NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Coyote Creek Mining Company, L.L.C.	)	Case No. RC-19-189
Renewal No. 1, Permit NACC-1302	)	Case No. RC-19-190
Revision No. 9, Permit NACC-1302	)	
Applications	)	

RESPONSE TO MOTION TO DISQUALIFY CROWLEY FLECK PLLP FROM REPRESENTING COYOTE CREEK MINING COMPANY, L.L.C.

[¶1] Before the North Dakota Public Service Commission ("Commission") is Casey and Julie Voigt's ("Voigts") Motion to Disqualify. The Voigts seek an order from this Commission disqualifying the undersigned and Crowley Fleck PLLP from representing Coyote Creek Mining Company, L.L.C. ("Coyote Creek") on the pending applications in Case No. RC-19-189 and Case No. RC-19-190. For the reasons discussed below, Coyote Creek respectfully asks the Commission deny the motion.

BACKGROUND

[¶2] The undersigned first joined what would become the firm of Crowley Fleck PLLP in November of 2007. On January 1, 2014, the undersigned accepted a gubernatorial appointment as Director of the North Dakota Office of Administrative Hearings and served as an administrative law judge ("ALJ") for approximately two years, during which time the office presided over hundreds of hearings and the undersigned individually presided over dozens of the same. The undersigned rejoined Crowley Fleck PLLP in January of 2016.

[¶3] The Voigts own certain surface and mineral estates in Mercer County, North Dakota. In 2010, they leased approximately 3,508.96 acres to an affiliate company of Coyote Creek for coal mining. This lease was recorded in Mercer County, North Dakota as Document No. 196024.

[¶4] On November 1, 2013, Coyote Creek submitted an application seeking a permit to engage in surface coal mining and reclamation operations on approximately 8,091.511 acres in Mercer County, North Dakota. The application was assigned Case No. RC-13-850. (Docket No. 1 in Case No. RC-13-850). Crowley Fleck PLLP represented Coyote Creek. On November 24, 2014, Casey Voigt requested a hearing on the permit application. (Docket No. 35 in RC-13-850). On December 18, 2014, the undersigned appointed the Honorable Janet Demarais Seaworth to preside as the procedural ALJ in that matter. (Docket No. 45 in RC-13-850). Judge Seaworth presided over the first day of the hearing but could not continue. (Docket No. 47 in RC-13-850). The undersigned presided over the remainder of the hearing but did not issue any recommended findings of fact, conclusions of law, or any proposed order. *Id.* Despite the undersigned's previous employment with Crowley Fleck PLLP the year before, and despite Crowley Fleck PLLP representing Coyote Creek with respect to the application, the Voigts did not object to the undersigned's involvement in that matter.

[¶5] The Commission approved Coyote Creek's application, subject to certain additional conditions, and issued permit NACC-1302. (Docket No. 125 in RC-13-850). Permit NACC-1302 has an effective date through October 22, 2019. The Voigts appealed the Commission's conclusions in that matter to the state district court pursuant to N.D. Cent. Code § 28-32-42. Case No. 08-2015-CV-01056. The district court affirmed the Commission's decision, concluding the weight of the evidence supported the Commission's decision. Case No. 08-2015-CV-01056 Docket No. 185. The Voigts further appealed, and the North Dakota Supreme Court again affirmed. *Voigt v. N.D. Public Serv. Comm'n.*, 2017 ND 76, 892 N.W.2d 149.

[¶6] On December 17, 2014, Coyote Creek filed a revision application seeking to expand Permit NACC-1302 to include approximately 352.105 acres necessary for a haul road and a coal

processing facility. That application was assigned Case No. RC-14-846. (Docket No. 1 in Case No. RC-14-846). Brian Bjella with Crowley Fleck PLLP again represented Coyote Creek in this new matter. On May 14, 2015, the undersigned was designated as the presiding ALJ. Despite the undersigned's previous employment with Crowley Fleck PLLP a little over a year before, and despite Crowley Fleck PLLP representing Coyote Creek, the Voigts again did not object to the undersigned's involvement in this new matter.

[¶7] After the hearing in Case No. RC-14-846, the Voigts, staff on behalf of the Commission, and Coyote Creek, each filed their own proposed findings of fact, conclusions of law, and accompanying orders. (Docket Nos. 31-33 in RC-14-846). On June 15, 2015, the undersigned issued a Recommended Findings and Ruling and Recommended Order. (Docket No. 38 in RC-14-846). The Voigts made no objection to the undersigned issuing the recommendation to the Commission despite knowing at the time that the undersigned had been with the firm of Crowley Fleck PLLP a little over a year before. On June 16, 2015, the Reclamation Division for the Commission filed a memorandum supporting the undersigned's recommendations. (Docket No. 54 in RC-14-846). The Commission, upon its own independent review, subsequently adopted the undersigned's recommendations and approved the application. (Docket Nos. 56-58 in RC-14-846).

[¶8] Rather than appeal that decision, the Voigts thereafter filed a federal lawsuit against Coyote Creek, alleging violations of the Clean Air Act. Case No. 1:15-cv-00109. Crowley Fleck PLLP again represented Coyote Creek in that litigation. Despite the undersigned's involvement in the matters identified as Case Nos. RC-13-850 and RC-14-846, and despite Crowley Fleck PLLP representing Coyote Creek, the Voigts did not object to Crowley Fleck PLLP's representation in the federal action. Upon competing motions for summary judgment, the federal district court

granted summary judgment in Coyote Creek's favor. *Voigt v. Coyote Creek Mining Company, LLC*, 329 F. Supp. 3d. 735 (D.N.D. 2018). The Voigts appealed and that matter is currently pending before the Eighth Circuit Court of Appeals. *See* Case No. 18-2705. Crowley Fleck PLLP continues to represent Coyote Creek in that appeal.

[¶9] Now, before the Commission are an Application for Renewal of Permit to Engage in Surface Coal Mining and Reclamation Operations ("Renewal Application") filed on May 23, 2019 (Docket No. 1 in Case No. RC-19-189) and an Application for Revision of Permit to Engage in Surface Coal Mining and Reclamation Operations ("Revision Application") filed on May 20, 2019 (Docket No. 1 in Case No. RC-19-190). The proposed renewal and the proposed revision are governed by distinct statutory provisions and each required a separate application. Each separate application is assigned its own case number. The Renewal Application and the Revision Application are separate and distinct matters from the two applications that were filed by Coyote Creek several years earlier and assigned two separate case numbers by the Commission. Case No. RC-13-850 and Case No. RC-14-846. Despite having no objection to the undersigned going from Crowley Fleck attorney to ALJ on Case Nos. RC-13-850 and RC-14-846 involving Permit NACC-1302, the Voigts now object on the eve of Permit NACC-1302's expiration seeking to disqualify the only law firm that has ever represented Coyote Creek on regulatory matters before the Commission.

ARGUMENT

[¶10] In the pending motion, the Voigts seek disqualification based upon the undersigned's perceived involvement several years ago in Case No. RC-13-850 and Case No. RC-14-846. Their argument is replete with problems. Notably, the Voigts' argument mischaracterizes what the Commission may or may not consider in Case No. RC-19-189 and Case No. RC-19-190;

mischaracterizes how the Commission's conclusions in Case No. RC-13-850 and Case No. RC-14-846 relate to the current matters, (Case No. RC-19-189 and Case No. RC-19-190); and mischaracterizes the undersigned's involvement in Case No. RC-13-850 and Case No. RC-14-846. Compounding those problems, the Voigts' delay in bringing the current motion based upon what has transpired over the past six years will cause Coyote Creek substantial prejudice. In short, the Voigts have not carried their heavy burden of showing the extraordinary relief of disqualification is necessary under the circumstances.

1. A party has the right to counsel of their own choosing, subject to the North Dakota Rules of Professional Conduct.

[¶11] This Commission has promulgated regulations for all persons appearing before it. "All persons appearing before the commission must conform to the standards of ethical conduct required of practitioners before the courts of the state of North Dakota." N.D. Admin. Code § 69-02-01-06. The Commission or a hearing officer has discretion to bar a person from appearing before the Commission for improper conduct. *Id.* (providing the "commission or a hearing officer may bar a person from appearing before the commission for improper conduct.") (emphasis added).

[¶12] It is well-established that a "party's right to select its own counsel is an important public right and a vital freedom that should be preserved." *Macheca Transport Co. v. Philadelphia Indem. Co.*, 463 F.3d 827, 833 (8th Cir. 2006). Motions to disqualify opposing counsel must be viewed with "extreme caution." *Sargent County Bank v. Wentworth*, 500 N.W.2d 862, 871 (N.D. 1993). Motions to disqualify warrant that strict scrutiny "because disqualification can be used to gain a tactical advantage and to harass the opposing party." *Sargent County Bank*, 500 N.W.2d at 871; *see also Macheca Transport*, 463 F.3d at 833 (noting "disqualification motions should be subjected to particularly strict scrutiny."). Accordingly, "the extreme measure of disqualifying a

party's counsel of choice should be imposed only when absolutely necessary." *Macheca Transport*, 463 F.3d at 833. "The moving party bears the burden of proving that disqualification is required." *Awnings v. Fullerton*, 912 F.3d 1089, 1096 (8th Cir. 2019).

[¶13] The North Dakota Rules of Professional Conduct narrowly qualify a party's right to retain counsel of its own choosing. Rule 1.12, N.D.Prof. Conduct, governs when a former judge may or may not represent certain clients in certain matters. In relevant part, that rule provides "a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or . . . unless all parties to the proceeding consent in writing after consultation." N.D.R.Prof. Conduct 1.12. As relevant, N.D.R.Prof. Conduct 1.12 precludes a former judge from representing a client in the same "matter" that the former judge "personally and substantively" participated as a judge or other adjudicative officer.

[¶14] For purposes of N.D.R.Prof. Conduct 1.12, the term "matter" is defined as "any judicial or other proceeding, application, request for a ruling or other determination, contract claim, controversy, investigation, charge, accusation, arrest, or other transaction." N.D.R.Prof. Conduct 1.0(i). Coyote Creek has not found, and the Voigts have not cited, any binding authority further defining that term for purposes of N.D.R.Prof. Conduct 1.12.

[¶15] Rule 1.12, N.D.Prof. Conduct, does not specifically define what constitutes "personal and substantive" participation for purpose of the rule. The rule, however, notes it does not apply in instances where a judge's involvement "did not affect the merits" of the matter. N.D.R.Prof. Conduct 1.12 cmt. 1; *see also In re Application for Disciplinary Action Against Hoffman*, 2003 ND 161, ¶ 12, 670 N.W.2d 500 (concluding N.D.R.Prof. Conduct 1.12 applied because the judge exercised adjudicative authority); N.D. Ethics Committee Opinion 95-10 (quoting former ABA Disciplinary Rules and Ethical Considerations for the proposition a "lawyer shall not accept private

employment in a matter upon the merits of which he has acted in a judicial capacity."). A judge's involvement affects a matter's merits when the judge exercises adjudicative authority. *Hoffman*, 2003 ND 161, ¶ 12 (concluding an attorney violated N.D.R.Prof. Conduct 1.12 by representing a client in a matter in which he had issued findings of fact, conclusions of law, and an order for judgment); *see also* N.D. Ethics Committee Opinion 95-10 (same). As applied, a judge has "personally and substantively" participated in a "matter" by exercising adjudicative authority.

[¶16] The foregoing makes clear Coyote Creek had the right to retain the undersigned, subject to the narrow qualifications set forth at N.D.R.Prof. Conduct 1.12. In attempting to divest Coyote Creek of that right, the Voigts have the burden of showing the necessity of disqualification under N.D.R.Prof. Conduct 1.12. The Commission must, with strict scrutiny, determine whether to grant that extraordinary remedy. The Voigts have fallen woefully short in this respect.

2. Case No. RC-19-189, Case No. RC-19-190, Case No. RC-13-850, and Case No. RC-14-846 are not the same "matter."

[¶17] In order for N.D.R.Prof. Conduct 1.12 to apply, Case No. RC-13-850 and Case No. RC-14-846 must be the same "matter" as Case No. RC-19-189 and Case No. RC-19-190. As discussed above, Case No. RC-19-189 and Case No. RC-19-190 can only be considered the same "matter" as Case Nos. RC-13-850 and RC-14-846 if they concern the same proceeding, application, request for a ruling or other determination, or other transaction. These separate applications and proceedings with separate case numbers seeking separate determinations are not the same "matter" because the substance and standards the Commission considered several years ago in Case No. RC-13-850 and Case No. RC-14-846 and what the Commission will consider in Case No. RC-19-189 and Case No. RC-19-190 are wholly distinct.

[¶18] This Commission's statutory authority to issue coal mining permits, and renewals of the same, is codified at N.D. Cent. Code ch. 38-14.1. Any party seeking to engage in surface coal

mining operations must make an application to the Commission. N.D. Cent. Code § 38-14.1-13. The Commission can approve the application and issue a permit only after making formal findings of fact that the applicant has complied with the exacting standards set forth in N.D. Cent. Code ch. 38-14.1. N.D. Cent. Code § 38-14.1-21(3). This requires formal findings as to a litany of issues. If the Commission formally finds the applicant has satisfied these standards, it may issue a coal mining permit with a term of up to, but not to exceed, five years. N.D. Cent. Code § 38-14.1-12(2).

[¶19] Once the Commission issues a coal mining permit, the permittee has the "the right of successive renewal upon expiration with respect to areas within the boundaries of the existing permit." N.D. Cent. Code § 38-14.1-22(1). To deny the permit renewal, the Commission must find the permit holder has not complied with the terms and conditions of the permit, and the current coal mining and reclamation operations do not comply with N.D. Cent. Code ch. 38-14.1, or the renewal substantially jeopardizes the operator's continuing responsibility on existing permit areas, and the performance bond in place is insufficient concerning the renewal period or the permittee has not revised or updated necessary information. N.D. Cent. Code § 38-14.1-22(1). Any opponents of the renewal have the burden to show why the permit should not be renewed. N.D. Cent. Code § 38-14.1-22(2). Any renewal term cannot exceed the permit's original term. N.D. Cent. Code § 38-14.1-22(3).

[¶20] Under this plain statutory procedure, obtaining a mining permit in the first instance is separate and distinct from obtaining a renewal of that permit. The two are wholly separate applications with wholly separate proceedings that require the applicant meet different standards and that require the Commission to make different findings. The terms "permit" and "permit renewal" are defined separately. Of significant permit renewal means the extension of the permit

term "upon the expiration of the initial permit term." N.D. Cent. Code § 38-14.1-02(15) and (18). These standards and findings are in no way related to one another. Whereas the application for a mining permit requires the applicant satisfy certain criteria prior to issuance of the permit, N.D. Cent. Code § 38-14.1-21(3), the application for renewal concerns whether the applicant has complied with different criteria subsequent to that issuance. N.D. Cent. Code § 38-14.1-22(1). Whether an applicant's conduct justifies renewal under N.D. Cent. Code § 38-14.1-22(1) is distinct from whether the applicant satisfied the criteria necessary for the initial issuance of that permit. The permit has to expire for the renewal permit to commence. The distinct inquiries in distinct proceedings concerning distinct applications, having their own separate case numbers and subject to distinct standards, are plainly and wholly distinct.

[¶21] That reality is conspicuously absent from the Voigts' argument that Coyote Creek's application for the mining permit and Coyote Creek's separate application for renewal of that permit are the same "matter." Instead, the Voigts make vapid and fleeting references as to how the determinations made in Case No. RC-13-850 and Case No. RC-14-846 may come to bear in Case No. RC-19-189 and Case No. RC-19-190. For instance, the Voigts represent "the matter at issue is nonetheless substantively the same as what Mr. Mann ruled upon in 2015: whether the PSC should modify [Coyote Creek]'s fugitive dust control plan to minimize dust." The Voigts further suggest the Commission might have to address its previous findings regarding air quality, reclamation, and alluvial valley floors in considering the pending applications. These arguments ignore the limited statutory scope of what this Commission may consider with respect to the pending applications.

[¶22] While the Voigts suggest the Commission will have to consider whether to modify Coyote Creek's fugitive dust plan, the Voigts do not provide any statutory authority under which this

Commission may do so. That lacking is for good reason. It is well-established the Department of Environmental Quality (f/k/a Department of Health) has exclusive jurisdiction to consider the propriety of the fugitive dust plan, not this Commission. *Voigt*, 329 F. Supp. 3d at 739 (noting the Department of Health "is the state agency charged with the administration and enforcement of the [Clean Air Act] and North Dakota's air quality laws."). This Commission came to that same conclusion. (Docket Nos. 38, 56 in Case No. RC-14-846) (concluding the Department of Health "has exclusive jurisdiction over permitting of air quality in North Dakota). Notably, the Voigts tacitly acknowledged that jurisdictional limitation by not appealing the Commission's conclusion and instead challenging the Department of Health's conclusions in the federal litigation. *Voigt*, 329 F. Supp. 3d at 739. The Voigts cannot use matters over which the Commission has no jurisdiction to manufacture the similarity justifying disqualification.

[¶23] While the Voigts further suggest the Commission may have to revisit its previous findings regarding air quality, reclamation, and alluvial valley floors, the Voigts again do not provide any statutory authority under which this Commission may do so. As discussed above, N.D. Cent. Code § 38-14.1-22 limits this Commission's review of Case No. RC-19-189 and Case No. RC-19-190 to whether circumstances occurring since issuance of Permit NACC-1302 justify denying the permit renewal. This does not allow reconsideration of the circumstances justifying issuance of the permit in the first instance. *See* N.D. Cent. Code § 38-14.1-22. Moreover, the proceedings associated with Case No. RC-19-189 and Case No. RC-19-190 do not afford an opportunity to relitigate those issues already decided. *Cridland v. N.D. Workers Compensation Bureau*, 1997 ND 223, ¶ 17, 571 N.W.2d 351 (noting administrative res judicata "prohibits relitigation of claims that were raised or could have been raised in a prior proceeding between the same parties or their privies, and which were resolved by a final judgment in a court of competent jurisdiction."). The

Commission has no authority to reconsider its previous findings regarding air quality, reclamation, and alluvial valley floors. Again, the Voigts cannot use matters over which this Commission has no statutory authority to manufacture the similarity necessary to justify disqualification.

[¶24] Perhaps recognizing the disparateness of what this Commission considered in Case No. RC-13-850 and Case No. RC-14-846 and what the Commission must now address in Case No. RC-19-189 and Case No. RC-19-190, the Voigts rely on two ethics opinions, Opinions 95-10 and 96-03, from the State Bar Association of North Dakota's Ethics Committee for an expansive reading of the term "matter." Notwithstanding the nonbinding nature of these opinions, neither provides the expansive definition of "matter" proffered by the Voigts. While the Voigts cite Opinion 95-10 as defining the term "matter" to include any topic "collaterally" related thereto, Opinion 95-10 did not purport to define the term "matter," whether through reference to collateral or otherwise. *See id.* While the Voigts rely on Opinion 96-03 as defining the term "matter" to include any issue related to a general topic area, Opinion 96-03 considered a situation where the attorney's previous and current representation directly related to an identical topic. *See id.* Neither provides the liberal and expansive definition of "matter" necessary for the Voigts to paper over the plain statutory differences between obtaining a coal mining permit and obtaining a renewal of the same.

[¶25] Furthermore, we are not free to speculate as to the meaning of "matter" in this situation as the Voigts would like us to do. "Matter" for purposes of Rule 1.12 is defined in Rule 1.0(i) and we must apply that definition of "matter". The applicable definition of "matter" for purposes of Rule 1.12 does not support the Voigts' argument so they instead ask the Commission to apply a different definition of "matter" that applies to a different rule (Rule 1.11). But the Voigts are seeking disqualification under Rule 1.12, not Rule 1.11, and are not free to cut and paste different

definitions into the applicable rule to fit their needs. The Commission can't simply ignore the actual definition of "matter" in Rule 1.0(i) and apply a different definition of the term "matter" from a different rule or rely on the Voigts' manufactured definition of the term "matter" based on their tortured interpretation of two old distinguishable opinions.

[¶26] Try as they may, the Voigts cannot escape the reality that Case No. RC-13-850 and Case No. RC-14-846 considered standards, burdens, and evidence separate and distinct from that which this Commission will consider in Case No. RC-19-189 and Case No. RC-19-190. While the Voigts would apparently like to revisit the adverse rulings made several years earlier by this Commission in Case No. RC-13-850 and Case No. RC-14-846, this Commission lacks, both by statute and administrative res judicata, authority to do so. Because Case No. RC-19-189 and Case No. RC-19-190 request the Commission consider issues substantively and procedurally different than those considered years ago in Case No. RC-13-850 and Case No. RC-14-846, the Voigts have not carried their strict burden of demonstrating the necessity of disqualification.

3. The undersigned did not personally and substantively participate in RC-13-850 and RC-14-846.

[¶27] Even if we assume for the sake of argument that the four separate applications, with the four separate case numbers, seeking four separate determinations were the same matter, in order for N.D.R.Prof. Conduct 1.12 to apply, the undersigned must have "personally and substantively" participated in Case No. RC-13-850 and Case No. RC-14-846. As discussed above, N.D.R.Prof. Conduct 1.12 does not specifically define what constitutes "personal and substantive" participation for purposes of the rule. As applied in *Hoffman* and Opinion 96-03, a judge "personally and substantively" participates in a "matter" by exercising adjudicative authority.

[¶28] The undersigned lacked any authority to exercise any adjudicative authority in Case No. RC-13-850 and Case No. RC-14-846. In Case No. RC-13-850, the undersigned served strictly as

a procedural ALJ with no authority to make any substantive findings or orders. In Case No. RC-14-846, the undersigned served as a substantive ALJ with the authority to issue a recommended findings of fact, conclusions of law, and order which could be adopted by but was not binding upon the Commission. N.D. Admin. Code § 69-02-04-07(2). Whether to adopt those recommendations is solely within the Commission's determination, as the Commission retains exclusive statutory authority as to all findings of fact, conclusions of law, and orders. N.D. Cent. Code § 38-14.1-21(1). The Commission is free to disregard the hearing officer's recommendations if, after review and in the Commission's own judgment, that recommendation is incorrect. As previously mentioned, the Commission had no authority to rule on clean air matters which are solely within the jurisdiction of the Department of Environmental Quality; and is now on appeal to the Eighth Circuit.

[¶29] That reality is missing from the Voigts' motion. Although noting no less than five times that the undersigned issued recommendations regarding Case No. RC-14-846, the Voigts do not address the Commission's ability to reject that recommendation if not supported by fact and law. The Voigts essentially ask the Commission to believe that the undersigned personally approved Permit NACC-1302 and its revisions despite lacking any statutory authority to do so. That lack of adjudicative authority readily distinguishes the undersigned's involvement from *Hoffman* and Opinion 96-03, where the judges at issue possessed and exercised final adjudicative authority over the action, subject only to appellate review. Accordingly, the Voigts have not carried their burden of demonstrating the necessity of disqualification even if the four distinct cases could somehow be viewed as the same matter.

4. Disqualification will result in substantial prejudice to Coyote Creek.

[¶30] In a final plea, the Voigts argue disqualification is appropriate because an appearance of bias exists, as perceived by them. According to the Voigts, they are concerned about the undersigned appearing in Case No. RC-19-189 and Case No. RC-19-190 and the undersigned's representation calls into question the validity of Case No. RC-13-850 and Case No. RC-14-846. These arguments ring hallow in myriad respects, most notably of which is the absence of context.

[¶31] As discussed above, the undersigned joined Crowley Fleck PLLP in November of 2007. The undersigned became Director of the North Dakota Office of Administrative Hearings on January 1, 2014. Despite the undersigned's previous employment with Crowley Fleck PLLP, and despite Crowley Fleck PLLP's representation of Coyote Creek, the Voigts did not object to the undersigned's involvement with Case No. RC-13-850 or Case No. RC-14-846. The undersigned returned to Crowley Fleck PLLP on January 1, 2016. Despite the undersigned's involvement with Case No. RC-13-850 and Case No. RC-14-846, the Voigts did not object to Crowley Fleck PLLP's continued representation of Coyote Creek.

[¶32] Despite nearly six years of administrative and legal proceedings, the Voigts have only now found concern and moved for disqualification on that basis. Disqualification will require Coyote Creek to obtain new counsel needing to familiarize themselves with nearly six years of relevant proceedings and thousands of documents in order to proceed. The Voigts acknowledge this will cause significant delay and have represented they will not oppose a continuation of the hearing date in Case No. RC-19-189 and Case No. RC-19-190 to accommodate any substitute counsel.

[¶33] Therein lies the impetus of this motion. As noted above, Permit NACC-1302 is set to expire on October 22, 2019 and Coyote Creek seeks a renewal effective as of that date. The Voigts could have raised their concerns at any point in the last six years. It is only now—a month before Permit NACC-1302 is set to expire—that the Voigts express that concern. At this juncture,

disqualification will cause significant delay with Case No. RC-19-189 and Case No. RC-19-190 when time is of the essence. By delaying in raising their concerns, the Voigts have maximized the disruption accompanying the requested disqualification. The Voigts' dilatoriness indicates the current motion is nothing more than their latest tactical move to achieve their desired end or the end of mining operations. When placed in context, the Voigts' concerns are pretextual and tactical. Disqualification does not exist for that purpose, and the subtext of the current motion is precisely why disqualification is strictly reviewed. *Sargent County Bank*, 500 N.W.2d at 871.

[¶34] The Voigts finally argue the undersigned's representation causes them concern about the validity of Case No. RC-13-850 and Case No. RC-14-846. That concern is grossly belated because, again, the Voigts could have addressed any concern at the time Case No. RC-13-850 and Case No. RC-14-846 were pending. Moreover, that concern is borne of lay opinion that every court, including the North Dakota Supreme Court, has rejected. To the extent the Voigts suggest the Commission will blindly follow the undersigned's arguments regarding Case No. RC-19-189 and Case No. RC-19-190, the Voigts can assuage that concern, real or contrived, through the ample means of judicial review available to them.

[¶35] The pending motion is nothing more than the Voigt's latest attempt to secure their desired end through alternative means. The realities of the numerous administrative and legal proceedings over the past six years belie the Voigts' newfound concern of the undersigned and Crowley Fleck PLLP's involvement in Case No. RC-13-850 and Case No. RC-14-846 and now Case No. RC-19-189 and Case No. RC-19-190. The Voigts could have addressed the concerns they now espouse at any time in the last six years. Yet, they waited in raising that concern until the eve of when Permit NACC-1302 needs renewal. That tactical delay risks severe prejudice in the form of Permit NACC-1302's possible expiration.

CONCLUSION

[¶36] The burden rests with the Voigts to demonstrate the necessity of exercising the extreme remedy of disqualification. The Voigts have not done so because the substance and standards of Case No. RC-19-189 and Case No. RC-19-190 are materially different than that which the Commission considered in Case No. RC-13-850 and Case No. RC-14-846. The Voigts further have not done so because the undersigned did not have, nor exercise, any final adjudicative authority in Case No. RC-13-850 and Case No. RC-14-846. Compounding that failure, granting the Voigts' belated motion would cause Coyote Creek undue prejudice consisting of time, expense, and jeopardy to Permit NACC-1032; and denial of their chosen long-time counsel.

[¶37] Neither N.D.R.Prof. Conduct 1.12(a) nor the totality of the circumstances warrants disqualification. Pursuant to the discretion afforded to the Commission under N.D. Admin. Code § 69-02-01-06, Coyote Creek requests the Commission deny the pending motion.

[¶38] Dated this 30th day of September, 2019.

/s/ Wade C. Mann

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