

NORTH DAKOTA

PUBLIC SERVICE COMMISSION

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

Case No. RC-19-189

Case No. RC-19-190

**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
SUBMITTED BY CASEY AND JULIE VOIGT**

October 16, 2019

Preliminary Statement

On May 20, 2019, Coyote Creek Mining Company, LLC (“CCMC”) filed an application with the Public Service Commission (“PSC”) to revise surface mining permit NACC-1302. PSC Docket RC-19-190 (hereafter “Revision Application”). This is the ninth revision to this permit and is referred to as Revision 9. On May 23, 2019, CCMC filed an application with the PSC to renew surface mining permit NACC-1302 for an additional five-year term. PSC Docket RC-19-189 (hereafter “Renewal Application”). CCMC’s Revision Application proposes to modify the layout of the mine pits, add and modify variances from N.D.C.C. § 38-14.1-24(14)’s three year default reclamation requirement, reconfigures haul roads within the mine permit area, removes cultural resource areas, and generally updates the introductory, legal, financial, compliance, environmental, operations and reclamation plans in the permit.

On June 28, 2019, the PSC deemed the Renewal Application and the Revision Application complete and directed CCMC to begin publishing the newspaper notices as required by N.D.C.C. § 38-14.1-18.

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On July 10, 2019, the PSC issued a Notice of Receipt of Renewal and Revision Applications and informing the public that written comments, objections, petitions to designate lands unsuitable for mining, or requests for an informal conference must be filed with the Commission by August 26, 2019.

On August 26, 2019, JJ England as counsel for Casey and Julie Voigt filed comments on the Renewal Application and the Revision Application, objected to the mine plan, and requested an informal conference before the PSC. The Voigts raised seven issues in their comments and objections: loss of access to the Voigts' ranch, dust problems, alluvial valley floors, omission of cultural resource sites from the mine plan, sediment build-up in Coyote Creek, CCMC's ability to reclaim the mine, and Coyote Station's control over the mine.

On August 28, 2019, the PSC requested the designation of an administrative law judge for the informal conference. On August 30, 2019, ALJ Thomas J. Dawson was designated to preside over the informal conference as a procedural ALJ. On September 4, 2019, the PSC requested that the ALJ be designated as a substantive ALJ.

On September 6, 2019, the Voigts, the PSC, and CCMC stipulated to waive the requirement that the informal conference be held within thirty days of receipt of the Voigts' comments. Following this stipulation, the PSC scheduled an informal conference on September 19, 2019 that the informal conference would be held at 8:30AM CDT on October 8, 2019, in the PSC's hearing room.

A prehearing conference was held by telephone on September 23, 2019. At the prehearing conference, Wade Mann appeared for CCMC, Derrick Braaten and JJ England appeared for the Voigts, and John Schuh appeared for the PSC.

On October 4, 2019, counsel for the Voigts filed a letter with the PSC indicating that they no longer intended to raise issues about cultural resource sites and Coyote Station's control of the mine at the informal conference.

The informal conference was held as scheduled. At the informal conference, Derrick Braaten and JJ England appeared for the Voigts. Casey Voigt, Julie Voigt, Mark Anderson, Lance Loken, and Shane Bofto all spoke on behalf of the Voigts. Wade Mann appeared as counsel for CCMC. Donn Steffen and Jessica Unruh spoke on behalf of CCMC. John Schuh appeared as counsel for the PSC, and a number of PSC staff members were present for the conference, including Dean Moos, Bruce Beechie, Bruce Johnson, and Guy Welch who spoke on behalf of the PSC.

Findings of Fact

1. On May 20, 2019, CCMC filed an application with the Public Service Commission ("PSC") to revise surface mining permit NACC-1302. PSC Docket RC-19-190. This is the ninth revision to this permit and is referred to as Revision 9. On May 23, 2019, CCMC filed an application with the PSC to renew surface mining permit NACC-1302 for an additional five-year term. PSC Docket RC-19-189.
2. CCMC's Revision Application proposes to modify the layout of the mine pits, add and modify variances from N.D.C.C. § 38-14.1-24(14)'s three year default reclamation requirement, reconfigures haul roads within the mine permit area, removes cultural resource areas, and generally updates the introductory, legal, financial, compliance, environmental, operations and reclamation plans in the permit.
3. Casey and Julie Voigt assert that the revised mine plan will affect access to their ranch and that the plan does not include required detail regarding reconstruction of County Road 25;

that coal mine dust and wind erosion has affected their ranch and that the PSC should require more stringent dust control in the mine plan and mine permit; that an alluvial valley floor exists on the Voigts' alfalfa fields but the permit does not reflect this; that the permit and mine plan should be revised to include monitoring of Coyote Creek for sediment build-up caused by discharges from the mine's sediment ponds; and that CCMC's ability to reclaim the mine is questionable.

Dust

4. Pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 USC § 1201 et. seq. ("SMCRA"), states can submit proposed state regulation programs to the federal Office of Surface Mining Reclamation and Enforcement ("OSM") for approval, which if granted, gives the states primacy to regulate surface coalmining and reclamation operations. On December 15, 1980, the North Dakota state program was approved by the OSM. To be a state approved program, the State of North Dakota had to adopt laws and regulations similar to SMCRA and OSM regulations promulgated under SMCRA. North Dakota has done so by promulgation of North Dakota Century Code Chapter 38-14.1 and the regulations set forth in North Dakota Administrative Code Chapter 69-05.2.. The Commission enforces only state rules and laws governing its program.
5. 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." *See also National Wildlife Federation vs. Hodel*, 839 F.2d 694 (D.C. Cir. 1988) (noting that "One of the Act's performance standards aimed at environmental protection requires that all surface coal

mining and reclamation operations “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.” SMCRA § 515(b)(4).”).

6. N.D. Admin. Code § 69-05.2-24-01(2)(a) provides that roads shall be “designed, constructed, reconstructed, used, maintained, and reclaimed so as to ... [c]ontrol or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust as well as dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices.”
7. The United States Environmental Protection Agency recognizes that dust control is regulated by SMCRA and that this dust control jurisdiction is concurrent with EPA jurisdiction. *See, e.g.*, EPA Docket EPA-HQ-OAR-2008-0260, Response to Comments Received on Proposed Amendments and Supplemental Proposal Standards of Performance for Coal Preparation and Processing Plants (40 CFR 60 subpart Y) USEPA, at p. 89 September 2009 (available at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2008-0260-0150>) (“SMCRA covers fugitive dust emissions from activities conducted on the surface of lands in connection with a surface coal mine and requires a fugitive dust plan and other requirements to control air pollution from such sources”).
8. Pursuant to N.D. Admin. Code §§ 69-05.2-09-05 and 69-05.2-24-01(2)(a), the PSC requires CCMC to include a fugitive dust control plan in its mine permit. CCMC’s fugitive dust control plan is located in Section 3.1.1.2 of its Renewal and Revision applications.
9. The PSC has discretion to determine which methods are necessary for a mine to comply with the requirements of N.D. Admin. Code §§ 69-05.2-09-05 and 69-05.2-24-01(2)(a).

10. CCMC's fugitive dust control plan in its application states that CCMC may apply dust control measures such as "applications of dust suppression agents, including but not limited to water, calcium chloride and other chemical agents." However, the plan does not include information about when such measures will be employed. The plan does not state that CCMC will monitor for dust and implement dust control based on that monitoring.
11. The Voigts presented evidence at the informal conference that they have been impacted by dust from the mine on their ranch. *See* Voigt Exhibits 3 and 4. Both Casey Voigt and Julie Voigt described the dust issues as ongoing and occurring from both the haul roads and the mine's pits and piles. The mine and the PSC do not contest that significant dust events have occurred at the mine and that these dust events have impacted the Voigts, their cattle, and their ranch. It is clear based on the evidence provided that CCMC's operations are capable of causing and have caused dust erosion from the surface of the mine, including its haul roads.
12. Shane Bofto is an environmental engineer who reviewed CCMC's fugitive dust control plan. Mr. Bofto spoke at the hearing on behalf of the Voigts. He explained that while CCMC's dust control plan contains measures to control dust that can be effective, these measures are only effective if implemented correctly. He explained that the plan would benefit from additional detail regarding when to implement these dust control measures. Mr. Bofto explained that in his experience, dust monitors have been used at other mines to assist with implementing dust control measures, and he suggested that dust monitors would help the mine implement its dust control measures here. These statements were not disputed.

13. The PSC has discretion to require dust monitors to ensure that CCMC complies with the performance standards in N.D. Admin. Code §§ 69-05.2-09-05 and 69-05.2-24-01(2)(a).

Alluvial Valley Floors

14. In PSC Case No. RC-13-850, extensive hearings were previously held before the PSC on whether an alluvial valley floor exists at the location of the Voigts' two alfalfa fields located in Section 31 of T143N, R88W. These two fields are inside of permit NACC-1302's permit area.
15. "Alluvial valley floors' means the unconsolidated stream-laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of sediment from sheet erosion, deposits by unconcentrated runoff or slope wash, together with talus, other mass movement accumulation, and windblown deposits." N.D.C.C. § 38-14.1-02.
16. "Agricultural activities' means, with respect to alluvial valley floors, the use of any tract of land for the production of animal or vegetable life, where the use is enhanced or facilitated by subirrigation or flood irrigation associated with alluvial valley floors. These uses include the pasturing, grazing, or watering of livestock, and the cropping, cultivation, or harvesting of plants whose production is aided by the availability of water from subirrigation or flood irrigation. Those uses do not include agricultural practices which do not benefit from the availability of water from subirrigation or flood irrigation." N.D.A.C. § 69-05.2-01-02(3).

17. “‘Subirrigation’ means, with respect to alluvial valley floors, the supplying of water to plants from a semisaturated or saturated subsurface zone where water is available for use by vegetation...” N.D.A.C. § 69-05.2-01-02(103).

18. N.D.A.C. § 69-05.2-08-13 states that an area must be identified as an alluvial valley floor if:

- 1) Unconsolidated streamlaid deposits holding streams are present, and
- 2) There is sufficient water to support agricultural activities as shown by; (a)the existence of flood irrigation in the area or its historical use,(b)the capability to be flood-irrigated, based on streamflow water yield, soils, water quality, and topography; or (c) subirrigation of the lands from the ground water system of the valley floor.

19. In finding of fact No. 52 for Case No. RC-13-850, the PSC found that “Permit NACC-1302 identifies Coyote Creek as a perennial stream for the portion that is within and adjacent to the permit area. It contains unconsolidated streamlaid deposits, otherwise referred to as alluvium. Coyote Creek meets the geomorphic criteria for being considered an AVF.” Thus, the first requirement of N.D.A.C. § 69-05.2-08-13 was met.

20. In Case No. RC-13-850, the PSC reviewed evidence available for that hearing and determined in conclusion of law No. 6 that “alluvium along Coyote Creek is not an alluvial valley floor as defined by subsection 1 of N.D.C.C. Section 38-14.1-02.” The PSC did not make an explicit finding of fact that there was not “sufficient water to support agricultural activities as shown by ... subirrigation of the lands from the ground water system of the valley floor.” N.D.A.C. § 69-05.2-01-02(3). Such a finding was implicit, however, in conclusion of law No. 6.

21. N.D.A.C. § 69-05.2-10-03(6)(b) provides that “no permit or significant revision will be approved unless, the application affirmatively demonstrates and the commission finds, in writing, on the basis of information in the application or otherwise available, which is documented in the approval and made available to the applicant, that ... [t]he applicant has obtained a negative determination” regarding the existence of an alluvial valley floor. (emphasis added).
22. In the current proceedings, the Voigts have provided additional evidence regarding whether there is sufficient water to support agricultural activities as shown by subirrigation on the Voigts’ alfalfa fields. At the informal conference, Lance Loken explained that he had drilled soil borings on the Voigts’ alfalfa fields on October 4, 2019. Mr. Loken explained that he found groundwater throughout these alfalfa fields at a depth of 11-12 feet, and that due to capillary rise, water was present at and below a depth of seven feet in the Voigts’ alfalfa fields. Mr. Loken referred to photographs of the soil borings and soil samples, as well as the locations from which he took these samples. Those photographs, GPS coordinates, and the depth to groundwater is contained in Voigt Exhibit 2. Mr. Loken indicated that it is his opinion that the Voigts’ alfalfa fields root into and below groundwater, are subirrigated, and benefit significantly from groundwater based upon his soil borings.
23. Neither the PSC nor CCMC disagreed with Mr. Loken’s description of the depth to groundwater in the Voigts’ alfalfa fields, except that Mr. Steffen noted that Mr. Loken’s elevations were all off by approximately 50 feet. Nonetheless, the parties agreed with the total depths to groundwater presented by Mr. Loken. *See, e.g.*, CCMC Exhibit 4.

24. Based on the additional information provided by the Voigts, including first-hand soil boring data directly from the Voigts' alfalfa fields, the Voigts' alfalfa fields located in Section 31 of T143N, R88W are subirrigated. There is sufficient water to support these agricultural activities in these locations as shown by subirrigation of the lands and the Voigts' alfalfa fields from the ground water system of the valley floor. The Voigts' alfalfa fields pre-date Coyote Creek Mine.

Roads and Access

25. CCMC successfully obtained Mercer County approval to close the county road described in Exhibit A to the Voigts' comments and objections in these proceedings. That road is commonly referred to as County Road 25. Casey Voigt explained at the informal conference that this road ties his ranch together.

26. Exhibit A to the Voigts' comments and objections is a road closure agreement with Mercer County. In that agreement, CCMC stated that it anticipates reconstructing this road in 2024 for use by the Voigts and other landowners who need the road for access, and that the reconstructed road would be reopened to the public by 2040.

27. While road closures and reopenings are primarily an issue that must be resolved at the county level, the PSC's reclamation rules require that "[e]ach application must describe, with appropriate maps and cross sections, measures to ensure the interests of landowners and the public are protected if the applicant plans to ... [r]elocate a public road." N.D.A.C. § 69-05.2-09-07.

28. Section 3.1.1.6 of CCMC's applications describe this road as "[a]n unnamed, roughly east-west oriented gravel road is located between County Road 13 and 17th Street SW." Neither

Section 3.1.1.6 nor Section 3.2.1 of CCMC's application describes how, when, or where CCMC plans to reconstruct this road.

Sediment

29. The Voigts referred to the photographs contained in Exhibit B attached to their comments and objections during the informal conference. Casey Voigt explained that he believes the sediment depicted in these photographs has appeared over time and appears to be the result of discharge from CCMC's sediment pond P31-01. Donn Steffen explained on behalf of Coyote Creek Mining Company that he disagrees that the sediment pond is the cause of this sediment accumulation. It is Mr. Steffen's belief that the sediment is due to erosion from the creek.
30. While the Voigts have not established based upon the information provided that the sediment definitely came from P31-01, they are not asking the PSC to find fault. Rather, their request is monitoring to locate such issues in the future, to determine the source of the issue, and to ultimately ensure that the issue is corrected. This is a reasonable request and should not cause any undue burden on the mine. This request is also within the jurisdiction of the PSC's discretion under N.D.A.C. § 69-05.2-13-07(6)(a), since sediment accumulation in Coyote Creek could affect the creek, which is fish habitat.

Reclamation

31. Prior to the informal conference, the Voigts requested an inspection of mine reclamation variance areas 1 and 2. This request was granted and the inspection of the mine was completed. Following this inspection, the Voigts filed an additional letter raising concerns about inadequate reclamation in variance area 1.

32. Two of the individuals who participated in the mine inspection were Casey Voigt and Mark Anderson. Mr. Anderson was a district conservationist and resource conservationist for thirty-five years.
33. Mr. Anderson explained at the informal conference that a portion of variance area 1 within permit NACC-1302 that had previously been grade-approved and cover cropped was full of weeds. Mr. Anderson explained that, generally, the mine's re-seeding and revegetation plans are sufficient, but he expressed concern that CCMC had not followed its revegetation plan. Mr. Anderson referred to a series of photographs that he took and his notes during the conference. Those photographs and notes are contained in Voigt Exhibit 5.

Conclusions of Law

1. The Commission has jurisdiction over CCMC's planned mining and reclamation operations in North Dakota, including Permit No. NACC-1302. The Commission's jurisdiction includes authority to control dust from CCMC's mining and reclamation operations.
2. For the Revision Application, the burden is on CCMC to show that it has met all of the elements and requirements necessary for a mine permit revision. N.D.C.C. § 38-14.1-21 ("The applicant for a permit, or a revision of a permit, has the burden of establishing that the application is in compliance with all the requirements of this chapter."). This burden includes affirmatively demonstrating that an alluvial valley floor does not exist. N.D.A.C. § 69-05.2-10-03(6)(b).
3. For the Renewal Application, the burden is on the Voigts to show that the mine has not met all of the elements and requirements necessary for a permit renewal. This is because the permit "must be issued ... unless" certain conditions are met. N.D.C.C. § 38-14.1-22.

4. CCMC's Revision Application does not meet all permit application standards under North Dakota Century Code Chapter 38-14.1 and North Dakota Administrative Code Article 69-05.2. Specifically:
 - a. The Revision Application does not affirmatively demonstrate that an alluvial valley floor does not exist as required by N.D.A.C. § 69-05.2-10-03(6)(b).
 - b. Additionally, the Revision Application does not "describe, with appropriate maps and cross sections, measures to ensure the interests of landowners and the public are protected" based upon CCMC's closure of the County Road 25. N.D.A.C. § 69-05.2-09-07. The application must, at the minimum, include plans, including a location and timeline, to reconstruct this road.
5. It is reasonable to require Coyote Creek Mining Company to revise Permit NACC-1302 to include dust monitoring.
6. It is reasonable to require Coyote Creek Mining Company to revise Permit NACC-1302 to include monitoring of Coyote Creek for sediment build-up.

Order

1. CCMC's Renewal Application for surface mining permit NACC-1302 is granted, subject to the following conditions:
 - a. Within three months of this order, CCMC shall file a dust monitoring plan with the PSC. The plan must include plans to continuously monitor dust in the locations where CCMC is working and to provide this monitoring information to the PSC. Additionally, CCMC shall provide to the PSC annual records related to the quantity of water, chemicals, and other materials used to suppress dust and wind erosion on the mine.

- b. CCMC shall monitor its pond discharge points once a month between May and October for sediment build-up in Coyote Creek originating from mine sedimentation ponds. If sediment build-up is located, CCMC shall notify the PSC of such build-up and prepare a corrective plan.
2. CCMC's Revision Application for surface mining permit NACC-1302 is deemed incomplete and is therefore denied. CCMC may submit an additional revision application. Such application must include the information required by N.D.A.C. § 69-05.2-10-03(6)(b) pertaining to alluvial valley floors and N.D.A.C. § 69-05.2-09-07 pertaining to road reconstruction.

Respectfully submitted this 16th day of October, 2019.

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