

**Thompson, Pamela J.**

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# Filing Accepted

Envelope Number: 5616693  
Case Number: 08-2024-CV-00694  
Case Style: Casey Voigt, et al. vs. North Dakota Public Service Commission, et al.



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Filing Details	
<b>Court</b>	Burleigh County
<b>Case Number</b>	08-2024-CV-00694
<b>Case Style</b>	Casey Voigt, et al. vs. North Dakota Public Service Commission, et al.
<b>Date/Time Submitted</b>	4/9/2024 6:47 PM CST
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<b>Filing Type</b>	Exhibit
<b>Filing Description</b>	CR Exhibit 98 - Complainants' Written Closing, Proposed Findings of Fact, Conclusions of Law and Order Submitted by Casey and Julie Voigt, and Declaration of Service
<b>Activity Requested</b>	EFileAndServe
<b>Filed By</b>	Pamela Thompson
<b>Filing Attorney</b>	John Schuh

Document Details	
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**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

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Casey and Julie Voigt,	)	
	)	Case No.: RC-23-348
Complainants,	)	
	)	OAH File No. 20230291
v.	)	
	)	<b>COMPLAINANTS' WRITTEN</b>
Coyote Creek Mining Company, L.L.C.,	)	<b>CLOSING</b>
	)	
Respondent.	)	
	)	

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**Procedural Background**

[¶1] This matter arises out of several grade approvals issued by the North Dakota Public Service Commission (“PSC” or “Commission”). The first notice the Voigts generally had of these grade approvals was the issuance of the letter with the Commission’s approval. Pursuant to N.D.C.C. § 28-32-22, these approvals constitute “informal dispositions” and are therefore subject to the provisions governing appeals set out in the Administrative Agencies Practice Act, N.D.C.C. chapter 28-32. The Voigts were concerned about the respread depths of SPGM based on prior disagreements raised in an informal conference on the Coyote Creek Mining Company’s (“CCMC” or “Mine”) Revision 12. *See* PSC Case No. RC-22-233, Docket Number 31. While the discussion at that informal conference focused on the *projected* respread depths, the current matter focuses on the *actual* respread depths, which are requested and approved along with the grade approvals.

[¶2] There are similar issues with how the Commission is allowing the Mine to calculate projected respread depths and those depths are calculated using the same table from N.D.A.C. §

69-05.2-15-04, but are calculated for the purpose of projecting required SPGM to ensure there is a sufficient supply to meet the *actual* respread depths when approved.<sup>1</sup> The relief sought in this proceeding, however, relates to the *actual* respread depths approved in the grade approvals being challenged.

[¶3] The bottom line is that the Voigts are asking for forty-eight inches of SPGM to be respread on their property and on the State of ND lands that are part of their ranch.

[¶4] Alternatively, the Voigts request that the Commission require testing of at least four feet of spoil in order to calculate the necessary SPGM respread depth pursuant to N.D.A.C. § 69-05.2-15-04(4).

### **Legal Basis for Reversal of PSC Staff Decision**

[¶5] The challenged grade approvals require less than 48 inches of SPGM to be respread on the Voigt ranch. *See* Docket Number 21, Voigt Exh. 2; Docket Number 27, Voigt Exh. 8; Docket Number 31, Voigt Exh. 12; Docket Number 35, Voigt Exh. 16; Docket Number 39, Voigt Exh. 20; Docket Number 45, Voigt Exh. 26. 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.

[¶6] 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).

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<sup>1</sup> And it should be noted here that the testimony at the hearing indicated that the Mine currently has a *deficit* of SPGM available for reclamation.

[¶7] 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 grade spoil material, which is the material onto which the SPGM is respread.

Suitable Plant Growth Material Redistribution Thickness

Spoil Properties		Total Redistribution Thickness	
Texture	Sodium Adsorption Ratio (SAR)	(Top Soil Plus Subsoil)	
		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		

[¶8] It is important to recognize that this table bases the depth of SPGM on the properties of the spoil onto which it will be respread. Important here is the Sodium Adsorption Rate, or “SAR”. If the spoil has a higher SAR, it can negatively alter the properties of the SPGM being respread on top of it. “[S]odicity primarily affects plant growth through its effect on physical properties of soils and minespoils.” *See* Docket Number 62, Voigt Exh. 43. The PSC staff testified that soils with an SAR above a 12 are considered “sodic” soils. *See* Docket Number 15, 0:49:00-0:49:04.

[¶9] The Voigts submitted a study from North Dakota researchers which gave “[s]pecial attention ... to a dynamic aspect of sodicity-the migration of sodium from mine spoil into overspread topsoil at certain sites.” *Id.* at p.2.<sup>2</sup> PSC Staff agreed at the hearing that this study is

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<sup>2</sup> Page number references for Voigt exhibits will be to the page numbers as labeled by the Voigts (e.g. “Voigt-002” is p.2 here).

from an authoritative source. Docket Number 15, 1:21:49-1:25:10; Docket Number 72, Voigt Exh. 53. That same study found that at “the site of several reclamation experiments in western North Dakota, upward migration of sodium **increased the exchangeable sodium of topsoil spread over minespoil.** Evidence is presented which indicates that chemical diffusion played an important role in this process.” *Id.* The table below indicates the SAR of the spoil over which topsoil was spread, and it illustrates in real numbers the impact the high-SAR spoil had on the SPGM laid down on top of it.

**Table 3. Initial and subsequent saturation extract sodium and sodium-adsorption-ratio (SAR) values found in fall (September to November) soil samples from four field sites where 12 inches of soil had been spread over minespoil.**

Site	Depth	Sodium					SAR				
		Years					Years				
		0	1	2	3	4	0	1	2	3	4
	inches	meq/liter									
SI	0-6	1	2	2	2	1	1	1	1	1	1
	6-12	1	6	7	9	10	1	3	3	4	5
	12-24	22	28	27	25	26	12	9	9	9	10
	24-36	22	20	20	21	21	12	14	13	12	13
B	0-6	1	1	2	1	1	1	1	1	1	1
	6-12	1	8	19	9	12	1	3	6	4	4
	12-24	35	38	39	34	44	11	11	10	10	10
	24-36	35	36	37	37	39	11	11	10	11	11
S2	0-6	3	6	4	3	3	2	4	3	2	3
	6-12	3	18	17	23	16	2	9	10	17	18
	12-24	30	27	29	26	33	25	24	23	21	26
	24-36	30	35	29	33	33	25	29	26	26	25
Z	0-6	9	11	17	12	12	3	3	5	4	4
	6-12	9	25	42	40	41	3	7	15	14	12
	12-24	39	41	40	39	31	27	28	29	27	27
	24-36	39	35	33	37	39	27	32	30	27	28

[¶10] As indicated, topsoil with an SAR of 2 was up to an SAR of 17 within four years, well over the PSC’s agreed definition of sodic soils (SAR of 12 or higher). It is therefore a proven fact that

respreding SPGM on sodic spoil will cause an increase in the sodicity of overlying SPGM. This fact is also reflected in the regulation, which requires additional SPGM to be respread as SAR values increase in the spoil.

[¶11] The Voigts' concern arises from the lack of sample data used by the Commission staff to determine the *actual* respread depth. Prior to mining, the Commission calculates *projected* respread depths using voluminous testing data taken from soil bores every 40 acres and to depths beyond one hundred feet in five-foot increments. Samples are tested for SAR and other overburden properties. *See* Section 2.1.7 OB Sample Analyses of the permit; Docket Number 58, Voigt Exh. 39, pp. 5-7. This comprehensive testing is utilized to calculate the projected respread depths.

[¶12] For whatever reason, the Commission requires this extensive testing for the projected respread depths, but only requires a *12-inch* depth for the samples of graded spoil analyzed to determine *actual* respread depths. This practice results in insufficient data for making these critical determinations, particularly in the matter at hand. Fortunately it is merely a practice the Commission has to require testing to a depth of 12 inches, and a practice that can be changed at any time and to any depth, such as is being requested here by the Voigts.

[¶13] As the Voigts have pointed out, “upward migration of sodium increased the exchangeable sodium of topsoil spread over minespoil” in numerous study sites in North Dakota, and this migration can move further than 12 inches. While it may not be necessary to conduct testing to the same depths post-mining for purposes of calculating respread depths for SPGM, it is elementary that this data should be collected at least to the rooting depth of the plants intended to be planted post-reclamation. Alfalfa has a rooting depth of at least 6-8 feet. *See* Docket Number 60, Voigt Exh. 41, p.4. PSC Staff agreed at the hearing that prairie grasses, the plants to which the Voigt lands will be planted post-mining, can root deeper than four feet deep. Docket Number 15, 1:30:55-

1:31:43. Mr. Voigt asked at the hearing for testing to be conducted to at least four feet or 48 inches from the surface of the graded spoil rather than merely the top 12 inches. *See* Docket Number 15, 2:39:10-2:39:51.

[¶14] The testimony from Casey Voigt at the hearing also supports the need to conduct additional and deeper sampling of the graded spoil. He submitted pictures into evidence showing the “pre-bench” or “glacial till” that the Mine claims to place on top of the sodic spoil. *See* Docket Number 69, Voigt Exh. 50, p.3. In one picture, Mr. Voigt explained he witnessed the Mine placing about 12 inches of the glacial till over top of gray spoil material. Docket Number 15, 2:35:21-2:39:07. Mr. Voigt also testified that staff from the Mine told him they were spreading twelve inches of pre-bench material over top of the spoil. Donn Steffen with the Mine disputed this when he testified, but also admitted he was not there for the conversation or photographs taken by Mr. Voigt. Docket Number 15, 4:09:00-4:09:08.

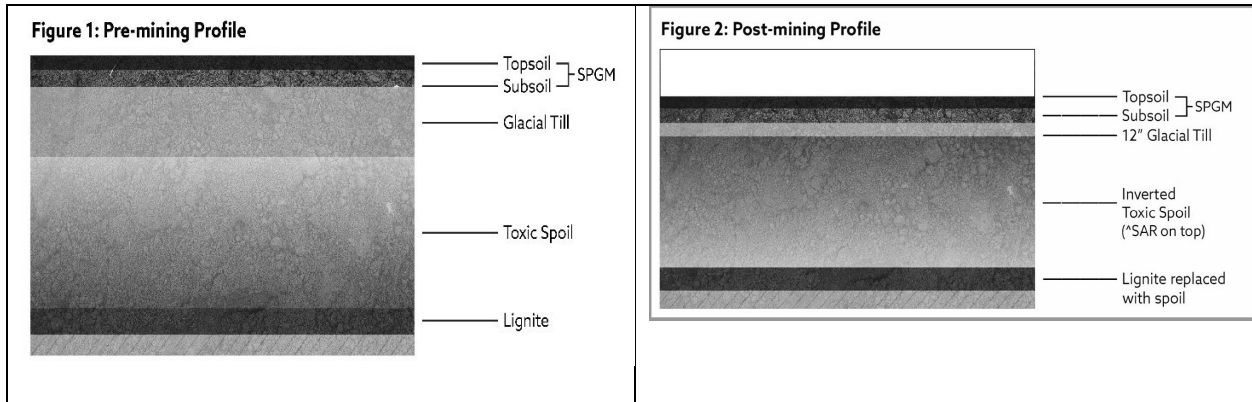
[¶15] There are numerous examples of spoil with SARs well above the “sodic” threshold of 12 to which the PSC Staff testified, and sometimes above 30 which is extremely toxic. Given the Mine’s practice of spreading the higher quality “pre-bench” material over what can be toxic spoil, and Mr. Voigt’s testimony that it was spreading approximately twelve inches on top of spoil, the PSC’s general practice of only requiring graded spoil to be tested to twelve inches is insufficient here.

[¶16] More importantly, this practice conflicts with the regulation which requires the SPGM respread depth to be calculated “based on the graded spoil characteristics.” N.D.A.C. § 69-05.2-15-04(4) (emphasis added). The “graded spoil” as used in the regulation refers to all of the spoil, and is nowhere limited to the top *twelve inches* of graded spoil. *See, e.g.*, N.D.C.C. § 38-14.1-24(3)(b) (“The permittee, at a minimum, shall backfill, grade, and compact (where advisable) using

*all available overburden and other spoil...*”). All available spoil is considered to be “graded” as it is used to reshape the land to its approximate original contour.

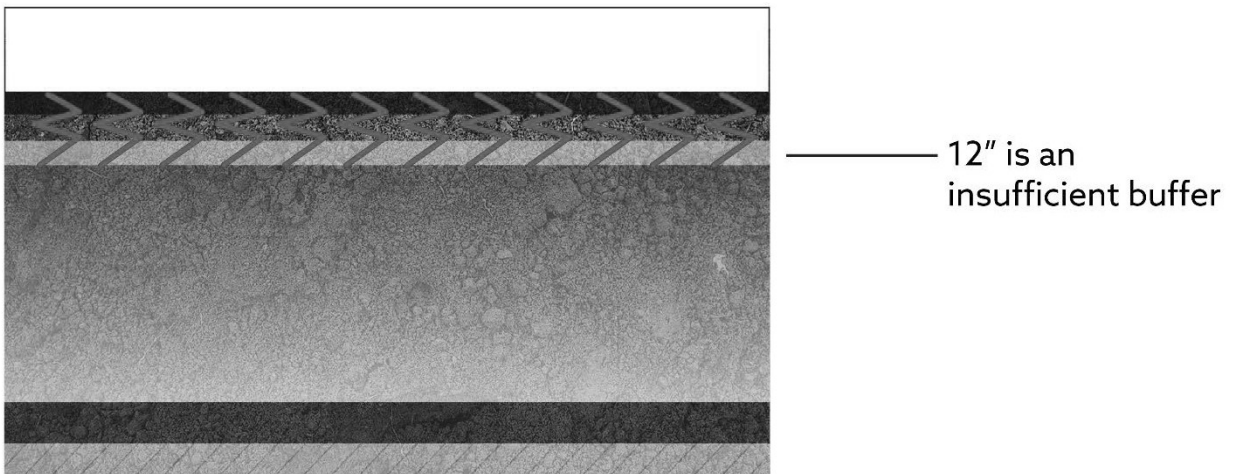
[¶17] Fortunately, there is no reason the PSC needs to require testing on only the top twelve inches of spoil in this case. The practice of testing the top twelve inches is just that – a practice – and one that can be changed at any time. It is not contained in the regulation and indeed, given the studies which form the basis for the regulation and their findings related to sodic migration, it is likely not practice well-grounded in the research. Given the testimony here that the Mine is spreading twelve inches of lower-SAR pre-bench material on top of spoil, there is an even more specific reason to require deeper testing beyond only the top twelve inches of graded spoil. The regulation requires it, but the facts of this matter also indicate that the parties and the PSC can only benefit from additional data and knowledge regarding the SAR values of the spoil for the challenged grade approvals. To the extent the SAR values are above 20 within the rooting zone of the plants that will be used for revegetation on the Voigt ranch, the SPGM should be respread at a minimum thickness of 48 inches.

[¶18] To further illustrate, the concern the Voigts have is that there is no data with respect to the SAR lurking just beneath the top twelve inches, and based on what Mr. Voigt saw in the field, it is possible that there is toxic spoil with an SAR well above 20 just below what was tested. Prior to mining, the most toxic spoil is near the lignite, but at the hearing the testimony indicated that the dragline will invert that spoil, such that the most toxic spoil is on top in backfilled areas.



[¶19] The figures above roughly illustrate the Voigts’ concern with soil and spoil strata prior to mining, and again after mining. As indicated, the larger buffer of glacial till is reduced to a 12” buffer after mining, and it sits immediately on top of the most toxic spoil. Based on the sodium migration evidenced in the study submitted by the Voigts, this 12” buffer of glacial till would be insufficient to prevent contamination of the SPGM if the “pre-bench” or glacial till materials were placed immediately on top of highly sodic spoil. The regulation requires a full 48 inches of SPGM if that is the case, but the data here is insufficient to make the determination.

**Figure 3: Toxic Spoil Contamination**



[¶20] The illustration above depicts the Voigts’ concern more directly, and there is only one way to ensure that the Mine is abiding by N.D.A.C. § 69-05.2-15-04(4) and its requirement to base the

respread depth on the “graded spoil.” The Mine must test at least to a depth sufficient to encompass the rooting depth of the plants with which it intends to revegetate the property, or it must respread a minimum of 48 inches of SPGM on the Voigt ranch.

[¶21] The current regulation at N.D.A.C. § 69-05.2-15-04(4) resulted from pressure from North Dakota mines, with North American Coal Corporation leading the charge. *See* Docket Number 63, Voigt Exh. 44, p.2 (article by Michael Poole, Manager of Environment Affairs, North American Coal Corporation, explaining history of current regulation). In order to get away from the prior standard of five feet of SPGM respread, industry and the Commission worked together with researchers to develop the current regulation. *Id.* According to North American Coal, in 1988 “[r]eclamation cost savings for each acre-foot of soil which does not have to be salvaged are more than \$1,000.” *Id.* That figure would obviously be far higher today. North American Coal described the regulation stating: “The gist of these regulations is shown in table 1. In most cases, reclamation costs will be reduced because less soil will have to be salvaged.” *Id.*

[¶22] In its summary of the research, North American Coal also lauded the researchers for adhering to a strict evidence-based approach:

The researchers themselves refused to make recommendations based on insufficient data, but once they felt confident in their research conclusions, they were willing to publicize and, if necessary, defend their research in the political arena, the media, and the scientific community. They conditioned their conclusions and recommendations, but not to the extent that the results of their work could not be applied to reclamation in the field.

*Id.* at p.6.

[¶23] And the lack of data is significant because there is a general concern from farmers about the actual success of reclamation at some mines. For example, another farmer in the area named John Weinand testified at the hearing that he and others have concerns about the success of reclamation because they have seen firsthand that production on mined and reclaimed lands is

substandard. Mr. Weinand referred to the “elephant in the room” and submitted yield maps showing significantly decreased yields on land used by another mine.



Voigt Exh. 54, Docket Number 73, p.1.

[¶24] The technology used to generate Mr. Weinand’s yield maps is commonplace for North Dakota farmers and would provide critical data on production and reclamation success for mined lands, and should be utilized by regulators to more accurately and comprehensively track reclamation success. It also highlights the Voigts’ concerns with having their highly productive land disturbed with the possibility of a detrimental long-term impact to the productivity of the soil. If sodium migration is allowed to move sodium into the SPGM being respread because the 12” buffer of glacial till is insignificant, there will be little recourse – indeed, the Mine admitted it is

already running at a deficit for SPGM to respread, so query how it will replace contaminated SPGM if the PSC allows the Mine to move ahead as planned and the SPGM is contaminated as the Voigts fear.

[¶25] In this matter, the Commission has been provided insufficient data to determine the required SPGM respread depth. The Voigts' request is simple: They ask for the Commission to require a full 48 inches of SPGM to be respread on the Voigt ranch, and to retest to a depth of four feet from the surface of the graded spoil in all areas tested for SAR for purposes of calculating the properties of the graded spoil pursuant to N.D.A.C. § 69-05.2-15-04(4).

Dated: January 19, 2024.

Respectfully submitted,

*/s/ Derrick Braaten*

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*Casey and Julie Voigt*

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

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Casey and Julie Voigt,	)	
	)	Case No.: RC-23-348
Complainants,	)	
	)	OAH File No. 20230291
v.	)	
	)	<b>PROPOSED FINDINGS OF FACT,</b>
Coyote Creek Mining Company, L.L.C.,	)	<b>CONCLUSIONS OF LAW, AND</b>
	)	<b>ORDER SUBMITTED BY CASEY AND</b>
Respondent.	)	<b>JULIE VOIGT</b>
	)	

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**Findings of Fact**

[¶1] Complainants Casey and Julie Voigt, (“Voigts”) filed a complaint with the North Dakota Public Service Commission (“PSC”) on November 22, 2023. A formal hearing was held on December 22, 2023.

[¶2] The complaint filed by the Voigts arose out of numerous appeals filed with the Burleigh County District Court as case numbers 08-2023-CV-01338, 08-2023-CV-01964, and 08-2023-CV-02561.

[¶3] On May 9, 2023, the PSC granted CCMC’s grade approval request COY-035 submitted on January 13, 2023 and resubmitted January 26, 2023. *See* Exhibit B to Complaint. On May 9, 2023, the PSC granted CCMC’s grade approval request COY-036 submitted on April 4, 2023. *See* Exhibit C to Complaint. On May 9, 2023, the PSC granted CCMC’s grade approval request COY-037 submitted on April 11, 2023. *See* Exhibit D to Complaint. On June 8, 2023, the Voigts filed a Notice of Appeal and Specification of Errors regarding COY-035, COY-036, and COY-037 and served the PSC, CCMC, and the North Dakota Attorney General (“AG”) on that date. *See* Case No. 08-2023-CV-01338, Index ##1-4.

[¶4] On August 7, 2023, the PSC granted CCMC's grade approval request COY-034 submitted on September 6, 2022, resubmitted on July 12, 2023, and subsequently revised on August 7, 2023. *See* Exhibit E to Complaint. On August 18, 2023, the Voigts served the PSC (through the Attorney General) and CCMC with a Notice of Appeal and Specification of Errors regarding COY-034 and filed the appeal on August 23, 2023. *See* Case No. 08-2023-CV-01964, Index ##1-5.

[¶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.

[¶6] 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 PSC 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 PSC 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 PSC order. *See* Case No. 08-2023-CV-01338, Index ## 119, 122.

[¶7] On September 27, 2023, the PSC granted CCMC's grade approval request COY-038 submitted on September 12, 2023. *See* Exhibit F to Complaint. On October 2, 2023, the PSC granted CCMC's grade approval request COY-039 submitted on September 14, 2023. *See* Exhibit G to Complaint. On October 24, 2023, the Voigts served the PSC (through the Attorney General)

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.

[¶8] 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 PSC and attempt to resolve the dispute before the agency through a formal hearing on the additional grade approvals.

[¶9] A Prima Facie Motion stating a prima facie case and to serve the complaint was filed on November 29, 2023. *See* Docket Number 4. A Notice of Formal Hearing was served on November 30, 2023 with the formal hearing scheduled for December 22, 2023. *See* Docket Number 7.

[¶10] A stipulation to dismiss the Burleigh County District Court appeal was filed on January 11, 2024 and the Order for Dismissal was entered on January 12, 2024. *See* Case No. 08-2023-CV-01338, Index ##127, 130.

[¶11] On December 22, 2023, a formal hearing was held and testimony was provided by Monty Johnson, staff member for the PSC, Casey Voigt, complainant, and Donn Steffen, staff representative for the Mine.

[¶12] The first notice the Voigts generally had of the disputed grade approvals was the issuance of the letter with the Commission's approval.

[¶13] The Voigts were concerned that the grade approvals referenced in the Voigts' complaint were approved through an "informal disposition" pursuant to N.D.C.C. § 28-32-22 and are therefore subject to the provisions governing appeals set out in the Administrative Agencies

Practice Act, N.D.C.C. chapter 28-32. Based on this concern, the Voigts filed appeals of numerous approvals within the 30-day window allowed for such appeals, in order to preserve their rights. They subsequently approached the Commission asking if the Commission and Mine would agree to attempt to resolve the matters through one consolidated hearing before the agency, giving it the first opportunity to consider and rule upon the Voigts' concerns. Based on this request, the Commission agreed to stay the district court proceedings and allow time for the Voigts to file a complaint and request for hearing setting forth their concerns with the grade approvals. The December 22, 2023 hearing was the culmination of this process.

[¶14] Having heard the testimony and reviewed the evidence submitted at the hearing, the Commission finds that the thickness of the SPGM respread following grade approval is significant and important for reclamation success.

[¶15] The Voigts submitted a study from North Dakota researchers which gave “[s]pecial attention ... to a dynamic aspect of sodicity-the migration of sodium from mine spoil into overspread topsoil at certain sites.” *Id.* at p.2.<sup>3</sup> PSC Staff agreed at the hearing that this study is from an authoritative source. Docket Number 15, 1:21:49-1:25:10; Docket Number 72, Voigt Exh. 53. That same study found that at “the site of several reclamation experiments in western North Dakota, upward migration of sodium increased the exchangeable sodium of topsoil spread over minespoil. Evidence is presented which indicates that chemical diffusion played an important role in this process.” *Id.*

[¶16] Respreading SPGM on sodic spoil will cause an increase in the sodicity of overlying SPGM. This fact is also reflected in the regulation, which requires additional SPGM to be respread as SAR values increase in the spoil.

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[¶17] Prior to mining, the Commission calculates projected respread depths using voluminous testing data taken from well bores every 40 acres and to depths beyond one hundred feet in five foot increments. Samples are tested for SAR and other overburden properties. *See* Section 2.1.7 OB Sample Analyses of the permit; Docket Number 58, Voigt Exh. 39, pp. 5-7. This comprehensive testing is utilized to calculate the projected respread depths, and the testing intervals provide data on the spoil to depths of over one hundred feet in five-foot increments.

[¶18] The Commission has a general practice of requiring testing of grade spoil to 12 inches for determining actual respread depths, but this practice can be modified at any time, and the facts of the current dispute justify a modification here. “[U]pward migration of sodium increased the exchangeable sodium of topsoil spread over minespoil” in numerous study sites in North Dakota, and this migration can move further than 12 inches.

[¶19] While it may not be necessary to conduct testing to the same depths post-mining for purposes of calculating respread depths for SPGM, it is elementary that this data should be collected at least to the rooting depth of the plants intended to be planted post-reclamation. Alfalfa has a rooting depth of at least 6-8 feet. *See* Docket Number 60, Voigt Exh. 41, p.4. PSC Staff agreed at the hearing that prairie grasses, the plants to which the Voigt lands will be planted post-mining, can root more than four feet deep. Docket Number 15, 1:30:55-1:31:43.

[¶20] The testimony from Casey Voigt at the hearing also supports the need to conduct additional and deeper sampling of the graded spoil. He submitted pictures into evidence showing the “pre-bench” or “glacial till” that the Mine claims to place on top of the sodic spoil. *See* Docket Number 69, Voigt Exh. 50, p.3. In one picture, Mr. Voigt explained he witnessed the Mine placing about 12 inches of the glacial till over top of gray spoil material. Docket Number 15, 2:35:21-2:39:07. Mr. Voigt also testified that staff from the Mine told him they were spreading twelve inches of

pre-bench material over top of the spoil. Donn Steffen with the Mine disputed this when he testified, but also admitted he was not there for the conversation or photographs taken by Mr. Voigt. Docket Number 15, 4:09:00-4:09:08.

[¶21] There are numerous examples of spoil with SARs well above the “sodic” threshold of 12 to which the PSC Staff testified, and sometimes above 30 which is extremely toxic. Given the Mine’s practice of spreading the higher quality “pre-bench” material over what can be toxic spoil, and Mr. Voigt’s testimony that it was spreading approximately twelve inches on top of spoil, the PSC’s general practice of only requiring graded spoil to be tested to twelve inches is insufficient here.

#### **Conclusions of Law**

[¶22] The “graded spoil” as used in the regulation refers to all of the spoil and is nowhere limited to the top *twelve inches* of graded spoil. *See, e.g.*, N.D.C.C. § 38-14.1-24(3)(b) (“The permittee, at a minimum, shall backfill, grade, and compact (where advisable) using all available overburden and other spoil....”) (emphasis added). All available spoil is considered to be “graded” if it is used to reshape the land to its approximate original contour.

[¶23] The practice of testing the top twelve inches is just that – a practice – and one that can be changed at any time. It is not contained in the regulation and indeed, given the studies which form the basis for the regulation and their findings related to sodium migration, it is likely not a practice well-grounded in the research. Given the testimony here that the Mine is spreading twelve inches of lower-SAR pre-bench material on top of spoil, there is an even more specific reason to require deeper testing beyond only the top twelve inches of graded spoil. The regulation requires it, but the facts of this matter also indicate that the parties and the PSC can only benefit from additional data and knowledge regarding the SAR values of the spoil for the challenged grade approvals. To

the extent the SAR values are above 20 within the rooting zone of the plants that will be used for revegetation on the Voigt ranch, the SPGM should be respread at a minimum thickness of 48 inches.

[¶24] The best way to ensure that the Mine is abiding by N.D.A.C. § 69-05.2-15-04(4) and its requirement to base the respread depth on the “graded spoil” is to test at least to a depth sufficient to encompass the rooting depth of the plants with which it intends to revegetate the property (or a minimum of four feet), and it must also respread a minimum of 48 inches of SPGM on the Voigt ranch.

### **Order**

[¶25] The Mine is hereby ordered to retest the approximate locations previously tested in its applications for the challenged grade approvals COY-034, COY-035, COY-036, COY-037, COY-038, and COY-039 but will retest to a depth of four feet below the surface of the prior graded spoil prior to respreading of SPGM; and

[¶26] The Mine will spread SPGM to ensure a depth of 48 inches of SPGM on all lands covered by the challenged grade approvals.

Dated: January 19, 2024.

Respectfully submitted,

*/s/ Derrick Braaten*

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*Casey and Julie Voigt*

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

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Casey and Julie Voigt,	)	Case No.: RC-23-348
	)	
Complainants,	)	OAH File No. 20230291
	)	
v.	)	<b>DECLARATION OF SERVICE</b>
	)	
Coyote Creek Mining Company, L.L.C.,	)	
	)	
Respondent.	)	
	)	

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[¶1] I hereby certify that true and correct copies of the following documents:

- **Complainants’ Written Closing;**
- **Proposed Findings of Fact, Conclusions of Law, and Order Submitted by Casey and Julie Voigt; and**
- **Declaration of Service.**

were, on the 19<sup>th</sup> day of January, 2024, electronically served and placed in the US Mail to:

North Dakota Public Service Commission  
600 E. Boulevard, Dept. 408  
Bismarck, ND 58505-0480  
[ndpsc@nd.gov](mailto:ndpsc@nd.gov)

The Honorable Hope Hogan  
Administrative Law Judge  
Office of Administrative Hearings  
2911 N 14<sup>th</sup> St., #303  
Bismarck, ND 58503  
[hlhogan@nd.gov](mailto:hlhogan@nd.gov)

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I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on this 19<sup>th</sup> day of January, 2024 at Bismarck, North Dakota.

  
\_\_\_\_\_  
Desirae Zaste