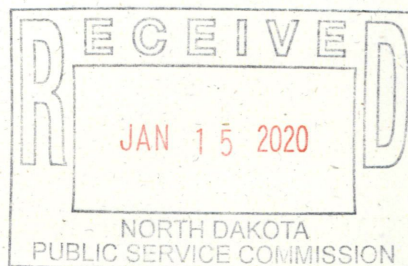




**BRAATEN**  
Law Firm

January 10, 2020

Mr. Steve Kahl  
Executive Director  
North Dakota Public Service Commission  
600 East Boulevard, Dept. 408  
Bismarck, ND 58503-0659



**Re: Coyote Creek Mining Company Renewal #1 and Revision #9, Permit NACC-1302  
PSC Case Nos. RC-19-189 and RC-19-190**

Dear Mr. Kahl:

Enclosed for filing, please find the following:

**1. Casey and Julie Voigts' Closing Arguments and Proposed Findings of Fact, Conclusions of Law, and Order**

Per agency policy, I have submitted eleven copies of each document. Please do not hesitate to contact us with any questions.

Sincerely,

JJ England

Enclosures

Cc: John Schuh (jschuh@nd.gov)  
Wade Mann (wmann@crowleyfleck.com)  
ndpsc@nd.gov  
Casey and Julie Voigt

188 RC-19-190 Filed 01/15/2020 Pages: 26  
Closing Arguments and Proposed Findings of Fact, Conclusions of Law, and Order  
Casey and Julie Voigt  
JJ England - Braaten Law Firm

173 RC-19-189 Filed 01/15/2020 Pages: 26  
Closing Arguments and Proposed Findings of Fact, Conclusions of Law, and Order  
Casey and Julie Voigt  
JJ England - Braaten Law Firm

**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**

**CASEY AND JULIE VOIGTS' CLOSING ARGUMENTS AND PROPOSED FINDINGS  
OF FACT, CONCLUSIONS OF LAW, AND ORDER**

**January 10, 2020**

**I. Preliminary Statement**

[¶1]. On October 22, 2014, the Public Service Commission (“PSC” or “Commission”) conditionally issued Surface Coal Mining Permit NACC-1302 to allow Coyote Creek Mining Company, LLC (“CCMC”) to open a new coal mine, mine coal, and supply lignite coal to Coyote Station. PSC Case No. RC-13-850. The mine is called Coyote Creek Mine, and the permit issued by the PSC had a five-year term. The mine permit encompassed 8,092 acres of land.

[¶2]. Casey and Julie Voigt, husband and wife (“Voigts”), requested a formal hearing before the PSC regarding issuance of permit NACC-1302. The Voigts own and lease much of the land in the eastern half of CCMC’s permit area, and these permitted lands encompass much of the Voigt family’s ranching operation. The Voigts’ land includes native grassland that is used for livestock grazing, cropland primarily used for hay production, and the Voigts’ home where the family resides. During these proceedings, the Voigts presented evidence and concerns that their two alfalfa fields along the banks of Coyote Creek are located upon an alluvial valley floor (“AVF”). The Voigts also presented detailed information and concerns regarding CCMC’s proposed reclamation plans. Based on the information provided to the Commission at that time, the

Commission concluded that the two alfalfa fields were not an AVF. Regarding reclamation practices, the Commission added three additional conditions to the permit as a result of the formal hearing.

[¶3]. On June 17, 2015, the PSC granted CCMC's Revision No. 1 application to add 352.105 acres to the mine permit area for an approximately 4-mile haul road and coal processing facility to convey coal to Coyote Station. PSC Case No. RC 14-846. The Voigts requested an informal conference regarding this application due to concerns about dust that might arise from CCMC's haul road. Judge Mann, who was designated as a substantive administrative law judge in that case, issued proposed findings of fact, conclusions of law, and a proposed order to the Commission to grant CCMC's Revision 1 application without modifications. The Commission adopted Judge Mann's recommended findings, conclusions, and order. The Voigts did not request a formal hearing in this proceeding.

[¶4]. On May 20, 2019, CCMC filed its Revision No. 9 application with the Commission. Revision 9 is a significant revision to CCMC's mine plan and is subject to the requirements of notice and the right to a hearing. N.D.A.C. 69-05.2-11-02(5)(a). To the Voigts' knowledge, the only other revision that the PSC has classified as significant and provided a case number is CCMC's Revision No. 1 application. CCMC's Revision No. 9 proposed new areas for coal removal in Section 36 of T143N R89W, modifies the pit layouts for the mine (in some cases, substantially), changes the sequence and timing of mining, moves the location of several overburden piles (or they have been removed altogether), removes cultural resource areas from the mine plan, and modifies the haul road configuration for the mine (including the addition of multiple new haul roads in Sections 35 and 36 of T143N R89W). *See* Section 3.1.3 of Revision No. 9 Application (Pit Layout and Facilities Map). Revision No. 9 also requests two new reclamation

variance areas (these are described as variances 5 and 6) and substantial seeding delays. *Id.* at Sections 3.1.1.3 (Reclamation Procedures and Schedule), 4.3.1 (Vegetation Success Standards).

[¶5]. On May 23, 2019, CCMC filed an application to renew permit NACC-1302 for another five-year term. PSC Case No. RC-19-189.

[¶6]. During the initial hearings on permit NACC-1302, no mining activity had yet begun. Concerns raised by the Voigts were therefore, to some extent, based on nascent activity because they were only based upon the information in the mine plan rather than CCMC's actual implementation of that plan. During the first permit term, however, the Voigts also became concerned about implementation of the mine plan. Additionally, the Voigts are concerned with some of the contents of the plan in Revision No. 9 and Renewal No. 1. The Voigts therefore brought these concerns to the attention of the Commission by filing comments on CCMC's Revision 9 Application and Renewal No. 1 application in PSC Case Nos. RC-19-189 and RC-19-190.

[¶7]. The Voigts initially raised seven concerns in their comments: (1) extensive problems with wind erosion and dust at the mine; (2) concerns about sediment build-up in Coyote Creek at CCMC's facilities; (3) inadequate information in CCMC's permit applications regarding plans to reconstruct and re-open County Road 25; (4) concerns regarding CCMC's ability to reclaim the mine, based in part on recent work completed by CCMC near the Voigts' house adjacent to the bridge crossing Coyote Creek, but also based on the same concerns expressed by the Voigts previously before the Commission; (5) an unexplained omission of a number of cultural resource sites in CCMC's mine plan; (6) concerns regarding Coyote Station's direct control over CCMC and reimbursement of CCMC's environmental fines; and (7) the need to present new evidence that

was not previously available to the Commission regarding the presence of an alluvial valley floor upon the Voigts' two alfalfa fields.

[¶8]. The Voigts requested an informal conference in PSC Case Nos. RC-19-189 and RC-19-190. The Honorable ALJ Dawson presided as a substantive ALJ in those proceedings. During those proceedings, the Voigts did not proceed with the cultural resource issue because the mine supplied additional information to the PSC prior to the hearing that resolved this issue. The Voigts also chose not to move ahead with the issue regarding Coyote Station's contractual right to direct control of CCMC, although the issue was discussed at an informal meeting of the parties prior to the informal hearing. This remains as a very concerning issue (it is currently the subject of both a North Dakota Department of Environmental Quality and United States Environmental Protection Agency investigation). However, the Voigts decided that it would be best to raise that issue directly with the PSC at a later date, primarily because Coyote Station is not a party to these current proceedings and it would be procedurally awkward to move ahead with that issue without Coyote Station present, and asking Coyote Station to intervene in the present proceeding would be inefficient.

[¶9]. As a result of the informal conference, Judge Dawson recommended approval of Renewal No. 1 and Revision No. 9. The Commission adopted Judge Dawson's recommended order, except that the Commission added a condition to the permit requiring CCMC to log, in detail, its dust control activities on a daily basis and to keep this log on file at the mine for inspection.

[¶10]. Following the PSC's approval of CCMC's Revision No. 9 and Renewal No. 1 applications, the Voigts requested a formal hearing on the five issues raised at the informal conference. A two-day hearing was held, with the Honorable ALJ Hogan presiding as a procedural ALJ. CCMC was represented by Wade Mann as counsel. The Voigts were represented by Derrick Braaten, JJ

England, and Carey Goetz as counsel. The hearing record was held open until the filing of closing arguments.

[¶11]. During the formal hearing, the Voigts presented testimony from Casey Voigt, Julie Voigt, Mark Anderson, Lance Loken, and Shane Bofto. Through these witnesses, the Voigts provided documentary evidence. Based upon this testimony and documentary evidence, the Voigts propose the following findings of fact, conclusions of law, and order for each of the five issues raised at the formal hearing.

## II. Wind Erosion and Dust

### A. Applicable Law

[¶12]. In 1983, the federal Office of Surface Mining, Reclamation and Enforcement (“OSMRE”) promulgated a rule which stated that “[a]ll exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.” Permanent Regulatory Program; Erosion Control, 48 Fed. Reg. 1160-01 (1983). This rule is still in place today and is part of North Dakota’s approved surface mining program. As Judge Mann indicated in 2015 in recommended findings of fact and conclusions of law that were adopted by this Commission, “the Commission’s rule set forth in N.D. Admin. Code § 69-05.2-09-05, provides that ‘[t]he applicant shall specify ... measures necessary to effectively control wind erosion and attendant air pollution.’” PSC Case No. RC-14-846, Docket # 38. See also *National Wildlife Fed’n v. Hodel*, No. 84-5743, 1988 WL 5024 (D.C. Cir. Jan. 29, 1988) (“pollution occasioned by erosion is regulated by this statute”).

[¶13]. The jurisdictional basis for both OSMRE’s rule and the PSC’s corresponding rule is Section 515(b)(4) of the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”), which provides the following performance standard applicable to all coal mines: “as a minimum ...

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.” (emphasis added). The Commission implements SMCRA in North Dakota. *See generally* N.D.C.C. ch. 38-14.1.

[¶14]. Separately, the Commission’s approved surface coal mining program also requires coal mine operators to control erosion from haul roads. N.D.A.C. § 69-05.2-24-01(2)(a) states 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.”

[¶15]. While the Department of Environmental Quality is the North Dakota agency with jurisdiction over health and environmental impacts of air pollution (including from coal mines), the Public Service Commission is the agency with primary jurisdiction and expertise over “wind erosion” and “attendant air pollution” from active coal mining operations as well as haul road design, use, and maintenance. The United States Environmental Protection Agency in 2008 agreed that agencies implementing SMCRA, such as the PSC, have direct jurisdiction over this erosion and attendant dust. *See* Rulemaking for Coal Preparation and Processing Plant Performance Standards, Docket EPA-HQ-OAR-2008-0260, EPA 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>) EPA stated that “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”. *Id.*

**B. Proposed Findings of Fact**

[¶16]. Section 3.1.1.2 of CCMC’s Mine Plan submitted for approval in Revision No. 9 and Renewal No. 1 include a Fugitive Dust Control Plan. The Fugitive Dust Control Plan was included in CCMC’s originally-approved mine permit. Revision 9 is the first time that CCMC has sought to modify this Dust Control Plan. CCMC’s Revisions proposed in Revision 9 added language to allow the mine to apply fly ash to roads, added information that CCMC has obtained an air quality operating permit from DEQ, and added language that the mine’s “[a]pplications of dust suppression agents, including but not limited to water, calcium chloride ,and other chemical agents can be found on file at the mine.”

[¶17]. At the formal hearing, Julie Voigt testified that she has seen extensive dust at Coyote Creek Mine. She testified that the dust has caked her family’s house and yard, and that the dust is coming from the mine. Mrs. Voigt provided twelve photographs and sixteen videos of this dust, and she explained that these photographs and videos are only a sample of what she regularly experiences. The photographs show wind erosion blowing soil off of the mine, dust blowing off of the mine from CCMC’s bulldozers, and CCMC’s haul trucks eroding the haul roads and sending the road surface into the air as plumes of dust. Mrs. Voigt testified that this dust has occurred repeatedly and provided photographs showing dirt on the snow caused by CCMC’s dust as recent as December 6, 2019.

[¶18]. Julie Voigt also testified that her horse’s water tank is located near her house and that prior to mining activities, she had to clean out the water tank a couple times a summer. Mrs. Voigt provided a photograph of this tank. After mining activities began, she testified that she has had to

clean dirt out of the water tank every day. Mrs. Voigt further testified that the dirt in the water tank is coming from the mine.

[¶19]. Both Julie Voigt and Casey Voigt testified that they are concerned about the wind erosion and dust coming off of the mine.

[¶20]. Guy Welch, a Public Service Commission inspector assigned to inspect CCMC, testified that the wind erosion and dust depicted in the photographs and videos provided by the Voigts and entered into evidence at the formal hearing is the worst that he has ever seen in his career at any North Dakota coal mine.

[¶21]. Shane Bofto provided expert testimony on behalf of the Voigts regarding the wind erosion and attendant air pollution and dust issues. Mr. Bofto is a chemical and environmental engineer with a focus on air and water quality. Mr. Bofto testified that he has experience working with coal mines. Mr. Bofto testified that he had a “large concern” about this erosion and dust, and that in his opinion, the dust depicted in the photographs and videos provided by the Voigts is more severe than he has experienced at any other coal mine in his professional career.

[¶22]. Mr. Bofto testified best management practices (“BMPs”) should be used to control dust at CCMC, and that these BMPs include capping, dust suppressants, and wetting. Mr. Bofto testified that he has reviewed CCMC’s fugitive dust control plan submitted by CCMC in its Revision No. 9 and Renewal No. 1 applications, and that his primary concern with CCMC’s fugitive dust control plan is not the measures proposed in that plan to control dust, but rather the lack of measures to indicate whether the measures described in this plan are being implemented effectively, and the evidence that these measures are in fact not being implemented effectively.

[¶23]. Mr. Bofto testified that, in his professional opinion, he recommends installation of dust monitors to provide immediate and effective feedback to CCMC so that CCMC can determine if

it is implementing its dust control plan effectively. When combined with the daily log that the PSC required as a result of the informal conference, Mr. Bofto testified that dust monitors would allow direct comparison of dust levels with the measures taken by the mine to control dust on any given day, and that these monitors would assist CCMC to rapidly identify wind erosion issues and to modify the mine's BMPs as appropriate based upon dust levels. Mr. Bofto indicated that these monitors would not be pollution compliance monitors, but instead would be monitors calibrated to inform CCMC if wind erosion and attendant dust is occurring. In Mr. Bofto's opinion, between two and three monitors should be installed: one for the south mine pits, one for the north mine pits, and one to the east of the haul road in-between CCMC's haul road and the Voigts' farmstead. Mr. Bofto testified that all three monitors should be located between fifty and one-hundred-fifty feet from any haul road, and that they should be located to the east of the mine's primary north-south haul road due to prevailing winds.

**C. Proposed Conclusions of Law**

[¶24]. The Commission has jurisdiction to require a surface coal mine to take measures to address "wind erosion and attendant air quality" pursuant to N.D.A.C. § 69-05.2-09-05. The Commission also has jurisdiction over road design, construction, reconstruction, use, maintenance, and reclamation to "[c]ontrol or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust..." N.D.A.C. § 69-05.2-24-01(2)(a)

[¶25]. It is a reasonable exercise of this jurisdiction to require CCMC to install dust monitors to provide feedback to CCMC and the PSC regarding the implementation and effectiveness of measures taken by CCMC to control or prevent erosion and dust.

**D. Proposed Order**

[¶26]. CCMC shall submit a revision application to Permit NACC-1302 by April 1, 2020 to add plans for a minimum of three continuous dust monitors calibrated to inform CCMC if erosion and attendant dust issues arise from the mine's surfaces, including haul roads. The dust monitors shall be located on the east side of the mine at a distance of 50-150 feet east of the mine's primary north-south haul road, with at least one monitor situated near the mine's north pits, one monitor situated near the mine's south pits, and another monitor situated in-between the Voigts' farmstead and CCMC's haul road closest to the Voigts' farmstead.

### **III. Sedimentation in Coyote Creek at CCMC's Facilities**

#### **A. Applicable Law**

[¶1]. The Commission has detailed regulations regarding both sedimentation ponds and discharge structures. The Commission's regulations for sedimentation ponds are located at N.D.A.C. § 69-05.2-16-09. These rules are detailed and extensive and generally discuss everything from design and construction, to inspection of these ponds. N.D.A.C. § 69-05.2-16(10). The Commission's performance standard for "discharge structures" from sedimentation ponds states the following:

Discharges from sedimentation ponds, permanent and temporary impoundments, coal processing waste dams and embankments, and diversions must be controlled, where necessary using energy dissipators, riprap channels, surge ponds, and other devices to reduce erosion, prevent deepening or enlargement of stream channels and minimize disturbances to the hydrologic balance. Discharge structures must be designed according to standard engineering design procedures.

N.D.A.C. § 69-05.2-16-10 (emphasis added).

#### **B. Proposed Findings of Fact**

[¶27]. Casey Voigt testified that he has witnessed sediment build-up at two haul road crossings constructed over Coyote Creek by CCMC. The first crossing is located to the west of CCMC's main office and shop in Section 30, T143N, R88W. The second crossing located in Section 19 of

T143N, R88W. Mr. Voigt provided photographs, which were admitted into evidence, depicting Mr. Voigts' concerns. In the photographs, sediment can be seen building up at these haul road crossings over time. The photographs also indicate that CCMC has discharge pipes directly adjacent to the location of the sedimentation. Mr. Voigt testified he believes that the sedimentation is being caused or contributed to by CCMC's discharge outlet pipes.

[¶28]. Donn Steffen, an environmental engineer employed by CCMC and CCMC's current production manager, testified that it is his opinion that the sedimentation depicted in the Voigts' photographs is the result of the Voigts' activities upstream. Mr. Steffen admitted, however, that the Mine installed new concrete matting at the behest of PSC inspectors, and that the new matting was superior because of its energy dissipation capacity, which is beneficial because it reduces erosion from silt and sediment being washed in the Creek.

[¶29]. Mr. Welch, a PSC inspector assigned to inspect CCMC, testified that he previously witnessed sedimentation issues at the location of CCMC's discharge outfalls, and he believed that the water at the discharge points was eroding the silt and sediment beneath the rock riprap placed by the Mine, and washing it into the Creek. Mr. Welch testified that because of this, he required CCMC to install concrete matting at the location of these discharge pipes in order to prevent the silt and sediment from being washed into the Creek where the sedimentation was observed by the Voigts.

[¶30]. Mr. Bofto provided expert testimony on behalf of the Voigts regarding these sedimentation issues. Mr. Bofto testified that he has not visited CCMC, but that he is comfortable forming opinions based upon the Voigts' photographs. In his opinion, he believes that CCMC's discharge pipes are likely eroding the soils between the rock and concrete mat immediately adjacent to CCMC's box culvert and is therefore likely causing or contributing to the sedimentation issues

shown in the photographs. This is consistent with the observations of the PSC inspector, Mr. Welch.

[¶31]. Mr. Bofto testified that in his professional opinion, he recommends monthly inspections of the channel to evaluate increased sedimentation in those areas; inspections just prior, during, and after discharge pumping; and inspections after any significant rainfall event to log what is happening that channel. Mr. Bofto also testified that enough sediment has accumulated at CCMC's two haul road crossings that the issue is likely to continue getting worse unless the sediment is removed.

[¶32]. The Commission has twice issued notices of violation to CCMC due to sedimentation and water erosion control problems at the mine. Both notices of violation resulted in fines paid by CCMC. *See* PSC Case Nos. RC-15-495; RC-16-547.

### **C. Proposed Conclusions of Law**

[¶33]. The PSC has jurisdiction over sedimentation pond design, construction, and operation pursuant to the PSC's performance standards located at N.D.A.C. § 69-05.2-16-09.

[¶34]. The PSC has jurisdiction over "discharge structures," including jurisdiction to ensure that discharges from sedimentation ponds and discharge structures are controlled, pursuant to N.D.A.C. § 69-05.2-16-10.

[¶35]. The PSC has jurisdiction to ensure that "diversions [are] controlled, where necessary using energy dissipators... to ... prevent ... enlargement of stream channels and minimize disturbances to the hydrologic balance." N.D.A.C. § 69-05.2-16-10.

[¶36]. It is reasonable to require CCMC to inspect Coyote Creek in the locations of CCMC's discharge structures to ensure that CCMC is complying with N.D.A.C. §§ 69-05.2-16-09, 69-05.2-16-10.

**D. Proposed Order**

[¶37]. CCMC shall submit a revision application to Permit NACC-1302 by April 1, 2020 to add plans to inspect (and maintain records from the inspection of) the stream channel of Coyote Creek on a monthly basis to evaluate sedimentation loads and the source of sedimentation loads. The inspections should take place during months when the stream is flowing. If sedimentation is located in the Creek, notice shall be provided to the Commission.

**IV. Sufficiency of Plans to reconstruct and reopen 18<sup>th</sup> St. Southwest**

**A. Applicable Law**

[¶38]. The Public Service Commission's jurisdiction and rules encompass certain aspects of road closures caused by coal mining operations. Specifically, the Commission's rules require the following:

**69-05.2-09-07. Permit applications - Operation plans - Relocation or use of public roads.** Each 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:

1. Conduct surface mining activities within one hundred feet [30.48 meters] of the right-of-wayline of any public road, except where mine access or haul roads join that right of way; or
2. Relocate a public road.

**B. Proposed Findings of Fact**

[¶39]. Section 1.2.6.1 of CCMC's Revision No. 9 and Renewal No. 1 applications contains a "Road Closure and Setbacks Map." Section 1.2.8 of these applications contains documents from the Mercer County Commission allowing, with conditions, the closure of 18<sup>th</sup> St. Southwest (this road is also referred to on some maps as County Road 25). In those documents, CCMC informed Mercer County that CCMC anticipates that the road will be reconstructed and available for use by

“affected landowners” by the year 2024, and that it will be available for use by the public in the year 2040. The Voigts are listed as “affected landowners” in these documents.

[¶40]. Casey Voigt testified that he is concerned that CCMC lacks a plan to reconstruct this road and that a plan to reconstruct the road is not included in CCMC’s mine permit application. Mr .Voigt explained that the State Department of Trust Lands had indicated that it did not want the road reconstructed in its original location and wanted the road constructed along the quarter line of the section.

[¶41]. For the first time during the formal hearing, CCMC provided a letter from the State Department of Trust Lands in which the Department of Trust Lands indicated that it would “allow the road to be rebuilt on its current alignment or preferably along the quarter line of the section.” CCMC Exh. 4.

[¶42]. Ms. Unruh, a manager at CCMC, testified, however, that CCMC has not obtained an easement to relocate the road.

[¶43]. No plans to relocate or reconstruct this road are contained in CCMC’s mine plan.

[¶44]. 18<sup>th</sup> St. Southwest cuts through the center of CCMC’s mine, and its closure and eventual reconstruction will affect the location of other facilities at the mine and impacts the Voigts’ access to their ranch.

### **C. Proposed Conclusions of Law**

[¶45]. Mercer County has primary jurisdiction over roads, including road closures and road openings.

[¶46]. The Public Service Commission has jurisdiction to require a mine, in its application, to provide information regarding plans to reconstruct and reopen a road pursuant to N.D.A.C. § 69-05.2-09-07.

[¶47]. N.D.A.C. § 69-05.2-09-07 requires a surface coal mine, in its permit application, to “describe, with appropriate maps and cross sections, measures to ensure the interests of the public are protected if the applicant plans to” either mine “within one hundred feet” of a road or to “[r]elocate a public road.”

[¶48]. Because CCMC is mining within one hundred feet of 18th St. Southwest, N.D.A.C. § 69-05.2-09-07 applies.

[¶49]. CCMC has not identified in its application, including with maps and cross sections, measures to ensure the interests of the public are protected from this road closure.

[¶50]. It is reasonable to require CCMC to describe its plans to reconstruct and/or relocate 18<sup>th</sup> St. Southwest, and the Commission has jurisdiction to require CCMC to provide this information in its permit application pursuant to N.D.A.C. § 69-05.2-09-07.

#### **D. Proposed Order**

[¶51]. CCMC shall submit a revision application to Permit NACC-1302 by April 1, 2020 that describes CCMC’s future plans for 18<sup>th</sup> St. Southwest, and whether it will relocate the road. This description must comply with to N.D.A.C. § 69-05.2-09-07 and must include, at the minimum, discussion of whether CCMC expects to reconstruct this road, when CCMC expects to reconstruct this road, and the timeframe for these plans.

### **V. Reclamation**

#### **A. Applicable Law**

[¶52]. The Commission has extensive and detailed statutes, regulations, and guidance regarding reclamation of coal mines. These statutes are generally contained in mine application requirements, performance standards, and reclamation requirements contained in N.D.C.C. ch. 38-

14.1, N.D.A.C. art. 69-05.2, and in the PSC's Standards for Evaluation of Revegetation Success Guidance.

[¶53]. N.D.C.C. § 38-14.1-24(14) requires surface coal mines to “[e]nsure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with the surface coal mining operations, provided that all reclamation through the initial planting on any land within the permit area must be completed by the operator no later than three years from completion of surface coal mining operations on such lands, unless otherwise prescribed by the commission.”

[¶54]. In addition to detailed statutes and regulations regarding reclamation and revegetation, the Commission's statutes and regulations also provide extensive inspection authority to the Commission. Pursuant to N.D.C.C. §§ 38-14.1-03, 38-14.1-27 and 38-14.1-28, and N.D.A.C. § 69-05.2-28-01, the Commission has jurisdiction to allow a landowner to accompany a mine inspector on a mine inspection.

**B. Proposed Findings of Fact**

[¶55]. CCMC's applications for Revision No. 9 and Renewal No. 1 contain six requests for variances from the three-year planting requirement contained in N.D.C.C. § 38-14.1-24(14). Taken together, these variances encompass the entirety of mining through the year 2018 at CCMC. *See* Application Section 3.1.1.3 (Reclamation Procedures and Schedule). Additionally, these applications contain a new request for seeding delays in Section 4.3.1 (Vegetation Success Standards).

[¶56]. Casey Voigt testified at the formal hearing that prior to the informal conference, he had participated in a mine inspection that was held over CCMC's objection pursuant to N.D.C.C. § 38-14.1-19. At that inspection, Julie Voigt, Mark Anderson and JJ England were also present on behalf

of the Voigts. PSC staff and CCMC staff were also present. The inspection was of those areas identified in CCMC's mine application as Variance Areas 1 and 2, which consists of lands that have already been mined. The inspection took place on October 1, 2019.

[¶57]. During the inspection, Casey Voigt testified that he inspected Grade Approval 04 and Grade Approval 05. He indicated that Grade Approval 04 had been seeded to oats as a cover crop, but the growth of those oats was not uniform. He also indicated that Grade Approval 05 was full of weeds. Mark Anderson, a rangeland expert hired by the Voigts, agreed with Mr. Voigts' assessments of the reclamation progress in Grade Approvals 04 and 05.

[¶58]. Ms. Unruh testified on behalf of CCMC that regarding Grade Approval 04, it was seeded to oats in 2018. In 2019, it was not seeded again, which allowed weeds to take over. Ms. Unruh testified that she believed the weeds are not a concern, but she testified that CCMC believes it is a best practice to clip or mow these weeds before they go to seed. Ms. Unruh testified that in Grade Approval 04, there is no question that the field was full of weeds at the time of the Voigts' inspection. She testified that CCMC had mowed the weeds in Grade Approval 04 in June or July of 2019, and that although the mine had intended to mow these weeds or spray them with glyphosate or a similar chemical, that CCMC had not done so in 2019. She was unsure if the weeds had gone to seed in 2019.

[¶59]. Mr. Anderson testified that he believes it is reasonable to require CCMC to mow all weeds before they go to seed during reclamation to prevent further infestation. Guy Welch, the PSC's inspector, agreed with Mr. Anderson on this point.

[¶60]. Mr. Anderson believed that it is reasonable to require CCMC to use weed-free certified seed, straw, and mulch to minimize the risk of weed infestation during reclamation.

### **C. Proposed Conclusions of Law**

[¶61]. The Commission has jurisdiction over weed control during reclamation pursuant to a number of statutes and regulations, including N.D.C.C. § 38-14.1-24(14) and N.D.A.C. ch. 69-05.2-22.

[¶62]. It is reasonable to require CCMC to take measures to minimize the growth of weeds during reclamation to facilitate prompt and efficient reclamation, including reclamation of surrounding lands that may be impacted by spread of weeds that go to seed.

[¶63]. The Public Service Commission has jurisdiction and authority to allow a landowner to accompany a mine inspector on any inspection pursuant to N.D.C.C. §§ 38-14.1-03, 38-14.1-27 and 38-14.1-28, and N.D.A.C. § 69-05.2-28-01.

**D. Proposed Order**

[¶64]. CCMC shall submit a revision application to Permit NACC-1302 by April 1, 2020 that modifies CCMC's mine plan to contain clear language indicating that CCMC will mow all weeds before they go to seed on all land that has been grade approved.

[¶65]. CCMC shall submit a revision application to Permit NACC-1302 by April 1, 2020 that modifies CCMC's mine plan to indicate that CCMC will make reasonable efforts to obtain only straw, mulch, and seed that is certified weed free. The certification may be completed either by a government agency or by the individual or entity providing the straw, mulch, and seed. If, after making reasonable efforts to obtain such certification, CCMC is unable to do so, CCMC shall inform the commission and may obtain other straw, mulch, and seed.

[¶66]. A special condition is hereby added to Permit NACC-1302 allowing Casey Voigt and Julie Voigt to accompany mine inspectors on any inspection subject to the discretion of the PSC's Reclamation Director. This condition shall in no way limit, expand, or otherwise modify any other

condition of NACC-1302 or the PSC's inspection and enforcement authorities, including the PSC's right to conduct unannounced inspections.

## VI. Alluvial Valley Floors

### A. Applicable Law.

[¶67]. For coal mine permit revision application, such as CCMC's Revision 9 application, the burden to obtain permit approval is on the applicant. This burden is set forth explicitly by statute and in the Commission's rules. "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." N.D.C.C. § 38-14.1-21(1). Further, "[n]o permit or revision application may be approved unless the applicant affirmatively demonstrates and the commission finds in writing on the basis of the information set forth in the application or from information otherwise available" that the application meets a number of requirements, including that the "proposed coal mining operation ... would not ... interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated..." N.D.C.C. § 38-14.1-21(3)(e) (emphasis added); *see also* N.D.A.C. § 69-05.2-10-03(6) "In addition to the requirements of subsection 3 of North Dakota Century Code section 38-14.1-21, no permit **or significant revision** will be approved, unless the application affirmatively demonstrates and the commission finds ... that ... [f]or alluvial valley floors ... [t]he applicant has obtained a negative determination [or] the permit area or adjacent area contains an alluvial valley floor ..." (emphasis added).

[¶68]. Alluvial Valley Floors ("AVF") are defined as "the unconsolidated stream-laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities." N.D.C.C. § 38-14.1-02(1).

[¶69]. OSMRE guidance states that an AVF exists "when the following criteria are met":

- i. Geologic criteria:
  - a. A topographic valley with a continuous perennial, intermittent, or ephemeral stream channel running through it; and
  - b. Within that valley, those surface landforms that are either flood plains or terraces if these landforms are underlain by unconsolidated deposits; and
  - c. Within that valley, those side-slope areas that can reasonably be shown to be underlain by alluvium and which are adjacent to flood plain or terrace landform areas.
- ii. Water availability criteria:
  - a. Water is available by surface-water irrigation or subirrigation and is being, or has successfully been, used to enhance production of agriculturally useful vegetation; or
  - b. Surface water is available and could be used to enhance production of agriculturally useful vegetation.

OSM Guidance at p. II-11, *available at* <https://psc.nd.gov/database/documents/13-0850/066-010.pdf>.

[¶70]. Additionally, “‘Flood irrigation’ means, with respect to alluvial valley floors, supplying water to plants by natural overflow, or the diversion of flows in which the surface of the soil is largely covered by a sheet of water.” N.D.A.C. § 69-05.2-01-02(34).

[¶71]. “‘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. Subirrigation may be identified by:

- a. Diurnal fluctuation of the water table, due to the differences in nighttime and daytime evapotranspiration rates;
- b. Increasing soil moisture from a portion of the root zone down to the saturated zone, due to capillary action;
- c. Mottling of the soils in the root zones;

- d. Existence of an important part of the root zone within the capillary fringe or water table of an alluvial aquifer; or
- e. An increase in streamflow or a rise in ground water levels, shortly after the first killing frost on the valley floor.”

N.D.A.C. § 69-05.2-01-02(103).

**B. Proposed Findings of Fact.**

[¶72]. At Coyote Creek Mine, it is conceded by all parties that Coyote Creek meets the “geologic criteria” for an AVF. Therefore, if the water availability criteria are met, an AVF exists.

[¶73]. During the initial formal hearing on permit NACC-1302, the PSC found that the Voigts’ two alfalfa fields are not subirrigated and therefore do not meet the “water quality criteria” for an AVF. However, at that hearing, no person who testified, except for the Voigts, had actually taken any samples or information from the Voigts’ two alfalfa fields. The only information collected in support of the negative AVF determination was taken from outside of the Voigts’ two fields. Additionally, given the timing of the hearing in the winter, it was not possible to collect additional evidence from the Voigts’ fields at the time of the initial formal hearing.

[¶74]. During the current formal hearing, the Voigts provided additional evidence regarding water availability at their two alfalfa fields. The Voigts’ two fields are located in Section 31 of T143N, R88W. Specifically, Mr. Voigt directed drilling and soil boring to determine the depth to groundwater in the Voigts’ two alfalfa fields and to show the existence of capillary rise in the soils, and also provided additional photographs to the Commission showing flood irrigation over his alfalfa fields.

[¶75]. Regarding depth to groundwater, Lance Loken testified as an expert on behalf of the Voigts. Mr. Loken testified that the depth to groundwater is between 8 and 10 feet on the Voigts’ two fields, and that accounting for capillary rise, the depth to groundwater is as little as six feet.

[¶76]. Regarding the rooting depth of alfalfa, Mark Anderson testified that alfalfa will easily root into groundwater at a depth of 6-10 feet and will benefit from this groundwater.

[¶77]. Although at times offering contradictory testimony, Bruce Beechie, PSC staff member, conceded that alfalfa can root to depths far greater than 6-11 feet.

[¶78]. Mr. Voigt testified that his lowland alfalfa fields exhibit enhanced productivity due to subirrigation. The fields exhibit enhanced production in wet and dry years. In extreme dry years, including the driest year on record (2017), he was still able to get a second cutting of alfalfa from his fields. Mr. Voigt attributes this to subirrigation.

[¶79]. Regarding flood irrigation, Mr. Voigt testified that his alfalfa fields have been submersed in water from Coyote Creek, and that these fields “used to flood every spring” and that this flooding “enhanced alfalfa production.” Mr. Voigt provided photographs of this flooding. He also testified that the former owner of the Voigts’ ranch, Ralph Murray, used a pump and irrigation equipment to irrigate the Voigts’ south alfalfa field using water from Coyote Creek. Mr. Voigt provided photographs showing that this irrigation equipment, although no longer in use, still is present on the Voigts’ alfalfa fields to this day. This testimony was undisputed.

[¶80]. Mr. Voigt testified that the Voigts’ alfalfa fields provide in excess of 30% of the Voigts total forage production and that they regularly get second and third cuttings from these fields, and that the fields are therefore critical to their ranching operation.

### **C. Proposed Conclusions of Law.**

[¶81]. The Commission retains ongoing jurisdiction to modify its prior findings based upon new evidence presented to the Commission. This jurisdiction is inherent in the broad authority conferred on the PSC in N.D.C.C. § 38-14.1-03. New circumstances and new evidence, such as the new circumstances presented in CCMC’s Revision No. 9 application (which is a significant

revision), and the new evidence obtained at significant cost to the Voigts, provide additional grounds to modify the Commission's prior findings. This is stated in the Commission's rules, such as at N.D.A.C. § 69-05.2-10-03(6), which states that in a mine revision application a mine applicant must "affirmatively demonstrate ... [t]he applicant has obtained a negative determination [or] the permit area or adjacent area contains an alluvial valley floor." *See also* N.D.C.C. § 38-14.1-21(3)(e).

[¶82]. In light of the new evidence provided by the Voigts regarding the depth to groundwater on the Voigts' fields, the depth of their alfalfa, and the history of natural flood irrigation on these fields, the Voigts have demonstrated that their two alfalfa fields are alluvial valley floors.

[¶83]. **Proposed Order.**

[¶84]. CCMC shall install two groundwater monitors, one in each of the Voigts' alfalfa fields, to monitor the depth to groundwater and to collect additional data. The location of these groundwater monitors shall be chosen in consultation with CCMC, the Voigts, and the PSC.

[¶85]. By September 30, 2020, CCMC shall complete a new alluvial valley floor determination of the Voigts' two alfalfa fields and submit the alluvial valley floor determination for these fields to the Commission so the Commission can determine if an update to the AVF status of the Voigts' fields is required. If the Voigts wish to provide their own alluvial valley floor report, they may file such a report by September 30, 2020.

Dated this 10<sup>th</sup> day of January, 2020.

**BRAATEN LAW FIRM**

/s/ Derrick Braaten

Derrick Braaten (#06394)

JJ England (#08135)

Carey Goetz (#05958)

Attorneys for Casey and Julie Voigt

109 N. 4th St., Ste. 100

Bismarck, ND 58501

Phone: 701-221-2911

Fax: 701-221-5842

derrick@braatenlawfirm.com

jj@braatenlawfirm.com

carey@braatenlawfirm.com

**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**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the following documents:

- 1. Casey and Julie Voigts' Closing Arguments and Proposed Findings of Fact, Conclusions of Law, and Order**

was on January 10, 2020 filed with the Public Service Commission by e-mail to [ndpsc@nd.gov](mailto:ndpsc@nd.gov) and via USPS Mail, and that the same was served by e-mail and by USPS First Class Mail upon the following:

The Honorable Hope Hogan  
Administrative Law Judge  
Office of Administrative Hearings  
2911 N 14<sup>th</sup> St., #303  
Bismarck, ND 58503  
[hlhogan@nd.gov](mailto:hlhogan@nd.gov)

Mr. Steve Kahl  
Executive Director  
North Dakota Public Service  
Commission  
600 East Boulevard, Dept. 408  
Bismarck, ND 58503-0659

John Schuh  
Special Assistant Attorney General  
North Dakota Public Service Commission  
600 E Boulevard Dept. 408  
Bismarck, ND 58505  
[jschuh@nd.gov](mailto:jschuh@nd.gov)

Wade Mann  
Crowley Fleck, PLLP  
PO Box 2798  
Bismarck, ND 58502-2798  
[wmann@crowleyfleck.com](mailto:wmann@crowleyfleck.com)

Dated this 10<sup>th</sup> day of January, 2020.

**BRAATEN LAW FIRM**

/s/ JJ England  
JJ England ND Bar #05958  
*Attorneys for Casey and Julie Voigt*  
109 North 4<sup>th</sup> Street, Suite 100  
Bismarck, ND 58501  
Phone: 701-221-2911  
[jj@braatenlawfirm.com](mailto:jj@braatenlawfirm.com)