

STATE OF NORTH DAKOTA

DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Casey Voigt and Julie Voigt,

Case No.

Appellants,

vs.

**NOTICE OF APPEAL AND
SPECIFICATIONS OF ERROR**

North Dakota Public Service Commission
and Coyote Creek Mining Company,
L.L.C.,

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 February 14, 2024 Order by the North Dakota Public Service Commission (“PSC” or “Commission”) in PSC Docket RC-23-348 (OAH File No. 20230391). A copy of the order is attached hereto as Exhibit A.

[¶ 2] Pursuant to the challenged order, the PSC affirmed the approval of grade approval requests COY-034, COY-035, COY-036, COY-037, COY-038, and COY-039 and dismissed the Voigt’s Complaint filed November 22, 2023. *See* Exhibit A, pg. 14.

[¶ 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 entered into a Surface and Coal Lease Agreement with NACoal on December 29, 2010. 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. On October 11, 2013, the Voigts signed a Landowner Post-Mining Preference Statement ("Preference Statement"). "No commingling of Top Soils, especially from the South or the East" was indicated on the Preference Statement.

[¶ 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.

[¶ 7] The PSC approved grade approval requests COY-034, COY-035, COY-036, COY-037, COY-038, and COY-039. These grade approvals allow less than forty-eight inches of suitable

plant growth material to be respread. The Voigts filed a Complaint on November 22, 2023 requesting an Order reversing the grade approval requests and requiring CCMC and its affiliates to have suitable plant growth material respread at a minimum of forty-eight inches on all lands covered by the grade approval requests challenged. PSC Docket Number 1. CCMC filed its answer on December 12, 2023. PSC Docket Number 10. A formal hearing was held on December 22, 2023. PSC Docket Number 15.

[¶ 8] Any projected respread depths for property owned by the Voigts should have been set at forty-eight inches pursuant to N.D.A.C. § 69-05.2-15-04(4)(a)(2) and their coal lease, and any grade approval requests that are approved and which result in a calculation for respreading 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(4)(a)(2) but the PSC has granted an exception to this legal requirement with no basis in law by allowing the Mine to only test the extreme upper twelve inches of the graded spoil in violation of N.D.A.C. § 69-05.2-15-04(4)(a)(2).

[¶ 9] This “practice” of the PSC does not comply with and violates the requirements of N.D.A.C. § 69-05.2-15-04.

[¶ 10] This “practice” of the PSC is based on the PSC’s Policy Memorandum Number 17.

[¶ 11] There is no basis in the underlying surface mining law implemented by the PSC to justify the PSC’s refusal to test the graded spoil post-mining.

[¶ 12] Pursuant to N.D.A.C. § 69-05.2-21-03 (emphasis added): “All exposed coal seams and toxic-forming and combustible materials exposed, used, or produced during mining must be **adequately covered** with nontoxic and noncombustible materials, or treated, to control the impact

on surface and ground water in accordance with chapter 69-05.2-16, to prevent sustained combustion, and to minimize adverse effects on plant growth and the approved postmining land use.”

[¶ 13] As used in this title of the Administrative Code, “Toxic-forming materials means earth materials or wastes which, if acted upon by air, water, weathering, or microbiological processes, are likely to produce chemical or physical conditions in soils or water that are detrimental to biota or uses of water.” N.D.A.C. § 69-05.2-01-02(115).

[¶ 14] The thickness of the SPGM respread following grade approval is significant and important for reclamation success. The applicable standards at N.D.A.C. § 69-05.2-15-04 contain a table that refers to the characteristics of the graded spoil material, which is the material onto which the SPGM is respread. That table sets forth the following:

Suitable Plant Growth Material Redistribution Thickness

Spoil Properties		Total Redistribution Thickness	
Sodium Adsorption		(Top Soil Plus Subsoil)	
Texture	Ratio (SAR)	Average in Inches	(Centimeters)
Medium*	12	24	(61)
Course**	12	36	(91)
***	12-20	36	(91)
***	20	48	(122)
*	Loam or finer		
**	Sandy loam or coarser		
***	Not applicable		

[¶ 15] As with the pre-mine testing of the spoil, the post-mine testing of spoil must test all of the actual graded spoil, not simply the extreme upper twelve inches.

[¶ 16] Any grade approval requests that are approved and which result in a calculation for respreading of suitable plant growth material must require that all property owned or ranched by

the Voigts will have suitable plant growth material respread at a minimum thickness of forty-eight inches pursuant to N.D.A.C. § 69-05.2-15-04(4)(a)(2), and must be based testing of all graded spoil pursuant to the regulation's requirement.

[¶ 17] The PSC has granted an exception to this legal requirement at N.D.A.C. § 69-05.2-15-04(4)(a)(2) by issuing several of the grade approvals challenged without first testing the graded spoil and then applying N.D.A.C. § 69-05.2-15-04(4)(a)(2) to those results.

[¶ 18] WHEREFORE, the Voigts request that this Court enter an order reversing the decision below pursuant to N.D.C.C. § 28-32-46 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 13th day of March, 2024.

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

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Casey and Julie Voigt
v. Coyote Creek Mining Company, L.L.C.
Complaint**

**Case No. RC-23-348
OAH File No. 20230391**

February 14, 2024

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES

Commissioners Randy Christmann, Sheri-Haugen Hoffart, and Julie Fedorchak.

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

Hope L. 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 June 8, 2023, Derrick Braaten, on behalf of Casey and Julie Voigt (Voigts) filed a Notice of Appeal and Specifications of Error in South Central District Court (Case No. 08-2023-CV-01338, Index ##1-4) and served the ND Public Service Commission (Commission), the Coyote Creek Mining Company (CCMC), and the ND Attorney General (AG). The Notice of Appeal and Specifications of Error challenges the Commission's Reclamation Division's grade approval process, soil respread projections, and soil respread depths of grade approvals COY-035, COY-036, and COY-037. The Voigts allege the Commission's practice "does not comply with and violates the requirements of N.D.A.C. § 69-05.2-15-04" and that "any projected respread depths for property owned by the Voigts should be set at forty-eight inches under N.D.A.C. § 69-05.2-15-04(a)(2). Although the Voigts had not filed a complaint or requested a hearing, the Voigts requested a reversal of the grade approvals and order remanding to the Public Service Commission for proceedings.

On August 18, 2023, the Voigts through their attorney, Derrick Braaten, served the Commission, through the AG, and CCMC with a Notice of Appeal and Specification of Errors regarding COY-034 grade approval and filed the appeal on August 23, 2023 (Case No. 08-2023-CV-01964, Index ##1-5).

On September 6, 2023, the parties filed a Stipulated Motion to Consolidate and to Extend Deadlines. *See* Case Nos. 08-2023-CV-01338, Index #115 and 08-2023-CV-01964, Index #9. On September 7, 2023, and September 8, 2023, the Court entered its Order to Consolidate and to Extend Deadlines. *See* Case Nos. 08-2023-CV-01964, Index #12 and 08-2023-CV-01338, Index #118.

On September 26, 2023, the parties entered into a Stipulation and Request for Stay and the Court entered its Order for Stay. The parties agreed that the Voigts would file a complaint with the Commission asking to hold a formal hearing and address the matters raised in the appeals of the grade approvals through an adjudicative proceeding under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32 and if the Commission accepts the complaint for adjudication and holds a formal hearing, and issues a final decision adjudicating the claims, the Voigts would file a motion to voluntarily dismiss the appeal with prejudice within three business days of the Commission's order. *See* Case No. 08-2023-CV-01338, Index ## 119, 122.

On October 24, 2023, the Voigts served the Commission (through the AG) and CCMC with a Notice of Appeal and Specification of Errors regarding COY-038 and COY-039 and filed the appeal on October 26, 2023. *See* Case No. 08-2023-CV-02561, Index ##1-5.

The parties entered into a Stipulation and Request for Stay and the Stipulation was filed on November 8, 2023. *See* Case No. 08-2023-CV-01338, Index #123 and 08-2023-CV-02561, Index #8. The Court entered its Order Consolidating 08-2023-CV-02561 to 08-2023-CV-01338 and granted the stay. *See* 08-2023-CV-01338, Index #126 and 08-2023-CV-02561, Index #11. As with the prior stipulation, the parties agreed that the Voigts would file a formal complaint with the Commission and attempt to resolve the dispute before the agency through a formal hearing on the additional grade approvals.

On November 22, 2023, the Voigts filed a Complaint pursuant to Chapter 28-32 of the Administrative Agencies Practice Act and Article 69-02 of the Administrative Code against CCMC. It claimed that CCMC's grade approval does not comply with and violates the requirements of N.D.A.C. 69-05.2-15-04. The Complaint alleged there is no basis in the underlying surface mining laws to justify thinner respread depths where a truck shovel method of removing overburden has been used and that there is no basis for creating a method of calculating respread topsoil and subsoil respread depths shallower than N.D.A.C. dictates. The Complaint asserted that any projected or actual topsoil and subsoil respread depths for properties 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 the Voigt's coal lease. The Complaint alleges the Commission has granted an exception by approving several grade approval requests that allow less than forty-eight inches of topsoil and subsoil.

The Voigt's requested relief is an order reversing the grade approval requests, requiring CCMC to have a minimum Suitable Plant Growth Material (SPGM) respread depth of forty-eight inches on all lands covered by the challenged grade approvals, and requiring all SPGM respread depths on Voigt property be calculated pursuant to N.D.A.C. § 69-05.2-15-04(a)(2) in the future.

On November 30, 2023, the Commission issued a Notice of Formal Hearing scheduling the Hearing for 9:00 a.m. CST on December 22, 2023, in the Public Service Commission Hearing Room, 12th Floor, State Capitol, Bismarck, North Dakota. The Notice stated that Casey and Julie Voigt are concerned with the terms of their lease agreement with Coyote Creek Mining Company, methods used to calculate the projected SPGM respread depths, SPGM respread depths for property owned or ranched by the Voigts, and the future productivity of their soil. The Notice of Formal Hearing was published once a week for two consecutive weeks in the Bismarck Tribune and the Hazen Star. The Formal Hearing was held as scheduled. The proceeding remained open until January 19, 2024, to allow written closing arguments and recommended orders.

Having allowed all interested persons an opportunity to be heard and having heard and considered all the testimony and evidence presented, 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 coal mining and reclamation operations at the Coyote Creek Mine. The Coyote Creek Mine has supplied lignite coal to the Coyote Power Station since 2016. Mr. Casey Voigt and his wife, Julie, either own or lease much of the land in the eastern half of the 8,443.62 acre permit area, and these permitted lands encompass much of the Voigt's ranching operation. The Voigt's land includes native grassland that is used for livestock grazing; cropland, primarily used for hay production; and an occupied farmstead where the Voigts reside.
2. The Voigts manage a cow-calf ranching operation on approximately 5,000 acres of deeded lands and lands leased from the North Dakota Department of Trust Lands. They raise cattle to produce beef, which is produced by harvesting grass. Mr. Voigt testified that soil health is important for grass production and that he has been trying to improve soil health on his ranch. Voigt's primary concern with reclamation on his property was soil health, which he indicated is deeply impacted by the mining method being used.
3. As part of a request for grade approval, permittees are required to submit a postmining contour map to the Commission for approval and specify the thickness of topsoil and subsoil to be respread over the graded area before spreading SPGM. The Commission

- must approve or disapprove the postmining topography within thirty days and notify the permittee of the decision and reasons for any disapproval.
4. The Voigts expressed concerns with the SPGM respread depths for the grade approvals COY-034, COY-035, COY-036, COY-037, COY-038, and COY-039. Mr. Voigt expressed his concerns with the depth of SPGM respread in relation to the rooting depths of plants, which ultimately may have a detrimental effect on forage production. He believes the grass species being planted at the Coyote Creek Mine to have a rooting depth greater than 48 inches.
 5. The Voigts requested that 48 inches of SPGM be respread on all properties covered by grade approvals COY-034, COY-035, COY-036, COY-037, COY-038, and COY-039.
 6. The Voigts request for reversal of the grade approvals is tied to a requested SPGM respread depth of 48 inches. The Voigts also requested that all SPGM respread depths be calculated pursuant to N.D.A.C. 69-05.2-15-04(a)(2) in the future. Assuming a typographical error in the Complaint, references in the Complaint to N.D.A.C. § 69-05.2-15-04(a)(2) are treated as referencing N.D.A.C. § 69-05.2-15-04(4)(a)(2).
 7. As part of the landowner preferences, the Voigts requested over 400 acres of native grassland be converted to cropland on their ranch. In accommodating the Voigts preference, more topsoil is respread on reclaimed cropland than on reclaimed native grassland. This reduces the topsoil respread depth on land that is to be reclaimed to native grassland. Despite this, CCMC is still required to meet the SPGM respread requirements set forth in administrative code.
 8. Mr. Voigt stated that it is his understanding that the rules and laws require 48 inches of SPGM be respread on this property. He said he thought the minimum SPGM respread depth in North Dakota was 48 inches. He alleged that the current process for SPGM respread was an exception to the rules.
 9. The Voigts called Monty Johnson, a Commission Environmental Scientist III, regarding his position and participation in the grade approval requests. He provided background information and explained that he examines the graded spoil sample results to ensure they align with the SPGM respread depths proposed by the mine.
 10. As testified by Mr. Johnson, the projected respread depth calculation conducted during the mine permitting process ensures that there is volumetrically enough SPGM within the mining permit to ensure that successful reclamation can occur. This is accomplished

through a detailed soil resource inventory and soil survey before mining. The projected respread depths are used on an annual basis to develop the annual soil handling plan.

11. Mr. Johnson walked through his example calculations on how projected respread depths are calculated for Permit NACC-1302. Mr. Johnson provided that the Agvise Laboratories report in Voigt Exhibit 39 represented a single overburden borehole sample analysis broken into 5-foot intervals through the target coal seam and that borehole represents approximately 40 acres.
12. The calculations for projected SPGM respread depths, derived from overburden greater than 85 feet above the coal, which is removed by mining equipment other than a dragline, are determined by identifying the least favorable 20 percent of sample intervals—those with the highest sodium absorption ratios (SAR)—to calculate a conservative estimate of respread thickness.
13. Mr. Voigt's assertion that different methods for calculating projected SPGM respread depths violate N.D.A.C. § 69-05.2-15-04 is incorrect. As testified by Mr. Johnson, N.D.A.C. § 69-05.2-15-04 applies to the actual respread of SPGM, not projected respread. He stated that there are no statutes or regulations for the calculation of projected SPGM respread depths.
14. He also testified that guidance was provided by the Commission in Policy Memorandum No. 17 to Mine Operators on how to calculate projected respread thicknesses. Mr. Johnson also clarified that Policy Memorandum No. 17 needs to be updated since it has not been revised after a rulemaking that eliminated saturation percentage as a parameter for determining actual SPGM respread thickness. He also stated that Policy Memorandum No. 17 does not change or supersede the administrative code.
15. Superficial, brown overburden is typically glacial till with a lower sodium adsorption ratio (SAR) value and deeper, gray overburden typically has a higher SAR value. The projected SPGM respread depth calculation changes because the truck shovel operation creates a dragline bench by removing the overburden in proximity to the surface. This method selectively handles higher quality pre-bench overburden and hauls the materials around the pit to be placed on top of spoils with a presumably higher SAR used to achieve final post mining topography. The dragline method removes overburden and places the typically higher quality overburden at the bottom of the pit and higher SAR overburden may end up nearer to the respread surface. The projected respread depth calculation typically accounts for a thicker projected SPGM respread to ensure adequate volumes of SPGM are available.

16. Mr. Johnson explained that a lesser amount of actual SPGM respread than what is required in administrative code is not permitted regardless of method to remove overburden.
17. Mr. Johnson testified that he annually reviews projected respread depths to determine whether a mine is trending towards a deficit of SPGM for resreading operations. If a mine reports a deficit, he reviews the quantity of SPGM respread relative to the projection in the grade approval request to determine if the amount of available SPGM is trending in the right direction.
18. Mr. Johnson stated that the mine reported a deficit at the start of 2023, but Mr. Johnson clarified that the Commission would not approve an actual respread depth of less SPGM than required by regulation to reduce a deficit and that the redistribution rules must be followed.
19. The calculation of projected respread depths ensures that there is enough SPGM to salvage and respread for revegetation success. Although the process and calculation of projected SPGM respread are important for the permitting process, Mr. Johnson testified that projected respread depths are not typically reviewed with a grade approval request or relevant to determine actual SPGM respread.
20. Mr. Johnson explained how he analyzes grade approval requests and determines actual SPGM respread depths. During a grade approval request, he checks the representative sampling, the SAR value, and the texture of the graded spoil. Based on the spoil properties, the actual SPGM respread depth is determined. Mr. Johnson explained the graded spoil texture parameter and clarified that a greater depth of soil is required on coarse-textured spoil because of reduced water holding capacity compared to finer-textured spoil.
21. SPGM consists of topsoil, subsoil, and other suitable strata. Other suitable strata is high quality overburden material that is classified as subsoil during the permitting process and is salvaged and stockpiled for respread. Mr. Johnson explained that areas receive 24, 36, or 48 inches of SPGM depending upon graded soil properties specified in N.D.A.C. § 69-05.2-15-04. The actual SPGM respread depth on graded spoil may vary within a single grade approval request.
22. Mr. Johnson confirmed that N.D.A.C. § 69-05.2-15-04 is applied when evaluating and approving actual SPGM respread depths. Mr. Johnson testified in review of the grade approvals, N.D.A.C. § 69-05.2-15-04 did not require 48 inches of SPGM across the Voigt's property. Mr. Johnson confirmed that he did not find anything in his evaluation that would question the sampling data and that the actual SPGM respread depths in all six

grade approvals complied with all applicable laws and regulations, were consistent with the mine's surface coal mining permit, and CCMC's 2023 soil handling plan.

23. Mr. Johnson provided that the current SPGM respread thickness regulations were implemented in 1987 and revised in 1999, which would be approximately 30 years. He added that we do not have any evidence that our current SPGM redistribution rules are not adequate and that the Commission has observed successful reclamation at other mines. He was not aware of any issues with long-term revegetation under current regulations.
24. Mr. Johnson also stated that it is in the best interest of the mine to ensure the appropriate respread depth and protect soil health to ensure they can meet the revegetation productivity performance standards to avoid costly work or soil amendments to obtain bond release.
25. The Surface Mining Control and Reclamation Act and North Dakota's surface coal mining rules and regulations do not have a soil health performance standard.
26. Don Steffen, CCMC operations manager, testified that the procedures complied with N.D.A.C. § 69-05.2-15-04 and that the requests were reviewed and approved by the Commission.
27. Mr. Steffen corroborated Mr. Johnson's explanation of the mining process, and determination of actual and projected SPGM respread. He stated that projected SPGM respread depths are calculated from overburden analysis when the land is being permitted and is used in the development of the soils handling plan — which is reviewed and updated annually. Mr. Steffen said actual SPGM redistribution is calculated by sampling the top 12 inches of graded spoil during the grade approval process. Mr. Steffen emphasized that we do not use any data from the pre-mine projected overburden analysis to determine actual topsoil and subsoil redistribution depths.
28. Mr. Steffen stated other suitable strata is used at times. He explained that it exists 5 to 10 feet underneath the subsoil in certain areas of the mine. He said other suitable strata, deep lift material, is surveyed and tested to ensure it is subsoil quality. The Commission grants permission to use that material as subsoil when there is a projected shortage of subsoil. Selectively handled overburden is typically redistributed in lifts that are six to eight feet thick, so it is unlikely that the quality of the spoil one to two feet deep is drastically different than the quality found in the upper foot. In certain situations, subsoil can be waived, and other suitable strata does not have to be salvaged if there is a projected surplus of subsoil.

29. Mr. Steffen also corroborated the difference between projected SPGM respread depths and actual SPGM respread depths. The projected depth is based on the quality of overburden prior to mining. He explained that boreholes are drilled and sampled at a spacing of 1,320 feet, or one sample per 40 acres, as discussed in Section 2.5.4 of the permit and reported on the projected SPGM respread depth map in Section 2.5.7 of the permit. He stated that Policy Memorandum No. 17 to mine operators provides some guidance to calculate the projected SPGM volumes — which is used only in the development of the annual soils handling plan.
30. Mr. Steffen testified that obtaining projected SPGM respread calculations and actual SPGM calculations are a significant part of CCMC's mine plan. He stated that determining projected SPGM redistribution is a significant amount of work, and a lot of sampling must be done to determine the projected SPGM redistribution thickness. He also stated that determining actual SPGM thickness is a fairly simple process.
31. Mr. Steffen testified that actual SPGM respread thickness is determined during the post-mining stage when grade approvals are submitted in accordance with the quality of spoil as provided in the table in N.D.A.C. § 69-05.2-15-04(4)(a)(2).
32. Mr. Steffen stated that a grade approval request must include a contour map and provide topsoil and subsoil respread thicknesses. The spoil is sampled to a 12-inch depth on a grid spacing about 400 feet apart, which means one sample represents about 3.7 acres. He then provided an evaluation of the results of the graded spoil samples in grade approval COY-037 and determined that two samples required 24 inches of SPGM respread and two samples required 36 inches of SPGM respread. Mr. Steffen explained that a grid is used to determine sample locations and that several samples are obtained from the vicinity of the pre-determined location. Spoil from several samples at one location is combined to make a composite sample that is bagged and sent to Minnesota Valley Testing Laboratories, Inc. for analysis.
33. When asked for clarification as to why the topsoil amount was determined to be 12.2 inches as opposed to a little more or a little less, Mr. Steffen stated that topsoil depth is determined once a year in the annual soils handling plan, which is approved by the Commission. He further clarified that the topsoil depth is determined by the total amount of topsoil available (cubic yards) for the calendar year and the acreage that will need topsoil respread. It is calculated to be evenly redistributed by land use and native grassland was computed at 12.2 inches and cropland at 18.2 inches. Mr. Steffen stated through this process that each landowner and each land use may get a different depth of topsoil. When transitioning SPGM respread depths, the thicker side is tapered into the area designated to receive less, usually 50 to 75 feet, to ensure all of the area requiring a greater depth of SPGM receives the required amount of SPGM.

34. Mr. Steffen referenced the 2023 soils handling plan which states that Voigt reclaimed grassland was to be respread with 12.2 inches of topsoil and explained that in areas (quadrants) of 24-inch respread, 11.8 inches of subsoil would be needed. Likewise, 23.8 inches of subsoil would be required in areas requiring 36 inches of SPGM respread.
35. Mr. Steffen testified that 100 percent of available topsoil is salvaged and that enough subsoil must be salvaged to meet the N.D.A.C. § 69-05.2-15-04 redistribution requirements according to the projected thickness requirements set forth in the annual soil handling plan.
36. Table 2.5.4.2, Soil Respread Depth Table, in Permit NACC-1302 documents that areas mined on Voigt's property have an average of 32 inches of topsoil and subsoil. Section 1, T142N, R89W, only has an average of 19 inches of topsoil and subsoil, which is less than the minimum respread requirements set forth in N.D.A.C. § 69-05.2-15-04.
37. The Voigts request for 48 inches of topsoil and subsoil to be respread would be more than what existed prior to mining.
38. Mr. Steffen stated that all subsoil is being salvaged and that the amount is checked during the annual soils handling plan review. If insufficient subsoil is available then other suitable strata must be salvaged, which is what the mine is currently doing. Since Voigt land does not have an adequate amount of subsoil available to salvage, the mine is salvaging other suitable strata to make up for the projected shortage of SPGM.
39. Mr. Voigt discussed Voigt Exhibit 50, which are photographs Mr. Voigt took that depict pre-bench operations at the Coyote Creek Mine where they were capping graded spoil with glacial till. Mr. Voigt stated that a portion of the graded spoil, as depicted in the exhibit, had approximately 12 inches of glacial till placed on top of the graded spoil while the other area of the graded spoil did not have any glacial till respread. Mr. Voigt believed that it was CCMC's intention to place 12 inches of glacial till on the graded spoil in this area.
40. Mr. Steffen clarified that approximately 40 feet of pre-bench spoil had been placed on a portion depicted in the photos of Voigt Exhibit 50 and that Mr. Voigt mistakenly referenced graded dragline spoil. Mr. Steffen said that the Coyote Creek Mine typically places pre-bench spoil in lifts six to eight feet thick.

Sodium Migration and Spoil Quality Testing and Monitoring

41. Mr. Voigt expressed concern that pre-bench material was being respread over an area larger than the bench where the soil was being removed and he suggested that dragline spoil

quality be tested and monitored to determine if any sodium was migrating upward into respread SPGM. The Voigts appeared to be advocating for an administrative rule change to accommodate changes in respread and monitoring.

42. Mr. Steffen testified that a change in administrative code would be needed to require a minimum of 48 inches of SPGM on mined lands. He said that new science proving the current regulations are inadequate would be required and that the existing regulations were based on sound science conducted in 1984 and adopted in 1987 and for the last 36 years he never found a problem with the requirements.
43. Mr. Steffen testified that he has been personally involved with bond releasing thousands of acres of reclaimed land and that the mines under his supervision have never failed to meet the bond release revegetation performance standards. Mr. Steffen stated that he had never heard of a mine having to go back and put more SPGM down after vegetation establishment.
44. Mr. Braaten questioned Mr. Johnson regarding pulled excerpts and tables from articles, including NDSU Extension SF1087, Managing Saline Soils in North Dakota (Voigt Exhibit 41); Changes of Sodicity and Salinity in Soils Reconstructed on Strip-mined Land, Table 2 (Voigt Exhibit 43); and NDSU Bulletin 514, Soil Replacement for Reclamation of Strip mined Lands in North Dakota (Voigt Exhibit 53) relating to effects of sodicity levels, capillary rise, and upward sodium migration to non-sodic soils. Although Mr. Johnson expressed that he did not have a reason to disagree with the statements referenced, he had not reviewed the documentation and would need to do additional research and evaluation in relation to soil conditions.
45. Although the Voigts did not provide an expert familiar with the provided articles, a review of the entirety of the articles does not provide a strong justification to alter the current regulations.
46. North Dakota's SPGM Removal and Redistribution rules under N.D.A.C. § 69-05.2-15 were amended and closely examined in 1987.¹ The studies indicated that the most productive soils in Western North Dakota consist of medium or fine textured soils that have an effective root zone at least 4 feet in depth and that plant's use of water is generally restricted to the upper 4 feet of the soil profile. The effective rooting depth of at least 4 feet does not necessarily have to consist of the topsoil and subsoil materials only, but that may include the uppermost portion of the graded spoil provided its physical and chemical properties are not deleterious to plant growth.

¹ Commission Case No. 10,794, this is also reflected in NDSU Bulletin 514's author, Mr. Eugen C. Doll's written testimony which discusses the potential for sodium migration. He provided that the SPGM redistribution depths were reasonably conservative values.

47. North Dakota's soil redistribution requirements in N.D.A.C. § 69-05.2-15-04 were heavily influenced by NDSU Bulletin 514, Soil Replacement for Reclamation of Stripmined Lands in North Dakota (Voigt Exhibit 53) Bulletin 514. In 1984, Bulletin 514 evaluated published and unpublished North Dakota research relating to the depth and quality of topsoil and subsoil (first and second lift) needed for successful reclamation in North Dakota strip-mined lands. As advocated in the document, the depth of the soil materials that must be replaced to restore soil productivity is dependent upon the chemical and physical properties of the underlying spoil.²
48. Bulletin 514 also provided that the ranges of suggested respread thicknesses are somewhat higher than the optimum levels found in some experiments, and it recognized the possibility of upward migration of sodium in the respread soil. This is the basis for the ranges of the respread depths relative to the SAR, and the requirement that 48 inches of SPGM be respread over highly sodic (SAR > 20) spoil. The 1987 amendment to N.D.A.C. § 69-05.2-21-03 was consistent with federal regulation that requires toxic materials to be adequately covered with nontoxic and noncombustible material rather than by a specific minimum of 4 feet of material.
49. Soil characteristics, chemical and physical properties, water holding capacity, effective root zone depth, effects of soluble salts, and sodicity levels were evaluated in developing suggested guidelines for SPGM respread depths in North Dakota's surface coal mined land. These are reflected in the current regulations. These regulations went through the appropriate process, including providing a scientific basis, stakeholder participation, comment, and approval from the Office of Surface Mining and Reclamation Enforcement. To the extent that the purpose was to advocate for a future change in regulations, there are alternative processes that are more appropriate for the Commission to pursue a rule change.³

Cropland Production Records

50. Mr. Voigt suggested that the Commission require cropland production records to demonstrate that reclaimed cropland production progressively improves over time. He suggested mining companies be required to keep data from computer-generated combine harvest yield maps.

² NDSU Bulletin 514, pg. 15 (Voigt Exhibit 53)

³ N.D.C.C. § 38-14.1-34

51. The Voigts called Mr. John Weinand to testify about harvest yield maps on property leased by him and located at a different mine. These yield maps were unrelated to the current proceeding and provided readings on selected years. Mr. Weinand said the yield maps are GPS oriented and the combine yield readings are recorded every 2 seconds. He testified that reclaimed lands yield 70 percent compared to undisturbed lands. Mr. Weinand expressed that water infiltration due to compaction can be poor on reclaimed lands, which prevents timely planting.
52. Mr. Weinand has leased the property for over 10 years. He did not know when the land was mined, but he stated that a portion of the field was used to store stockpiles and not actual mining. The reclaimed portion of the field was affected by associated mining disturbance. The assertions of reduced yields are not applicable to the Voigt mined lands and the allegations related to SPGM respread depths included in the Complaint. These were areas of associated disturbance, not areas subject to SPGM respread based on graded spoil properties.⁴
53. In relation to CCMC's monitoring of the productivity of reclaimed lands at the mine, Mr. Steffen testified that portions of the mine were in the early stages of monitoring productivity, but general productivity of reclaimed cropland could begin in year two and native grassland sampling could begin in year three or four to measure productivity, species seasonality, species diversity and begin looking at species composition trends over time. Mr. Steffen said mines do not report productivity sampling data until bond release.
54. The cropland harvest yield maps did not provide a location of the field depicted in the map and the legend did not provide measurement units as to what it was depicting. Furthermore, as testified by Mr. John Weinand, the field depicted in the harvest yield maps was affected by associated disturbance; therefore, the field was not subject to SPGM redistribution based on graded spoil properties.
55. Cropland production data is not collected until after year six of the responsibility period for the purposes of determining revegetation success.⁵ There are no requirements in the Commission statutes, rules, or orders for CCMC to collect crop production data at this time and the Voigts did not demonstrate that additional monitoring is warranted.

Lease and Landowner Preference Statement

56. The Voigts allege that SPGM respread should be set at 48 inches pursuant to their coal lease.

⁴ N.D.A.C. § 69-05.2-15-04(4)(b)

⁵ N.D.A.C. § 69-05.2-22-07(4)(c)

57. Mr. Voigt stated that he completed a landowner preference statement for the Coyote Creek Mine and included language regarding the mixing of soils on his ranch. In testimony, Mr. Voigt did not provide a provision that required a 48-inch SPGM respread depth.
58. Mr. Steffen stated that the landowner preference statement is a reclamation requirement that establishes a landowner's preferred post-mining land uses relative to the pre-mining land use.
59. Mr. Johnson stated that he was aware of the landowner preference statements and mixing agreements specified in the lease, but generally, it is not something that he reviews. He did not testify to the provisions in his coal lease.
60. During permitting, the Commission reviews landowner post mine land use preferences and approves implementation when feasible and to the extent that they are not in conflict with reclamation requirements. However, the Commission does not have jurisdiction over coal lease terms, conditions, practices, or private agreements and negotiations.
61. The Voigts have not met the burden to demonstrate that N.D.A.C. § 69-05.2-15-04 results in a 48-inch SPGM respread depth, except as already required by N.D.A.C. § 69-05.2-15-04, on the grade approvals named in the Complaint.
62. The Voigts have not met the burden to demonstrate that the grade approvals should be reversed.
63. The Voigts have not met the burden of demonstrating that CCMC is not calculating grade approval respread depths in accordance with N.D.A.C. § 69-05.2-15-04.
64. The Voigts have not met a burden of demonstrating that CCMC is in violation of a statute or regulation.
65. Pursuant to 38-14.1-36, the Commission may assess a sum equal to the aggregate amount of costs and expenses, including attorney's fees, as determined by the Commission to have been reasonably incurred by such party for or in connection with participation in a proceeding. Based upon the circumstances of the proceeding, the Commission declines to assess fees.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over CCMC's planned mining and reclamation operations in North Dakota, including Permit No. NACC-1302, and grade approval requests COY-034, COY-035, COY-036, COY-037, COY-038, and COY-039.

2. Grade approval requests COY-034, COY-035, COY-036, COY-037, COY-038, and COY-039 were approved in accordance with the requirements of N.D.A.C. § 69-05.2-15-04(4)(a)(2).
3. The Voigts have not demonstrated that 48 inches of actual SPGM respread is required in accordance with current statutes and regulations.
4. The Voigts have not demonstrated that CCMC is in violation of a statute or regulation.
5. The Commission does not have jurisdiction over the issues provided with the Voigt coal lease.
6. The Commission declines to assess fees pursuant to N.D.C.C. § 38-14.1-36.

ORDER

1. The approval of grade approval requests COY-034, COY-035, COY-036, COY-037, COY-038, and COY-039 are affirmed.
2. The Voigt's Complaint, filed November 22, 2023, is dismissed.

PUBLIC SERVICE COMMISSION


Sheri Haugen-Hoffart
Commissioner


Randy Christmann
Chair


Julie Fedorchak
Commissioner