco, Illona; 'Brian R. Bjella'; Blaine Johnson; JJ England  
**Cc:** Deutsch, James R.  
**Subject:** RC-14-846 Informal Conference - Staff's Proposed Findings and Ruling  
**Attachments:** PSC Staff Cert of Service RC-14-846 Rev. No 1.pdf; PSC Staff Findings and Ruling RC-14-846 Revision No. 1.pdf

Judge Mann,

Please find attached Staff's Proposed Findings and Ruling for the Informal Conference on Revision No. 1 in case RC-14-846.

Thank you

**Casey A. Furey**

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Public Service Commission

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

**Coyote Creek Mining Company, L.L.C.**  
**Revision No. 1, Permit NACC-1302**  
**Approval**

**Case No. RC-14-846**  
**OAH File No. 20150224**

**PROPOSED**  
**FINDINGS AND RULING**

**June 9, 2015**

**Preliminary Statement**

On December 17, 2014 Coyote Creek Mining Company, L.L.C. (“Coyote”) filed an application for Revision No. 1 to Surface Coal Mining Permit NACC-1302. As part of this revision, Coyote proposes to add 352.1 acres to the permit area for a haul road, coal handling and stockpile facility, and two additional sedimentation ponds. The land to be added to the permit is located in portions of Sections 7, 8, 9, 10, and 18, T143N, R88W, Mercer County, North Dakota, resulting in changes throughout the permit. The revision also updates the introductory, legal, financial, compliance, environmental, operations and reclamation plans in the permit.

On March 25, 2015 the Commission issued a Notice of Receipt of Revision Application for Revision No. 1 to Permit NACC-1302 informing the public written comments, objections, petitions to designate lands unsuitable for mining, or requests for an informal conference must be filed with the Commission by May 11, 2015.

On May 9, 2015, Mr. JJ England of Bismarck, counsel on behalf Mr. Casey Voigt (“Voigt”) and Mr. Don Morrison, Executive Director of Dakota Resource Council (“DRC”) filed with the Commission a request for an informal conference (“Conference”). Voigt expressed concerns about dust and fugitive emissions. DRC expressed concerns about the permit application not complying with air quality rules that apply to western coal mines and a lack of explanation how Coyote will comply with the Clean Air Act and other air quality rules.

On May 11, 2015, the Commission issued a Notice of Informal Conference scheduling the Conference for 9:00 a.m. on June 2, 2015, at the Public Service Commission Hearing Room, 12<sup>th</sup> Floor, State Capitol, Bismarck, ND.

On May 13, 2015, the Commission requested the designation of an administrative law judge (“ALJ”) to preside as hearing officer at the Conference. On May 14, 2015, ALJ Wade C. Mann was designated to preside at the Conference and issue recommended findings and ruling as well as a recommended order to the Commission, which will issue the final order in this matter.

The Conference was held as scheduled. Voigt and DRC appeared, represented by Mr. England who gave oral argument regarding the issues. Coyote was represented at the hearing by Mr. Brian R. Bjella and Mr. Blaine Johnson of Bismarck. Mr. Bjella called two witnesses, Mr.

Don Steffen, Environmental Manager for Coyote and Mr. Joel Trinkle from Barr Engineering. Mr. Bjella gave oral argument and also offered 11 exhibits, all of which the ALJ made part of the record. Special Assistant Attorneys General Casey A. Furey and Illona Jeffcoat-Sacco appeared representing the Commission's Reclamation Division (RD). Mr. James (Jim) R. Deutsch, Director, Reclamation Division, also appeared. Ms. Furey and Mr. Deutsch made oral arguments and also offered three exhibits which the ALJ made part of the record.

N.D.C.C. Section 38-14.1-19 requires the Commission to issue a ruling on this matter within thirty days of the close of the Conference. The ruling may thereafter be appealed to the Commission and reviewed at a formal hearing under N.D.C.C. Section 38-14.1-30. *See* N.D.C.C. Section 38-14.1-20.

The Surface Mining Control and Reclamation Act, Public Law 95-87, provides that no person who presides at an informal conference shall participate in the decision-making process at the appeal level. *See* N.D.C.C. Section 38-14.1-30(3)(f). No commissioner participated in the Conference to allow for full involvement by the Commissioners at a formal hearing should the final order in this matter be appealed to a formal hearing. Staff's proposed order is based on Staff's recommending findings and ruling, after having considered the presentations of the parties, the documentation included in the record, the applicable statutes, rules, and case law.

### **Findings**

1. Voigt and DRC assert Coyote has not adequately addressed dust and fugitive emissions that could result from the approval of Revision No. 1 to Permit NACC-1302. Specifically, Voigt requests the Commission add particularized standards to Coyote's permit to ensure that air quality is protected as required by Surface Mining Control and Reclamation Act of 1977 (SMCRA). DRC asserts SMCRA air quality rules apply to Coyote requiring the permit application include an air quality plan for fugitive dust and an air quality monitoring program. DRC also asserts the permit application does not explain how Coyote will comply with the Clean Air Act.
2. Coyote asserts Revision No. 1 to Permit NACC-1302 has met the Commission's requirements regarding air quality.
3. RD asserts detailed fugitive dust emissions and air quality standards referenced in the Voigt and DRC's Comments and Request for Informal Conference dated May 9<sup>th</sup>, 2015 are outside the scope of the Commission's jurisdiction. Air quality standards are regulated by the State Department of Health pursuant to N. D. Admin. Code Article 33-15.
4. The Commission's Reclamation Program has been approved by the Office of Surface Mining Reclamation and Enforcement of the U.S. Department of the Interior since December 15<sup>th</sup> 1980. The Commission enforces only state rules and laws governing its program.<sup>1</sup>

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<sup>1</sup> PSC Exhibit 3. "Permit approval will be based upon standards included in the State regulatory programs and implemented as legally enforceable in that State . . ." 48 Fed. Reg. 1160, 1161 (Jan. 10. 1983).

5. The applicable statutes governing the air quality standards under the Commission's jurisdiction in this matter are as follows:

**38-14.1-14. Permit applications – Mining and reclamation plans.**

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2. Each applicant for a permit shall submit as part of the permit application a reclamation plan that must include, in the degree of detail necessary to demonstrate that reclamation as required by this chapter can be accomplished, a statement of:

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j. A map or plan, to an appropriate scale, clearly showing the land to be affected within the permit area upon which the applicant has the legal right to enter and commence surface coal mining operations.

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**38-14.1-24. Environmental protection performance standards.**

General performance standards are applicable to all surface coal mining and reclamation operations and must require the permittee at a minimum to:

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4. Stabilize and protect all surface areas, including spoil piles affected by the surface coal mining and reclamation operation, to effectively control erosion and attendant air and water pollution.

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6. The applicable rules governing the air quality standards under the Commission's jurisdiction in this matter are as follows:

**69-05.2-09-05. 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.

**69-05.2-13-07. Performance standards - General requirements – Air resources protection.**

The permittee shall comply with all applicable air pollution control laws and rules of the state department of health and stabilize and protect all surface areas.

7. Permit applications do not need to comply with SMCRA air quality rules 30 C.F.R. § 780.15 or 30 C.F.R. § 816.95.<sup>2</sup>
8. The Commission's program is not required to have corresponding state rules to 30 C.F.R. § 780.15 or 30 C.F.R. § 816.95.<sup>3</sup>
9. The Commission has no jurisdiction to enforce provisions of the Clean Air Act.

**Ruling**

1. The Commission has jurisdiction over Coyote's surface mining and reclamation operations in North Dakota.
2. The issues raised by Voigt and DRC regarding fugitive dust emissions are outside the jurisdiction of the Commission.
3. Plans included in Coyote's Revision No. 1 of Permit NACC-1302 have met the statutory requirements of N.D. Admin. Code § 69-05.2-09-05 and 69-05.2-13-07. The objections raised by Voigt and DRC to the approval of Coyote's application for Revision No. 1 of Permit NACC-1302 may not be a basis for denial of that revision.
4. This ruling may be appealed to the Commission within thirty days of service of the Commission's ruling pursuant to N.D.C.C. § 38-14.1-19(6) and 38-14.1-20, for a formal hearing under N.D.C.C. § 38-14.1-30.

Dated this 9<sup>th</sup> day of June, 2015.

State of North Dakota  
Public Service Commission

By: \_\_\_\_\_  
Wade C. Mann

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<sup>2</sup> The United States Court of Appeals for the District of Columbia Circuit Court affirmed the District Court's decision to strike down a SMCRA § 515(b)(4) interpretation that required operators to engage in pervasive control of air pollution from all their mining operations. National Wildlife Federation v. Hodel, 839 F.2d 694, 764 (1988).

<sup>3</sup> PSC Exhibit 3. “. . . the final rule reflects the interpretation of Section 515(b)(4) [statutory authority for 30 C.F.R. §816.95] that limits the applicability to the stabilization of exposed surface areas, erosion control, and control of air pollution attendant to erosion. It is not intended to regulate air quality in general or establish air quality goals.” 48 Fed. Reg. 1160, 1162 (Jan. 10, 1983).

Administrative Law Judge  
Office of Administrative Hearings  
2911 North 14<sup>th</sup> Street – Suite 303  
Bismarck, ND 58503  
Telephone: (701) 328-3200

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the original PROPOSED FINDINGS AND RULING was sent via email, on the 9<sup>th</sup> day of June 2015, to the following:

Illona Jeffcoat-Sacco ijs@nd.gov

Brian R. Bjella bbjella@crowleyfleck.com

Blaine Johnson bjohnson@crowleyfleck.com

JJ England jjengland@baumstarkbraaten.com

Wade C. Mann wmann@nd.gov

Dated this 9<sup>th</sup> day of June, 2015.

/s/ Casey A. Furey  
Casey A. Furey