

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Coyote Creek Mining Company, L.L.C.
Renewal 1, Permit NACC-1302
Revision 9, Permit NACC-1302
Application

Case No. RC-19-189
Case No. RC-19-190

February 7, 2020

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES

Commissioners Brian Kroshus, Julie Fedorchak, and Randy Christmann.

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

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

John Schuh, General Counsel, Public Service Commission, State Capitol, Bismarck, North Dakota 58505, advisory counsel to the Public Service Commission.

Hope Hogan, Administrative Law Judge, Office of Administrative Hearings, 2911 N 14th Street – Suite 303, Bismarck, North Dakota 58503, as Procedural Hearing Officer.

PRELIMINARY STATEMENT

On May 20, 2019, Coyote Creek Mining Company, L.L.C. (“CCMC”) filed an application for Revision No. 9 (Revision 9) to Surface Coal Mining Permit No. NACC-1302. Revision 9 identifies the next five-year coal removal areas and updates the legal information, operation plans, and reclamation plans in Permit NACC-1302 for the first renewal of the permit. Revision 9 is assigned Case No. RC-19-190.

On May 22, 2019, CCMC filed an application for Renewal No. 1 (“Renewal 1”) to Surface Coal Mining Permit No. NACC-1302. Renewal 1 will allow CCMC to continue to engage in surface coal mining and reclamation operations within Permit NACC-1302 until October 21, 2024. Renewal 1 is assigned Case No. RC-19-189.

On July 10, 2019, the Public Service Commission (“Commission”) issued a Notice of Receipt of Renewal and Revision Applications for Renewal 1 and Revision 9 to Permit NACC-1302 informing the public that written comments, objections, or requests for an informal conference must be filed with the Commission by August 26, 2019.

On August 26, 2019, JJ England of Bismarck, counsel for Casey and Julie Voigt (“Voigts”) filed comments, objections, and a request for an informal conference. The Voigts expressed concerns about access, dust, alluvial valley floors (“AVF”), omission of cultural resource sites, sediment build-up in Coyote Creek, CCMC’s ability to reclaim the mine, and Coyote Partner’s control over CCMC. On October 4, 2019, the Voigts clarified the issues they intended to discuss at the Conference. They indicated that they did not intend to discuss the omission of cultural resource sites and Coyote Partner’s control over CCMC. The Voigts further clarified that they intended to discuss the remaining five issues identified in their August 26, 2019 request for an informal conference.

The informal conference was held as scheduled on October 8, 2019. The Commission adopted the Hearing Officer’s Recommended Findings and Ruling and Recommended Order.

On October 21, 2019, the Commission conditionally approved Revision 9 and approved Renewal 1 to Permit NACC-1302. Special Condition No. 1 attached to Revision 9 requires “Coyote Creek Mining Company shall maintain detailed records of all measures and methods used on a daily basis to effectively control wind erosion and attendant air pollution. These records shall be maintained at the mine office and be available during mine inspections.”

The Commission’s conditional approval of Revision 9 was subject to the right of any person with an interest who is or may be adversely affected to request a formal hearing on the decision.

On November 20, 2019, the Commission received a request for a Formal Hearing in the matter from the Voigts. The Voigts raised the same issues as in the informal conference and included reclamation, dust control, sediment deposition, the presence of an AVF, and road closures/access.

At the request of the Commission, on December 13, 2019, the Voigts and CCMC provided updated filings clarifying the issues and requested relief.

On November 21, 2019, the Commission issued a Notice of Formal Hearing scheduling the hearing for December 16, 2019. The hearing notice was served on the parties and it was also published in the Beulah Beacon on November 28, 2019 and December 5, 2019 and Bismarck Tribune on November 27, 2019 and December 4, 2019.

The Formal Hearing began on December 16, 2019 and continued on December 17, 2019. The proceeding remained open until January 10, 2020 to allow the Voigts and CCMC to submit written closing arguments and recommended orders.

Having allowed all interested persons an opportunity to be heard and having heard, reviewed, and considered the record, the Commission makes the following:

Findings of Fact

1. On October 22, 2014, the Commission issued Surface Coal Mining Permit No. NACC-1302 to allow CCMC to conduct surface mining and reclamation operations at the Coyote Creek Mine beginning on October 22, 2014 until October 21, 2019.
2. On May 20, 2019, CCMC filed an application for Revision 9 identifying the next five-year coal removal area and updating the mining and reclamation plans prior to the permit renewal. CCMC did not seek to expand the permit area.
3. On May 22, 2019, CCMC filed an application for Renewal 1 to Surface Coal Mining Permit No. NACC-1302. Renewal 1 will allow CCMC to continue to engage in surface coal mining and reclamation operations within Permit NACC-1302 until October 21, 2024.
4. On October 21, 2019, the Commission conditionally approved Revision 9 and issued its Renewal of Permit to Engage in Surface Coal Mining and Reclamation Operations allowing CCMC to continue to operate under approved mining and reclamation plans for the permit until October 21, 2024.
5. On November 20, 2019, the Voigts requested a Formal Hearing. On December 13, 2019, the Voigts and CCMC filed supplemental information clarifying the five areas of concern and the requested action from the Commission. The Voigts' areas of concern were identified as: Access, Dust, AVF, Sediment Build-up, and Reclamation. CCMC's concern was specific to Special Condition No. 1, attached to the approval of Revision 9.

Access

6. The Voigts expressed concern regarding the closure and reconstruction of 18th Street SW, also referred to as County Road 25 on some maps, ("the Road"), which provides access from their residence to County Road 13.
7. The Voigts submitted that the approved mine plan in Revision 9 will limit their ability to access portions of their ranch not affected by mining activities and that it violates the terms of CCMC's prior agreement with the Voigts and Mercer County by not planning to restore a pre-mine road located in the S½ of Section 36 in accordance with an agreement between CCMC and Mercer County.

8. The Voigts requested that the Commission require CCMC to comply with N.D. Admin. Code § 69-05.2-09-07 by describing, with appropriate maps and cross sections, the measures the permit applicant will take to ensure that the interests of landowners and the public are protected.

9. During the hearing, Donn Steffen, Mining Engineer for CCMC, described how phased access will be provided to affected landowners including access trails and the plans to relocate the described road through 2024. He also expressed confidence that CCMC will be able to construct the permanent road by 2024. He submitted that this plan has been approved by Mercer County and that it is included in Permit NACC-1302 as part of Revision 9.

10. The May 18, 2016 Mercer County Agreement (“Road Agreement”) and County Resolution to temporarily close the Road was added to Section 1.2.8 of Permit NACC-1302 with Revision 9. Section 3.1.1.6, Landowner and Public Access, of the permit provides that proposed road closures and setback waivers will be made only with Mercer County approval following public notice and public hearing. Revision 9 clarifies that “limited access through this area will be maintained during mining and the road will be replaced after reclamation according to the 2016 agreement.”

11. The Road Agreement temporarily closes a portion of the Road through the mine, provides affected landowners phased temporary access through areas affected by mining, and includes plans for a permanent road on the east-west quarter line between the N½ and S½ of Section 36 and the north-south section line between the SE¼ of Section 36 and SW¼ of Section 31 as depicted on Exhibit A in the Road Agreement. The Road Agreement includes a map showing how phased temporary access roads are to be constructed to ensure that the interest of the landowners and the public are protected.

12. The planned location of the permanent road is not depicted on the Post Mining Topography and Land Use Map in Permit NACC-1302. However, it is depicted in the Road Agreement included in Permit NACC-1302. The application describes, with appropriate maps and cross sections, measures to ensure the interests of the landowners and public are protected, but a special condition, requiring CCMC to depict the Road on the Post Mining Topography and Land Use Map is reasonable. Cross sections are part of the actual design and are not necessary at this time.

13. The Voigts argue that not having an easement from the State of North Dakota Department of Trust Lands (“DTL”) creates an uncertainty for reconstruction of the Road.

14. CCMC testified that it is bound by the Road Agreement and that, although the easements have not been acquired to reconstruct the Road, CCMC shall meet with the county annually to review the existing status of the access trails and reconstruction of the Road.

15. The Road Agreement provides that Mercer County is responsible for securing right-of-way easements for the reconstructed road and that the road should be reconstructed by 2024.

16. CCMC provided a letter from the DTL to Mercer County clarifying that it is willing to grant an easement to Mercer County to allow for the reconstruction of a replacement road for 18th Street SW “on the current alignment or preferably along the quarter line of the section.” CCMC Exhibit 4.

17. CCMC argued that the Road issue is under the jurisdiction of Mercer County. The Mercer County Resolution found that the Road is not required during mining operations due to readily accessible routes, does not deprive adjacent landowners’ access to their property, that a public benefit exists in temporary closure, and that the interests of affected landowners will be protected.

18. The Reclamation Division testified that the Commission previously concluded, “[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.” Case No. RC-13-850, Findings of Fact Conclusions of Law and Order, Docket No. 125.

19. Finding No. 7 to Permit NACC-1302 and Special Condition No. 2 to the original permit requires CCMC to provide the Commission with copies of the road authority’s approval documents within 30 days of the approval date and written findings made by the road authority will remain in effect. N.D. Admin. Code § 69-05.2-04-01.3 requires the Commission to make a written finding on protecting the interests of the public and affected landowners if this is not included in the road authority’s approval process. Mercer County’s road closure resolutions for the Coyote Creek Mine fulfill the requirements of N.D. Admin. Code § 69-05.2-04-01.3 and the resolutions include findings that the interest of the public and affected landowners will be protected.

20. The closure of county roads in the vicinity of the Coyote Creek Mine is under the jurisdiction of the Mercer County Commission. The changes provided for in Revision 9 are consistent with the Commission’s jurisdiction.

21. During the hearing, the Voigts and CCMC also briefly discussed issues relating to CCMC’s interference with ranch access. Section 3.1.1.6, Landowner and Public Access, in the permit states that farmer/rancher access will be made available for all undisturbed fields and pastures during mining. Permit NACC-1302 contains the Voigts’ Surface and Coal Lease Agreement in Section 1.5.1. The lease addresses CCMC’s right to mine coal on the Voigts’ property, compensation for damages to crops and livestock, and repair and replacement of roadways. In addition, CCMC also entered into a Memorandum of Access Agreement with the Voigts addressing access to their operations. CCMC Exhibit No. 5.

22. The Reclamation Division responded to a recent Voigt complaint regarding access to their property on December 11, 2019, explaining that it is a contractual issue between

the landowner and CCMC and is outside the jurisdiction of the Reclamation Division. CCMC Exhibit 1.

23. Administration of the lease agreement between the Voigts and CCMC is not within the jurisdiction of the Commission.

Alluvial Valley Floor

24. The Voigts assert that the alfalfa fields along Coyote Creek are subirrigated and meet the definition of an AVF. In support of their assertion, the Voigts provided what they offer as new evidence of the existence of subirrigation largely based on coring data conducted on October 4, 2019 by Lance Loken of Western Plains Consulting.

25. Based upon this assertion, the Voigts request an updated AVF determination that considers new information gathered by the Voigts and the installation of additional monitoring wells within their fields to ensure the alfalfa fields and the hydrologic balance are protected.

26. Mr. Loken conducted four soil borings for the Voigts within the north and south alfalfa fields that are located along Coyote Creek in the NE $\frac{1}{4}$ of Section 31 and SE $\frac{1}{4}$ of Section 31, respectively. Mr. Loken stated that ground water was encountered on average, about 11-13 feet below surface and that ground water at that depth coupled with capillary rise would provide a supply of ground water (subirrigation) within the rooting depth of alfalfa.

27. Mr. Loken mainly based his analysis on the soil cores and discussions with the Voigts and Voigts' counsel and without review of the 1983 OSM Alluvial Valley Floor Identification Guidelines, reclamation laws and rules regarding AVF, or review of the previous AVF reports and determinations.

28. Mr. Voigt testified that his alfalfa fields exhibited enhanced production, including a second cutting of alfalfa from his fields in extreme dry years. The Commission previously attributed the production difference to differences in soil quality and landscape position in Case No. RC-13-850. The overall higher hay production from those fields compared to his upland hayfields is due to the inherent high productivity of the Straw soils, which the National Resource Conservation Service ("NRCS") classified as not subirrigated.

29. CCMC installed ground water monitoring wells next to both alfalfa fields in August 2012 and has recorded and submitted water level and water quality data to the Reclamation Division for evaluation since that time. The Reclamation Division agreed with Mr. Loken that the water table (top of the alluvial ground water aquifer) of 11 feet below surface was an accurate representation of depth to ground water beneath the alfalfa fields. The Reclamation Division provided a data table of the water level elevations collected since August 2012.

30. CCMC testified that the Voigts have not provided anything that would change the previous AVF determinations. Mr. Steffen disputed Voigts' enhanced production during the drought year of 2017 and commented that an AVF would be demonstrated by consistent production, regardless of rainfall in a particular season. Mr. Steffen also stated that they have 80 ground water monitoring wells on the property with three located in the Coyote Creek alluvium. Mr. Steffen asserted that the Voigts information only affirms the data collected since April of 2016 that demonstrates no significant fluctuations and that mining has had no negative effect on the ground water level.

31. The Reclamation Division provided exhibits including excerpts from the OSM Guidelines that provide definitions and examples of subirrigation and an overarching statement regarding the productivity of AVF compared with surrounding areas. The Reclamation Division provided several aerial photographs of the lowland and upland alfalfa fields during the good precipitation year of 2014 and during the drought year of 2017. Photographs taken of the alfalfa fields on June 12, 2014 showed lush, green, productive hayfields that would be expected for that time of year with good to excellent precipitation. Photographs taken during the drought year on June 27, 2017 depict a distressed hay crop in both fields with wide-ranging expanses of what appeared to be barren ground. Bruce Beechie, hydrologist for the Reclamation Division, testified that if production of those fields were enhanced from subirrigation, the vegetative stand health and vigor during drought years would be consistent with years of abundant precipitation or applied surface water irrigation.

32. The Reclamation Division provided three North Dakota State University (NDSU) Extension Service publications as exhibits describing that the effective rooting depth of alfalfa ranges from 3.5 to 5 feet below the surface. The OSM Guidelines support the NDSU publication reports on pages 41 and 42 of Appendix C. *"For instance, most of the root biomass of dryland alfalfa is found within 9.8 feet of the surface, and about 80 percent of these roots are within 4 feet of the surface."*

33. The Voigts contend that capillary rise will account for water extraction nearer to surface than 11 or 13 feet. However, the core information obtained by Mr. Loken reported gravel deposits in the alluvium. Dean Moos, Director of the Reclamation Division, testified that the existence of gravel deposits in the soil profile restricts capillary rise and makes the alluvium less likely to provide a benefit to alfalfa or native vegetation.

34. The Reclamation Division provided a spreadsheet that was generated from data submitted by CCMC and entered into the Reclamation Division's ground water database showing that since mining began at CCMC in mid-April 2016 through September 24, 2019, the ground water levels in both alluvial monitoring wells have increased slightly, not decreased. Mining at CCMC has not reduced or cut off the flow of ground water to Coyote Creek alluvium.

35. The Voigts provided several photographs of Coyote Creek as it was flooding in the spring of 2009. Occasional spring flooding may make a very small contribution to topsoil or subsoil moisture for a limited time; however, spring flooding in North Dakota generally occurs during March when ground conditions are still frozen, thus providing limited or minimal benefit to vegetative growth.

36. The Reclamation Division testified that the local NRCS office was contacted during preparation of the 2009 AVF study report for Dakota Westmoreland Mine. NRCS expressed the absence of flood irrigation south of the Knife River in Mercer County, which includes the Voigts' alfalfa fields and Coyote Creek Mine. Mr. Beechie stated that the 2009 AVF study report also evaluated surface water quality and quantity of Coyote Creek and concluded that flood irrigation on Coyote Creek is not a viable option. See Case No. PU-13-850, Findings of Fact, Conclusions of Law and Order, Docket No. 125. ("[E]xcept for snowmelt and extreme precipitation events, flow and surface water availability in the channel is very limited. The DWC study also indicates that natural flooding is rare along Coyote Creek and is only likely to occur during extreme runoff events.")

37. The Voigts provided several photographs of irrigation pipe and pipe components near or next to the south alfalfa field, ostensibly to represent that surface water irrigation has been attempted in the past by a previous landowner.

38. The pipes may have withdrawn water from Coyote Creek or the alluvial aquifer. The neighboring irrigator to the north of the Voigts along the Knife River withdraws irrigated water from the Knife River alluvial aquifer. If the irrigation water was withdrawn from the alluvial aquifer in the south alfalfa field, that usage is a non-candidate for AVF consideration. Mr. Beechie assumed that if surface water irrigation from Coyote Creek had been attempted, it was likely unsuccessful and the practice was abandoned. Mr. Beechie also testified to the fact that attempts at surface water irrigation would provide an indication of the lack of subirrigation.

39. Failed or abandoned irrigation systems are generally rejected as consideration in AVF identification.

40. The Reclamation Division explained that requirements for an irrigation water use permit from the State Water Commission date back to the late 1950's or early 1960's and there have been no water use permits issued for Sections 30 or 31 along Coyote Creek.

41. Mr. Loken testified that he observed capillary rise in the soil profile from the ground water surface to a depth within 69 inches of the soil surface in one soil boring and ranged from 8 feet to 9 feet in one of the other soil borings; however, there was no capillary rise in one of the soil borings conducted by Mr. Loken. He felt that the capillary rise would provide additional moisture for use by alfalfa. However, when questioned, Mr. Loken stated that he had no knowledge if the capillary rise would be available for plant use.

42. Mr. Moos, testified that soil moisture provided by capillary rise may not all be available for plant utilization as a certain portion is bound by the soil particles and not available for plant uptake. He also pointed out that any textural discontinuity in the soil profile will limit capillary rise. Mr. Moos also stated that the fact that there were very few plant roots within the zone of the capillary rise and ground water saturation in the close-up photos of the soil borings provided by Mr. Loken indicates to Mr. Moos that the plants are not extracting water from those depths.

43. The Reclamation Division testified that the evidence provided by the Voigts does not demonstrate a basis to change the previous negative AVF determination.

44. The Voigts expressed that the goal was not to rehash the previous AVF determination, but to add to it by adding specific knowledge of soils, soil borings, and capillary rise in the alfalfa fields. A review of the previous record shows extensive discussion of capillary rise and soils.

45. In the original permit application, Case No. RC-13-850, there were two separate AVF reports examined, and over a period of three days of testimony, the Commission heard from three expert witnesses on the AVF issue, including testimony from the Voigts' expert witness. The Commission concluded that there was no AVF. This was appealed to the district court and the North Dakota Supreme Court, both of which affirmed the Commission's conclusion. *Voigt v. N.D. Pub. Ser. Comm. and Coyote Creek Mining Co., L.L.C.*, 2017 ND 76. This issue has been conclusively decided and administrative res judicata prevents this from being re-litigated through the renewal and revision process. However, even without the matter being subject to administrative res judicata, the Voigts did not demonstrate an adequate basis to depart from the previous Commission determination or the necessity for an additional evaluation.

46. The Voigts have not demonstrated an adequate basis to require CCMC to install additional monitoring wells.

CCMC's Ability to Reclaim the Mine

47. The Voigts assert that CCMC's initial efforts to reclaim land raises serious concerns about CCMC's ability to reclaim the mine. Specifically, they were concerned about weeds on tracts reclaimed in 2018 and 2019.

48. The Voigts conducted an inspection on October 1, 2019 with Commission Staff and representatives of CCMC. Mr. Anderson, testifying as an expert witness for the Voigts, indicated that the reclamation plan in Permit NACC-1302 is adequate but that based on observations made during a joint inspection on October 1, 2019, it was apparent that the plan was not being followed or properly implemented. He expressed concerns about the unevenness of the cover crop stand on Grade Approval/Field 5 and the heavy annual weed cover on Grade Approval/Field 4.

49. Jessica Unruh, Environmental Manager for CCMC, testified that Grade Approval/Field 4 was seeded to an oats cover crop in 2018 but not in 2019. She indicated that the weeds growing on the tract were primarily annual weeds and they were mowed early in the 2019 growing season. She also testified that her primary concern was erosion due to Coyote Creek Mine's highly erodible soil and that annual weeds are not detrimental in early stages of native grassland reclamation.

50. The Reclamation Division Staff testified that the permit complies with the reclamation rules and laws and that Revision 9 provides flexibility to delay native grassland seedings. Reclamation Division Staff also testified that a variance from the requirement to seed within three years after coal removal is commonly granted at all mines, especially when first opening a new pit area. The Reclamation Division Staff testified that they did not have concerns with the ability of the mine to achieve reclamation performance standards at this time.

51. Based upon the concerns of the widespread annual weeds on Grade Approval/Field 4, the Voigts requested a special condition to use certified weed-free mulch, straw and seed. Mr. Anderson did not provide a strong basis for the use of certified weed-free mulch, straw, and seed and acknowledged that certified weed-free mulch is not likely widely available.

52. Ms. Unruh testified that CCMC sources its mulch from a local producer and is comfortable with the mulch, straw and seed obtained by CCMC.

53. Guy Welch, Environmental Scientist for the Reclamation Division, did not recommend the use of certified weed-free mulch, straw, and seed and believed requiring certified weed-free mulch might be too prescriptive.

54. Mr. Welch and Ms. Unruh testified that certified weed-free hay only means that the hay is free of state listed noxious weeds and other invasive species, but not free of annual weeds.

55. The Voigts did not demonstrate adequate basis for an additional special condition or permit revision requiring certified weed-free mulch, straw, and seed.

56. The Voigts also requested a special condition to Permit NACC-1302 to allow them to annually inspect reclamation progress during the summer months.

57. CCMC testified that the Voigts' lease contains inspection rights and allows an inspection upon written notice to CCMC.

58. Mr. Welch and Mr. Moos both testified that there is a provision in the administrative rules to request an inspection and that the Reclamation Division would accommodate a request by the Voigts to inspect the reclamation of their land, absent a good reason to deny it.

59. The Voigts' request for a special condition to provide an opportunity for annual inspection is unnecessary considering the opportunity for inspection available in the lease with CCMC. In the event that CCMC fails to provide the Voigts an opportunity to inspect, there are procedures set forth in statute and rule for the Reclamation Division to accommodate a request for inspection.

60. Although the Voigts did not request this relief prior to the hearing, and it was not extensively discussed, Mr. Anderson commented that he recommended to mow all weed growth prior to weeds going to seed. CCMC stated that it is a best management practice when practicable, but conditions do not always allow for perfect management.

61. CCMC's current reclamation plan, if implemented, is sufficient. Given the nature of the performance standards and the reclamation and revegetation process, no additional special conditions or permit requirements relating to reclamation are necessary at this time.

Sediment

62. The Voigts asserted that CCMC has caused sediment build-up in Coyote Creek adjacent to a mine access road. Shane Bofto, testifying as an expert witness for the Voigts, stated that he believed the sediment build-up was caused by sediment pond P31-01 discharges. Mr. Bofto did not conduct a field inspection but based his opinion on photographs provided by the Voigts.

63. Mr. Steffen provided evidence disputing the source of the sediment build-up, testified that only clean water is discharged from the mine and that he believes the sediment observed in Coyote Creek is from an upstream diversion in Coyote Creek unrelated to mining. CCMC provided 2015 correspondence from Greg Thompson, a professional engineer with Houston Engineering, about potential head cutting caused by the upstream diversion which was resulting in erosion and sediment build-up. Mr. Steffen provided that regardless of the source, CCMC would remove the sediment build-up in the stream if it adversely affects the hydraulics of the box culverts.

64. While the Reclamation Division did not have clear evidence of the origin of the sediment, Mr. Welch testified that erosion may have been occurring under riprap at discharge point from an unrelated pond in Section 19. The Reclamation Division previously recommended corrective action to prevent erosion and CCMC responded appropriately by placing concrete matting underlain with erosion control fabric. Mr. Welch testified that CCMC's actions addressed his concerns.

65. Voigts requested a special condition be added to Permit NACC-1302 to include plans for CCMC to inspect the creek monthly and provide photographic and video evidence to be submitted to the Commission during the months that it is not frozen.

66. Mr. Steffen testified that the Coyote Creek box culvert crossings are inspected more than any other piece of land on CCMC's property, making the special condition unnecessary.

67. Mr. Welch and Mr. Moos provided that the Reclamation Division routinely inspects the mine, including the box culvert crossings, 2 or 3 times a month, and both believe that requiring CCMC to inspect the box culvert crossings on a monthly basis is unnecessary.

68. The Voigts have not demonstrated an adequate basis to require the requested special condition relating to the sediment issue.

Dust

69. The Voigts presented photographs and a video of dust near their ranch, discussed the impacts that it has on their operations, and requested a condition to the permit requiring dust monitors at key locations within the active mining area.

70. Mr. Welch testified that the Reclamation Division frequently inspects CCMC and that he personally was at the mine half a dozen times in the previous year. Mr. Welch stated that he considered the photographs of the dust as atypical from his experiences at the mine. Mr. Moos testified that the Reclamation Division and the Department of Environmental Quality ("DEQ") have not received a formal dust complaint from the Voigts.

71. Mr. Bofto stated that he read the dust control plan in Revision 9 and that he generally agrees with the methods that CCMC is proposing to mitigate dust; however, he indicated that there is no implementation plan or plans for evaluating the effectiveness of the various dust control methods. He stated that implementation of best management practices in the permit are key to effectively mitigating dust. He recommended that air monitors be used to evaluate the effectiveness of the fugitive dust control plan.

72. Mr. Bofto testified that he is aware of two coal mines that utilize air quality monitors, one in British Columbia and the Spring Creek Surface Coal Mine in Montana. When questioned if the air quality monitors at the Spring Creek Mine were required as part of the surface mine permit or the air quality permit, Mr. Bofto was unable or unwilling to provide the answer.

73. Mr. Moos testified that the Casper Field Office of the Office of Surface Mining indicated that air quality monitors at the Spring Creek Mine were required by the Environmental Protection Agency and the Waste and Air Quality Bureaus of the Montana DEQ, therefore, the air quality monitors were part of the air quality permit and not the surface coal mining permit.

74. Mr. Moos also testified that in his discussion with the DEQ, the DEQ was not aware of any air monitors being utilized by any coal mine in North Dakota and that DEQ indicated

that visual monitoring is as effective, or probably even more effective, than the actual monitors.

75. Mr. Steffen testified that CCMC uses the best management practices for controlling dust recommended by Mr. Bofito including capping, calcium chloride, and watering. He provided the measures that CCMC takes to stabilize soil stockpiles including mulching and planting to a vegetative cover. Mr. Steffen also testified that the photographs provided were isolated incidents and that CCMC has taken steps to minimize the chance of recurrence. Some examples Mr. Steffen provided are training staff on methods used to control dust, to be proactive and plan ahead to recognize times, areas, and tasks that have the potential to create dust, and refraining from hauling to and from stockpiles on dry, windy days. Mr. Steffen also testified that they have ceased operations at times due to the occurrence of dust.

76. CCMC's Air Pollution Control Permit to Construct and Air Pollution Permit to Operate specify that the permittee shall control fugitive dust and that any alteration, modification, or change to the permits must be reviewed and approved by the DEQ.

77. Mr. Moos stated that dust attendant to erosion is part of the Commission's responsibility, but Mr. Moos clarified that the Commission does not have the authority to set standards or make alterations within the air quality permit and that fugitive dust control plan falls under the jurisdiction of the DEQ. Mr. Moos clarified that the Surface Mining Control and Reclamation Act ("SMCRA") and North Dakota's Surface Coal Mining Laws and Regulations requires mining companies to specify measures to comply with the air pollution control requirements of the DEQ and any other measures to effectively control wind erosion and attendant air pollution. N.D. Admin. Code § 69-05.2-09-05. N.D.C.C. § 38-14.1-24(4) requires mining companies to stabilize and protect all surface areas, including spoil piles affected by surface coal mining and reclamation operations, and to effectively control erosion and attendant air and water pollution.

78. While the Voigts agree that the DEQ has jurisdiction, they assert that it is concurrent jurisdiction. The Voigts contend that the erosion causing the dust is subject to N.D. Admin. Code § 69-05.2-09-05 as "any other measures necessary to effectively control wind erosion and attendant air pollution."

79. Mr. Moos stated that he and staff had recently met with the DEQ and discussed jurisdiction and enforcement of air quality and fugitive dust emissions to affirm jurisdiction and the understanding of cooperative enforcement, with the DEQ having primary expertise.

80. The DEQ has exclusive jurisdiction over permitting of air quality in North Dakota pursuant to the Clean Air Act. The Commission does not have authority 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 [Department of Environmental Quality] and any other measures necessary to effectively control wind erosion and attendant air pollution." See Commission Order, June 17, 2015, Case No. RC-14-846.

81. N.D. Admin. Code § 69-05.2-09-05 is a permit application requirement and not a mining and reclamation performance standard. It only requires the mining company to specify the measures it will use to comply with the air pollution control requirements of the DEQ and any other measures necessary to effectively control wind erosion and attendant air pollution.

82. Once a permit is granted, the Commission has statutory standards that must be met. N.D.C.C. § 38-14.1-24 establishes environmental protection performance standards. This section provides in part that "[g]eneral performance standards are applicable to all surface coal mining and reclamation operations and must require the permittee at a minimum 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." The Commission has adopted a rule requiring that "[t]he permittee shall 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. Admin. Code § 69-05.2-13-07.

83. CCMC obtained an Air Pollution Control Permit to Operate (Permit No. 016017) to control fugitive dust as required by state regulation. Measures used to control fugitive dust from facility operations are described in Section 3.1.1.2, Mining Methods Narrative, in Permit NACC-1302. The fugitive dust narrative in Section 3.1.1.2 states that measures will be taken where necessary and feasible to prevent and reduce wind erosion in areas susceptible to such erosion and that all measures taken for dust abatement will be done in accordance with current, prudent engineering practices as required by N.D. Admin. Code § 69-05.2-24-01(2)(a). The soils handling narrative and mining methods narrative in Sections 3.1.1.1 and 3.1.1.2 of Permit NACC-1302 states that topsoil and subsoil stockpiles will be selectively placed on stable areas within the permit in a manner that minimizes any loss or deterioration of such material and that stockpiles will be seeded to control erosion, and/or mulched as necessary. The Air Pollution Control Permit is incorporated by reference into NACC-1302 and satisfies the Commission's permitting requirements.

84. The evidence presented and the remedy requested by the Voigts are primarily matters related to fugitive dust and air quality, and therefore subject to jurisdiction of the DEQ and Permit No. 016017. Additional dust abatement and monitoring measures are subject to the DEQ's permitting requirements.

85. CCMC argues that Special Condition No. 1 to Revision 9 is non-jurisdictional to the Commission since it requires CCMC to maintain records of all measures and methods used on a daily basis to effectively control wind erosion and attendant air pollution. CCMC requested the removal of Special Condition No. 1.

86. Mr. Bofto testified that in addition to their request for air quality monitors, Special Condition No. 1 is beneficial for evaluating implementation of a dust control plan.

87. Mr. Moos testified that Special Condition No. 1 was attached to Revision 9 and requires CCMC to keep detailed records of all the measures and methods used on a daily basis to effectively control wind erosion and attendant air pollution. He indicated the reason the special condition was attached to the revision approval was to have some sort of documentation in the event that a complaint is received.

88. N.D.C.C. § 38-14.1-03(9) provides that the Commission may attach conditions to assist in carrying out administration of a permit. CCMC's Air Pollution Control Permit to Operate addresses air quality and dust abatement and monitoring measures and Special Condition No. 1 possibly infringes upon the jurisdiction of the DEQ. To the extent that additional air quality measures, monitoring, or documentation of implementation is necessary, it is more appropriately addressed by the DEQ's permitting process. It is unnecessary to require CCMC to document the implementation of the fugitive dust control measures.

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

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over CCMC's planned mining and reclamation operations in North Dakota, including Permit No. NACC-1302, Renewal 1 and Revision 9 thereto.
2. That CCMC's Revision 9 application to Surface Coal Mining Permit NACC-1302 meets all permit revision standards under N.D.C.C. ch. 38-14.1 and N.D. Admin. Code, art. 69-05.2.
3. That CCMC's Renewal 1 application to Surface Coal Mining Permit NACC-1302 meets all permit renewal standards under N.D.C.C. ch. 38-14.1 and N.D. Admin. Code, art. 69-05.2 and carries "with it the right of successive renewal."
4. Pursuant to N.D.C.C. § 38-14.1-22(2), the Voigts have the burden to demonstrate that Permit No. NACC-1302 should not be renewed.
5. The Road identified by the Voigts under their access concerns, 18th Street SW (County Road 25), is subject to jurisdiction of Mercer County, North Dakota.

6. CCMC's application complies with N.D. Admin. Code § 69-05.2-09-07 by describing, with appropriate maps and cross sections, the measures the permit applicant will take to ensure that the interests of landowners and the public are protected.
7. The Commission does not have jurisdiction over the Voigt/CCMC coal or surface leasing terms, conditions, practices, or private agreements and negotiations.
8. The AVF issue has been conclusively decided and administrative res judicata prevents this from being re-litigated through the renewal and revision process.
9. The Voigts did not demonstrate an adequate basis to depart from the previous Commission determination or the necessity of an updated AVF determination.
10. That jurisdiction and authority to regulate air quality in North Dakota is within the purview of the DEQ pursuant to North Dakota Century Code Chapter 23.1-06. The requested relief and the allegations are primarily issues related to air quality and CCMC's Fugitive Dust Control Plan, and are therefore subject to the jurisdiction of the DEQ
11. That CCMC has complied with North Dakota Administrative Code § 69-05.2-09-05 by obtaining the Air Pollution Control Permit to Construct No. PTC15001 and Air Pollution Control Permit to Operate No. PTO016017, from the DEQ.
12. The necessity of Special Condition 1 to Revision 9 is more appropriately addressed by the DEQ's Air Pollution Control Permit to Operate and through the DEQ's permitting process. Special Condition 1 should be revoked.
13. CCMC has complied with North Dakota's mining law and mining regulations in its submittal of Renewal 1 and Revision 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, special conditions, or revisions to the permit with respect to the comments and issues raised by the Voigts. However, it is reasonable to add a new Special Condition No. 1 to Revision 9 requiring that CCMC depict the planned permanent road on the Post Mining Topography and Land Use Map in Permit NACC-1302 with the next revision.

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

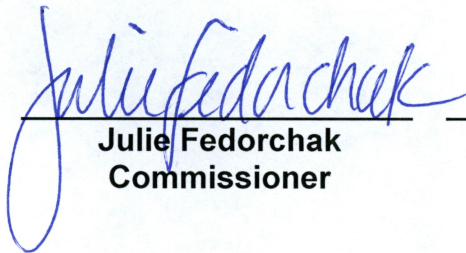
ORDER

The Commission orders:

1. The Commission's October 21, 2019 conditional approval of Revision 9 to Permit NACC-1302 is AFFIRMED;

2. The Commission's October 21, 2019 approval of Renewal 1 to Permit NACC-1302 is AFFIRMED;
3. The previously ordered Special Condition 1 to Revision 9 requiring the maintenance of detailed records of all measures and methods used on a daily basis to effectively control wind erosion and attendant air pollution, is revoked.
4. A new Special Condition 1 is added to Revision 9. Special Condition No. 1 requires that Coyote Creek Mining Company, L.L.C. depict the proposed permanent road (18th Street SW) on the Post Mining Topography and Land Use Map in Permit NACC-1302 with next permit revision.

PUBLIC SERVICE COMMISSION



Julie Fedorchak
Commissioner



Brian Kroshus
Chairman



Randy Christmann
Commissioner