

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

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

RECOMMENDED FINDINGS AND RULING
AND RECOMMENDED ORDER

June 15, 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, Special Assistant Attorneys General, Public Service Commission, State Capitol, Bismarck, North Dakota 58505, on behalf of the North Dakota Public Service Commission.

James R. Deutsch, Director, Reclamation Division, Public Service Commission, State Capitol, Bismarck, North Dakota 58505

Wade C. Mann, Administrative Law Judge, Office of Administrative Hearings, 2911 North 14th Street – Suite 303, Bismarck, North Dakota 58503, as Substantive Hearing Officer.

Preliminary Statement

On December 17, 2014, Coyote Creek Mining Company, L.L.C. (“Coyote Creek Mining”) filed an application for Revision No. 1 to Surface Coal Mining Permit NACC-1302. As part of this revision, Coyote Creek Mining proposes to add 352.105 acres to the permit area for a primary 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, south of Zap in Mercer County, North Dakota. The revision also updates the introductory, legal, financial, compliance, environmental, operations and reclamation plans in the permit.

On March 17, 2015, the Public Service Commission (“Commission”) deemed the application complete and directed Coyote Creek Mining to begin publishing the newspaper notices as required by N.D.C.C. § 38-14.1-18.

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 that 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, JJ England, as counsel for Casey Voigt (“Mr. Voigt”) and Don Morrison, Executive Director of the Dakota Resource Council (“DRC”) filed comments and requests for an informal conference (“Conference”) with the Commission. Mr. 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 of how Coyote Creek Mining 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, 12th 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. Mr. England gave oral argument regarding the issues raised by Mr. Voigt and DRC. Ms. Furey and Mr. Deutsch gave oral arguments on behalf of the Commission’s Reclamation Division. Ms. Furey offered three exhibits which were all made part of the record. Mr. Bjella gave oral argument and called two witnesses on behalf of Coyote Creek Mining. Donn R. Steffen, Engineering/Environmental Manager with Coyote Creek Mining and Joel Trinkle with Barr Engineering testified on behalf of Coyote Creek Mining. Mr. Bjella also offered eleven exhibits, all of which were made part of the record.

In accordance with N.D.C.C. § 38-14.1-19, the Commission shall issue a ruling on this matter within thirty days of the close of the Conference. N.D.C.C. § 38-14.1-20 provides for further review to the Commission at a formal hearing in accordance with N.D.C.C. § 38-14.1-30. N.D.C.C. § 38-14.1-30(3)(f) incorporates the restriction in the Surface Mining Control and Reclamation Act, Public Law 95-87, that no person who presides at an informal conference shall participate in the decision-making process at the appeal level. No Commissioner participated in the Conference in order to allow for their full involvement at a formal hearing should the final order in this matter be appealed to a formal hearing.

Consideration of the presentations of the parties, the documentation included in the record, the applicable statutes, rules and case law, supports the following findings and ruling.

Findings

1. On October 22, 2014, the Commission issued Surface Coal Mining Permit No. NACC-1302 to allow Coyote Creek Mining 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, Coyote Creek Mining 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. Mr. Voigt and DRC make a number of assertions with respect to Coyote Creek Mining's proposed revision. They primarily assert that Coyote Creek Mining has not adequately addressed dust and fugitive emissions that could result from the approval of Revision No. 1 to Permit NACC-1302. Specifically, Mr. Voigt requests that the Commission add particularized standards to Coyote Creek Mining's permit to ensure that air quality is protected as required by the Surface Mining Control and Reclamation Act of 1977, 30 USC § 1201 et. seq. ("SMCRA"). DRC asserts SMCRA air quality rules apply to Coyote Creek Mining requiring the permit application to 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 Creek Mining will comply with the Clean Air Act. Reclamation Division staff asserts that the detailed fugitive dust emissions and air quality standards referenced in the comments of Mr. Voigt and DRC are outside 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. Coyote Creek Mining asserts that DRC failed to establish standing to participate in the Conference. N.D.C.C. § 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 . . ." Coyote Creek Mining contends that DRC must establish associational standing in order to participate and that it failed to do so. Therefore, Coyote Creek Mining argues that the comments and assertions raised in DRC's letter of May 9, 2015, should not be considered. DRC counters that it has members who are directly and adversely impacted by Revision No. 1 to Permit NACC-1302 but did not identify the specific members.

In the case of *Dakota Resource Council v. Stark County Board of County Commissioners*, 2012 ND 114, 817 N.W.2d 373, 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 in that case as two individuals were identified as members who would have had standing to appeal the decision in their own right. *Id.* at ¶ 11. By failing to identify the affected members in this matter, DRC has not provided sufficient information to establish associational standing.

The extent to which the common law associational standing requirements extend to limit participation in an informal conference in accordance with N.D.C.C. § 38-14.1-18 is unclear. Regardless, the remedy sought by Coyote Creek Mining to exclude DRC’s comments is rejected as Mr. Voigt in his May 9, 2015, letter expressly “incorporates by reference into this comment the comments of the Dakota Resource Council submitted on May 9, 2015, for this mining permit application ...” Even if DRC were to be excluded, their arguments have been adopted and brought into the record by Mr. Voigt.

5. Pursuant to SMCRA, states can submit proposed state regulation programs to the federal Office of Surface Mining Reclamation and Enforcement (“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 and are consistent with the provisions of SMCRA and the regulations issued pursuant thereto. The Commission enforces only state rules and laws governing its program.
6. DRC and Mr. Voigt contend that regardless of the OSM approved state regulations, 30 CFR § 780.15(a) applies and requires Coyote Creek Mining to have an air pollution control plan including an air quality monitoring program and a fugitive dust control plan in accordance with 30 CFR § 816.95.
7. The regulations contained in 30 CFR § 780.15, and other federal mining regulations were the subject of several lawsuits, including the case of *National Wildlife Federation vs. Hodel*, 839 F.2d 694 (Ct. App. D.C. 1988). The Court stated in *National Wildlife Federation* 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.* The Commission’s approved program is not required to have corresponding state rules to 30 CFR § 780.15 or 30 CFR § 816.95¹.

8. Permit application’s issued by the Commission are not subject to the SMCRA air quality rules set forth in 30 CFR § 780.15 or 30 CFR § 816.95.
9. The North Dakota Department of Health has exclusive jurisdiction over permitting of air quality in North Dakota pursuant to the Clean Air Act. The Commission does not have jurisdiction to enforce provisions of the Clean Air Act but as a state-approved program, has adopted a specific rule governing what an applicant must set forth in the permit application with respect to air quality. The Commission’s rule set forth in N.D. Admin. Code § 69-05.2-09-05, provides that “[t]he 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.”
10. Once a permit is granted, the Commission has statutory standards that must be met. N.D.C.C. section 38-14.1-24 establishes environmental protection performance standards. This section provides in part that “[g]eneral performance standards are applicable to all surface coal mining and reclamation operations and must require the permittee at a minimum to ... 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.” N.D.C.C. § 38-14.1-24(4).² The Commission has adopted a rule requiring that “[t]he 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.” N.D. Admin. Code § 69-05.2-13-07.
11. By application dated September 9, 2014, Coyote Creek Mining applied to the North Dakota Department of Health for an air quality permit to construct its proposed surface coal mine and coal processing facility.

¹ OSM in responding to public comment on 30 CFR § 816.95 explained that “the final rule reflects the interpretation of Section 515(b)(4) [the 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).

² While an applicant is not required to comply with 30 CFR § 816.95, the provisions of N.D.C.C. § 38-14.1-24(4) contain similar requirements. 30 CFR § 816.95 requires that “all exposed surface areas should be protected and stabilized to effectively control erosion and air pollution attendant to erosion.”

12. The Department of Health issued Air Pollution Control Permit to Construct No. PTC15001 to Coyote Creek Mining on January 7, 2015. 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.
13. Coyote Creek Mining submitted a Fugitive Dust Control Plan as part of Revision 1. The plan is contained in section 3.1.1.2 and sets forth detailed measures used to control fugitive dust from facility operations. The plan 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.
14. The issuance of Permit to Construct No. PTC15001 by the Department of Health to Coyote Creek Mining, in addition to the submittal of § 3.1.1.2 of Revision No. 1 to the Commission, satisfies the requirements set forth in N.D. Admin. Code § 69-05.2-09-05.
15. At the Conference, Mr. Voigt and DRC challenged the sufficiency of a number of Coyote Creek Mining's plans with respect to air quality matters. These challenges focused primarily on air quality issues subject to Coyote Creek Mining's Permit to Construct No. PTC15001 and which are under the jurisdiction of the Department of Health. This is not the proper venue to challenge these air quality issues. N.D.C.C. § 23-01-36 establishes a mechanism to appeal the issuance of a permit by the North Dakota Department of Health. That section

provides in part that the challenge “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.” The Commission does not have authority or jurisdiction to regulate air quality at coal mines in North Dakota. That jurisdiction and authority is vested in the Department of Health. Mr. Voigt and DRC’s challenges to the air pollution control requirements in this proceeding are a collateral attack upon the Department of Health’s authority and upon the permit to construct.

Ruling

1. The Commission has jurisdiction over Coyote Creek Mining’s planned surface mining and reclamation operations in North Dakota, including Permit No. NACC-1302, and Revision No. 1 thereto.
2. Coyote Creek Mining’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. Specifically, with respect to issues raised by Mr. Voigt and DRC, Coyote Creek Mining has complied with N.D.C.C. § 38-14.1-24(4) and N.D. Admin. 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.
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 DRC.
4. Allegations asserting noncompliance with air quality laws and regulations are outside the jurisdiction of the Commission and constitute an impermissible collateral attack upon the Permit to Construct No. PTC15001 as issued by the North Dakota Department of Health.
5. 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.

Recommended Order

Coyote Creek Mining's application for Revision No. 1 to Surface Coal Mining Permit NACC-1302 satisfies all permit revision standards under North Dakota Century Code Chapter 38-14.1 and North Dakota Administrative Code, Article 69-05.2.

State of North Dakota
Public Service Commission



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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the **RECOMMEND FINDINGS AND RULING AND RECOMMENDED ORDER** was mailed, inside mail, at the State Capitol, on the 15 day of June 2015, to:

Darrell Nitschke
Executive Secretary
Public Service Commission
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Bismarck, ND 58505-0480

and that true and correct copies of the above document was mailed, regular mail, on the 15 day of June 2015, to

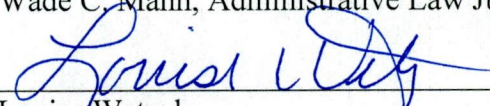
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OFFICE OF ADMINISTRATIVE HEARINGS
Wade C. Mann, Administrative Law Judge



Louise Wetzel