

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Casey Voigt and Julie Voigt,)

Case No. 08-2023-CV-01964

Appellants,)

Agency Case No. RC-22-233

vs.)

OAH File No. 20220259

North Dakota Public Service Commission)

and Coyote Creek Mining Company,)

L.L.C.,)

**NOTICE OF APPEAL AND
SPECIFICATIONS OF ERROR**

Appellees.)

TO: NORTH DAKOTA PUBLIC SERVICE COMMISSION, NORTH DAKOTA ATTORNEY GENERAL DREW WRIGLEY, AND COYOTE CREEK MINING CO., L.L.C.

[¶ 1] PLEASE TAKE NOTICE that Appellants Casey Voigt and Julie Voigt, pursuant to N.D.C.C. § 28-32-42, hereby give notice of their appeal from the August 7, 2023 grade approval designated as COY-034 by the North Dakota Public Service Commission (“PSC” or “Commission”). A copy of the grade approval is attached hereto as Exhibit A.

[¶ 2] Pursuant to the challenged approval, the PSC approved the grade and soil respread projections for surface mining permit NACC-1302, which allows surface coal mining operations to take place on 8,091 acres in Mercer County, North Dakota. The Applicant for this mining permit is Coyote Creek Mining Company (“CCMC”). Casey and Julie Voigt own a cattle ranch in the heart of the Coyote Creek Mine, and continue to ranch in the midst of the coal mine.

[¶ 3] Venue lies with this court pursuant to N.D.C.C. § 28-32-42(3)(a), which provides that the appeal of an agency determination “may be taken to the district court designated by law, and if none is designated, then to the district court of the county in which the hearing or a part thereof

was held.” No other district court is designated by law for this appeal, and the hearing in this matter was held in the Commission hearing room at the State Capitol in Bismarck, Burleigh County, North Dakota. Therefore this appeal is appropriately venued in Burleigh County.

[¶ 4] 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.

[¶ 5] Revision 12 to NACC-1302, CCMC’s mine permit, 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.

[¶ 6] At the informal conference, Monty Johnson, PSC staff member, testified that it is a practice of the PSC to allow different methods for calculation of projected respread depths when a truck shovel pre-bench fleet is used, consistent with this narrative in CCMC’s Section 2.5.4 of its permit. This “practice” of the PSC does not comply with and violates the requirements of N.D.A.C. § 69-05.2-15-04.

[¶ 7] 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 and which result in a calculation for resspreading of suitable plant growth material must 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. This is required by the equation set forth at N.D.A.C. § 69-05.2-15-04(a)(2) but the PSC has granted an exception to this legal requirement with no basis in law.

[¶ 8] Additionally the PSC has improperly disposed of these issues through an informal disposition and without a hearing on the approval specifically or other full opportunity for the Voigts to be heard on these issues, and the way the PSC and CCMC have processed the grade approval behind closed doors violates the Voigts procedural and substantive due process rights and at a minimum the approval should be remanded for a formal adjudicative proceeding in order to afford the Voigts due process and right to be heard on these critical issues. This determination literally decides how much suitable plant growth material will be held to respread on the Voigt property and goes to the heart of successful reclamation on the ranch. The Voigts have worked for decades to build the soil health on their ranch and the PSC and CCMC are sweeping away all these long years of hard work building up the soil with these determinations made behind closed doors. These are pivotal decisions for the future reclamation of the ranch being made with almost no input or formal process for the Voigts' involvement and the informal disposition of the approval without a hearing and opportunity for the Voigts to be heard violates due process and fundamental notions of fairness and public participation.

[¶ 9] WHEREFORE, the Voigts request that this Court enter an order reversing the decision below and remanding to the Public Service Commission for further proceedings consistent with

this Court's order and the requirements of due process, awarding costs and attorneys' fees to the Voigts pursuant to N.D.C.C. § 28-32-50, and granting any and all other relief to which the Voigts may be entitled.

DATED this 17th day of August, 2023.

BRAATEN LAW FIRM

/s/ Derrick Braaten

Derrick Braaten, ND Bar # 06394
109 North 4th Street, Suite 100
Bismarck, ND 58501
Phone: 701-221-2911
Fax: 701-221-5842
derrick@braatenlawfirm.com
Attorneys for Casey and Julie Voigt



Public Service Commission
State of North Dakota

08-2023-CV-01964

COMMISSIONERS

Randy Christmann
Sheri Haugen-Hoffart
Julie Fedorchak

Sent via email only

August 7, 2023

600 East Boulevard, Dept. 408
Bismarck, North Dakota 58505-0480
Web: www.psc.nd.gov
E-mail: ndpsc@nd.gov
Phone: 701-328-2400
ND Toll Free: 1-877-245-6685
Fax: 701-328-2410
TDD: 800-366-6888 or 711

Mr. Lee Becker
Senior Mining Engineer
Coyote Creek Mining Company, L.L.C.
6502 17th St. SW
Zap, ND 58580
lee.becker@nacoal.com

Dear Mr. Becker:

This letter is in follow-up to grade approval request COY-034 that was submitted originally on September 6, 2022 for approximately 4.92 acres, which was withdrawn. Grade approval COY-034 was resubmitted on July 12, 2023 and subsequently revised on August 7, 2023 for approximately 16.09 acres in Section 36, T143N, R89W in Permit NACC-1302. The postmine land use of native rangeland and potential cropland for the area as depicted on the SPGM respread map is consistent with Section 4.1.2 (Post-Mining Topography and Landuse Map) most recently approved with Revision No. 11 and remains unchanged with pending Revision No. 12 with the exception for the reclaimed farmer access road shown in Revision No. 12. Grade approval is granted based on a review of the submitted materials and a field inspection by PSC personnel.

The proposed topsoil respread depth of 12.0 inches for Voigt ownership postmine potential cropland and 13.2 inches for North Dakota Department of Trust Lands (State) ownership postmine potential cropland and native rangeland is approved. The total SPGM respread thickness of 24 inches and 36 inches as depicted on the submitted SPGM respread map is also approved. Blending will be necessary in areas having different total respread thicknesses, but without reducing the thickness of the area requiring the greater thickness and ensuring the proper drainage through the transition area.

Please be reminded that methods must be used to minimize subsoil and topsoil compaction as specified and approved in Revision No. 2 to Permit NACC-1302. Upon completion of the SPGM respread in the approved area, the area must be stabilized to prevent erosion as required by NDAC 69-05.2-15-04(5) and NDAC 69-05.2-22-05.

If you have any questions, please contact this office.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan Emmer".

Jonathan Emmer
Assistant Director
Reclamation Division

cc via email only: [Jeremy Eckroth \(jeremy.eckroth@nacoal.com\)](mailto:jeremy.eckroth@nacoal.com)
 [Derrick Braaten \(derrick@braatenlawfirm.com\)](mailto:derrick@braatenlawfirm.com)
 [Desirae Zaste \(desirae@braatenlawfirm.com\)](mailto:desirae@braatenlawfirm.com)