

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

**BRIEF REGARDING THE PUBLIC SERVICE COMMISSION'S
JURISDICTION TO REGULATE AIR QUALITY ISSUES**

[1.] Coyote Creek Mining Company, L.L.C. (“CCMC”) submits this brief regarding the Commission’s jurisdiction to regulate air quality. As a state agency, this Commission’s jurisdiction is statutorily limited. *Berger v. State Personnel Bd.*, 502 N.W.2d 539, 542 (N.D. 1993). Chapter 38-14.1, N.D.C.C., governs surface coal mining operations in North Dakota and affords the Commission jurisdiction to ensure statutory compliance. *See* N.D.C.C. § 38-14.1-03. Pursuant to N.D.C.C. ch. 38-14.1’s jurisdictional grant, the Commission has promulgated the applicable regulations at N.D.A.C. ch. 69-05.2.

[2.] An applicant seeking a surface coal mining permit must “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.” N.D.A.C. § 69-05.2-09-05. This only allows the Commission jurisdiction to consider whether an application has specified measures to comply with the DEQ’s air pollution control requirements. This allowance solely concerns an application itself, not whether the applicant subsequently and effectively controls wind erosion and attendant air pollution after approval of an application. Whether a permittee has effectively controlled wind erosion and attendant air pollution is an issue exclusively within the DEQ’s jurisdiction. *See* N.D.C.C. ch. 23.1-06; N.D.A.C. art. 33.1-15.

Accordingly, N.D.A.C. § 69-05.2-09-05 does not provide a basis for the Commission exercising jurisdiction over air control issues.

[3.] Once a surface coal mining permit is issued, the Commission has promulgated various performance standards regarding air quality issues. In relevant part, these performance standards require a permit 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.” N.D.C.C. § 38-14.1-24. This Commission further requires a permittee to “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.A.C. § 69-05.2-13-07. Again, whether a permittee has complied with all applicable air pollution control laws so as to effectively control erosion and attendant air pollution, as required by N.D.C.C. § 38-14.1-24 and N.D.A.C. § 69-05.2-13-07, is a determination solely within the DEQ’s jurisdiction. *See* N.D.C.C. ch. 23.1-06; N.D.A.C. art. 33.1-15. Accordingly, these performance standards do not provide a basis for the Commission exercising jurisdiction over air control issues.

[4.] This Commission has generally come to the same conclusion. The Commission has repeatedly held the Department of Health, now the Department of Environmental Quality, has exclusive jurisdiction over air quality issues. Case No. RC-14-846, Docket Nos. 38, 56 (concluding the Department of Health, now the Department of Environmental Quality, “has exclusive jurisdiction over permitting of air quality in North Dakota.”); Case No. RC-19-189, Docket No. 60 at ¶ 67 (concluding the “DEQ has exclusive jurisdiction over permitting of air quality in North Dakota.”); Case No. RC-19-190, Docket No. 68 at ¶ 67 (same). The courts have made similar observations. *Voigt v. Coyote Creek Mining Co., LLC*, 329 F. Supp. 3d. 735, 739 (D.N.D. 2018) (noting the Department of Health was “the state agency charged with the

administration and enforcement of the [Clean Air Act] and North Dakota's air quality laws.”). That exclusivity precludes consideration of air quality issues in other proceedings, and any issue regarding the same must be brought through the DEQ. *See* N.D.C.C. ch. 23.1-01.

[5.] To the extent the Commission concludes it has jurisdiction concurrent with the DEQ to consider air quality issues, whether it be air pollution caused by wind erosion or otherwise, it should nonetheless defer to the DEQ as to those issues. The Commission and the DEQ have reached an understanding of cooperative enforcement regarding air quality and fugitive dust emissions. Case No. RC-19-189, Docket No. 60 at ¶ 66; Case No. RC-19-190, Docket No. 68 at ¶ 66. That understanding is one of pragmatism, as the DEQ’s primary jurisdiction over air quality issues has resulted in decades of expertise. Recreation of that expertise would involve unnecessary duplication of the Commission’s already limited resources, a result to be avoided. *See* N.D.C.C. § 38-14.1-03(14). The technical inability to discriminate between air quality issues within and without the Commission’s jurisdiction underscores the problems with the Commission exercising jurisdiction—if the Commission exercises jurisdiction over air quality issues, but the specific cause of those issues is unknown, the Commission would effectively supplant the DEQ’s jurisdiction over air quality issues. To avoid unnecessary duplication of State resources, and to respect the DEQ’s primacy and expertise, the Commission should defer any jurisdiction it concludes to have.

Dated this 10th day of January, 2020.

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