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Sent: Tuesday, June 09, 2015 5:00 PM
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Subject: Electronic filing, RC-14-846 Informal Conference - Complainant's Proposed Findings and Ruling
Attachments: RC-14-846 Informal Conference - Complainant's Proposed Findings and Ruling.docx

Judge Mann,

Attached please find Complainant DRC's and Casey Voigt's proposed findings of fact, conclusions of law, and order for RC-14-846.

Regards,
JJ England

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Proposed Findings of Fact, Conclusions of Law, and Order

Dakota Resource Council and Casey Voigt

JJ England, Baumstark Braaten

STATE OF NORTH DAKOTA
NORTH DAKOTA PUBLIC SERVICE COMMISSION

IN THE MATTER OF AN INFORMAL)	PSC Case No. RC-13-850
HEARING REGARDING COYOTE)	
CREEK MINING COMPANY'S)	OAH File No. 20140505
APPLICATION FOR REVISION 1 TO)	
MINING PERMIT NACC-1302)	
)	COMPLAINANTS' PROPOSED
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW, AND
)	ORDER
)	
)	

PRELIMINARY STATEMENT

Coyote Creek Mining Company (“CCMC”) applied for Revision 1 to Surface Coal Mining Permit on NACC-1302 on December 16, 2014. This Revision would extend CCMC’s existing surface mining permit an additional 352.105 acres in order to construct a haul road, an eight acre open coal storage pile, and a coal processing facility. Casey Voigt and the Dakota Resource Council (“DRC”) filed comments on CCMC’s application for Revision 1 to NACC-1302 on May 9, 2015. Those comments, which discussed air quality and dust issues, cross-referenced and incorporated one another by reference. In addition, Casey Voigt and the Dakota Resource Council requested an informal hearing on the issues discussed in their respective comments as allowed under N.D.C.C. § 38-14.1-18 and N.D.C.C. § 38-14.1-19. An informal hearing was held on this matter at 9:00AM on June 2, 2015 in the PSC’s hearing room. Present at the hearing was:

For Complainants: JJ England appearing for Casey Voigt and Dakota Resource Council; Casey Voigt; Julie Voigt; and Marie Hoff for DRC

For Respondent: Brian Bjella and Blaine Johnson appearing for Coyote Creek Mining Company; Donn Steffen; and Joel Trinkle

For PSC: Casey Fuhrer and Illona Jeffcoat-Sacco appearing for PSC; Jim Deutsch

PROPOSED FINDINGS OF FACT

1. CCMC applied for Revision 1 to Surface Mining Permit NACC-1302 on December 16, 2014.

2. The PSC determined that CCMC's Revision 1 application was complete on March 17, 2015.
3. Pursuant to the process in N.D.C.C. § 38-14.1-18 and N.D.C.C. § 38-14.1-19, Casey Voigt and DRC ("Complainants") submitted comments regarding the completeness of CCMC's Revision 1 application. Those comments raised a number of issues regarding air quality and emissions of dust with respect to CCMC's application. The comments ultimately concluded that because CCMC's application did not meet all air quality standards applicable to the mine, that this permit application was incomplete and therefore was not ripe for the PSC's review.

PSC Jurisdiction

4. The PSC has jurisdiction over surface coal mining laws in North Dakota. North Dakota's surface coal mining program is currently approved by the federal Office of Surface Mining ("OSM").
5. 30 U.S.C. § 1255(a) (2015) provides that "[n]o State law or regulation in effect on the date of enactment of [SMCRA, enacted Aug. 3, 1977] or which may become effective thereafter, shall be superseded by any provision of [SMCRA] or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this Act."
6. 30 C.F.R. § 733.11 provides that "[s]tates with an approved State [mining] program shall implement, administer, enforce and maintain it in accordance with the act, this chapter [i.e., SMCRA], and the provisions of the approved State program."
7. If a portion of North Dakota's surface mining program is approved by OSM but is "inconsistent with the federal provision, the latter [i.e., federal law] supersedes the former as provided in 30 U.S.C. § 1255(a)" and 30 C.F.R. § 733.11. *Canestraro v. Faerber*, 374 S.E.2d 319, 321 (W.Va. 1988).
8. The PSC does not have jurisdiction over the issuance of air quality permits. Rather, the North Dakota Department of Health and the United States Environmental Protection Agency have jurisdiction over the issuance of air quality permits.

Description of measures to comply with air quality laws in CCMC's mining permit application

9. Pursuant to PSC mining regulations, an applicant for a surface mining permit "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." N.D.A.C. § 69-05.2-09-05 (emphasis added). Pursuant to OSM regulations, an applicant for a surface mining permit must provide in its permit application a "description of steps to be taken to comply with the requirements of the Clean Air Act." 30 C.F.R. § 780.18(b)(9). These requirements are jurisdictional to the PSC because they are express requirements of

the PSC's mining program. Therefore, CCMC is required to provide in its mining application a list of steps that it will take to comply with the requirements of North Dakota air quality laws, including the Clean Air Act. This includes substantive and procedural requirements of these laws.

10. The following air quality laws apply to CCMC:

a. 40 C.F.R. Part 60, Subpart y (incorporated by reference into North Dakota state law pursuant to N.D.A.C. 33-15-12-01.1):

- i. No emissions from coal processing or conveying equipment or coal transfer equipment greater than 10% opacity for more than a six minute increment in an hour. 40 C.F.R. 60.254(b)(1).
- ii. No emissions from coal processing or conveying equipment or coal transfer equipment greater than 0.023 g/dscm (0.010 gr/dscf). 40 C.F.R. 60.254(b)(2).
- iii. Preparation of a fugitive dust emissions plan for any open coal storage piles that contains at least one approved method of dust control and explains why the chosen method is appropriate for site-specific conditions. 40 C.F.R. 60.254(c).
- iv. Completion of a performance test for all NSPS Subpart Y Affected facilities subject to an emissions limitation, including coal processing or conveying equipment and coal transfer equipment. 40 C.F.R. 60.254(a); 40 C.F.R. 60.8.

b. NDAC 33-15-17:

- i. Take reasonable precautions to prevent fugitive emissions from all sources. NDAC 33-15-17-01(2).
- ii. No emissions of fugitive emissions that exceed ambient air quality standards at the property line of the mine. NDAC 33-15-17-02(2). Applicable ambient air quality standards include the following limits:
 1. Inhalable particulates of 10 microns or less (PM_{10}): 150 micrograms per cubic meter, 24 hour average concentration;
 2. Inhalable particulates of 2.5 microns or less ($PM_{2.5}$): 12.0 micrograms per cubic meter annual arithmetic mean concentration; 35 micrograms per cubic meter 24-hour average concentration;

3. Sulfur Dioxide (SO₂): 0.075 parts per million (196 micrograms per cubic meter) 1 hour average concentration; 0.5 parts per million (1309 micrograms per cubic meter of air) maximum 3-hour concentration, not to be exceeded more than once per calendar year;
 4. Carbon Monoxide (CO): 9 parts per million (10 milligrams per cubic meter of air) maximum 8-hour concentration not to be exceeded more than once per year; 35 parts per million (40 milligrams per cubic meter of air) maximum 1-hour concentration not to be exceeded more than once per year;
 5. Ozone (O₃): 0.075 parts per million (147 micrograms per cubic meter of air) daily maximum 8-hour concentration;
 6. Nitrogen Dioxide (NO₂): 0.053 parts per million (100 micrograms per cubic meter of air) maximum annual arithmetic mean; 0.100 parts per million (188 micrograms per cubic meter of air) 1-hour average concentration;
 7. Lead: 0.15 micrograms per cubic meter of air arithmetic mean averaged over a three month period;
 8. All air contaminants: no concentrations injurious to human health or well-being or that would unreasonable interfere with the enjoyment or that would injure plant or animal life.
- iii. No emissions of fugitive emissions that exceed air quality significant prevention of deterioration increments at our beyond the property line of the mine. NDAC 33-15-17-02(3). These increments are generally more stringent than the above ambient air quality standards and are located at 40 C.F.R. § 52.1829(d).
 - iv. No emissions of fugitive emissions that exceed restrictions on visible emissions in NDAC 33-15-03. NDAC 33-15-17-02(4).
- c. NDAC 33-15-03:
- i. No emissions greater than 20% opacity for non-fugitive sources of emissions (i.e., conveyed through a discrete vent, stack, or opening) within the facility for more than a six minute period in an hour.
 - ii. No emissions greater than 40% opacity for fugitive sources of emissions within the facility for more than a six minute period in an hour.

d. NDAC 33-15-05-01:

- i. No emissions of particulate matter from the mine in excess of the rates shown in the following table, located at NDAC 33-15-05-01, Table 3:

Table 3. Maximum Allowable Rates of Emission of Particulate Matter from Industrial Processes			
English		Metric	
Process Weight Rate (p)	Allowable Emission Rate (E)	Process Weight Rate (p)	Allowable Emission Rate (E)
tons/hr	lb/hr	metric tons/hr	kg/hr
0.05	0.551	0.045	0.25
0.25	1.62	0.23	0.74
0.50	2.58	0.45	1.16
2.50	7.58	2.27	3.43
5.00	12.05	4.54	5.46
10.00	19.18	9.07	8.67
25.00	35.43	22.68	16.03
50.00	44.58	45.36	20.21
250.00	60.96	226.80	27.65
500.00	68.96	453.59	31.29
1000.00	77.59	907.19	35.21
2500.00	90.06	2267.96	40.87

e. NDAC 69-05.2-24:

- i. Each road at a coal mine must be designed and constructed to prevent erosion, siltation, and the air pollution attendant to erosion, including road dust as well as dust occurring on other exposed surfaces by stabilizing all surfaces in accordance with current, prudent, engineering practices.

f. N.D.A.C. § 69-05.2-24-08(3):

- i. Transportation facilities (excluding roads) must be designed to control and minimize air pollution.

g. N.D.C.C. § § 38-14.1-24(4):

- i. 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.

11. A substantial portion of the area contained within the proposed Revision 1 to Surface Mining Permit NACC-1302 is, by its nature, narrow in width (1/2 a mile in width or less) because the bulk of Revision 1 is for a haul road. The centerline of much of this haul road is ¼ mile or less from the mine's property boundary. This increases the risk of violations of air quality standards at the property line.
12. The only discussion of compliance with air quality rules in CCCM's mining permit application is contained in Section 3.1.1.2. Section 3.1.1.2 contains a "fugitive dust control plan."
13. CCMC's fugitive dust control plan contains no discussion of the laws contained in Finding of Fact 10, *supra*, and the means by which CCMC will comply with these laws except for a very brief discussion of NSPS Subpart Y. In regards to NSPS Subpart Y, CCMC explains in Section 3.1.1.2 of its application why its proposed coal pile will not be subject to this regulation.
14. At the informal hearing, Mr. Trinkle, an air quality engineer responsible for Coyote Creek Mine's air permit application, reiterated that NSPS subpart Y does not apply to CCMC's coal pile.
15. Regardless of CCMC's application and Mr. Trinkle's statement, the plain language of 40 C.F.R. Subpart Y shows that this regulation clearly applies to all open coal storage piles. 40 C.F.R. 60.250(d) (open storage piles are subject to NSPS subpart Y); 40 C.F.R. 60.251(m) (defining open storage piles as "any facility" that is not enclosed and is used to store coal; 40 C.F.R. 60.254(c) (standards of performance applicable to open coal storage piles).

SMCRA's fugitive dust and air pollution laws

16. The provisions of 30 C.F.R. 780.15(a) apply to CCMC because CCMC is a mine located west of the 100th prime meridian with a production rate greater than 1,000,000 tons per year. This federal regulation requires CCMC to submit with its mining permit application an air pollution control plan that includes a plan for fugitive dust control practices to effectively control erosion and air pollution attendant to erosion, and a monitoring plan to provide sufficient data to evaluate the effectiveness of CCMC's fugitive dust control plan.
17. 30 C.F.R. 780.15(a) was not adopted into North Dakota's surface mining regulations. In this situation, the PSC is required to enforce the federal law. *See* Findings of Fact 5 through 7, *supra*.
18. At the informal hearing in this matter, PSC counsel suggested that 30 C.F.R. 780.15(a) is "meaningless" because OSM revised 30 C.F.R. 816.95. PSC staff presented PSC Exhibit 1 as proof of this statement. However, PSC Exhibit 1 does not say that OSM intended not to regulate air pollution under 30 C.F.R. 780.15(a). Rather, this exhibit shows that OSM intended to curtail its jurisdiction over air pollution issues solely to those air quality issues that are caused by erosion of the

surface. OSM's regulations often describe this type of air pollution as "air pollution attendant to erosion."

19. 30 C.F.R. 780.15(a) and 30 C.F.R. 816.95 are both in full force and effect today and therefore cannot be meaningless. All laws must be given meaning.
20. CCMC's application for Revision 1 to surface mining permit NACC-1302 does not contain a fugitive dust control plan as required under 30 C.F.R. 780.15(a). Although Section 3.1.1.2 contains a subsection entitled "fugitive dust control plan," Section 3.1.1.2 explicitly states that the plan included in the application is required by the Department of Health. The Department of Health necessarily imposes different standards than the air quality requirements of 30 C.F.R. 780.15(a), and the required fugitive dust control plans are not the same. 30 C.F.R. 816.95(a) requires that the CCMC include in its fugitive dust control plan methods to protect and stabilize all exposed surface areas to effectively control air pollution attendant to erosion. This standard is different from any standard required by the Department of Health.
21. CCMC's application does not contain a dust monitoring plan as required by 30 C.F.R. § 780.15(a)(1).
22. Without air quality monitoring in place, it is not possible for CCMC to prove whether or not it is in compliance with its fugitive dust control plan and whether this plan is effective.

Specificity in CCMC's Permit Application

23. Section 3.1.1.2 of CCMC's permit application contains a number of vagaries that would make it difficult, if not impossible, for the PSC to effectively enforce this permit, should it be finalized. For example, CCMC repeatedly explains that it will use dust control methods "periodically," if "necessary," or if existing methods are not "effective" or "not enough." No definition is given to these words.
24. At the informal hearing, Donn Steffen, speaking on behalf of Coyote Creek Mining Company listed a number of conditions related to weather and operations that could necessitate varied responses for fugitive dust control. Mr. Steffen mentioned that he will train employees on how to respond to these conditions. No record of this training program exists in CCMC's mining permit application. If this program exists, it should be included in this mining permit application. The details of this program would assist the PSC and the public with expectations, accountability, and enforcement with regard to fugitive dust control.

CONCLUSIONS OF LAW

25. CCMC's permit application does not contain statements of how it will comply with a number of air quality laws as required by N.D.A.C. § 69-05.2-09-05 and 30

C.F.R. § 780.18(b)(9). To the extent that Section 3.1.1.2 contains such statements in regards to NSPS subpart Y, they are inaccurate.

26. CCMC's permit application does not contain a fugitive dust control plan and a monitoring plan as required by 30 C.F.R. 780.15(a) and 30 C.F.R. 816.95.
27. Because CCMC's application for Revision 1 to mining permit NACC-1302 does not contain required information, it is incomplete. The PSC cannot consider an incomplete application. In such situation, the PSC is required to disapprove the permit application in its entirety. N.D.C.C. § 38-14.1-20(1).

ORDER

The Commission hereby ORDERS:

28. That CCMC's application for Revision 1 to Surface Mining Permit NACC-1302 is denied.
29. CCMC may resubmit its application to this Commission. Such application must comply with all applicable air quality laws and regulations as described herein.

Randy Christmann
Commissioner

Julie Fedorchak
Chair

Brian P. Kalk
Commissioner