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Case Number: 08-2023-CV-01338
Case Style: Casey Voigt, et al. vs. North Dakota
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Case Number	08-2023-CV-01338
Case Style	Casey Voigt, et al. vs. North Dakota Public Service Commission, et al.
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NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Coyote Creek Mining Company, L.L.C.
Revision No. 12, Permit NACC-1302
Application

Case No. RC-22-233

OAH No. 20220259

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

Preliminary Statement

On March 17, 2022, Coyote Creek Mining Company, LLC (“CCMC”) filed an application with the Public Service Commission (“PSC”) to revise surface mining permit NACC-1302. PSC Docket RC-22-233 (hereafter “Revision Application”). This is the twelfth revision to this permit and is referred to as Revision 12. CCMC’s Revision Application proposes to modify Variances 1-7 from N.D.C.C. § 38-14.1-24(14)’s three-year default reclamation requirement indefinitely, incorporates projected respread depths pursuant to N.D.A.C. § 69-05.2-15-04 applicable to pending grade approval requests being approved through this Revision 12.

On July 6, 2022, the PSC issued a Notice of Receipt of Revision Application and informing the public that written comments, objections, or requests for an informal conference must be filed with the Commission by August 29, 2022.

On August 29, 2022, Casey and Julie Voigt filed comments on the Revision Application, and requested an informal conference before the PSC. An informal conference was held on October 12, 2022.

The Voigts raised several concerns at the informal conference including loss of access to the Voigts’ ranch, ongoing issues with excessive dust in the air and covering the Voigts’ property,

the irrigability of fields along Coyote Creek, sediment build-up in Coyote Creek, CCMC's ability to reclaim the mined lands, the unlimited extension of variances including Variance 7, and the calculation of respread depths for SPGM on the Voigt properties under their coal lease and applicable law.

Findings of Fact

1. On March 17, 2022, CCMC filed an application with the Public Service Commission ("PSC") to revise surface mining permit NACC-1302. PSC Docket RC-22-233. This is the twelfth revision to this permit and is referred to as Revision 12.
2. CCMC's Revision Application includes a fugitive dust control plan, proposes to modify Variances 1-7 from N.D.C.C. § 38-14.1-24(14)'s three-year default reclamation requirement indefinitely, and incorporates projected respread depths pursuant to N.D.A.C. § 69-05.2-15-04.
3. Casey and Julie Voigt assert that the revised mine plan continues to impede access to their ranch; that coal mine dust and wind erosion has affected their ranch and that the PSC should require more stringent dust control in the mine plan and permit and specifically within the fugitive dust control plan; that the Voigts' fields along Coyote Creek are irrigable, but the permit does not reflect this; that Coyote Creek has had sediment build-up caused by discharges from the mine's sediment ponds; that Variances 1-7 should have a time limit from the time of this Revision 12 before initial planting must be commenced; and that the respread depths for respread of suitable plant growth material following any grade approval requests contained in this Revision 12 should require forty-eight inches of suitable plant growth material to be respread on the Voigt ranch.

Dust

4. Pursuant to N.D. Admin. Code §§ 69-05.2-09-05 and 69-05.2-24-01(2)(a), the PSC requires CCMC to include a fugitive dust control plan in its mine permit. CCMC's fugitive dust control plan is located in Section 3.1.1.2 of its Revision application.
5. The PSC has discretion to determine which methods are necessary for a mine to comply with the requirements of N.D. Admin. Code §§ 69-05.2-09-05 and 69-05.2-24-01(2)(a).
6. CCMC's fugitive dust control plan in its application states that CCMC may apply dust control measures such as applications of dust suppression agents. However, the plan does not include information about when such measures will be employed. The plan does not state that CCMC will monitor for dust and implement dust control based on that monitoring.
7. The Voigts presented evidence at the informal conference that they have been impacted by dust from the mine on their ranch. Both Casey Voigt and Julie Voigt described the dust issues as ongoing and occurring from both the haul roads and the mine's pits and piles. The mine and the PSC do not contest that significant dust events have occurred at the mine and that these dust events have impacted the Voigts, their cattle, and their ranch. It is clear based on the evidence provided that CCMC's operations are capable of causing and have caused dust pollution from erosion from the surface of the mine, including its haul roads.
8. The PSC has discretion to require dust monitors to ensure that CCMC complies with the performance standards in N.D. Admin. Code §§ 69-05.2-09-05 and 69-05.2-24-01(2)(a).

Reclamation

9. At the informal conference, the Voigts and the PSC concurred that the revisions in Revision 12 purport to allow an unlimited amount of time before CCMC must comply with N.D.C.C. § 38-14.1-24(14), rather than the three-year default period specified in the statute.
10. CCMC did not present any evidence to support an indefinite and unlimited amount of time before initial planting must occur pursuant to N.D.C.C. § 38-14.1-24(14).
11. CCMC agreed it was not its intent to create an unlimited extension of time before it must complete initial planting pursuant to N.D.C.C. § 38-14.1-24(14).

Soil Respread Depths

12. The Voigts' coal lease requires at a minimum that all suitable plant growth material be restored to the property, or similar suitable plant growth material.
13. Revision 12 includes the following language at Section 2.5.4:

Where overburden depths are less than 85 feet above coal, respread depths were calculated by identifying the best sample from the worst 20% of samples at each borehole location. Where overburden depths are greater than 85 feet above coal, a different method will be utilized to calculate projected respread depths. Overburden up to 85 feet in depth is typically spoiled by the dragline using a simple side casting method. When overburden depths exceed 85 feet, a truckshovel pre-bench fleet will normally remove any overburden greater than 85 feet above coal. Prebench material is usually hauled across the active pit and placed on spoils created by the dragline. Because of this mining method, where pre-benching operations occur, the projected respread thickness will be based on the best sample from the worst 20% of samples of the overburden removed by the pre-bench fleet. This depth from the surface will be determined by subtracting 85 feet from the total depth of overburden, which would account for the overburden removed by the dragline. The 85 foot cover limit line is shown on the Projected Soil Respread Depth Map of Section 2.5.7. Holes have not been drilled on tracts with unleased Federal Coal, so these areas were assumed to require the maximum 48 inch respread depth. Since most of the land surrounding these tracts requires 48 inches, it is likely that this will be the actual depth required.

14. At the informal conference, Monty Johnson testified that it is a practice of the PSC to allow different methods for calculation of projected respread depths when a truckshovel pre-bench fleet is used, consistent with CCMC's Section 2.5.4 of its permit.

Conclusions of Law

1. The Commission has jurisdiction over CCMC's planned mining and reclamation operations in North Dakota, including Permit No. NACC-1302. The Commission's jurisdiction includes authority to control dust from CCMC's mining and reclamation operations.
2. For the Revision Application, the burden is on CCMC to show that it has met all of the elements and requirements necessary for a mine permit revision. N.D.C.C. § 38-14.1-21 ("The applicant for a permit, or a revision of a permit, has the burden of establishing that the application is in compliance with all the requirements of this chapter.").

Dust

3. Pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 USC § 1201 et. seq. ("SMCRA"), states can submit proposed state regulation programs to the federal Office of Surface Mining Reclamation and Enforcement ("OSM") for approval, which if granted, gives the states primacy to regulate surface coal mining and reclamation operations. On December 15, 1980, the North Dakota state program was approved by the OSM. To be a state approved program, the State of North Dakota had to adopt laws and regulations similar to SMCRA and OSM regulations promulgated under SMCRA. North Dakota has done so by promulgation of North Dakota Century Code Chapter 38-14.1 and the regulations set forth in North Dakota Administrative Code Article 69-05.2. The Commission enforces only state rules and laws governing its program.

4. The Commission's rule set forth in N.D. Admin. Code § 69-05.2-09-05 provides that "[t]he applicant shall specify the measures to comply with the air pollution control requirements of the State Department of Health and any other measures necessary to effectively control wind erosion and attendant air pollution." *See also National Wildlife Federation vs. Hodel*, 839 F.2d 694 (D.C. Cir. 1988) (noting that "One of the Act's performance standards aimed at environmental protection requires that all surface coal mining and reclamation operations "stabilize and protect all surface areas including spoil piles affected by the surface coal mining and reclamation operation to effectively control erosion and attendant air and water pollution." SMCRA § 515(b)(4).").
5. N.D. Admin. Code § 69-05.2-24-01(2)(a) provides that roads shall be "designed, constructed, reconstructed, used, maintained, and reclaimed so as to ... [c]ontrol or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust as well as dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices."
6. The United States Environmental Protection Agency recognizes that dust control is regulated by SMCRA and that this dust control jurisdiction is concurrent with EPA jurisdiction. *See, e.g.*, EPA Docket EPA-HQ-OAR-2008-0260, Response to Comments Received on Proposed Amendments and Supplemental Proposal Standards of Performance for Coal Preparation and Processing Plants (40 CFR 60 subpart Y) USEPA, at p. 89 September 2009 (available at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2008-0260-0150>) ("SMCRA covers fugitive dust emissions from activities conducted on

the surface of lands in connection with a surface coal mine and requires a fugitive dust plan and other requirements to control air pollution from such sources”).

7. It is reasonable to require Coyote Creek Mining Company to revise Permit NACC-1302 to include dust monitoring as part of its fugitive dust control plan.

Reclamation

8. It is necessary to impose a restriction on the delay of initial planting pursuant to N.D.C.C. § 38-14.1-24(14) for Variances 1-7. A reasonable delay will be allowed until no later than June of 2024 (but any planting on native prairie should follow best practices for mixed warm and cool season grass seed plantings).

Soil Respread Depths

9. Any projected respread depths for property owned by the Voigts should be set at forty-eight inches pursuant to N.D.A.C. § 69-05.2-15-04(a)(2) and their coal lease, and any grade approval requests that are approved through Revision 12 which result in resspreading of suitable plant growth material will have as a specific requirement that all property owned by the Voigts will have suitable plant growth material respread at a minimum thickness of forty-eight inches.

Order

1. CCMC’s Revision Application for surface mining permit NACC-1302 is granted, subject to the following conditions:
 - a. Within three months of this order, CCMC shall file a dust monitoring plan with the PSC. The plan must include plans to continuously monitor dust in the locations where CCMC is working and to provide this monitoring information to the PSC. Additionally, CCMC shall provide to the PSC annual records related to the quantity

of water, chemicals, and other materials used to suppress dust and wind erosion on the mine.

- b. A reasonable delay of initial planting pursuant to N.D.C.C. § 38-14.1-24(14) for Variances 1-7 will be allowed until no later than June of 2024 (but any planting on native prairie should follow best practices for mixed warm and cool season grass seed plantings).
- c. Any projected or actual respread depths for property owned by the Voigts should be set at forty-eight inches pursuant to N.D.A.C. § 69-05.2-15-04(a)(2) and their coal lease, and any grade approval requests that are approved through Revision 12 which result in respreading of suitable plant growth material will have as a specific requirement that all property owned by the Voigts will have suitable plant growth material respread at a minimum thickness of forty-eight inches.

Respectfully submitted this 26th day of October, 2022.

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CERTIFICATE OF SERVICE

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

- 1. Proposed Findings of Fact, Conclusions of Law, and Order Submitted by Casey and Julie Voigt; and**
- 2. Certificate of Service.**

were on October 26, 2022 filed with the Public Service Commission by e-mail to ndpsc@nd.gov and USPS First Class Mail, and that the same were served by e-mail and by USPS First Class Mail upon the following:

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Dated this 26th day of October, 2022.

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