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Case Style: Casey Voigt, et al. vs. North Dakota Public Service Commission, et al.



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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

_____)	
)	
Casey Voigt and Julie Voigt)	
)	
Appellants,)	
)	CIVIL NO. 08-2024-CV-00694
vs.)	
)	
North Dakota Public Service Commission)	
and Coyote Creek Mining Company,)	
L.L.C.,)	
)	
Appellees)	
)	
_____)	
PSC Case No. RC-23-348)	
_____)	

BRIEF OF APPELLEE NORTH DAKOTA PUBLIC SERVICE COMMISSION

STATEMENT OF THE CASE

[1] This is an administrative appeal of a decision of the Public Service Commission (Commission) affirming grade approval requests COY-034, COY-035, COY-036, COY-037, COY-038, and COY-039 and dismissing the November 22, 2023 complaint filed by Casey and Julie Voigt (Complaint) against Coyote Creek Mining Company (CCMC). The administrative decision followed a hearing, requested by landowner and coal lessee, Appellants, Casey and Julie Voigt (Appellant or Voigts). The Voigts requested the

hearing under North Dakota Century Code chapter 28-32 and Article 69-02 of the North Dakota Administrative Code.

[2] The Voigts initially filed a series of appeals in August through October of 2023 challenging the Commission approvals of grade approvals COY-034, COY-035, COY-036, COY-037, COY-038, and COY-039 alleging inadequate respread depths of suitable plant growth materials (SPGM) pursuant to N.D.A.C. § 69-05.2-15-04(4)(a)(2) and that the Commission improperly disposed of these issues through an informal disposition and without hearing. See Case Nos. 08-2023-CV-01338, 08-2023-CV-01964, and 08-2023-CV-02561. Despite no complaint or hearing request with the Commission, the Voigts requested the court remand the grade approvals for formal adjudication. Upon stipulation of the parties, the matter was stayed and the appeal was ultimately dismissed by the Voigts upon a Commission decision to hold a formal hearing and issue a final decision adjudicating the claims. See *Order to Consolidate and Stay*, 08-2023-CV-01338, Index #126; 08-2023-CV-02561, Index #11.

[3] In its complaint, the Voigts disputed the Commission's calculation of "projected" respread where a truck shovel method of removing overburden has been used. Index #12, Complaint, ¶¶ 20-22. The Voigts asserted any projected or actual SPGM respread depths for property owned by the Voigts should be set at 48 inches pursuant to N.D.A.C. § 69-05.2-15-04(4)(a)(2) and the Commission granted an exception to the legal requirement by issuing several grade approvals. *Id.* at ¶¶ 24-28. The requested relief was to reverse the grade approval requests and require CCMC to have SPGM respread at a minimum of 48 inches on all lands covered by the grade approval requests as required by the equation in N.D.A.C. § 69-05.2-15-04(4)(a)(2). *Id.* at ¶ 31. The

Commission concluded the Voigts did not meet the burden to demonstrate that the grade approvals should be reversed, that CCMC is not calculating approval depths in accordance with N.D.A.C. § 69-05.2-15-04, or that CCMC is in violation of a statute or regulation. As a result, the Commission affirmed the grade approval requests. Index #116, Findings of Facts, Conclusions of Law, and Order, p. 13.

[4] Although the Appellant largely argues facts in its brief, the issue stated for appeal is whether N.D.A.C. § 69-05.2-15-04 requires all graded spoil to be tested in order to assess and determine final SPGM respread.

STANDARD OF REVIEW

[5] In reviewing an agency's findings of fact, an appellate court does not substitute its judgment for that of the agency or make independent findings. *Voigt v. N. Dakota Pub. Serv. Comm'n*, 2017 ND 76, ¶ 9, 892 N.W.2d 149, 152; *Capital Elec. Coop. v. City of Bismarck*, 2007 ND 128, ¶ 31, 736 N.W.2d 788. Rather, in reviewing the Public Service Commission's findings of fact, the appellate court determines "only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by weight of the evidence from the entire record." *Voigt* at ¶ 9 (see also, *Power Fuels, Inc. v Elkin*, 282 N.W.2d 214, 220 (N.D. 1979) and *North Central Electric Cooperative, Inc. v N.D. Public Service Commission, Otter Tail Power Company, and Turtle Mountain Band of Chippewa Indians*, 2013 ND 158, ¶ 6-7, 837 N.W. 138). The appellate court does "not reweigh or reevaluate the evidence...[or] function as a super board and second guess the Commission's findings." *Capital Elec. Coop.*, ¶ 35 (2007).

[6] Furthermore, "[a]n administrative agency's reasonable interpretation of a regulation is entitled to deference." *Voigt v. N. Dakota Pub. Serv. Comm'n*, 2017 ND 76,

¶ 28, 892 N.W.2d 149, 160–61; see also *People to Save the Sheyenne River, Inc. v. N.D. Dep't of Health*, 2008 ND 34, ¶ 15, 744 N.W.2d 748. “[C]ourts generally defer to an agency's reasonable interpretation when the language is so technical that only a specialized agency has the experience and expertise to understand it or when the language is ambiguous.” *N.D. Sec. Comm'r v. Juran and Moody, Inc.*, 2000 ND 136, ¶ 25, 613 N.W.2d 503 (quoting *In the Matter of Permits to Drain Related to Stone Creek Channel Improvements and White Spur Drain*, 424 N.W.2d 894, 900 (N.D. 1988)). “An agency has a reasonable range of discretion to interpret and apply its own regulations, and the agency's expertise is entitled to deference when the subject matter is complex.” *St. Benedict's Health Ctr. v. N.D. Dep't of Human Servs.*, 2004 ND 63, ¶ 9, 677 N.W.2d 202.

BACKGROUND

[7] On October 22, 2014, the Commission issued Surface Coal Mining Permit No. NACC-1302 allowing CCMC to conduct surface coal mining and reclamation operations at Coyote Creek Mine. See Index #116, Findings of Facts, Conclusions of Law, and Order, p. 3, ¶ 1. The permitting and commencement of mining operations began a litany of administrative proceedings filed by the Voigts against CCMC. See Case Nos. RC-13-850 (arguing native grassland seed mixtures, productivity of reclaimed lands, spoil grading and soils replaced on reclaimed land, county road closures, mine signage, coal lease, and alluvial valley floors); RC-14-846 (alleging noncompliance with air quality laws and regulations); and RC-19-189 and RC-19-190 (objecting to road access, fugitive dust, alluvial valley floors, cultural resource sites, sediment buildup, CCMC's ability to reclaim the mine, and financial incentives). This appeal is the most recent dispute initiated by the

Voigts. This proceeding was initiated by complaint rather than an objection to a permit application. See Index #12, Complaint.

[8] During the permit application phase, the mining plan is evaluated by the Commission. See N.D.C.C. § 38-14.1-14; N.D.A.C. § 69-05.2-05-01. Upon demonstration that a reclamation plan can accomplish reclamation as required by N.D.C.C. ch. 38-14.1 and associated regulations, the Commission may issue a permit. N.D.C.C. § 38-14.1-21. The second phase is an iterative process with continued oversight, inspection, bonding, and adjustments to ensure that it continues according to performance requirements and efficient mining practices. N.D.A.C. § 69-05.2-11-02. The final step is that the operator must demonstrate reclamation and revegetation success, which includes a demonstration of restoration of agricultural productivity. N.D.C.C. § 38-14.1-24(17); N.D.A.C. § 69-05.2-22-07. This generally occurs multiple years after final grading and seeding. If these requirements are not met, soil amendments and additional reclamation are required to continue until completed. Upon completion of the final step, the operator may apply for final bond release. N.D.A.C. § 69-05.2-12-12.

[9] N.D.A.C. § 68-05.2-08-01(1) requires each application to include a description of the premining environmental resources of the permit and adjacent areas affected by mining. This includes a detailed soil survey to provide information on the amount of SPGM available within the requested permit area before mining occurs. N.D.A.C. § 69-05.2-08-10. SPGM “means that soil material (normally A, B, and portions of the C horizons) located within the proposed permit area” found by the Commission to be most acceptable for plant growth when respread on the surface of regraded areas. N.D.C.C. § 38-14.1-

02(33). Overburden, as the term is used, is all of the earth and other materials, with the exception of SPGM, which lies above natural deposits of coal. N.D.C.C. § 38-14.1-02(13).

[10] Based upon the soil survey, the permit requires an estimate of SPGM necessary for reclamation — commonly referred to as the projected respread thickness. The mining company is then able to either salvage all available SPGM and respread the same amount, or salvage enough SPGM based on the *projected* respread thickness and respread an *actual* specific amount based on the graded spoil properties during reclamation.

[11] A permit application requires the in-situ overburden be sampled to comply with the geological evaluation in N.D.A.C. § 69-05.2-08-05 and to determine the chemical and physical properties. The overburden is sampled down through the deeper of either the stratum immediately below the deepest coal seam to be mined or any lower aquifer that may be adversely affected by mining. N.D.A.C. § 69-05.2-08-05(1). This rule also requires physical and chemical analyses of each overburden sample at five-foot intervals to identify horizons containing potential toxic-forming materials. N.D.A.C. § 69-05.2-08-05(2). The overburden sampling results are used to create a projected SPGM respread depth map for redistribution thickness to ensure that, volumetrically, there is enough SPGM available to reclaim the mined land based on projected respread thickness and comply with N.D.A.C. § 69-05.2-21-03.

[12] If the evaluation shows a shortage of SPGM, an operator may salvage, stockpile, and use high-quality overburden material classified as subsoil, “other suitable strata”, to supplement the deficit of SPGM and meet redistribution requirements of N.D.A.C. § 69-05.2-15-04(4)(a)(2) by conducting a deep lift soil survey. Under NACC-1302, the

applicant, in consultation with the Commission, was required to provide results of the analyses, trials, and tests of the deep lift soil survey under N.D.A.C. § 69-05.2-15-02(5).

[13] The soil resources section of the permit application was deemed satisfactory to meet the soil redistribution requirements in the findings of NACC-1302. Index #24, Transcript of Electronic Recording, p. 22, Ins. 13-18. The permit requires that actual soil removal volumes and expected respread depths are calculated annually and presented in an annual soil handling plan prepared by the operator. Index #71, Johnson Memorandum, p. Voigt-014. The annual soil handling plan acts as a snapshot in time of the operator's stockpiled inventory of SPGM, current reclamation obligations, and disturbance plans for SPGM removal in the upcoming year. The Commission's reclamation division reviews the plan to track and make adjustments to ensure the operator has enough SPGM to reclaim disturbed areas as mining proceeds.

[14] During the mining process, all topsoil and subsoil are salvaged to meet redistribution requirements. See Index #24, Tr. of Electronic Recording, p. 85. N.D.A.C. § 69-05.2-21-06 requires that the mine submit a grade approval request to the Commission before SPGM respread. Index #25, Tr. of Electronic Recording, p. 168, Ins. 10-15. After the mining pits are backfilled and graded to the approximate approved post-mining topography, a mining company must submit a grade approval request that includes the actual SPGM respread depths. See N.D.A.C. § 69-05.2-21-06; See also Index #24, Tr. of Electronic Recording, p. 19, Ins. 16-18.

[15] Spoil is "overburden that has been disturbed by mining operations." N.D.A.C. § 69-05.2-01-02(101). The actual SPGM respread depths are determined by the graded spoil characteristics, sodium adsorption ratio (SAR) and soil texture, outlined in N.D.A.C. § 69-

05.2-15-04(4)(a)(2). The spoil characteristics are determined by an operator's sample(s) of the underlying materials and analyzed by a third-party laboratory once it has been graded to the approximate approved post-mining topography. See N.D.A.C. § 69-05.2-15-04(4)(a)(2)(b). Based upon the physical and chemical properties determined from the sample analyses, SPGM is respread at 24, 36, or 48 inches. N.D.A.C. § 69-05.2-15-04(4)(a)(2).

[16] Upon final reclamation and before bond release, the Commission checks the SPGM respread depths to ensure an adequate depth was respread based on the grade approvals. The productivity of these areas is evaluated relative to their pre-mine baseline productivity and post-mining land use. At this time, if the area's productivity falls short of the requirements, additional soil amendments or other measures may be required before bond release. N.D.C.C. § 38-14.1-02(29).

[17] This is an appeal of a Commission decision to affirm the grade approval requests COY-034, COY-035, COY-036, COY-037, COY-038, and COY-039 submitted by CCMC. A decision to affirm the grade approvals was made by the Commission after a hearing and consideration of the entirety of the record.

LAW AND ARGUMENT

[18] North Dakota's coal mining and reclamation law is found in North Dakota Century Code chapter 38-14.1. The Commission has adopted rules implementing that law, which can be found in North Dakota Administrative Code article 69-05.2. Both North Dakota laws and rules for the state's coal regulatory program must meet federal approval. 30 C.F.R. Part 730.

[19] Under Federal requirements of the Surface Mining Coal and Reclamation Act (SMCRA), all topsoil shall be removed as a separate layer from the area to be disturbed and segregated. 30 C.F.R. § 816.22(a)(1)(i). The regulatory authority may require that B horizon, C horizon, or other underlying strata be segregated, stockpiled, and redistributed as subsoil if it finds that the subsoil layers are necessary to comply with revegetation requirements. 30 C.F.R. § 816.22. Although SMCRA does not necessarily require the salvage of subsoil, N.D.C.C. ch. 38-14.1 and N.D.A.C. art. 69-05.2 do.

[20] The pre-mining detailed soil survey provides that the Voigts property currently has an average of 32 inches of combined topsoil and subsoil. See Index #71, Tr. of Electronic Recording, p. Voigt-018 (Table 2.5.4.2, Soil Respread Depth Table in Permit NACC-1302); Index #25, Tr. of Electronic Hearing p. 190, Ins. 15-19. For clarification, in the Appellant's brief, it appears that the Appellant is asserting all the grade approvals require less than a 48-inch respread. Index #132, Brief, p. 5, ¶ 13. This is not the case.

[21] Grade approvals COY-035 and COY-039 require 48 inches of SPGM over the specified areas. See Index #39, COY-35 Grade Approval, p. Voigt-002; and Index #57, COY-039 Grade Approval, p. Voigt-002. Grade approval COY-036 required a combination of 24, 36, and 48 inches of SPGM respread. See Index #43, COY-036 Grade Approval, p. Voigt-002. Grade approvals COY-034, COY-037, and COY-038 were determined to require a combination of 24 and 36 inches of SPGM respread. See Index #33, COY-034 Grade Approval, p. Voigt-002; Index #47, COY-037 Grade Approval, p. Voigt-002; and Index #51, COY-038 Grade Approval, p. Voigt-002.

A. N.D.A.C. § 69-05.2-15-04 does not require a 48-inch SPGM respread depth for grade approvals COY-34, 36, 37, and 38.

[22] The complaint was that “any projected or actual respread depths for property owned or ranched by the Voigts should be set at forty-eight inches pursuant to N.D.A.C. § 69-05.2-15-04(a)(2)” and that “[a] forty-eight inch depth for SPGM on Voigt property is required by the equation set forth at N.D.A.C. § 69-04.2-15-04(a)(2). Index #12, Complaint p. 5, ¶¶ 24, 27. During the hearing, Mr. Voigt reiterated that it was his understanding that N.D.A.C. § 69-05.2-15-04(4)(a)(2) entitled him to 48 inches of respread on all of his tracts under the grade approvals. Index #24, Tr. of Electronic Recording, p. 115, Ins 18-21.

[23] The administrative rules provide performance standards to ensure that the final reclamation productivity and bond release can be met. Regarding respread over toxic materials, N.D.A.C. § 69-05.2-21-03 provides:

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.

[24] Based on the definition of toxic-forming materials and research conducted in North Dakota reflected in the administrative code, sodic spoil is the common toxic-forming material exposed, used, or produced during strip mining. See N.D.A.C. § 69-05.2-01-02(114) and 69-05.2-15-04; see *generally* Index #88, Bulletin 514. Although spoil is not always toxic, when certain characteristics are present like a SAR value of 12 or greater, the Commission requires mine operators to place a cover of non-toxic SPGM over graded spoil to minimize adverse effects on plant growth and the approved postmining land use.

[25] An operator complies with adequate “nontoxic” coverage material requirements through compliance with the table provided in N.D.A.C. § 69-05.2-15-04(4)(a)(2), unless

the Commission approves a lesser redistribution thickness than those listed as permitted by N.D.A.C. § 69-05.2-15-04(4)(a)(2)(a). N.D.A.C. § 69-05.2-15-04(4)(a)(2) provides for varying thickness of “suitable plant growth materials to be redistributed” based upon the graded spoil characteristics. Under N.D.A.C. § 69-05.2-15-04(4)(a)(2), SPGM cover requirements increase as sodicity increases in the spoil resulting in a requirement of 24, 36, or 48 inches of respread.

[26] Once the spoil is graded to the approved topography during the grade approval process, the Commission reviews the sampling of the graded spoil, SAR value, and texture to determine an appropriate SPGM respread depth. Index #24, p. 19, Ins. 16-18. To ensure adequate sampling of the spoil characteristics, the Commission has advised composite sampling to a 12 inch depth on a grid with approximately 400-foot intervals. See Index #71, Johnson Memorandum, p. Voigt-010; see *also* Index #25, Tr. of Electronic Recording, p. 169, Ins. 15-21. CCMC provided that their graded spoil samples were collected to a depth of 12 inches. Index #25, Tr. of Electronic Recording, p. 169, Ins. 15-21.

[27] During the hearing, there was no dispute as to the appropriateness of approved respread depths if based on the 12-inch sample of the spoil characteristics. Index #24, Tr. of Electronic Recording p. 72, Ins. 12-17; p. 127, Ins. 18-19; and p. 172, Ins 16-24.

B. CCMC’s sampling does not conflict with the law and is consistent with a reasonable interpretation of the regulations.

[28] In asserting that the Commission did not comply with the applicable regulations, the Appellant would have the court believe that sampling must be through the depth of *all* regraded spoils. See Index #132, Brief, p. 17, ¶ 38. The assertion that the sampling

“conflicts with the regulation” and is “arbitrary” is based upon an erroneous interpretation of the regulatory requirements and a fundamental misunderstanding of the framework.

The sampling practices do not conflict with the regulation

[29] N.D.C.C. § 38-14.1-24(5) provides that an operator must “[r]emove, segregate, and respread suitable plant growth material *as required by the commission* within the permit area.” The law provides no requirement to sample all in this section or N.D.A.C. § 69-05.2-15-04(4)(a)(2), and this court should be wary to add words or requirements to the statute and regulations. *See First Union Nat. Bank v. RPB 2, LLC, 2004 ND 29, ¶ 17, 674 N.W.2d 1, 7* (“This court will not add words or additional meaning to the statute.”). The absence in (4)(a)(2) is more notable when contrasted with the immediately preceding subparagraph, (4)(a)(1), which provides that “[a]ll suitable plant growth material inventoried and removed . . . must be uniformly distributed.”

[30] In support of its interpretation, the Appellant cites N.D.C.C. § 38-14.1-24(3)(b) which provides that “at a minimum, . . . backfill, grade, and compact (where advisable) using all available overburden and other spoil and waste materials to attain the lowest practical grade. . . .” The citation is detached from its application. The performance standard is to ensure that all areas affected by mining are appropriately reshaped consistent with adjacent unmined landscape and to the approximate original contour or topography suited for the postmining land use, not appropriate sampling of graded spoils. In order to achieve the approximate original contour, all available overburden and other spoil are needed.

[31] The Appellant’s argument is a curious one. Under the Appellant’s interpretation of N.D.A.C. § 69-05.2-15-04(4)(a)(2), an insertion of all in its application would arguably

require sampling of every inch, horizontally and vertically, across the graded respread to possibly a depth of 85 feet or more for determining the appropriate SPGM respread depths. A sampling to this depth would bear no influence on final productivity or adequate coverage. To apply the Appellant's interpretation would result in an illogical result — exactly what precedent has provided courts should avoid. See *Hunts Along v. Dir., N. Dakota Dep't of Transportation*, 2018 ND 261, ¶ 5, 920 N.W.2d 491, 493 (“We construe statutes to avoid absurd or illogical results”).

[32] The term “sample” itself contemplates discretion and that not all of the graded spoil will be evaluated. Various intervals, depths, and methods of soil sampling may be employed to determine the physical and chemical properties and characteristics of the graded spoil necessary to determine adequate SPGM coverage. The Commission has reviewed available research and provided guidance on appropriate sampling methods. See Index #71, Johnson Memorandum, p. Voigt-008 to 011 (Policy Memorandum No. 17 to Mine Operators). The Commission's guidance was to sample to a depth of 12 inches on a grid with approximately 400-foot intervals. *Id.* at Voigt-010. The Commission also recommended that at least 3 or 4 samples be randomly collected around each grid point and combined into a composite sample for analysis (although the mine testified that they have taken as many as 6-8). *Id.*; Index #25, Tr. of Electronic Recording p. 180, In 5.

[33] A plain reading of the statutes and regulations supports the Commission's interpretation. There is no conflict or contradiction afforded in its language. Furthermore, the subject matter is complex. Accordingly, to the extent that this court finds there is any ambiguity, the Commission should be granted discretion and deference in interpreting and applying its regulations. See *Voigt v. N. Dakota Pub. Serv. Commission*, 2017 ND

76, ¶ 28, 892 N.W.2d 149, 161 (“[C]ourts generally defer to an agency's reasonable interpretation when the language is so technical that only a specialized agency has the experience and expertise to understand it or when the language is ambiguous.” (*quoting N.D. Sec. Comm’r v. Juran and Moody, Inc.*, 2000 136, ¶ 25, 613 N.D.2d 503).

The sampling methods are not arbitrary.

[34] The Appellant would have this court believe that a 12-inch sampling depth to determine graded spoil characteristics is arbitrary. This is not the case. It was developed with the agency’s subject matter experts evaluating the reclamation laws and regulations, mining operations and soil handling, available research, and methods.

[35] As noted during the hearing, SPGM respread was heavily influenced by Bulletin 514, Soil Replacement for Reclamation of Stripmined Lands in North Dakota, published in 1984. See Index #88, Bulletin 514; Index #24, Tr. of Electronic Recording, p. 52, Ins. 22-25. Bulletin 514 was an evaluation of published and unpublished North Dakota research and data, *including the tables and research relied on by the Appellant in its brief*, relating to depth and quality of topsoil and subsoil needed for successful reclamation of North Dakota strip-mined lands. See Index #88, Bulletin 514, p. 22 (citing Index #75, Merrill, S.D., E.J. Doering, and J.F. Power. 1980a. Changes of Sodicity and Salinity in Soils reconstructed on Strip-mined land. Agric. Exp. Sta. Farm Research).

[36] The report provided a recommended range of respread SPGM thickness that was “somewhat higher than the optimum levels reported in some of the experiments,” based on spoil properties of the “underlying spoil”. Index #88, Bulletin 514, p. 19; see *also* Index #116, p. 11, ¶ 48. As noted in the Commission’s findings, Bulletin 514 evaluated spoil characteristics, chemical and physical properties, water holding capacity, effective root

zone depth (including alfalfa and prairie grasses), and upward migration of sodium in the respread soil, among other things. Index #116, Findings of Fact, Conclusions of Law, and Order, ¶¶ 44-49. It also contemplated selective placement of high-quality spoil at the surface to justify the replacement of less subsoil. Index #88, Bulletin 514, p. 24. The research is reflected in N.D.A.C. § 69-05.2-15-04(4)(a)(2) and Policy Memorandum 17 — both issued shortly after the report’s publication (both were issued in 1987). See Index #71, Johnson Memorandum, p. Voigt-008.

[37] The sampling makes practical sense due to spoil mixing that occurs during backfilling and regrading operations and the grading material being placed in multiple foot lifts. See Index #25, Tr. of Electronic Recording, p. 165, Ins. 1-4. As testified by the CCMC witness and corroborated by the Commission Staff, “[i]t’s been used for 36 years by the industry and PSC successfully.” Index #25, Tr. of Electronic Recording, p. 193, Ins. 7-14; see also Index #24, Tr. of Electronic Recording, p. 81-82 (“we’ve seen how this process has worked at other mines”). CCMC’s witness also testified that his experience from previous reclamation using the methods has resulted in “a hundred percent” of bond release. Index #24, Tr. of Electronic Recordings p. 194, Ins. 16-22.

[38] CCMC’s reclamation plan was also comprehensively reviewed by the Commission during the application phase, including the sampling and respread methods. See Index #71, Johnson Memorandum, p. Voigt-014 (Section 2.5.4 discusses that the required respread is based on NDAC 69-05.2-15 and Policy Memorandum 17 to Mine Operations for the NACC-1302 Revision 12 application). During the past 12 revisions, the Commission has continued to review ongoing reclamation methods and soil resources and requested adjustments, as needed for successful reclamation. *Id.* at p. Voigt-003,

Voigt-020, Voigt-061, Voigt-064, Voigt-072. However, there has been no finding by the Commission that alterations to the sampling of graded spoil are needed.

[39] The Appellant is correct that sampling methods can be changed upon demonstration with sufficient evidence that they are inadequate. Index #132, Brief, p. 10, ¶ 22. However, *it would be arbitrary* to change long-standing, successfully implemented reclamation methods based upon adjudication of a complaint that did little to assert the inadequacy of the sampling methods and provided little to no record to support inadequate SPGM coverage.

The record does not support a change in methods.

[40] The Appellant spends considerable time disputing CCMC's sample analyses of graded spoil and discrediting the 12-inch sampling depth. Furthermore, the Appellant appears to assert that the record supports a change in sampling practice. Insofar as that is the assertion, the Appellant is wrong. In support of its argument, the Appellant's brief cites a study on sodium migration, plant rooting depth, and argues that the selectively handled pre-bench materials are being respread at only 12 inches.

[41] During the hearing, the Appellant called a member of Commission Staff unfamiliar with the specific articles or had not reviewed the process of sodium migration for the proceeding. Index #24, Tr. of Electronic Recording p. 52, Ins. 13-17. No additional witnesses with expertise on sodium migration were called by the Appellant. To discuss rooting depths, the Appellant called Mr. Voigt to testify to the depth of prairie grass and alfalfa roots (Index #24, Tr. of Electronic Recording, p. 101, Ins. 20-23) and the same member of Commission Staff, who provided that the rooting depths were outside of his

expertise (Index #24, Tr. of Electronic Recording, p. 57, Ins. 24-25). No expertise or testimony regarding effective rooting depth was provided.

[42] Much of the Appellant's argument is also predicated on Mr. Voigt's testimony that the operator had capped approximately 12 inches of higher quality pre-bench material spread over the dragline spoil. Index #24, Tr. of Electronic Recording p. 105, Ins. 19-25; p. 106, Ins. 15-18. However, this was refuted by CCMC's operation manager. He testified that 40 feet of pre-bench material was already spread at the time of the alleged 12-inch cap and pre-bench is generally placed in 6-8 foot lifts. Index #25, Tr. of Electronic Recording p. 164, Ins. 23-25.

[43] Regardless, the entirety of the record was reviewed and weighed by those with expertise in the subject matter and the record did not support a change of methodology or a finding that CCMC was not in compliance with any statute or regulation.

C. The court may avail itself to exhaustion of remedies.

[44] The requirement to exhaust administrative remedies serves to preserve agency authority and promote judicial efficiency by recognizing the agency's decisionmaking responsibility. See *Cont'l Res., Inc. v. N. Dakota Dep't of Env't Quality*, 2019 ND 280, ¶ 10, 935 N.W.2d 780, 783. Although exhaustion need not occur when a legal question simply involves statutory interpretation, it has been determined to be appropriate when a party requests a court to "read ambiguity into the [r]ule where it doesn't otherwise exist and apply other provisions in the Administrative Code to interpret the rule differently than the express words." *Id.* at ¶ 14. The requirement to exhaust administrative remedies is particularly weighty when the agency's decision involves factual issues or administrative expertise. *Id.* at ¶ 15.

[45] Although the complaint broadly referenced N.D.A.C. § 69-05.2-15-04(4)(a)(2), the Appellant narrowly tailored its argument to, “[a] forty-eight inch depth for SPGM on the Appellant’s property is required by the equation set forth at N.D.A.C. § 69-05.2-15-04(a)(2).” Index #12, Complaint, ¶¶ 24-17. During the hearing, the Appellant pivoted from the allegations in the complaint and argued that “[t]here’s not enough information there to come up with” a determination for 48 inches, and requested testing of 12 inches to 48 inches of dragline spoils. See Index #24, Tr. of Electronic Recording, p. 125, Ins. 18-22; p. 107, Ins. 6-12; p. 138, Ins. 20-25. Inadequate sampling analyses by the mine were not alleged in the complaint and were not developed by the Voigts and presented at the hearing. Upon dismissal of the complaint, the Appellants seem to be taking an opportunity to develop a new theory of the case in arguing that N.D.A.C. § 69-05.2-15-04(4) requires testing of “all” of the graded spoil. Index #132, Brief, ¶ 38.

[46] The Commission submits that there is no basis, legal or factual, provided by the Appellant to reverse the Commission’s order and that there is no conflict in the application of law or regulation. However, to the extent that the court finds additional development of the issue necessary, it may consider the requirement of exhaustion of remedies.

CONCLUSION

[47] As acknowledged by the Appellant, the subject matter of this case is “technical”. Index #132, Brief p. 8-9, ¶ 19. In such cases, the precedent is clear that the court should defer to a specialized agency that has the experience and expertise to understand it or the language is ambiguous. *Voigt v. N. Dakota Pub. Serv. Comm’n*, 2017 ND 76, ¶ 28, 892 N.W.2d 149, 160. Additionally, agency expertise is entitled to appreciable deference

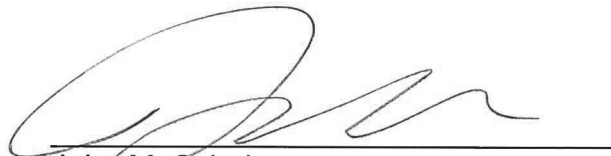
if the subject matter is highly technical. *Minn-Kota Ag. Prod., Inc. v. N. Dakota. Pub. Serv. Comm'n*, 2020 ND 12, ¶ 28, 938 N.W.2.d 118, 128.

[48] The matter of law raised by the Appellant provides no contradiction or basis to reverse the Commission order.

[49] The factual record before the agency provides no basis to reverse the Commission's methodology or decision.

[50] Accordingly, the Commission respectfully requests that its decision be affirmed.

Respectfully submitted this 4th day of June 2024



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