

**NORTH DAKOTA**

**PUBLIC SERVICE COMMISSION**

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

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**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER  
DATED OCTOBER 16, 2019**

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**Appearances**

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

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

John M. Schuh, Special Assistant Attorney General, 600 E. Boulevard Avenue, 12<sup>th</sup> Floor, Dept. 408, Bismarck, North Dakota 58505, on behalf of the North Dakota Public Service Commission Advocacy Staff.

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

**Preliminary Statement**

On May 22, 2019, Coyote Creek Mining Company, L.L.C., (“CCMC”) filed an Application for Renewal of Permit to Engage in Surface Coal Mining and Reclamation Operations (“Renewal Application”) seeking to renew Permit NACC-1302 to allow CCMC to continue to engage in surface coal mining and reclamation operations within the permit area until October 22, 2024. The application is assigned Case No. RC-19-189.

On May 20, 2019, CCMC filed an Application for Revision of Permit to Engage in Surface Coal Mining and Reclamation Operations (“Revision Application”) to identify the next five-year coal removal areas and update legal information, operation plans and reclamation plans in Permit NACC-1302 for the first renewal of the permit. The revision is identified as Revision No. 9 and the application is assigned Case No. RC-19-190.

On July 10, 2019, the North Dakota Public Service Commission (“Commission”) issued a Notice of Receipt of Renewal and Revision Applications summarizing the purpose of the applications and giving notice that anyone may submit written comments or

objections on the proposed permit renewal and request an informal conference with the Commission and the applicant on the Renewal Application or Revision Application provided the written comments, objections, or requests for informal conference must be made by August 26, 2019.

On August 26, 2019, counsel for Casey and Julie Voigt (“Voigts”) filed Comments of Casey Voigt and Julie Voigt, Objection to Mine Plan, and Request for Informal Hearing (“Comments”).

Pursuant to a Stipulation to Informal Conference Schedule entered into by counsel for the Voigts, counsel for CCMC and counsel for Commission Advocacy Staff, a Notice of Informal Conference was issued on September 19, 2019, scheduling an Informal Conference to begin at 8:30 a.m., CDT, on October 8, 2019 in the Commission’s hearing room on the 12<sup>th</sup> Floor, State Capitol, Bismarck, North Dakota.

The informal conference was held as scheduled, commencing at 8:30 a.m. CDT on October 8, 2019.

Having allowed all interested persons an opportunity to be heard and having heard, reviewed, and considered all the evidence presented, the undersigned Administrative Law Judge makes the following:

### **Findings of Fact**

1. On October 22, 2014, the Commission issued Surface Coal Mining Permit No. NACC-1302 (“Permit NACC-1302”) to allow CCMC to conduct surface coal mining and reclamation operations at the Coyote Creek Mine, to supply coal to the Coyote Power Station.
2. On May 22, 2019, CCMC filed its Renewal No. 1 to Permit NACC-1302, seeking to allow CCMC to continue to operate within the existing permit area until October 22, 2024.
3. On May 20, 2019, CCMC filed its Revision No. 9 to Permit NACC-1302, identifying the next five-year coal removal subarea, modifying the post-mining topography and updating the mining and reclamation plans prior to permit renewal.
4. On August 26, 2019, the Voigts filed comments and objections to the Renewal Application and the Revision Application and requested an informal hearing on the applications. The August 26<sup>th</sup> comments covered seven topics. By letter dated October 4, 2019, counsel for the Voigts, indicated that they were no longer intending to address the cultural resource issue or the CCMC/Coyote Station contract issue at the informal conference. The five remaining issues addressed at the informal conference on October 8, 2019, include 1) Access, 2) Dust, 3) Alluvial Valley Floors, 4) Sediment and 5) Reclamation.

5. The Commission has previously addressed the same access issue in Case No. RC-13-850 and the same dust issue in Case No. RC-14-846 and concluded in both cases that they do not have jurisdiction over either of these issues.

### **Access**

6. The Voigts expressed concern about a road closed by Mercer County and request that the PSC add a permit condition requiring CCMC to maintain their access and restore the road at the end of the permit term.

7. With respect to the road at issue, the Commission has previously stated that “[t]he closure of county roads in the vicinity of the Coyote Creek Mine is under the jurisdiction of the Mercer County Commission, not the Public Service Commission.” (Docket No. 125, Case No. RC-13-850, ¶39 of Findings of Fact).

8. No evidence was presented to establish that the Voigts have been denied access and the requested relief has already been covered by CCMC’s agreement with Mercer County.

9. The road at issue is subject to a Mercer County Resolution and a written agreement between Mercer County and CCMC to maintain access and restore the road after completion of mining operations. (Docket No. 5, Ex. A, Case No. RC-19-189 and Docket No. 8, Ex. A, Case No. RC-19-190).

10. By Resolution of the Mercer County Commission dated May 18, 2016, the County determined that “the [Mercer County] Commission has jurisdiction over the subject matter of the Petition and the road involved therein.” (Docket No. 5, Ex. A, Case No. RC-19-189 and Docket No. 8, Ex. A, Case No. RC-19-190).

11. The County further concluded “[t]hat said road is not required due to readily accessible alternate routes of travel” and “[t]hat the temporary closing of said road does not deprive adjacent landowners access to their property.” (Docket No. 5, Ex. A, Case No. RC-19-189 and Docket No. 8, Ex. A, Case No. RC-19-190).

12. In addition to the County Resolution and agreement between CCMC and the County, CCMC also entered into a Memorandum of Access Agreement with the Voigts addressing access.

13. The Commission has no jurisdiction over the road and with no evidence of access being denied, it is unnecessary to impose an additional permit condition that is already covered by CCMC’s road agreement with Mercer County.

### **Dust**

14. The Voigts presented pictures and video of dust near their ranch and in their Comments they assert that CCMC’s “existing fugitive dust control plan is ‘extremely vague,’ and is practically unenforceable”. The Voigts further stated 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.”

15. The allegations of dust at the mine and the Voigts’ concerns with the plan were previously addressed at length by the Commission in Case No. RC-14-846. *See* Docket No. 56, Case No. RC-14-846. The Commission’s extensive findings detail the history of CCMC’s air control permit and fugitive dust control plan and the Commission’s lack of jurisdiction over the plan. *Id.*

16. The North Dakota Department of Environmental Quality (“DEQ”) currently has exclusive jurisdiction over permitting of air quality in North Dakota pursuant to the Clean Air Act. *See* N.D. Cent. Code Chapter 23.1-06. The Commission does not have jurisdiction to enforce provisions of the Clean Air Act but as a state-approved program, has adopted a specific rule governing what an applicant must set forth in the permit application with respect to air quality. The Commission’s rule set forth in N.D. Admin. Code § 69-05.2-09-05, provides that “[t]he applicant shall specify the measures to comply with the air pollution control requirements of the State Department of Health and any other measures necessary to effectively control wind erosion and attendant air pollution.”

17. In order to comply with N.D. Admin. Code § 69-05.2-09-05, CCMC by application dated September 9, 2014, applied to the North Dakota Department of Health for an air quality permit to construct its proposed surface coal mine and coal processing facility.

18. That by obtaining Air Pollution Control Permit to Construct No. PTC15001, CCMC satisfied that portion of the requirement of the mining regulation, N.D. Admin. Code § 69-05.2-09-05 specifying compliance with the air pollution control requirements of the Department of Health (n/k/a the DEQ).

19. CCMC has a Fugitive Dust Control Plan on file with the Commission and with the DEQ. The plan sets forth detailed measures used to control fugitive dust from facility operations. The plan includes provisions on haul road dust, open coal storage pile dust, stabilization of disturbed areas, measures to be implemented at the coal processing facility, and training of employees and has been deemed acceptable to the DEQ on multiple occasions.

20. The Voigts challenge the sufficiency of CCMC’s Plan with respect to air quality matters. Their challenge focuses primarily on air quality issues subject to CCMC’s Permit to Construct No. PTC15001 and which are under the jurisdiction of the DEQ. This is not the proper venue to challenge these air quality issues. The Commission does not have authority or jurisdiction to regulate air quality at coal mines in North Dakota. That jurisdiction and authority is vested in the DEQ. The Voigts’ challenge to the air pollution control requirements in this proceeding is a collateral attack upon the DEQ’s authority and upon the permit to construct.

## Alluvial Valley Floors

21. The Voigts provided two separate sets of comments with respect to Alluvial Valley Floors. The first were filed with the Commission on August 26, 2019, and provided that the Voigts were confident that their two alfalfa fields in Section 31 are subirrigated alluvial valley floors and that they are concerned that mining operations have and will continue to cut off the flow of groundwater to the alluvium underlying these fields. To support these Comments, the Voigts reference four holes they state were drilled by Knife River Corporation in the north alfalfa field and four holes drilled in the south alfalfa field approximately two years ago. Mr. Voigt recalls in the comments that the south alfalfa field showed groundwater present at a depth of 11 feet in a seam of gravel approximately two feet thick and that the 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. No evidence was provided at the informal conference documenting or supporting the information in the Comments and the statements regarding these holes was not discussed.

22. The second set of comments relating to the Voigts' AVF claims were raised for the first time only four days before the hearing in an October 4, 2019, letter. The October 4<sup>th</sup> letter stated that "regarding issue seven (alluvial valley floors), the Voigts would like to discuss the fact that they hired a consulting firm, Western Plains Consulting, who completed drilling in the Voigts' alfalfa fields today. Groundwater was located in these fields at approximately 11 feet, within the rooting zone of the Voigts' alfalfa. There are also soil indicators of subirrigation. This information will be provided to the PSC at the informal conference."

23. The Commission's Notice of Receipt of Renewal and Revision Applications dated July 10, 2019, clearly stated that "[w]ritten comments, objections, or requests for informal conference **must be made by August 26, 2019.**" The Voigts comments regarding AVF first referenced only four days before the hearing, are more than one month past the deadline upon which the Commission stated the comments must be made in order to be considered. The Voigts provided no explanation as to why the comments were made more than a month past the deadline. Because the comments and new information provided by Western Plains Consulting were not timely, they cannot be considered.

24. The issue of Alluvial Valley Floors on these same lands has been conclusively decided and administrative res judicata prevents this issue from being re-litigated through this renewal and revision process. *See* Docket No. 125, Case No. RC-13-850; *see also Voigt v. N.D. Pub. Ser. Comm. and Coyote Creek Mining Co., L.L.C.*, 2017 ND 76. The issue of Alluvial Valley Floors beneath these two fields was extensively addressed at the initial permit hearing for Permit No. NACC-1302 in Case No. RC-13-850. In that case, there were two separate alluvial valley floor reports examined, and over a period of three days of testimony, the Commission heard from three expert witnesses providing testimony on the alluvial valley floor issue, including testimony from the Voigts' expert witness. The Commission concluded that there was no Alluvial Valley Floor. The Voigts appealed to

the district court and the North Dakota supreme court, both of which confirmed that there was no Alluvial Valley Floor. *See Voigt*, 2017 ND 76.

25. Ignoring *res judicata* and considering the information provided in violation of the Commission's comment deadline does not change the conclusion. Nothing new has been provided to demonstrate the existence of any AVF. The Voigts had Lance Loken testify with respect to their belief in the existence of an AVF beneath their alfalfa fields. Mr. Loken is not an AVF expert and admitted he is not familiar with SMCRA requirements for an AVF, yet at the hearing he opined that there was an alluvial valley floor beneath the Voigts' alfalfa fields. Mr. Loken confirmed that he based this opinion solely on the information he gathered on Friday October 4, 2019, which was the core samples he took from the Voigts' fields.

26. The North Dakota supreme court highlighted the extensive work that previously went into the determination that there was no AVF present on the Voigts' property. The court noted that "[o]n the basis of the various studies and voluminous data collected, both Dr. Bickel and Beechie, the Commission's expert, opined that no subirrigation is occurring. Additionally, Moos testified regarding the lack of subirrigated soils, and Flath testified that soils, rather than subirrigation explain the difference in productivity between Voigt's upland and lowland alfalfa fields." *See Voigt*, 2017 ND 76, ¶36. Mr. Loken admitted that he reviewed none of this information. He did not examine the 2009 or the 2013 AVF evaluation reports or any of the testimony from the three expert witnesses on AVF at the hearing. Ignoring this information and relying entirely on the limited data from the four cores he took on October 4, 2019, Mr. Loken concluded that an AVF existed. CCMC is seeking to renew Permit NACC-1302 and in objecting to the renewal, the Voigts carry the burden of proof. Mr. Loken's conclusion based solely on the October 4<sup>th</sup> data and completely ignoring the 2009 and 2013 reports as well as the testimony of three expert witnesses on the same issue from the original permit hearing is not credible and comes nowhere near meeting the burden. The Voigts have again not demonstrated the existence of an AVF.

### **Sediment**

27. Photographs offered by the Voigts show sediment buildup in Coyote Creek near the P31-01 discharge. (Docket No. 5, Ex. B, Case No. RC-19-189 and Docket No. 8, Ex. B, Case No. RC-19-190).

28. The Voigts allege in their Comments and argued at the conference that the sediment buildup is the result of discharge from CCMC's retention pond.

29. While the photographs show sediment build up in Coyote Creek, they do not support the Voigts' allegations that the buildup is caused by CCMC's discharges.

30. The photographs show larger pieces of scoria in and on top of the sediment. Larger rocks deposited on top of a boulder at the foot of the sediment is also present. Sediment is

also present on the bank of the creek opposite of CCMC's discharge pipe. (Docket No. 5, Ex. B, Case No. RC-19-189 and Docket No. 8, Ex. B, Case No. RC-19-190).

31. CCMC's pond discharges are regulated. The pond has been discharged eleven times since its construction in 2015. All discharges were tested and all met the effluent requirements of the discharge permit.

32. The amount of sediment in the pictures, combined with the mixing of scoria pieces, larger rocks deposited on top of the boulder and sediment buildup along both banks of the creek are more consistent with sediment being carried from an upstream source and deposited during a high flow.

33. Greg Thompson, a professional engineer with Houston Engineering raised concerns in 2015 about head cutting caused by the Voigts' by-pass channel upstream of the area in the photographs resulting in erosion and sediment build up downstream. *See Exhibit 8.* Mr. Thompson noted that "[t]he erosion through this area will cause soil particles to be suspended in the flow which will eventually deposit at some location downstream. This deposition could occur near the proposed haul road culverts, but it could also remain suspended all of the way to the Knife River. I suggested that the effects of the erosion be monitored in the future so it doesn't reduce the capacity of the downstream channel or culverts." *Id.* Mr. Thompson further explained that "I expect the head cutting to continue migrating upstream which could introduce problems with the foundations of upstream structures such as the bridge along CR 25. The head cutting should be addressed if any improvements are made to any structures upstream of the bypass channel." *Id.*

34. The Voigts had Shane Bofto testify regarding the sediment buildup in Coyote Creek. Mr. Bofto testified regarding sediment ponds and discharge from sediment ponds. Mr. Bofto did not conduct any type of inspection at the mine and did not examine any of CCMC's discharge records. He was unaware of the erosion from the Voigts' by-pass and made no attempt to determine what actually caused the sediment build up in the creek. He generally testified as to recommendations regarding sediment ponds and their discharge. With respect to sediment ponds and their discharge, CCMC is already subject to regulation to varying degrees by DEQ, the US Army Corps of Engineers and the Commission and Mr. Bofto's suggestions are already addressed through this regulation.

35. CCMC has no ability to prevent sediment build up in an accretion area of the creek resulting from erosion of the Voigts' by-pass channel located upstream from the box culvert. CCMC's sediment ponds are adequately regulated and do not require any additional permit conditions.

### **Reclamation**

36. The Voigts initially raised concerns with reclamation in their Comments filed with the Commission on August 26, 2019. The Comments referenced a county reclamation project that in the Voigts' opinion had failed. They used this reclamation project as an example to suggest that CCMC is not equipped to reclaim the mine. The Voigts indicated

that they were not requesting a specific fix for the issue at that time and they presented nothing further relating to the county reclamation project at the informal conference.

37. After the Commission's comment and objection deadline closed on August 26, 2019, the Voigts were granted permission to conduct an inspection at the mine relating to reclaimed areas.

38. The Voigts conducted the inspection on October 1, 2019, with Commission staff and representatives of CCMC. The areas inspected were in the early stages of the reclamation process and did not include the area referenced in Comments filed by the Voigts but rather, included new areas that were not addressed in the Comments.

39. Commission representatives, Bruce Beechie, Environmental Scientist, Bruce A. Johnson, P.E., Environmental Engineer, and Guy A. Welch, Environmental Scientist filed an Inspection Report documenting the findings from the October 1, 2019 partial inspection. (Docket No. 30, Case No. PU-19-189 and Docket No. 38, Case No. PU-19-190).

40. Mark Anderson testified on behalf of the Voigts and raised concerns about CCMC's reclamation practices. The Voigts also question whether CCMC's bond was sufficient to address reclamation issues.

41. CCMC has a reclamation plan and schedule in place with the Commission. Dean Moos, Reclamation Division Director, testified to the challenges associated with the early stages in the reclamation process and that attempting to draw conclusions about the ultimate success of a reclamation project is not fruitful, especially regarding native grassland tracts.

42. Bruce Johnson testified with respect to CCMC's bond, noting that it is adequate and that the mine is currently over bonded.

43. Guy Welch testified that CCMC's current reclamation plan is sufficient and that additional permit requirements relating to reclamation are not necessary at this time.

From the foregoing Findings of Fact, the Commission now makes its:

### **Conclusions of Law**

1. That the Commission has jurisdiction over CCMC's mining and reclamation operations in North Dakota, including Permit No. NACC-1302, Renewal No. 1 and Revision No. 9 thereto.

2. That CCMC's Renewal No. 1 application to surface coal mining Permit NACC-1302 meets all permit renewal standards under North Dakota Century Code Chapter 38-14.1 and North Dakota Administrative Code, Article 69-05.2 and carries "with it the right to successive renewal".

3. That CCMC's Revision No. 9 application to surface coal mining Permit NACC-1302 meets all permit revision standards under North Dakota Century Code Chapter 38-14.1 and North Dakota Administrative Code, Article 69-05.2.

4. That the road identified by the Voigts in their Comments as County Road 25 is under the jurisdiction of Mercer County, North Dakota. North Dakota Century Code § 24-05-17 provides that "[t]he boards of county commissioners in their respective counties have the sole authority and responsibility to acquire land for, construct, maintain, and operate the county road system as designated and selected by them." By Resolution of the Mercer County Commission dated May 18, 2016, Mercer County confirmed its jurisdiction over this road. The Commission cannot make the permit conditions requested by the Voigts that would infringe upon Mercer County's jurisdiction over the road.

5. That jurisdiction and authority to regulate air quality in North Dakota is solely within the purview of the North Dakota Department of Environmental Quality pursuant to North Dakota Century Code Chapter 23.1-06.

6. That CCMC has complied with North Dakota Century Code § 38-14.1-24(4) and North Dakota Administrative Code § 69-05.2-09-05 by obtaining the Air Pollution Control Permit to Construct No. PTC15001, from the Department of Health.

7. That allegations asserting noncompliance with air quality laws and regulations and challenging the sufficiency of CCMC's Fugitive Dust Control Plan are outside the jurisdiction of the Commission and constitute an impermissible collateral attack upon the Permit to Construct No. PTC15001 as issued by the North Dakota Department of Health and currently under the jurisdiction of the North Dakota Department of Environmental Quality.

8. That pursuant to North Dakota Century Code § 38-14.1-22(2), the Voigts have the burden to demonstrate that Permit NACC-1302 should not be renewed.

9. That CCMC has complied with North Dakota's mining law and mining regulations in its submittal of Renewal No. 1 and Revision No. 9 and that no basis has been established for the Commission to deny or delay renewal or revision of Permit NACC-1302 or to seek further amendments to the revision to the permit with respect to the comments and issues raised by the Voigts.

From the foregoing Findings of Fact and Conclusions of Law, the Commission now makes its:

### **Order**

The Commission orders:

1. That Renewal No. 1 as submitted by CCMC, fulfills the requirements of North Dakota's mining law and mining regulations.

2. That Revision No. 9 as submitted by CCMC, with respect to the comments and issues raised by the Voigts, fulfills the requirements of North Dakota's mining law and mining regulations.

3. That Permit NACC-1302 shall be renewed for an additional five years and Revision No. 9 be approved as scheduled to allow CCMC to continue to engage in surface coal mining and reclamation operations within the permit area until October 22, 2024.

PUBLIC SERVICE COMMISSION

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Timothy J. Dawson  
Substantive Administrative Law Judge