

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

CLOSING ARGUMENT

Coyote Creek Mining Company, L.L.C. (“CCMC”), respectfully sets forth the following closing argument in support of its applications for Renewal No. 1 and Revision No. 9 of Permit NACC-1302. The issues covered by the parties over the two days of formal hearing are the same issues the Commission previously addressed at length in the informal conference held on October 8, 2019. Upon conclusion of that conference, the Commission concluded that “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” and that “[n]o 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.” Paragraphs 2 and 3 of Ruling, Docket No. 68, Case No. RC-19-190; Docket No. 60, Case No. RC-19-189. The Voigts presented nothing new at the formal hearing to support rejection of the permit or any amendments or conditions with respect to the same issues they have once again raised. Instead, they once again seek to collaterally attack previously decided matters and continue to push issues subject to the jurisdiction of other governmental bodies.

Access

Access is governed by the lease executed by the Voigts and the road at issue is subject to

the jurisdiction of Mercer County, not the Commission. The Voigts have requested the

Commission require CCMC add documents to the permit to demonstrate compliance with Mercer County on this issue. These documents are already included in the permit and enforcement of these agreements does not lie within the authority of the Commission. Previous findings and conclusions of this Commission confirm that conclusion:

- **“The 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.”** Paragraph 37 of Findings of Fact, Docket No. 125, Case No. RC-13-850.
- **“The Commission has no jurisdiction over the closure of county roads.”** Paragraph 8 of Conclusions of Law, Docket No. 125, Case No. RC-13-850.
- **“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.”** Paragraph 11 of Findings of Fact, Docket No. 68, Case No. RC-19-190; Docket No. 60, Case No. RC-19-189.
- **“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.”** Paragraph 13 of Findings of Fact, Docket No. 68, Case No. RC-19-190; Docket No. 60, Case No. RC-19-189.

Mercer County also clearly asserts its jurisdiction over the road in question. Upon conclusion of a series of public hearings in which Casey Voigt and CCMC participated, the Mercer County Commission concluded:

1. **That the [Mercer County] Commission has jurisdiction over the subject matter of the Petition and the road involved therein.**
5. **That the temporary closing of said road does not deprive adjacent landowners access to their property.**
6. **That a public benefit exists in temporarily closing said road and that the interests of the public and affected landowners will be protected.**

As part of that process CCMC entered into an Agreement with Mercer County dated May 18, 2016, ensuring access and reconstruction of the temporarily closed road in accordance with the Agreement. The Agreement is part of the permit and clearly sets forth the plan for access. The Agreement also adequately addresses the reconstruction of the road in its permanent location in 2024 and its use by affected landowners until it is opened to the public in 2040.

In addition to the Agreement in place with Mercer County, CCMC has also entered into a Memorandum of Access with the Voigts further addressing access issues.

PSC Reclamation Staff recently addressed the access issue again with the Voigts in a December 11, 2019 letter. In that letter, Reclamation Division staff explained as follows:

The surface and coal lease agreement in Section 1.5 of Permit NACC-1302 that you and Julie signed give CCMC right of entry to your property. Access to your property while trying to maintain your ranching operation is a lease contractual issue between you and CCMC. Compliance with the terms and conditions of your lease agreement is outside the jurisdiction of the Reclamation Division.

The letter went on to conclude that **“Mercer County’s road closure resolutions for the Coyote Creek mine fulfill the requirements of NDAC 69-05.2-04-01.3 and the resolutions include language about protecting the interest of the public and affected landowners.”** Ex. 1 (December 11, 2019 Letter from Dean K. Moos, Director, Reclamation Division, to Casey Voigt).

CCMC's permit contains the appropriate details related to the road in question and adequately addresses measures to ensure the interests of landowners and the public are protected as required.

Alluvial Valley Floor

The issue of Alluvial Valley Floors on these lands has been conclusively decided on multiple occasions 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 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.”** Paragraph 6 of Conclusions of Law, Docket No. 125, Case No. RC-13-850.

The North Dakota supreme court in confirming the conclusion of the Commission 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.

After the informal conference, it was again confirmed that there is not AVF as demonstrated by the Commission's findings set forth below:

- **“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.”** Paragraph 43 of Findings of Fact, Docket No. 68, Case No. RC-19-190; Docket No. 60, Case No. RC-19-189.

- **“The Voigts did not demonstrate that an AVF exists.”** Paragraph 50 of Findings of Fact, Docket No. 68, Case No. RC-19-190; Docket No. 60, Case No. RC-19-189.

The Voigts have provided nothing new. The few core samples dug days prior to the informal conference only confirmed what both CCMC and Reclamation Division staff already knew, the vast network of monitoring wells CCMC already has in place are more than adequate to monitor the hydrology of the alluvium for impacts from mining, and no impacts from mining have been observed in the alluvium or elsewhere since data collection began in 2012, prior to mining. The only testimony the Voigts offered in support of their claims was from Mr. Lance Loken who does not consider himself an AVF expert and admitted that he reviewed none of the extensive information from the previous case and identified by the supreme court. 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 initial hearing. Ignoring this information and relying entirely on the limited data from the cores he took on October 4, 2019, Mr. Loken concluded that an AVF existed. Mr. Loken admitted that he used neither the OSM guidelines or any other AVF guidance documents but instead relied on information that counsel for the Voigts told him, testifying that he believed that would be called hearsay. Once again, the Voigts have not demonstrated the existence of an AVF and CCMC has demonstrated they have not affected nor could they affect, the alluvium, and CCMC’s groundwater monitoring plans are adequate.

Sediment

The Voigts have requested a special condition requesting CCMC to visually inspect Coyote Creek on a monthly basis when not frozen to locate sediment buildup and document with photo and video evidence and require CCMC to determine the root cause of the buildup. Similar to the Voigts other requests, this requested condition is unwarranted and unnecessary. The location of the sediment buildup is one of the most traveled areas at the mine and is essentially examined on

a daily basis as employees enter the mine and during nearly every inspection by the Commission. CCMC has been monitoring the sediment for years and is already aware of the cause of the buildup. The buildup is the result of significant upstream erosion caused by the Voigts. *See* CCMC Ex. 15. Concerns over the impact of the Voigts' erosion was expressed by Greg Thompson, a professional engineer with Houston Engineering, back in May of 2015. Despite being well aware of the cause of the sediment buildup, upon receipt of the Voigts unfounded allegations, CCMC took the additional step of evaluating and eliminating any other potential cause of sediment buildup from its mining operations. It is unnecessary to impose the condition requested by the Voigts when the cause of the buildup is already monitored and known to be caused by the Voigts themselves.

Reclamation

The Voigts request special conditions to the permit requiring certified-weed-free mulch, straw and seed and allowing them to inspect reclamation progress annually. Consistent with previous efforts, the Voigts again attempt to get the Commission to impose unnecessary conditions on the permit. It has been established that the Voigts already have inspection rights under the terms of their lease and they have failed to demonstrate that the "certified" mulch, straw and seed they request even exists, or if it did, would resolve the perceived issue. They have once again failed to present any evidence to demonstrate that CCMC's existing reclamation plan is inadequate in any way.

At this stage in the life of the mine and its operations, the ultimate success of any reclamation project is merely speculative. At the informal conference, Reclamation Division staff explained that at this point in time "it would be premature to judge reclamation success" and concluded that **"[r]eclamation 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.” Paragraphs 31 and 36 of Findings of Fact, Docket No. 68, Case No. RC-19-190; Docket No. 60, Case No. RC-19-189. The Voigts provided absolutely nothing at the hearing to alter that previous conclusion of Reclamation Division staff.

Dust

Dust is a legitimate concern for the Voigts and an issue that CCMC takes very seriously. However, the Voigts pushing this issue on the Commission is misplaced. The Commission’s dust related jurisdiction is very narrow in scope and specifically defined in statute. CCMC has satisfied the dust related requirements that are under the jurisdiction of the Commission. CCMC’s accompanying Brief Regarding the Public Service Commission’s Jurisdiction to Regulate Air Quality Issues addresses the jurisdictional issue. Special Condition 1 to Revision No. 9 previously approved by the Commission, as well as the condition requested by the Voigts, infringe upon the jurisdiction of the North Dakota Department of Environmental Quality and such regulation should be left to the DEQ.

CCMC has an Air Quality Permit with the DEQ and an adequate Fugitive Dust Control Plan on file with both the Commission and DEQ. Removing Special Condition 1 and not approving the requested monitors does not mean that dust will not be controlled at the mine. The existence of Special Condition No. 1 or requiring the requested dust monitors does not mean that dust will be eliminated or even controlled any differently. Removing Special Condition No. 1 and allowing DEQ to decide if further monitoring is necessary simply leaves the regulation in the hands of the appropriate agency with the jurisdiction and expertise to address the dust related issues, in this case, the DEQ.

Conclusion

CCMC prides itself on its operations and takes these issues very seriously. CCMC’s employees are proud of what they do, where they live and where they work. They strive to be

good neighbors and work very hard to ensure the mine operates safely and efficiently. While it is frustrating to the mine and unfair to its employees to be continually subjected to unfounded attacks and harassment, CCMC is always willing to work with everyone impacted by the mine, including the Voigts. To the extent that the Voigts communicate legitimate concerns to them, the mine is certainly willing to continue to work with them to address those concerns to the extent possible as has been done in the past.

Dated this 10th day of January, 2020.

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