

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

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

**Case No. RC-19-189  
Case No. RC-19-190  
OAH File No. 20190309**

**RECOMMENDED FINDINGS AND RULING  
AND RECOMMENDED ORDER**

**October 21, 2019**

**Appearances**

Derrick Braaten and JJ England, Attorneys at Law, 109 N Fourth Street Suite 100, Bismarck, North Dakota 58501, on behalf of Casey and Julie Voigt.

Wade Mann, Attorney at Law, 100 W Broadway, Suite 250, Bismarck, North Dakota 58501, on behalf of Coyote Creek Mining Company, L.L.C.

John M. Schuh, Special Assistant Attorney General, Public Service Commission, State Capitol, Bismarck, North Dakota 58505, on behalf of the Public Service Commission.

Dean Moos, Director, Reclamation Division, Public Service Commission, State Capitol, Bismarck, North Dakota 58505.

Timothy J. Dawson, Administrative Law Judge, North Dakota Office of Administrative Hearings, 2911 North 14<sup>th</sup> Street, Suite 303, Bismarck, ND 58503.

**Preliminary Statement**

On May 20 and 22, 2019, Coyote Creek Mining Company, L.L.C. (“CCMC”) filed the applications for Revision No. 9 and Renewal No. 1, respectively to Surface Coal Mining Permit NACC-1302. Revision No. 9 identifies the next 5-year coal removal area and updates the permit for the next permit term. Renewal No. 1 will renew the permit for another 5-year permit term.

On July 10, 2019, the Public Service Commission (“Commission”) issued a Notice of Receipt of Renewal and Revision Applications for Renewal No. 1 and Revision No. 9 to Permit NACC-1302 informing the public that written comments, objections, or requests for an informal conference must be filed with the Commission by August 26, 2019.

On August 26, 2019, JJ England of Bismarck, counsel for Casey and Julie Voigt (“Voigts”) filed comments, objections, and a request for an informal conference (“Conference”). The Voigts expressed concerns about access, dust, alluvial valley floors, omission of cultural resource sites,

sediment buildup in Coyote Creek, CCMC's ability to reclaim the mine, and Coyote Partner's control over CCMC.

On August 28, 2019, the Commission requested the designation of an administrative law judge ("ALJ") to preside as hearing officer at the Conference. On September 4, 2019, the Commission updated its request to a Substantive ALJ to conduct the hearing and to issue recommended findings and ruling as well as a recommended order to the Commission, which will issue the final order in this matter. The Office of Administrative Hearings designated Timothy J. Dawson as substantive ALJ.

On September 6, 2019, the parties stipulated to waive the thirty day time requirement specified in N.D.C.C. § 38-14.1-19. On September 13, 2019, the parties stipulated to an informal conference schedule allowing the conference to be held on October 8, 2019, in the Public Service Commission Hearing Room, 12<sup>th</sup> Floor, State Capitol, Bismarck, North Dakota.

On September 19, 2019, the Commission issued a Notice of Informal Conference scheduling the Conference for 8:30 a.m. on October 8, 2019, in the Public Service Commission Hearing Room, 12<sup>th</sup> Floor, State Capitol, Bismarck, North Dakota.

On September 25, 2019, the Voigts requested a site inspection, specifically variance areas number one and two, for the purpose of gathering information relative to the Conference. On September 30, 2019, the ALJ granted the request to inspect the areas of the Coyote Creek Mine relative to the Voigt's request. The field inspection took place on October 1, 2019 with the Voigts, JJ England, Mark Anderson, Donn Steffen, Tyler Barth, Guy Welch, Bruce Beechie, and Bruce Johnson participating.

On October 4, 2019, the Voigts clarified the issues they intended to discuss at the Conference. They indicated that they did not intend to discuss the omission of cultural resource sites and Coyote Partner's control over CCMC. The Voigts further clarified that they intended to discuss the remaining five issues identified in their August 26, 2019 request for a Conference.

The Conference was held as scheduled. Casey and Julie Voigt appeared, represented by Derrick Braaten. The Voigts also brought Mark Anderson, a consultant with Western Plains Consulting, Lance Loken, owner and consultant with Western Plains Consulting, and Shane Bofto, engineer and consultant with HydroSolutions to participate in the discussion. CCMC was represented by Wade C. Mann of Bismarck. CCMC brought Donn Steffen, Production Manager, and Jessica Unruh, Environmental Manager, to participate. Special Assistant Attorney General John M. Schuh and Director of the Reclamation Division, Dean K. Moos appeared representing the Commission's Reclamation Division. Three other members of the Reclamation Division participated in the discussion including, Guy A. Welch, Environmental Scientist, Bruce A. Johnson, Environmental Engineer, and Bruce E. Beechie, Hydrologist and Geologist. Each party offered exhibits which the ALJ made part of the record.

N.D.C.C. § 38-14.1-19 requires the Commission to issue a ruling on this alternative public participation procedure within thirty days of the close of the Conference. N.D.C.C. § 38-14.1-20 provides for further review by 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 (“SMCRA”), 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 to allow for their full involvement at a formal hearing should further review be requested.

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 CCMC to conduct surface mining and reclamation operations at the Coyote Creek Mine beginning in October 22, 2014 until October 21, 2019.
2. CCMC filed the applications for Revision No. 9 on May 20, 2019 and Renewal No. 1 on May 22, 2019. Revision No. 9 identifies the next 5-year coal removal area and updates the permit for the next permit term. CCMC did not seek to expand the permit area. Renewal No. 1 renews the permit term until October 21, 2024.
3. The Voigt’s comments and objections provide a number of assertions with respect to CCMC’s Revision No. 9 and Renewal No. 1 to Surface Coal Mining Permit NACC-1302. By the time of the Conference, the issues were reduced to and addressed in the following order:
  - a. The Voigt’s ability to access lands not affected by mining activities and CCMC’s plan to restore a pre-mine road located in the S½ of Section 36.
  - b. Concerns related to CCMC’s initial efforts to reclaim lands and whether the worst-case bond amount adequately accounts for land management costs.
  - c. The Alluvial Valley Floor (“AVF”) determination from Case No. RC-13-850.
  - d. The sediment build-up adjacent to a mine access road in Coyote Creek.
  - e. The sufficiency of the fugitive dust control plan.

### **Access**

4. Revision No. 9 updated a portion of Section 3.1.1.6 of Permit NACC-1302. Section 3.1.1.6 of the permit states that proposed road closures and setback waivers will be made only with Mercer County approval following public notice and public hearing. Changes with Revision No. 9 clarifies that “limited access through this area will be maintained during mining and replaced after reclamation according to the 2016 agreement.” Section 1.2.8 of the permit contains a copy of the May 18, 2016 Mercer County agreement that temporarily closed the road passing through the S½ of Section 36, T143N, R89W.
5. The Voigts expressed concern that the proposed mine plan will limit their ability to access portions of their ranch not affected by mining activities and that CCMC is not planning to restore a pre-mine road located in the S½ of Section 36 in accordance with an agreement between CCMC, the Voigt’s and Mercer County. The Voigts described the road of concern as 18<sup>th</sup> Street (“the Road”), which provides access from their residence to County Road 13. Mr.

Voigt explained that his family and neighbors historically accessed portions of his property using the Road.

6. Mr. Voigt also briefly expressed that CCMC is not willing to provide viable access to make use of scoria reserves northwest of his farmstead in Section 31. This issue was not provided prior to the hearing and was not discussed adequately at the Conference to be addressed as part of this order.
7. Mr. Braaten discussed that not having an easement from the State of North Dakota Department of Trust Lands (surface owner of the SW¼ of Section 36) creates an uncertainty for reconstruction of the Road.
8. Mr. Mann expressed that the Road issue is a non-issue for the Commission and that Mercer County has jurisdiction over the petition and the road therein. Mr. Mann noted that Mercer County determined that the road is not required due to readily accessible alternative routes of travel and that the temporary closing of the road does not deprive adjacent landowners access to their property.
9. Mr. Steffen provided details of how access will be provided to affected landowners including access trails and the plans to move the described road through 2024. He also expressed confidence that CCMC will meet their plan through 2024. He described that this plan has been approved by Mercer County and that it has been included as part of Revision No. 9.
10. CCMC indicated that easements have not been acquired to reconstruct the road. However, CCMC's Agreement with Mercer County states that CCMC shall reconstruct the road on the east-west quarter line between the N½ and S½ of Section 36, the right-of-way easements necessary to reconstruct the closed road will be secured, and that CCMC shall meet with the county annually to review the existing status of the access trails and reconstructed closed road. CCMC states that it is bound by the Agreement.
11. The Reclamation Division noted that to a degree, this issue was previously addressed in RC-13-850. In RC-13-850, the Commission issued a finding and conclusion of law that the closure of county roads in the vicinity of Coyote Creek Mine is under the jurisdiction of the Mercer County Commission and that the Commission (PSC) has no jurisdiction over the closure of county roads.
12. Section 3.1.1.6, Landowner and Public Access, in the permit states that farmer/rancher access will be made available for all undisturbed fields and pastures during mining. Permit NACC-1302 contains the Surface and Coal Lease Agreement in Section 1.5.1. The lease addresses CCMC's right to mine coal on the Voigt's property, compensation for damages to crops and livestock, and repair and replacement of roadways. Administration of the lease agreement between the Voigt's and CCMC is not within the jurisdiction of the PSC.
13. The closure of county roads in the vicinity of the Coyote Creek Mine is under the jurisdiction of the Mercer County Commission and the Agreement. The changes provided for in Revision No. 9 are consistent with the Commission's jurisdiction.

## *CCMC's Ability to Reclaim the Mine*

14. During its pre-renewal review, the Reclamation Division requested that CCMC update their reclamation schedule, revegetation plans and reclamation costs. Sections 3.1.1.3, 3.1.1.8, and 4.2 of the permit were updated to account for changes planned during the next term of the permit. CCMC updated the permit in response to this request and extended the revegetation initiation period of reclaimed native grasslands and woodlands in areas where backfilling, grading, and revegetation is being delayed (“Variance Areas”). With Revision No. 9, CCMC may delay seeding of native grassland and woodland planting for a period up to 6 years after coal removal. Justification for delaying the seeding is provided in Section 4.3.1 of the permit. Delaying the native grassland seedings will provide CCMC with an opportunity to eradicate undesirable non-native introduced grasses prior to seeding native species and will facilitate CCMC’s ability to manage reclaimed lands with prescribed grazing.
15. The Voigts assert that CCMC’s initial efforts to reclaim lands raises serious concerns about CCMC’s ability to reclaim the mine. Mr. Voigt said he previously raised these concerns and was told that his concerns were just speculation. Mr. Voigt indicated that what he observed on the October 1, 2019 field inspection was worse than he had previously feared.
16. Mr. Anderson discussed photos they had taken and observations they had made on the October 1, 2019 field inspection. They provided photographs showing wide variability in the plant vigor and maturity of the oats cover crop on Field/Grade Approval No. 5. Mr. Anderson speculated that fertility and soil compaction could be reasons why the oats cover crop was not uniform in height or maturity on areas respread with soil in Section 25. Mr. Anderson was under the impression that there was only seeding of oats on this tract in 2019.
17. Field/Grade Approval No. 4 was also discussed by Mr. Anderson. The area had been respread with subsoil and topsoil in 2018 and Mr. Anderson indicated that it did not appear to have been seeded with a cover crop or the approved seed mixture. Photographs provided by the Voigts showed a vegetative cover consisting of primarily annual weeds.
18. Mr. Anderson explained that erosion and areas where weeds are allowed to set seed might cause problems for native grass establishment. He also noted a few other areas where barnyard grass may create competition for new grass seedlings and some individual plants such as crested wheat grass and common cocklebur, although not a major issue, could be pulled to prevent seed dispersal.
19. The Voigts expressed concerns that the Russian thistle observed on Field/Grade Approval No. 4 was introduced in the mulch that was applied to the respread area and that the Russian thistle plants will turn to tumbleweeds that will blow off-site and lodge in fences and infest other areas of their ranch.
20. Mr. Anderson explained that he was unaware of the different practices used resulting in the differing vigor of crops. Mr. Anderson recommended soil and compaction testing where there is difference in vigor. He recommended two years of managed cover-cropping to reduce the seed bank in the soil and the use of soil cover crops, such as round-up ready canola and

soybeans to help rebuild soil health, control weeds and erosion. For fertility issues, Mr. Anderson recommended planting inoculated legumes and soil health crops consistent with the National Resource Conservation Service recommendations.

21. Mr. Anderson stated that he reviewed Section 4.2.1, the reclamation and revegetation plan of Permit NACC-1302 and that he felt it was adequate; however, his opinion was that it was not being properly implemented.
22. Ms. Unruh explained the reclamation process used at the Coyote Creek Mine. She explained that CCMC normally plants a cover crop on a reclaimed tract followed by straw mulch crimped into the soil to stabilize it until the cover crops start to grow. She described how the Field/Grade Approval No. 5 area was first broadcast seeded with oats and then later drill seeded to oats again, thus explaining different stages of growth of oats observed during the October 1, 2019 field inspection.
23. Ms. Unruh read the Reclamation Division's October 1, 2019 inspection report, which provided an explanation why the oats cover crop was not uniform in height and maturity. In response to the Voigt's concerns with weed growth on areas respread with soil in 2018, Ms. Unruh explained that the weed growth was clipped twice on areas respread with topsoil in 2018 and that soil compaction and soil health will be monitored by CCMC throughout the liability period.
24. Ms. Unruh testified that the observations made on the October 1, 2019 field inspection are not an indication of CCMC's ability to reclaim the mine and that current conditions observed are just a "snapshot in time." Ms. Unruh further testified that Field/Grade Approval No. 4 was mulched following soil respread in 2018 and that it had been mowed earlier this year to limit seed production and that the company will likely mow and/or spray again this year.
25. Ms. Unruh agreed that there was minor erosion in respread areas due to the recent rainfall, but that CCMC is stabilizing the soil from erosion using best management practices.
26. The Reclamation Division expressed concerns that CCMC did not plant a cover crop on Field/Grade Approval No. 4 in 2019 and relied on volunteer annual weed growth to provide protection from erosion. However, Mr. Moos testified that initial vegetative stands following soil respread are often irregular and weedy. He indicated that this was most likely due to the loss of soil structure from soil removal and respread operations. He further indicated that soil structure begins to redevelop in the reclaimed soils and soil conditions improve with time. The Reclamation Division intends to closely monitor practices used by CCMC in areas approved for delayed seeding. However, no revision to the permit is recommended by the Reclamation Division.
27. Mr. Moos also expressed concern regarding soil testing and the suggested fertilization of native grassland plantings that was brought up in discussion. He indicated that the mining company is required to manage reclaimed lands in a manner similar to nearby undisturbed lands. Since fertilization of native grassland is an uncommon practice, it would be an unacceptable practice on reclaimed grassland. He further indicated fertilizing reclaimed native grassland would

create a favorable environment for Kentucky bluegrass, an undesirable species in native grassland.

28. Mr. Moos stated that compaction issues are a concern for the Reclamation Division, but that CCMC has taken steps to address this in Revision No. 2 to the permit. He explained that the ultimate review is whether CCMC meets the revegetation success standards and that there are multiple options available to achieve success.
29. Mr. Welch testified that seeding a cover crop does not initiate the 10-year liability period for native grasslands and that there are no specific revegetation standards for cover crops. He also stated that since the Reclamation Division does not have specific reclamation success performance standards for cover crops, it would be premature to judge reclamation success.
30. The Voigts expressed concern that the reclamation bond for the Coyote Creek Mine may be inadequate. The Voigts requested that the Reclamation Division be available to discuss the bonding and bonding process.
31. Mr. Moos explained that the worst-case reclamation cost estimate is updated every 5 years at the time of permit renewal. He explained that for each permit term, the worst-case reclamation condition is determined. The worst-case reclamation condition is the point in the permit term that has the maximum reclamation liability. The worst-case reclamation cost estimate is also reevaluated at permit midterm to determine if the bond amount remains adequate.
32. Mr. Johnson indicated that the worst-case reclamation cost estimate for the upcoming permit term is \$22,049,992 and that CCMC currently has \$23,300,000 in bond. He also explained that the variable reclamation costs such as fuel, equipment, tire, and seed are updated annually. Mr. Johnson explained that reclamation costs associated with delayed reclamation areas are accounted for in the worst-case reclamation cost estimate and bond amounts for the Coyote Creek Mine.
33. The Voigts inquired about the variance areas. CCMC has proposed several additional variance areas in Revision No. 9. The Reclamation Division stated that the variances are for a delay of the backfilling, grading, and seeding timing requirements of N.D. Admin. Code § 69-05.2-21-01(2), and N.D.C.C. § 38-14.1-24(14). The worst-case reclamation cost estimate includes delayed reclamation costs.
34. Section 4.1.1 of the Permit NACC-1302 explains CCMC's plans for reclaiming affected lands and Section 4.2.1 indicates that native grassland seeding and woodland plantings will be delayed. With Revision No. 9, CCMC requests to delay native grass and woodland planting in Variance Areas 1 through 6 for a maximum of six years following coal removal. CCMC explains the reason for delaying native grass seeding and provides the appropriate justification in the permit. Delaying native grass seeding will provide an opportunity to eradicate non-native invasive grasses on reclaimed lands prior to initially planting the approved native grassland seed mixture.

35. Section 3.1.1.1. of Permit NACC-1302 provides methods to minimize compaction of topsoil and subsoil that is replaced on reclaimed lands and a testing plan to determine if there is excess compaction in the replaced topsoil and subsoil, and describes measures that will be used to alleviate excessive compaction if detected. Section 4.2.1 of Permit NACC-1302 also contains plans for fertilizing reclaimed cropland.
36. Reclamation provided for by N.D.C.C. ch. 38-14.1 can be accomplished under Revision No. 9 by the reclamation plan. Given the nature of the performance standards and the reclamation and revegetation process, there is no need for further modifications.

### ***Alluvial Valley Floors***

37. Based on the August 26, 2019 submitted comments by the Voigts, they believe they have lost alfalfa production in the two fields, suggesting the flow of ground water has been reduced or cut off to these fields due to CCMC's operations. The alluvial valley floor ("AVF") analysis that was conducted in Case No. RC-13-850 was not a subject of CCMC's Revision No. 9.
38. The Voigt's expressed continued concern over the AVF analysis that was conducted during RC-13-850 and provided "missing data points" as evidence of existence of subirrigation based on drilling data conducted on October 4, 2019 by Western Plains Consulting. Mr. Loken conducted the drilling and soils testing in the Voigt's north and south alfalfa fields, located in the NE<sup>1</sup>/<sub>4</sub> of Section 31 and SE<sup>1</sup>/<sub>4</sub> of Section 31 respectively, and he provided a presentation of the drilling and boring work.
39. Mr. Loken provided a photographic presentation of the drilling work conducted and indicated he did not believe the soils in the alfalfa fields were straw loam soils. Mr. Loken did not provide an alternative classification for the soils that were recovered. Mr. Loken described that based on the drilling work conducted, ground water was located in the alfalfa fields at approximately 11 feet below surface. In his opinion, an 11 to 13 foot level is sufficient to give subirrigation benefits to alfalfa.
40. Mr. Loken recommended installing 2 inch monitoring wells near the creek and in the fields to determine the extent of the subirrigation and AVF benefits. He believes that 3 to 6 wells would be adequate when questioned. Mr. Loken said that he was unaware of the current CCMC wells that were monitoring groundwater in the alluvium.
41. CCMC argued that this matter had already been adjudicated and should be subject to administrative Res Judicata. *Cridland v. N. Dakota Workers Comp. Bureau*, 1997 ND 223, ¶ 18, 571 N.W.2d 351, 355 (1997). CCMC also argued that there was nothing presented that would change the AVF determination because it was not and still is not an AVF and that even if there was an AVF, the mine's operations will not impact it.
42. Mr. Steffen provided a comparison of CCMC's ground water monitoring data with the data that the Voigts provided and found the data to be comparable. Mr. Steffen also provided a demonstration of the trends between the water level of the creek and water level in the alluvium and provided his opinion that water in the stream is the source for the ground water in the

alluvium. His comparison indicates that water in the alluvium is supplied by Coyote Creek and that fluctuations in Coyote Creek will result in fluctuations of the water level in the alluvium.

43. Mr. Schuh generally agreed with CCMC in that the AVF issue has been extensively discussed and was addressed in Case No. RC-13-850 and is a matter that should be at rest.
44. In response to the Voigts indicating that they wanted to provide the soils and water level information to the Commission because they felt this was new information that was not provided in either of the AVF evaluation reports, Mr. Beechie responded by describing that on page 15 of the 2013 Alluvial Valley Floor Evaluation Report, Coyote Creek Mining Company, L.L.C., prepared by Dr. Dave Bickel, that water levels of two ground water monitoring wells screened in alluvium next to the two alfalfa fields provided water level and hydraulic head data that were provided and reviewed.
45. The Reclamation Division agreed that ground water located at 11 feet below surface in the alfalfa fields was an accurate depiction of water levels in the alfalfa fields and that those measurements agree with the data that has been collected in CCMC's alluvial ground water monitoring wells since 2012.
46. The Reclamation Division provided copies of ground water monitoring data from alluvial ground water monitoring wells located next to Coyote Creek at the east end of the north alfalfa field and next to Coyote Creek at the west end of the south alfalfa field. *See* PSC Exhibit F. Mr. Beechie discussed that he was involved in the AVF analysis provided in Case No. RC-13-850 and that the Reclamation Division continues to monitor the groundwater level data. Mr. Beechie explained that ground water levels and water quality analyses have been conducted on these wells beginning in August 2012, almost four years before coal removal began at Coyote Creek Mine. The data shows that since mining began in mid-April 2016 through September 24, 2019, the water levels of both wells actually increased, albeit slightly (+.05 feet for the north monitoring well and +.58 feet for the south monitoring well). The water level data and spreadsheet provided also show that during dry or drought periods (2017 for example) the water level in the alluvium drops and during higher precipitation periods the water level in the alluvium increases. The water level of Coyote Creek proper controls the hydraulic head (or water level) in the alluvium. In short, Mr. Beechie demonstrated that the water level in the alluvium mirrors the water level of Coyote Creek. The data provided shows that mining at Coyote Creek Mine has not reduced the flow of ground water to the alfalfa fields.
47. Mr. Beechie discussed the Office of Surface Mining's ("OSM") 1983 guidelines for evaluating whether an area is an AVF. He noted that the OSM guidelines state that "the water availability criterion excludes areas that could be developed for subirrigation; e.g., by establishing deep rooting alfalfa to tap ground water not presently used by native vegetation." *See* PSC Exhibit C. Mr. Beechie also explained that studies by the NDSU Extension Service and OSM guidelines mention that 80 percent of the alfalfa root biomass is within the top four feet of surface. Four feet is where groundwater needs to be for alfalfa to benefit from subirrigation, but most varieties will send out a deep taproot to 15 feet, or even deeper. The Reclamation

Division also noted that vegetation or alfalfa roots did not appear to be visible in the photographs that were provided by Mr. Loken.

48. Section 2.5.2 of Permit NACC-1302 demonstrates that a High Intensity Soil Survey was previously conducted within the Coyote Creek Mine permit area by Prairie Soil Consulting, LLC of Bismarck, North Dakota in 2013. The High Intensity Soil Survey Report consists of 104 pages of data and information regarding the soils at the Coyote Creek Mine, including the alfalfa fields, and is provided in the permit in Section 2.5.2. The soil survey report and associated map provided in Section 2.5.6 of the permit indicate that approximately 99.5% of the soils in the north and south alfalfa fields are identified as Straw loam, 0-3% slopes and one small area (about .5% of the total alfalfa field acreage) was identified as Belfield silt loam, 1-3% slopes. Straw soils are common alluvial soils in North Dakota that develop next to stream channels on flood plains and terraces. These identified soils are not subirrigated soils. There are seven soil types identified in Mercer County as subirrigated soils, but no subirrigated soils are identified in the north or south alfalfa fields.
49. The Reclamation Division expressed that it is comfortable with CCMC volunteering to install additional monitoring wells. Mr. Mann objected to being required to install additional monitoring as a condition of the permit to needlessly demonstrate that there is no AVF, when there has been a finding that it is not an AVF and there has been no demonstration of an AVF.
50. The Voigts did not demonstrate that an AVF exists.

### ***Sediment Build-up in Coyote Creek***

51. The Voigts assert that CCMC has caused sediment build-up in Coyote Creek adjacent to a mine access road. CCMC discharges sediment pond P31-01 into Coyote Creek adjacent to the access road west of CCMC's shop office facilities area in Section 31. Mr. Voigt showed pictures taken in 2016 and 2019 of sediment in Coyote Creek adjacent to the box culverts under the access road in Section 31. Mr. Voigt contended CCMC was discharging water that contained sediment load which was being deposited in the stream adjacent to the box culvert.
52. Mr. Bofto indicated that it was his opinion that the source of the sediment observed in the photos was from sediment pond P31-01. He stated that the scoria was likely from pond P31-01. Mr. Bofto recommended sampling by a discharge permitting agency and inspections at regular time intervals. Mr. Bofto did not conduct an inspection of the site and based his determination upon the pictures of the sediment build-up.
53. Mr. Steffen stated that CCMC is aware of the sediment and that it has been monitoring the accumulation since 2015. Mr. Steffen stated that the accumulation is not significant enough to affect the hydraulics of Coyote Creek and although CCMC is not the source of the sediment, that the company will remove the sediment if it becomes an issue.
54. Mr. Steffen contended that there are a few potential sources of the sediment in the stream from the mine.

- 1) Pond Discharge. Mr. Steffen stated that sediment pond P31-01 has been discharged eleven times since being constructed in 2015 and that all discharges were tested and met North Dakota Department of Environmental Quality (DEQ) discharge effluent requirements. Mr. Steffen clarified that water is discharged by pumping from the surface of the pond. As a result, only fine suspended solids in the water could be discharged from the pond, not gravel or scoria rocks. Based upon this, Mr. Steffen concluded that the discharge from P31-01 is not the source of this sediment.
- 2) Erosion from the Discharge End of the Pipe. Mr. Steffen stated that there is riprap at the location and it is lined with erosion fabric to dissipate energy and minimize erosion. It is his opinion that significant erosion has not occurred due to discharge at this location and that it is not a major sediment source.
- 3) Erosion from the Adjacent Haul Road Ditch. Mr. Steffen stated that the haul road ditch is well vegetated and has a silt fence to collect sediment before it enters the creek. His opinion is that it is not a major sediment source.

55. Mr. Steffen stated that the sediment erosion likely came from upstream erosion transported from Coyote Creek and deposited in that location. In support of his claim, Mr. Steffen pointed to sediment deposits on the opposite side of the creek with no mine activity. Mr. Steffen also pointed to scoria in the sediment build-up and availability of scoria upstream in the alluvium shown in Mr. Loken's pictures.

56. Mr. Steffen explained that 10,000 cubic yards have eroded from a diversion channel east of the Voigt's farmstead since the diversion "blow-out" in August of 2014. To further support this claim, Mr. Steffen provided an email interaction with Greg Thompson of Houston Engineering in May of 2015. *See Exhibit 8*. In the interaction, Mr. Thompson stated that he had concerns with erosion occurring in the bypass channel due to upstream head cutting and rolling rapids that will cause soil particles to be suspended. He expressed that the soil particles are suspended in the flow, which will likely be deposited either near haul road culverts or carry out to the Knife River.

57. While the Reclamation Division does not have definitive evidence of the origin, Mr. Moos stated that it believes that some of the erosion of the sediment building could have occurred under the rock riprap from pond discharges in the past, prior to the corrective action. The Reclamation Division has recommended corrective action and continues to monitor the sediment and the effectiveness of the water management in that area.

58. Mr. Moos explained that the Reclamation Division usually inspects the mine, including this area, 2 or 3 times a month. Mr. Moos also testified that the stormwater permit is administered by the DEQ, which the Commission has a cooperative agreement with, and that the sediment deposit is not likely from the pond P-31-1 discharges not meeting effluent standards.

59. The Voigts did not demonstrate that the sediment build-up was a result of CCMC's mining practices.

## *Dust*

60. The Voigts assert that the fugitive dust control plan is insufficient and that dust has caused significant problems since the mine began operating. The Voigts provided a number of pictures showing instances of fugitive dust occurring on the mine. The majority of these pictures showed dust created by mine equipment traveling along the primary haul road, but one showed dust covered snow in and around the Voigt farmstead and there was a picture of fugitive dust rising up and around cattle being trailed through an area affected by mining. Although most of the discussion and pictures regarding dust was specific to fugitive dust created by mine equipment, Mr. Voigt also stated that wind erosion over open surfaces and spoil piles has caused fugitive dust issues. Ms. Voigt said that although she is not completely sure of the origin, she believes that much of the fugitive dust comes from open spoil piles.
61. Mr. Bofto discussed that he has a background with environmental impact statements (“EIS”), water permits, and air permits. Some examples of dust mitigation that he has observed for coal mines are 10 ft. berms on the sides of haul roads, road grading multiple times a day, and watering in regular intervals. He also observed that a copper mine used binders and capping with water to mitigate dust and that the dust control plan included a high wind contingency plan that employed a meteorologist.
62. Mr. Bofto stated that he read the dust control plan in the Revision No. 9 and that he generally agrees with the methods that CCMC are proposing to mitigate dust; however, he indicated that there is no implementation plan or plans for evaluation of the various dust control methods. He stated that implementation of the best management practices in the permit are key to effectively mitigating dust.
63. Mr. Mann indicated that CCMC has an approved Air Quality Permit and fugitive dust control plan in place. He stated that there is an appeal in the 8<sup>th</sup> circuit regarding the DEQ permit. To the extent that the Voigts are attempting to challenge that plan, Mr. Mann states that it is an impermissible collateral attack. To make changes or address anything related to the plan, it is a DEQ issue. Regardless, Mr. Mann stated that the company has training, takes measures to control dust, and will shut down in certain situations. He stated that it has a plan that meets the SMCRA requirements.
64. Mr. Moos clarified that the fugitive dust plan from mine equipment operating falls under the jurisdiction of the DEQ. Mr. Moos clarified that the SMCRA and North Dakota’s Surface Coal Mining Laws and Regulations requires mining companies to specify measures to comply with the air pollution control requirements of the DEQ and any other measures to effectively control wind erosion and attendant air pollution. N.D. Admin. Code § 69-05.2-09-05. N.D.C.C. § 38-14.1-24(4) requires mining companies to stabilize and protect all surface areas, including spoil piles affected by surface coal mining and reclamation operations, and to effectively control erosion and attendant air and water pollution.
65. While the Voigts agree that the DEQ has jurisdiction, they assert that it is concurrent jurisdiction. Mr. Braaten contends that the erosion causing the dust that is the issue in the current case is subject to N.D. Admin. Code § 65-05.2-09-05 as “any other measures necessary to effectively control wind erosion and attendant air pollution.”

66. Mr. Moos stated that he and staff had recently met with the DEQ and discussed jurisdiction and enforcement of air quality and fugitive dust emissions to affirm jurisdiction and the understanding of cooperative enforcement. The DEQ has not received a dust complaint from the Voigts. He also stated that the Reclamation Division had not received a complaint from the Voigts. Mr. Moos discussed interactions that he had with Gene Robinson from OSM confirming that the appropriate step is for CCMC to receive an air permit from the DEQ to satisfy the requirements for incorporation into the mining permit.
67. The DEQ has exclusive jurisdiction over permitting of air quality in North Dakota pursuant to the Clean Air Act. The Commission does not have requirements 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 for 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 [Department of Environmental Quality] and any other measures necessary to effectively control wind erosion and attendant air pollution." *See* Commission Order, June 17, 2015, Case No. RC-14-846.
68. Once a permit is granted, the Commission has statutory standards that must be met. N.D.C.C. § 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." The Commission has adopted a rule requiring that "[t]he permittee shall comply with all applicable air pollution control laws and rules of the [Department of Environmental Quality] and stabilize and protect all surface areas." N.D. Admin. Code § 69-05.2-13-07.
69. CCMC obtained an Air Pollution Control Minor Source Permit to Operate (Permit No. O16017) to control fugitive dust as required by state regulation. Measures used to control fugitive dust from facility operations are described in Section 3.1.1.2, Mining Methods Narrative, in Permit NACC-1302. The fugitive dust narrative in Section 3.1.1.2 states that measures will be taken where necessary and feasible to prevent and reduce wind erosion in areas susceptible to such erosion and that all measures taken for dust abatement will be done so in accordance with current, prudent engineering practices as required by N.D. Admin. Code § 69-05.2-24-01(2)(a). The soils handling narrative and mining methods narrative in Sections 3.1.1.1 and 3.1.1.2 of Permit NACC-1302 states that topsoil and subsoil stockpiles will be selectively placed on stable areas within the permit in a manner that minimizes any loss or deterioration of such material and that stockpiles will be seeded to control erosion, and/or mulched as necessary. The Air Pollution Control Minor Source Permit is incorporated into NACC-1302 for satisfying the Commission's permitting requirements. To the extent that the additional dust abatement and monitoring measures are needed and reasonable, the measures would be subject to the DEQ's permitting requirements.
70. The performance standards set forth in the permit relating to erosion meet the requirements set forth in N.D.C.C. ch. 38-14.1 and N.D. Admin. Code § 69-05.2-24-01(2)(a).

71. The effects demonstrated by the Voigts are primarily air quality issues. To the extent that air pollution control measures need to be modified, a revision to the air quality permit must be obtained from the DEQ.
72. N.D.C.C. § 38-14.1-03(9) provides that the Commission may attach conditions to assist in carrying out administration of a permit. It is reasonable to request a mining company to document the implementation of the fugitive dust control measures.

### **Ruling**

1. The Commission has jurisdiction over CCMC's planned surface mining and reclamation operations in North Dakota, including Permit No. NACC-1302, and Revisions No. 9 and Renewal No. 1 thereto.
2. CCMC's Revision No. 9 and Renewal No. 1 applications to NACC-1302 meet all permit revision and renewal standards under N.D.C.C. ch. 38-14.1 and N.D. Admin. Code art. 69-05.2 with respect to issues raised by the Voigts.
3. No basis has been established for the Commission to reject or to seek amendments to Revision No. 9 or Renewal No. 1 with respect to the comments or objections raised by the Voigts.
4. CCMC's Revision No. 9 of Permit NACC-1302 meets the statutory requirements of N.D. Admin. Code § 69-05.2-09-05 that requires CCMC to specify the measures it will use to comply with the air pollution requirements of the Department of Environmental Quality and any other measures necessary to effectively control wind erosion and attendant air pollution. Special Condition No. 1 is attached to Revision No. 9 to further require CCMC to maintain detailed daily records of all measures and methods used to effectively control wind erosion and attendant air pollution. These records shall be made available to Commission inspectors during mine inspections.
5. The reclamation variances from the 180 day grading and three-year seeding requirements have been justified and are being approved by the Commission as allowed by N.D. Admin. Code § 69-05.2-21-01(2) and N.D.C.C. § 38-14.1-24(14).
6. 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**

1. Coyote Creek Mining Company’s applications for Revision No. 9 and Renewal No. 1 to Surface Coal Mining Permit NACC-1302 satisfies all permit revision and renewal standards and North Dakota Century Code Chapter 38-14.1 and North Dakota Administrative Code Article 69-05.2.
2. Coyote Creek Mining Company shall comply with Special Condition No. 1, attached to the approval of Revision No. 9.

Dated this \_\_\_ day of October, 2019.

State of North Dakota  
Public Service Commission

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

**STATE OF NORTH DAKOTA**

**PUBLIC SERVICE COMMISSION**

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

**RC-19-190**

**SURFACE COAL MINING AND RECLAMATION PERMIT CONDITIONS**

**October 21, 2019**

**Revision No. 9 to Surface Coal Mining Permit Number NACC-1302** has been issued to **Coyote Creek Mining Company, L.L.C.** subject to Chapter 38-14.1 of the North Dakota Century Code, all the rules promulgated thereunder, and the following condition:

1. Coyote Creek Mining Company, L.L.C. shall maintain detailed records of all measures and methods used on a daily basis to effectively control wind erosion and attendant air pollution. These records shall be maintained at the mine office and be available during mine inspections.

**PUBLIC SERVICE COMMISSION**

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**Julie Fedorchak  
Commissioner**

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**Brian Kroshus  
Chairman**

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**Randy Christmann  
Commissioner**