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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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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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 File No. 20220259

RECOMMENDED FINDINGS AND RULING
AND RECOMMENDED ORDER

October 26, 2022

Appearances

Derrick Braaten and Lisa Andersen, Attorneys at Law, 109 N Fourth Street - Suite 100, Bismarck, North Dakota 58501, on behalf of Casey and Julie Voigt.

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

John M. Schuh, Special Assistant Attorney General, Public Service Commission, State Capitol, Bismarck, North Dakota 58505, on behalf of the Public Service Commission.

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

Preliminary Statement

[1] On March 17, 2022, Coyote Creek Mining Company, L.L.C. (CCMC) filed an Application for Revision of Permit to Engage in Surface Coal Mining and Reclamation Operations. The Application was designated as Revision No. 12 to Surface Coal Mining Permit NACC-1302. The Application seeks to add sediment pond designs, update the reclamation and variance map, and modify the post mine topography on 280 acres in Sections 6 and 7, T142N, R88W and Section 1, T142N, R89W; add design plans for three sediment ponds; and update the contemporaneous reclamation section of the permit. The introductory, legal, financial, compliance information, environmental, operations and reclamation sections have proposed revisions.

[2] On July 6, 2022, the Public Service Commission (Commission) issued a Notice of Receipt of Revision Application for Revision No. 12 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 29, 2022.

[3] On August 29, 2022, Casey and Julie Voigt (collectively referred to as “Voigts”), through their legal counsel Derrick Braaten, filed an Objection to Mine Plan and Request for Informal

Conference. The Voigts expressed concerns about dust, projected topsoil and subsoil respread depths, reclamation variances, and the timing of revegetation.

[4] On September 1, 2022, the Commission requested the Office of Administrative Hearings designate an administrative law judge (ALJ) to preside as hearing officer at the informal conference. ALJ Hope L. Hogan was designated to administer the informal conference, make recommended findings of fact and conclusions of law, and issue a recommended order.

[5] The parties waived the thirty-day deadline for the informal conference. N.D.C.C. § 38-14.1-19. The parties stipulated to an informal conference held on October 12, 2022, in the Public Service Commission Hearing Room, 12th Floor, State Capitol, Bismarck, North Dakota (hereinafter referred to as "Conference").

[6] On September 12, 2022, the Commission issued a Notice of Informal Conference scheduling the Conference for 9:30 a.m. CDT on October 12, 2022, in the Public Service Commission Hearing Room, 12th Floor, State Capitol, Bismarck, North Dakota. The issues listed in the notice were dust, projected topsoil and subsoil respread depths, reclamation variances, and the timing of revegetation.

[7] The Conference was held as scheduled. Casey and Julie Voigt appeared, represented by attorneys Derrick Braaten and Lisa Andersen. CCMC was represented by attorney Wade C. Mann. CCMC brought representatives Donn Steffen, Production Manager, and Jeremy Eckroth, Environmental Manager. Special Assistant Attorney General John M. Schuh and Assistant Director of the Reclamation Division, Jonathan W. Emmer appeared representing the Commission's Reclamation Division. Two other members of the Reclamation Division participated in the discussion - Guy A. Welch, Environmental Scientist, and Monty Johnson, Environmental Scientist. The ALJ submitted a document list that described the documents provided and discussed at the Conference.

[8] N.D.C.C. § 38-14.1-19 requires the Commission to issue a ruling on this alternative public participation procedure within thirty days of the close of the Conference. N.D.C.C. § 38-14.1-20 provides for further review by the Commission at a formal hearing in accordance with N.D.C.C. § 38-14.1-30. N.D.C.C. § 38-14.1-30(3)(f) incorporates the restriction in the Surface Mining Control and Reclamation Act (SMCRA), Public Law 95-87, that no person who presides at an informal conference shall participate in the decision-making process at the appeal level. No Commissioner participated in the Conference to preserve their involvement at a formal hearing should further review be requested.

[9] After consideration of the presentations of the parties, the documents provided at the Conference, applicable statutes, rules, and case law supports the following recommended findings and recommended order are made.

Findings

[10] On October 22, 2014, the Commission issued Surface Coal Mining Permit No. NACC-1302 to CCMC for surface mining and reclamation operations at the Coyote Creek Mine.

[11] CCMC filed the application for Revision No. 12 to Surface Coal Mining Permit NACC-1302 on March 17, 2022. Revision No. 12 proposes to:

- Change the post mine topography on 280 acres in Sections 6 and 7, T142N, R88W and Section 1, T142N, R89W;
- Add design plans for three sediment ponds; and
- Update the contemporaneous reclamation section of the permit.

The application proposed revision to the introductory, legal, financial, compliance information, environmental, operations and reclamation sections of the permit.

[12] Revision No. 12 proposes updates to Section 3.1.1.3 and Section 3.1.1.3.1 of Permit NACC-1302 to add Variance Area 7 in Section 6 of the permit area. CCMC requests a variance from the 3-year reclamation requirement for Variance Area 7 (N.D.C.C. § 38-14.1-24(14)). Coal removal started in this area in 2019. By 2022, there will be inadequate area to distribute all the dragline box cut spoil from the 2019 mining. CCMC plans to respread Suitable Plant Growth Material (SPGM) and seed this area in 2023. CCMC is requesting a one-year variance from the 3-year reclamation requirement. Variance Area 7 is approximately twenty-one acres in size and located approximately six-tenths of a mile south of the Voigts' farmstead located in Section 31.

[13] At the Conference, the Voigts brought forth the following issues: (a) dust, (b) projected respread depths, specifically adequate soil respread on the Voigts' property, (c) revegetation, (d) the Voigts' use of the farmer access road in the S1/2 of Section 36, and (e) surface water management of the stormwater pollution prevention plan (SWPPP), pond P-06-03, and the clean water sump in Section 6.

[14] The Reclamation Division was agreeable to discussing the Voigts' concerns and answer questions, but it would be improper for the Commission to address issues outside the scope of the issues contained in the notice.

[15] At the conclusion of the informal conference, the Voigts provided a list of requests for consideration. The Voigts request: a) testing for soil compaction prior to soil respread, (b) a requirement for forbes, or other deep rooting species, to be included in the preliminary seed mix, (c) the unspecified period for reseeding be addressed, and (d) that the Reclamation Division be open to communication with the Voigts regarding technical deficiencies.

Dust and Variance Areas

[16] The Voigts expressed concern about dust as it relates to Variance Area 7. They asserted that dust has been an ongoing issue due to the proximity of the mining activities to their farmstead. In support of their concerns, the Voigts displayed photos and a video of dust impacts on their

property and ranch operations within the permit area. The video footage was taken prior to 2018, and the photos provided were taken from 2020 to 2022. Mr. Voigt stated that the issue of dust is ongoing, but he could not quantify any increase or decrease of dust from the video and photos since the 2019 proceeding.

[17] Mr. Braaten related the issue of dust to the revegetation of Variance Area 7. He argued that the failure to properly revegetate results in furtherance of dust impacts.

[18] Dust impact was previously addressed at an informal conference and formal hearing in 2019 (Case No. RC-19-189 & RC-19-190). The current dust complaint is similar to the Voigts' complaint in 2019. Mr. Mann asserted that bringing up the issue of dust from 2016 is not indicative or reflective of the current conditions today.

[19] Mr. Eckroth stated that to control wind and water erosion the respread areas, regardless of the variance, are seeded with a cover crop in compliance with permit requirements. He also explained that the seeded areas are mulched to help control erosion and provide cover on the ground before the area is revegetated.

[20] Mr. Welch stated that the Commission has not granted a variance from the requirements to mulch, stabilize, and plant cover crops on areas to control erosion. Mr. Welch also stated that during his inspections of CCMC, he did not find a failure to meet erosion control requirements and no Notice of Violations have been issued related to revegetation or resulting impacts.

Variance for Final Native Grassland Seeding

[21] Revision No. 12 proposes removal of the 6-year requirement to reseed native grassland to its post mine land use (Sections 3.1.1.3, 3.1.1.3.1, and 4.3.1). These areas will be seeded with a cover crop to control erosion, but the native grassland seeding will be delayed until larger and manageable tracts are available.

[22] The Voigts expressed concern that Revision No. 12 proposes to remove all time limits on reseeding and revegetation on the seven variances. The Voigts are concerned about the timing of bond release because the mining company determines the extent of a logical unit before it is bond released. More importantly, the Voigts are concerned when tracts will be put back into production.

[23] Mr. Eckroth stated he has worked with Mr. Voigt to ensure that larger tracts of native grassland will be seeded for proper management.

[24] Mr. Eckroth discussed Variance Area 7 and the purpose of the variance area. He stated the intent of the revision was to make the permit language consistent in various sections of the permit. He clarified that CCMC is not asking for an indefinite variance for seeding of the area and that CCMC plans to have the area respread in 2023 once there is enough room in the pit to remove the box cut spoils from this area.

[25] Mr. Welch explained that the variance areas and delayed native grassland seedings will not delay final bond release because the 10-year revegetation liability period is applied to the last final seeding on a tract of land. Furthermore, a logical unit needs to be available for bond release and it might be around the year 2040 before any of the Voigts' land is eligible for final bond release.

[26] Mr. Welch informed the parties that the narrative describing delayed native grass seeding was properly justified and incorporated into the permit with Revision No. 9 in 2019 and, in his opinion, Mr. Eckroth was attempting to revise sections of the permit to make it consistent. However, Mr. Welch expressed that clarification of when reclaimed areas will be seeded to native grassland is needed.

[27] Specific revegetation timelines are needed for all variance areas and all areas where delayed native grassland seedings are planned.

Revegetation

[28] The Voigts expressed concerns with soil quality and compaction on reclaimed areas and urged CCMC to plant forbes and other deep rooting species as part of the delayed seed mix to reduce possible compaction.

[29] Mr. Eckroth explained that native grassland areas will be seeded to a cover crop once topsoil is respread. The type of cover crop and seeding rates depend on when topsoil was respread, but the seeding rates are outlined in Section 4.2.2. If a cover crop is used, it is generally oats along with a temporary native seed mix. The purpose of the seed mixes is to control invasive weeds until a larger tract is available that can be seeded to permanent native grassland and managed with grazing. Mr. Eckroth stated that forbes are not included in the temporary mix, but they are included in the final native grassland seed mix.

[30] Mr. Eckroth acknowledged the Voigts' request to use forbes in the delayed seed mix, but explained the delayed native seed mix is used for management purposes. CCMC needs to manage invasive grass species such as brome grass in the seed bank and broadleaf weeds by annual spraying and clipping. The inclusion of broadleaf forbes into the seed mix would result in an inability to spray. Planting the final native grassland seed mix would limit CCMC's ability to control the invasive grass species and broadleaf weeds.

[31] The Voigts challenged whether it mattered if the result is that the temporary mix is entirely sprayed and reseeded with a final native mix. They asserted that forbes can be employed in the interim to assist with compaction.

[32] Mr. Welch stated that until a bond release, the area is still permitted, under the jurisdiction of the Commission, and the mining company is required to establish and manage reclaimed lands during the revegetation responsibility period.

[33] The Voigts questioned if CCMC was seeding the early native grassland at an appropriate rate. Mr. Welch stated that the seeding rate of 19.5 pounds/acre of pure live seed for early native

grassland seeding is 2-3 times greater than the NRCS recommended seeding rate and the Commission does not dictate the seeding rate for reclaimed lands.

[34] CCMC may choose to plant forbes in the delayed native grassland seeding, but it would limit their ability to manage invasive grasses and broadleaf weeds. CCMC's native grassland revegetation and management practices will not delay the return of the land to agricultural production and does not impede final reclamation success.

Respread Depths

[35] Revision No. 12 proposes updates to the Projected Soil Respread Depth Map (Section 2.5.7) of the Permit to revise the projected SPGM respread depth from 48 inches to 36 inches for three areas in Section 25. These changes were proposed to correct a previous error in the permit.

[36] Mr. Braaten stated that provisions in the Voigts' coal lease require the same amount of soil to be replaced during reclamation, and it appeared there may be an attempt to reduce the respread depths on the Voigts' property. Mr. Braaten and the Voigts admitted that they did not fully understand Policy Memorandum No. 17 to Mine Operators and how the calculations are conducted. Monte Johnson discussed, and answered questions, regarding the analysis for SPGM respread.

[37] The Voigts' are concerned that there would not be enough soil to accomplish what was set forth in the lease. The Voigts noted that the lease allows for the commingling of soils; however, the Voigts' preference statement expresses for no commingling.

[38] The Voigts expressed their concerns related to the quantity of topsoil and subsoil being replaced on their land but did not request a remedy.

[39] Mr. Eckroth stated that Sections 2.5.4 and 2.5.7 of the permits were revised with Revision 12 because of an error in the projected respread depths in the permit. Three areas were incorrectly labeled as 48 inches instead of 36 inches of respread. Revision 12 propose to correct the error.

[40] Mr. Eckroth explained that the SPGM respread map (Section 2.5.7) is only used for operational planning purposes and does not change how an area is reclaimed. He also stated that these areas will be respread according to the Commission's regulations and performance standards.

[41] Mr. Johnson explained how the projected SPGM respread depths are determined with respect to Policy Memorandum No. 17 to Mine Operators and North Dakota Administrative Code. Based on his review and analysis, Mr. Johnson opined that CCMC's revised projected SPGM respread depths are justified in Section 25 because CCMC mistakenly determined that a 48-inch SPGM respread was required.

[42] Mr. Johnson also explained that the projected SPGM respread depths are only an estimate used for planning purposes so the mine can determine how much SPGM to salvage to ensure there is enough SPGM stockpiled to reclaim the disturbed areas. The volume of SPGM available to

respread and the projected amount of SPGM to salvage is submitted with the mine's annual Soil Handling Plan that is evaluated by the Commission.

[43] Mr. Johnson explained the process of sampling overburden within a regraded area to determine how much SPGM will be replaced. The amount of SPGM to be replaced is dependent on the Sodium Adsorption Ratio and texture of the overburden as described in N.D.A.C. § 69-05.2-15-04.

[44] The Voigts' surface and coal lease includes a mixing agreement for all Voigt owned topsoil and subsoil. The landowner's post mine land use preference statement includes a handwritten statement requesting no commingling of Voigt topsoil.

[45] The surface owner may provide a preference statement for post mine land use to initiate, implement, approve, or authorize the land use following reclamation. N.D.A.C. § 69-05.2-09-13. The Commission reviews landowner's post mine land use preferences and requested implementation when feasible, but the Commission does not have jurisdiction over coal or surface lease terms, conditions, practices, or private agreements and negotiations.

Other Issues

[46] The Voigts brought forth the following additional issues which are beyond the scope of the notice: (a) use of the farmer access road in the S1/2 of Section 36, (b) surface water management of the SWPPP, pond P-06-03, (c) the clean water sump in Section 6, (d) soil compaction testing, and (e) soil health and organisms present in the soil.

[47] The Voigts stated that their request for an informal conference did not include some issues because they were not aware of the issues until receipt of a Reclamation Division's inspection report which they received after filing their request for an informal conference. Other items were proposed after the discussion and the parties may not have had the appropriate personnel or preparation to address the issues at the Conference. For the purposes of facilitating continued discussion between the parties, a brief memorialization of the discussion is provided in the following findings.

[48] The Voigts communicated an issue regarding an access road from Section 31 through Section 36 that they believe should not be considered an active mine area. CCMC responded that the Voigts have access with an escort and the area is designated as an active mine area by the Mine Safety and Health Administration and not the Commission.

[49] The Voigts had questions about SWPPP regulation. Reclamation staff offered to have follow-up discussions with the Voigts regarding the North Dakota Department of Environmental Quality's jurisdiction and their authority to regulate SWPPP under N.D.C.C. ch. 61-28.

[50] The Voigts expressed concern regarding soil health and asked whether CCMC is conducting composite soil analysis to determine the organisms and makeup of the soil. CCMC does not conduct any soil sampling to determine the soil health and organisms present in the soil.

Mr. Welch stated there are no performance standards for analytically measuring soil health within the state or federal coal mining regulations. CCMC is only subject to the bond release production performance standard.

[51] The Voigts questioned whether compaction testing is conducted on graded spoil before SPGM is respread. They also requested testing for soil compaction prior to soil respread. Mr. Welch explained that there is no specific standard related to compaction on graded spoil, mentioned reducing compaction of subsoil-built haul roads, and clarified CCMC's compaction testing on respread topsoil and subsoil as required by the order in Case No. RC-13-850.

[52] The Reclamation Division was receptive to communicating with the Voigts regarding clarification of a time period for planned final seeding and the other concerns. The Reclamation Division will take these concerns under advisement as they continue to review Revision No. 12 and have the mining company correct deficiencies for the current revision.

Ruling

[53] The Commission has jurisdiction over CCMC's planned mining and reclamation operations in North Dakota, including Permit No. NACC-1302, and Revision No. 12.

[54] CCMC's Revision No. 12 application to Surface Coal Mining Permit NACC-1302 is currently under review by the Commission and the comments or objections raised by the Voigts will be taken into consideration during the review process.

[55] CCMC's Revision No. 12 of Permit NACC-1302 meets the requirements of N.D.A.C. § 69-05.2-09-05 that require CCMC to specify the measures it will use to comply with the air pollution requirements of the Department of Environmental Quality and any other measures necessary to effectively control wind erosion and attendant air pollution.

[56] CCMC's revised Projected Soil Respread Depth Map, Section 2.5.7 of the Permit, submitted with Revision No. 12 meets the requirements of N.D.A.C. §§ 69-05.2-08-05, 69-05.2-15, and Policy Memorandum No. 17 to Mine Operators which specify the measures and processes used to sample overburden and project SPGM respread depths.

[57] On April 14, 2015, the Commission ordered CCMC to submit a permit revision that added plans for conducting compaction testing in the topsoil and subsoil replaced on reclaimed lands and describe measures that will be used to alleviate excessive compaction if detected. These plans were submitted with Revision No. 2 to Surface Coal Mining Permit NACC-1302 and this revision was approved by the Commission on June 27, 2018. During the Conference, no reasonable basis or performance standard was provided to add testing for soil compaction.

[58] The reclamation variances from the 180-day grading and 3-year seeding requirements have been justified and are being reviewed by the Commission as allowed by N.D.A.C. § 69-05.2-21-01(2) and N.D.C.C. § 38-14.1-24(14). Currently, the time for final seeding of native grass mix is not adequately addressed.

[59] The Commission does not have performance standards related to temporary or delayed seed mixes. CCMC may use forbes in their temporary or delayed seed mix, but it is not required.

[60] The Commission's Order following the informal conference may be appealed within thirty days of service of the Order pursuant to N.D.C.C. §§ 38-14.1-19(6) and 38-14.1-20, for a formal hearing under N.D.C.C. § 38-14.1-30.

Recommended Order

[61] Coyote Creek Mining Company L.L.C. shall provide a final native grassland seeding timeline for delayed native grassland seedings to initiate the 10-year revegetation period, describe how these variance areas will be managed prior to seeding to initiate the 10-year revegetation period, and provide a map depicting variance from the 3-year seeding rule (N.D.C.C. § 38-14.1-24(14)) for Commission review prior to Revision No. 12 approval.

Dated at Bismarck, North Dakota this 3 day of November 2022.

State of North Dakota
Public Service Commission

By: 

Hope E. Hogan
Administrative Law Judge
Office of Administrative Hearings
2911 North 14th Street – Suite 303
Bismarck, North Dakota 58503
Telephone: (701) 328-3200

STATE OF 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 File No. 20220259

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the **RECOMMENDED FINDINGS AND RULING AND RECOMMENDED ORDER** and proposed **ORDER** was mailed, inside mail, at the State Capitol, on the 3 day of November 2022, to:

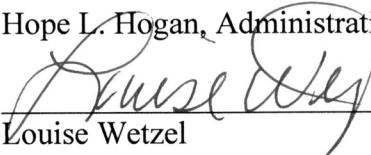
John Schuh
Special Assistant Attorney General
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and that true and correct copies of the above document was mailed, regular mail, on the 3 day of November 2022, to:

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OFFICE OF ADMINISTRATIVE HEARINGS
Hope L. Hogan, Administrative Law Judge



Louise Wetzel