

**NORTH DAKOTA**

**PUBLIC SERVICE COMMISSION**

**Coyote Creek Mining Company, L.L.C.  
Renewal No. 1, Permit NACC-1302  
Revision No. 9, Permit NACC-1302  
Applications**

**Case No. RC-19-189  
Case No. RC-19-190**

**COMMENTS OF CASEY VOIGT AND JULIE VOIGT, OBJECTION TO MINE PLAN,  
AND REQUEST FOR INFORMAL HEARING**

**August 26, 2019**

**I. Introduction**

Coyote Creek Mining Company, L.L.C. (“CCMC”) filed applications to renew and revise Surface Coal Mining Permit NACC-1302. Casey and Julie Voigt (“Voigts”), by and through their counsel, hereby submit comments on CCMC’s applications. For the reasons stated in these comments, the Voigts object to the mining plan and request an informal hearing before the Public Service Commission (“PSC”). The Voigts own the surface of much of the mine. The Voigts’ house, in Section 31 of T143N, R88W, is directly adjacent to the active mining area for the mine and is within the permit boundary. The Voigts also continue to operate an active cow-calf ranching operation upon the surface of the mine permit area. Nearly all of the surface that will be disturbed in CCMC’s requested upcoming five year permit term will be upon the Voigts’ property.

As the PSC is aware, the Voigts previously requested a formal hearing on CCMC’s original application for NACC-1302. The issues raised in that formal hearing centered on the presence of an alluvial valley floor in the Section 31, T143N, R89W (at the location of the Voigts’ alfalfa fields along Coyote Creek) and concerns about CCMC’s ability to adequately reclaim the Voigts’ ranch after completion of mining based upon concerns about CCMC’s sister companies’ reclamation history in North Dakota. The Voigts also requested an informal hearing regarding air quality concerns at CCMC before the mine became operational. *See* Docket RC-14-846. Regrettably, after four years of mining, the Voigts previous concerns are now substantiated by four years of direct experience.

**II. Summary of issues raised in these comments.**

These comments focus on seven areas of concern about CCMC’s mine permit applications for the revision and renewal of NACC-1302. For each issue, these comments also propose a requested solution. A summary of the seven topics and solutions follows:

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JJ England, Braaten Law Firm
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Objections to Renewal 1 & Revision 9 to Permit NACC-1302 and request for an informal hearing  
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### Issue One—Access

Issue: The mine plan raises significant concerns regarding the Voigts' ability to access their surface and appears to violate the terms of CCMC's prior agreement with the Voigts and Mercer County.

Proposed solution: The PSC should add a permit condition requiring CCMC to maintain the Voigts' access and to restore the public road connecting the bridge over Coyote Creek in Section 31, T143N, R88W to County Road 13 at the end of the permit term.

### Issue Two—Dust

Issue: The mine plan is insufficient to minimize fugitive dust, which has caused significant problems for the Voigts over the past four years.

Proposed Solution: The mine plan should include evidence-based best available control technology for dust, as well as dust monitoring to ensure that dust is minimized. As is done at some mines in Wyoming, the PSC should require CCMC to pause its coal haulage operations until the road can be watered if and when dust monitors indicate unsafe levels.

### Issue Three—Alluvial Valley Floors

Issue: Knife River Company drilled eight core samples two years ago to search for gravel. Four of the core samples were drilled in the Voigts' north alfalfa field, and four of the core samples were drilled in the Voigts' south alfalfa field. All eight samples returned groundwater within a thick gravel deposit at the rooting depth of alfalfa. Based upon this new evidence and the mine's significant alteration to its mine pit layout, a new alluvial valley floor analysis must be completed for this mine permit Revision and Renewal.

Proposed Solution: A new alluvial valley floor determination must be completed prior to approving CCMC's proposed revision and renewal of NACC-1302.

### Issue Four—Omission of Cultural Resource Sites

Issue: The pit layout and facilities map for Revision 9 appears to omit a number of eligible cultural resource sites identified in the pit layout and facilities map for Revision 8 in Section 6 of T143N, R89W. The Voigts have been unable to find justification in CCMC's permit applications for the change.

Proposed solution: The cultural resource sites identified in Revision 8 in Section 6 of T143N, R89W should be re-added to CCMC's mine plans.

### Issue Five—Sediment Build-Up in Coyote Creek

Issue: The mine plan is inadequate to address sediment build-up issues in Coyote Creek from CCMC, which has been an issue during the current permit term.

Proposed Solution: The PSC should add a permit condition requiring the Mine to monitor the creek for sediment build-up monthly from May to October, to notify the PSC of any sediment build-up, and to implement a corrective action plan if sediment build-up is located.

#### Issue Six—CCMC’s Ability to Reclaim the Mine

Issue: CCMC’s recent efforts at reclamation of a small tract of land within the permit area raise serious concerns about CCMC’s ability to reclaim the mine.

Proposed Solution: The PSC should carefully monitor CCMC’s mine reclamation efforts. The Voigts intend to do the same, and will continue to inform the PSC of any concerns or issues that arise.

#### Issue Seven—CCMC has no incentive to comply with the terms of NACC-1302 because Coyote Station’s partners reimburse CCMC’s environmental fines.

Issue: Coyote Station’s partners’<sup>1</sup> contract with CCMC is a cost-plus contract through which those partners exert significant control over CCMC. The partners retain ultimate approval over CCMC’s mine plans, and those partners have ultimate authority to accept or reject CCMC’s mine plans. The partners also, by contract, apparently pay any and all fines directed to CCMC, including fines issued by the PSC for the violation of permit NACC-1302. Through this arrangement, CCMC lacks a meaningful incentive to comply with the law. Further, the companies with the actual incentive to comply with the PSC’s mine rules are Coyote Station’s partners, since liability for violation of the mine plan has been shifted by contract to OTP.

Proposed Solution: The PSC should make approval of the mine permit contingent upon Coyote Station’s partners and CCMC certifying to the PSC that the Station’s partners have rescinded control over CCMC and that Coyote Station’s partners will no longer pay CCMC’s fines.

### **III. Issue One: Access**

The Voigts’ farmstead is located in the center of Section 31, T143N, R88W, on the west bank of Coyote Creek. The Voigts’ ranch includes land between Coyote Creek and County Road 13 to the west. Prior to the construction of CCMC, a public road allowed the Voigts to easily access their lands to the west of their house, as well as County Road 13. On maps, the road is described as County Road 25. The road runs roughly east-west and includes an improved bridge over Coyote Creek (the bridge is directly adjacent to the Voigts’ house).

Several years ago, CCMC petitioned Mercer County to close this road to allow CCMC to mine the coal beneath this public road. Due to the significant access issues that this would cause the Voigts (it is more than twenty miles round-trip to detour around on public roads), the Voigts objected to the Mercer County Commission and cited to N.D.C.C. § 38-01-07.1, which provides

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<sup>1</sup> The Station’s operating partner is Otter Tail Power Company (“OTP”). The Station’s other partners are Montana-Dakota Utilities Co., Northern Municipal Power Agency and Northwestern Energy.

that a county may close a road for mining, but only if “the road is not required due to readily accessible alternate routes of travel and the closing or relocation does not deprive adjacent landowners access to their property.” After three days of hearings, the Mercer County Commission voted to require CCMC to provide the Voigts and other members of the public access. A copy of Mercer County’s Resolution requiring access is attached hereto as Exhibit A. Notably, CCMC indicated to Mercer County and the Voigts that it expects to reconstruct the road in the year 2024. *Id.*

Unfortunately, the new mine plan proposed by CCMC deviates significantly from CCMC’s prior mine plans (the pit layout, for example, differs significantly from prior versions) and raises significant questions about how and whether CCMC will comply with the terms of Mercer County’s resolution granting CCMC the privilege to mine this public road. If CCMC is unable to comply with the terms of Mercer County’s resolution, that raises significant questions regarding the Voigts’ ability to access their land. This issue is likely best illustrated in person, with a map, and this is one reason that the Voigts request an informal hearing before the PSC.

The Voigts request that CCMC’s mine plan be revised to explain how CCMC will maintain access for the Voigts and other landowners affected by the closure of this public road and to confirm that the road will be reconstructed in the year 2024 as previously anticipated by CCMC and indicated to Mercer County and the Voigts. *See e.g.*, N.D.A.C. § 69-05.2-09-07.

#### **IV. Issue Two: Dust**

The Voigts appreciate that the PSC, in its technical review letter to CCMC dated August 9, 2019, is requiring CCMC to update its fugitive dust control plan. Fugitive dust has been a significant and ongoing problem at this mine, and dust from the mine has impacted the Voigts on numerous occasions. As the Voigts have previously explained to the PSC, CCMC’s existing fugitive dust control plan is “extremely vague,” and is practically unenforceable. *See* Comments of Casey and Julie Voigt, Docket RC-14-846. Unfortunately, the Voigts’ previously-expressed concerns are now confirmed based upon four years of mining.

Over the last four years, dust has impacted the Voigts, their cattle, their home, and their grassland on a significant and ongoing basis. The Voigts intend to more fully express their concerns in person with the PSC at an informal conference, and this is another reason that the Voigts request an informal conference before the Commission.

At this time, it is difficult for the Voigts to fully comment on CCMC’s mine application on this issue because the PSC has requested that CCMC revise its fugitive dust control plan, but that plan is not yet available to the Voigts. The Voigts request that the PSC provide the Voigts a copy of CCMC’s proposed plan once it is available. In general, however, the plan should be based upon the best available control technologies as demonstrated at other mines. Due to the significant dust issues at the mine, including episodes involving the Voigts’ cattle being enveloped in dust, the Voigts’ yard and entire house becoming caked with a thick layer of dust, and regular episodes of coal haul trucks sending clouds of dust across the mine, the Voigts believe that an updated fugitive dust control plan is urgently needed. The plan should specifically require CCMC not just to control dust with specific performance standards and methods of control, but also to monitor for dust.

One specific, and fairly simple method, that the Voigts request for inclusion in CCMC's dust control plan is a system that the Voigts have seen used at mines in Wyoming. That system attaches a traffic control light to dust monitors. If haul trucks cause too much dust, the dust monitor causes the traffic light to halt the coal haulage pattern until the road is watered. The Voigts assert that this system is one aspect of the best available dust control technology for a dirt haul road.

**V. Issue Three: Alluvial Valley Floors**

One significant issue raised at the formal hearing on NACC-1302 was whether the Voigts' two alfalfa fields along the banks of Coyote Creek in Section 31 of T143N, R88W were subirrigated, and thus whether those fields met the definition of an alluvial valley floor. N.D.C.C. § 38-14.1-02(1). The PSC determined that these two fields were not an alluvial valley floor at that time because the fields were not flood irrigated or subirrigated.

Approximately two years ago, Knife River Corporation drilled four holes in the Voigts' north alfalfa field, and four holes in the Voigts' south alfalfa field. These holes were drilled to determine if gravel deposits were present in these fields. Mr. Voigt recalls that all four cores drilled in the south alfalfa field showed groundwater present at a depth of 11 feet in a seam of gravel approximately two feet thick. Mr. Voigt recalls that all four cores drilled in the north alfalfa field showed groundwater present at a depth of 13 feet in a seam of gravel approximately 1.5 feet thick. The cores were drilled approximately in the four corners of each field, respectively. These groundwater depths are directly in the rooting zone of alfalfa.

Further, the Voigts have lost alfalfa production on these fields since mining began, which suggests the flow of groundwater has been reduced or cut off to these fields due to CCMC's operations.

This information was not previously available to the PSC. The Voigts request that, based upon this new information, an updated alluvial valley floor analysis be completed at the location of the Voigts' two alfalfa fields. The Voigts further request that the PSC provide the Voigts with specifications for the exact type of data that the PSC would find useful for this alluvial valley floor analysis. The Voigts are willing to provide direct scientific evidence on this issue, including based upon additional drilling within these fields to the PSC's specifications. The Voigts note that the PSC's previous determination did not have the benefit of any actual data from within the alluvium of the Voigts' fields, and therefore the Voigts wish to facilitate this detailed investigation.

Based on the core samples drilled two years ago, the Voigts are confident that their two alfalfa fields in Section 31, T143N, R88W are subirrigated alluvial valley floors, and the Voigts remain very concerned that mining operations have and will continue to cut off the flow of groundwater to the alluvium underlying these fields.

**VI. Issue Four: Cultural Resource Sites appear to have been omitted from the mine plan.**

CCMC's pit layout and facilities map for Revision 8 of NACC-1302 listed a number of cultural resource sites in Section 6 of T143N, R89W. The Voigts have been unable to find

justification in CCMC's permit applications for the change, including in Section 2.8 of CCMC's applications. Absent further justification from CCMC, the cultural resource sites identified in Revision 8 in Section 6 of T143N, R89W should be re-added to CCMC's mine plans.

**VII. Issue Five: Sediment Build-up in Coyote Creek**

The Voigts have witnessed a significant quantity of sediment build-up accumulate directly between CCMC's outfall from P31-01 and CCMC's box culvert crossing Coyote Creek near CCMC's main shop and office. Photographs of this issue are attached as Exhibit B. This location is within the permit area for NACC-1302. Based upon these photographs, it appears that CCMC's discharges from this outfall have caused the creation of a land bridge in the middle of Coyote Creek due to sediment buildup from CCMC's retention pond. This is an environmentally damaging condition that impacts flow on the stream. While other government agencies (DEQ and the Army Corps) regulate the effluent discharge and addition of fill to Coyote Creek, the PSC regulates the sediment ponds themselves. As part of the PSC's concurrent jurisdiction with the DEQ and the Army Corps, the Voigts request that the PSC require CCMC to include in its mine plan that it will monitor Coyote Creek monthly from May to October of each year to locate sediment build-up arising from CCMC's outfalls. If such sediment buildup is located, the Voigts further request that if such sediment buildup is located, that CCMC be required to notify the PSC, to submit a corrective action plan to the PSC, and to coordinate with DEQ and the Army Corps to resolve the issue, as needed.

**VIII. Issue Six: CCMC's recent reclamation efforts raise questions as to CCMC's ability to reclaim the mine.**

Recently, CCMC attempted to reclaim land directly adjacent to County Road 25's bridge across Coyote Creek located in Section 31 of T143N, R88W. In the Voigts' opinion, that reclamation so far has failed. See photographs attached as Exhibit C.

The Voigts are not requesting a specific fix for this issue at this time, but they are nonetheless taking this opportunity to alert the PSC to the Voigts' concerns that if CCMC cannot successfully reclaim even this small area of land, that CCMC seems ill-equipped to reclaim the rest of the mine. The Voigts intend to remain vigilant regarding all aspects of CCMC's reclamation operations on the Voigts' land, and the Voigts will raise issues with the PSC as necessary and appropriate.

**IX. Issue Seven—CCMC has no incentive to comply with the terms of NACC-1302 because Coyote Station's partners reimburse CCMC's environmental fines.**

Coyote Station's partners have a twenty-five-year Lignite Sales Agreement ("LSA") with CCMC. Pursuant to the LSA, Coyote Station exerts control over Coyote Creek Mine. The LSA between Coyote Station and CCMC is available in its entirety (with pricing terms removed) to the

public through filings with the U.S. Securities and Exchange Commission (“SEC”).<sup>2</sup> An excerpt of the relevant portions of the LSA are attached to these comments as Exhibit D. The Agreement requires CCMC to submit an “annual mining plan” to Coyote Station every year. This plan must include detailed information, including:

maps showing mine progression, location of infrastructure, and capital projects locations ... mining operations schedules ... labor requirements ... a reclamation plan ... and a permitting and bonding schedule ... an estimated capital budget containing detailed, itemized estimates of all capital expenditures ... including any proposed acquisition of Capital Assets by [CCMC] ... estimated employee headcounts ... an estimated Monthly cash flow statement ... a projection of the next four Years of operations in such detail as directed by [Coyote Station].

*Id.* Coyote Station then must give its “approval or disapproval” of this annual mining plan. If Coyote Station “disapproves” and CCMC and Coyote Station are “unable to resolve their differences,” then “[CCMC] shall adopt such changes to the annual mining plan as requested by [Coyote Station], and shall submit a revised mining plan.” *Id.* (emphasis added). In other words, Coyote Station has the absolute right under this contract to disapprove CCMC’s mine plans and to force CCMC to change its mine plans. The Agreement also prohibits CCMC from making any “material modification of or material deviation from the approved Annual Mining Plan ... without written approval of [Coyote Station].” *Id.*

The LSA is a cost-plus requirements contract, which means that, through the LSA, CCMC is required to provide all of Coyote Station’s coal, and Coyote Station has guaranteed CCMC a profit over its costs. The LSA’s plain language gives Coyote Station’s owners direct authority to approve and deny all capital expenditures at CCMC and sets in place mandatory processes for Coyote Station’s owners to review all capital expenditures during the agreement’s minimum twenty-five year term.

CCMC also explained in a formal letter to another North Dakota agency—NDDH (now DEQ)—that “the Coyote Station owners agreed to reimburse CCMC for financial penalties” arising from environmental violations at CCMC’s mine. This is not limited to any specific type of violation, and would include reimbursement for fines arising from the violation of the PSC’s rules and the terms of NACC-1302.

Through this arrangement, CCMC lacks a meaningful incentive to comply with the law. Further, the entities with the actual incentive to comply with the PSC’s mine rules are Coyote Station’s partners, since financial responsibility for violation of the mine plan has been shifted by contract to those partners. This contractual arrangement directly and negatively impacts the Voigts because CCMC lacks meaningful incentives to comply with the terms of NACC-1302 and the PSC’s surface mine rules. The PSC has already cited and fined CCMC three separate times for violating the PSC’s rules. *See* Dockets RC-15-165, RC-15-495, RC-16-547. By the terms of the

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<sup>2</sup> The entirety of the LSA is available at the SEC’s website at the following link: <https://www.sec.gov/Archives/edgar/data/789933/000078993313000013/ncexh1058201210k.htm>.

LSA, CCMC apparently transferred this financial liability to Coyote Stations' partners, which then reimbursed CCMC for those fines. This contractual arrangement raises numerous questions. Is the LSA illegal and void for violating public policy because it essentially indemnifies CCMC against civil penalties intended to deter CCMC from breaking the law? Is payment of CCMC's fines by Coyote Station's partners (fines which result from violations of the laws of North Dakota), something that North Dakota's rate payers should be burdened with?

The Voigts believe that this contractual issue, which is admittedly behind-the-scenes, colors every problem that they have had with CCMC thus-far. If Coyote Station exercises control over the mine and even pays the mine's fines when CCMC breaks the law, it is little wonder that the Voigts have had difficulty getting CCMC to address issues such as providing them with meaningful access and controlling dust. Perhaps even more importantly, this arrangement raises serious questions about whether CCMC has authority to reclaim the mine without approval of Coyote Station.

To resolve these issues, the PSC should require Coyote Station's partners and CCMC to certify to the PSC, in writing, that the Station's partners have fully rescinded all control over CCMC and that Coyote Station's partners will neither pay fines directed to CCMC nor reimburse CCMC for these fines.

#### **X. Conclusion**

For the foregoing reasons, the Voigts object to CCMC's applications for the renewal and revision of surface mining permit NACC-1302. The Voigts additionally request an informal conference before the Public Service Commission on these issues and any other issues that may arise during the course of these proceedings.

Submitted this 26<sup>th</sup> day of August, 2019.

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