

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Casey Voigt and Julie Voigt,)
)
 Appellants,)
 v.)
)
 North Dakota Public Service Commission and)
 Coyote Creek Mining Company, L.L.C.,)
)
 Appellees.)

Civil No. 08-2024-CV-00694

BRIEF OF APPELLEE COYOTE CREEK MINING COMPANY, L.L.C.

[¶1] Appellee Coyote Creek Mining Company, L.L.C. (“CCMC”) submits this brief in support of affirming the North Dakota Public Service Commission’s (“PSC”) February 14, 2024, Findings of Fact, Conclusions of Law and Order in Case No. RC-23-348 (“Order”). Docket No. 116.

SUMMARY OF THE ARGUMENT

[¶2] CCMC operates the Coyote Creek coal mine (“Coyote Creek Mine”) in Mercer County. Once CCMC has mined out a tract of land, CCMC must grade (*i.e.*, topographically contour) the tract and spread certain amounts of Suitable Plant Growth Material (“SPGM”) across the graded tract. *See* N.D.A.C. § 69-05.2-15-02(2)(a) (recognizing that SPGM is “commonly referred to as topsoil . . . and subsoil”). As is relevant to this appeal, N.D.A.C. § 69-05.2-15-04(4)(a)(2) dictates how much SPGM must be spread on the graded tract based upon numerous circumstances (discussed further below), with a 24-inch minimum and a 48-inch maximum. Before CCMC can spread any SPGM, the PSC must approve CCMC’s proposed SPGM depths in a grade approval.

[¶3] CCMC followed that procedure for six tracts of land contested by Appellants Casey and Julie Voigt (“Voigts”). In grade approvals COY-034 through COY-039, the PSC approved CCMC’s proposed SPGM respread for those tracts, which provided for 24, 36, or 48 inches of

SPGM depending on the given tract. Following a formal adjudicative hearing, the PSC affirmed those grade approvals, concluding all six “were approved in accordance with the requirements of N.D.A.C. § 69-05.2-15-04(4)(a)(2).” Docket No. 116, at ¶ 2, p. 14.

[¶4] While having numerous technical components, this administrative appeal is straightforward. Rather than focus on what the applicable regulations actually require, the Voigts focus on what they think those regulations should require. And rather than focus on the facts of this case, the Voigts want the Court to rely upon abstract theories. The Voigts’ unsubstantiated claims do not warrant reversal. Under the deferential standard of review owing to the PSC, the Court should affirm the Order approving each of the six grade approvals.

STATEMENT OF THE FACTS AND THE CASE

[¶5] The current appeal is the Voigts’ latest attempt to hinder CCMC’s mining operations. The Voigts’ acknowledge that they “have been involved in proceedings with [CCMC] under North Dakota” law concerning the Coyote Creek Mine. Docket No. 132, at ¶ 35. Those proceedings include an earlier unsuccessful challenge by the Voigts relating to SPGM respread depths.

I. The Voigts’ previous dispute relating to CCMC’s SPGM respread.

[¶6] On March 17, 2022, CCMC applied to revise its mining permit, NACC-1302. PSC Case No. RC-22-233, Docket No. 1. On August 29, 2022, the Voigts objected to CCMC’s proposed revisions to NACC-1302’s Sections 2.5.4 and 2.5.7. PSC Case No. RC-22-233, Docket No. 16. Specifically, the Voigts accused CCMC of trying to “significantly reduce the amount of [SPGM] being respread across the mine.” *Id.* at 2. The Voigts requested an informal conference, which occurred on October 12, 2022. PSC Case No. RC-22-233, Docket No. 31.

[¶7] At that informal conference, “Mr. Braaten and the Voigts admitted that they did not fully understand Policy Memorandum No. 17 to Mine Operators and how the [SPGM] calculations are conducted.” PSC Case No. RC-22-233, Docket No. 52, at ¶ 36. To allay that confusion, Monty

Johnson, a PSC staff member, “discussed, and answered questions, regarding the analysis for SPGM respread.” *Id.* at ¶¶ 41–43.

[¶8] The PSC approved the requested revisions to NACC-1302 on November 9, 2022. *Id.* The PSC specifically concluded that “CCMC’s revised Projected Soil Respread Depth Map, Section 2.5.7 of the Permit, submitted with Revision No. 12 meets the requirements of N.D.A.C. §§ 69-05.2-08-05, 69-05.2-15, and Policy Memorandum No. 17 to Mine Operators.” *Id.* at ¶ 56. Concerning the Voigts’ claim that their coal lease with CCMC somehow governed SPGM respread, the PSC concluded that it “does not have jurisdiction over coal or surface lease terms, conditions, practices, or private agreements and negotiations.” *Id.* at ¶ 45.

II. The Voigts’ current challenge to the disputed grade approvals.

[¶9] In 2023, CCMC submitted the six grade approval requests to the PSC, each concerning a different tract of land either owned or previously leased by the Voigts. The PSC subsequently issued letter approvals for each of the requests. Docket No. 33 (approving COY-034); Docket No. 38 (approving COY-035); Docket No. 42 (approving COY-036); Docket No. 46 (approving COY-037); Docket No. 50 (approving COY-038); Docket No. 56 (approving COY-039).

A. The Voigts first appeal the disputed grade approvals to district court.

[¶10] The Voigts challenged grade approvals COY-034 through COY-039 in multiple administrative appeals to state district court for Burleigh County. *Voigt v. N.D. Public Serv. Comm’n*, Case No. 08-2023-CV-01338 (Burleigh County District Court) (concerning COY-035, COY-036, and COY-037); *Voigt v. N.D. Public Serv. Comm’n*, Case No. 08-2023-CV-01964 (Burleigh County District Court) (concerning COY-034); *Voigt v. N.D. Public Serv. Comm’n*, Case No. 08-2023-CV-02561 (Burleigh County District Court) (concerning COY-038 and COY-039). Those appeals were eventually consolidated in Case No. 08-2023-CV-01338. The Voigts, CCMC, and the PSC subsequently agreed that the Voigts would dismiss those appeals and file a formal

administrative complaint concerning the disputed grade approvals. *See* Docket No. 116, at pp. 1–3 (outlining that procedural history). Accordingly, the district court dismissed the consolidated appellate action. Case No. 08-2023-CV-01338, Docket No. 130.

B. The Voigts then file their Complaint.

[¶11] The Voigts filed their administrative Complaint on November 22, 2023. Docket No. 12. In the Complaint, the Voigts alleged that CCMC’s grade approvals violated N.D.A.C. § 69-05.2-15-04 by allowing unlawfully thin SPGM respread depths. *Id.* The Voigts requested an order from the PSC reversing the grade approvals, requiring CCMC to have a minimum 48-inch SPGM respread across the disputed tracts, and requiring CCMC to calculate all future SPGM respread depths pursuant to N.D.A.C. § 69-05.2-15-04(4)(a)(2). *Id.* The Voigts additionally requested that the PSC require CCMC to undertake crop productivity monitoring and sodium migration monitoring. *Id.* CCMC answered, denying those allegations. Docket No. 20.

[¶12] The PSC held a formal hearing concerning the Complaint on December 22, 2023. *See* Docket No. 17. Below is a summary of the testimony and evidence received.

1. Monty Johnson testified that the grade approvals were correct.

[¶13] The Voigts called Monty Johnson, a PSC staff member, as their first witness. Docket No. 24, at 18:13. Mr. Johnson is an Environmental Scientist III with the PSC and is responsible for reviewing grade approval requests. *Id.* at 18:18–18:25. Mr. Johnson explained how he reviews grade approval requests. *Id.* at 43:16–44:16. Mr. Johnson explained that he begins by looking at the data submitted concerning the graded spoil’s texture and Sodium Absorption Ratio (“SAR”) values. *Id.* Mr. Johnson explained that, pursuant to *Policy Memorandum No. 17*, *see* Docket No. 69, the PSC recommends that the data be taken from boreholes drilled to a 12-inch depth in the graded spoil. Docket No. 24, at 44:22–45:16. After reviewing a grade approval request to ensure

that the data was taken from a sufficient depth, Mr. Johnson compares the spoil's texture and SAR values with the chart found in N.D.A.C. § 69-05.2-15-04(4)(a)(2). That chart provides:

Suitable Plant Growth Material Redistribution Thickness

Spoil Properties		Total Redistribution Thickness (Topsoil Plus Subsoil)	
Texture	Sodium Adsorption Ratio (SAR)	Average in Inches	(Centimeters)
Medium*	< 12	24	(61)
Coarse**	< 12	36	(91)
***	12 – 20	36	(91)
aaa ¹	> 20	48	(122)

* Loam or finer
 ** Sandy loam or coarser
 *** Not applicable

On that comparison, Mr. Johnson determines the required SPGM respread depth and whether the grade approval request complies with that required depth. *Id.*

[¶14] Mr. Johnson personally reviewed CCMC's grade approval requests, which included data from an independent lab concerning both the graded spoil's texture and SAR values. Based upon his review of that independently analyzed data, Mr. Johnson concluded that the SPGM respread depths in the grade approval requests complied with the PSC's regulations. *Id.* at 68:9-68-13; *id.* at 72:12-72:15. Mr. Johnson concluded that the Voigts' request for 48-inch SPGM respread across all six of the disputed grade approvals was inappropriate based upon N.D.A.C. § 69-05.2-15-04(4)(a)(2). *Id.* at 75:4-75:7.

2. Casey Voigt did not identify anything wrong with the grade approvals.

[¶15] The Voigts then called Casey Voigt to testify. *Id.* at 96:17. Mr. Voigt is not an environmental scientist or soil scientist. He testified that he owns four of the disputed grade approval areas and he previously leased the other two grade approval areas from the North Dakota Department of Trust Lands. *Id.* at 130:9–130:14. Asked whether anyone from the Department of

Trust Lands expressed any concern about CCMC's SPGM respread on the State-owned lands, Mr. Voigt responded: "No." *Id.* 132:9–135:15.

[¶16] Asked what SPGM respread depth he would like to see across the disputed grade areas, Mr. Voigt said 48 inches. *Id.* at 101:9-101:16. Asked how he came to that SPGM respread depth, Mr. Voigt responded: "I thought that was a minimum requirement." *Id.* When asked to identify any requirement, whether in statute or regulation, that requires a 48-inch respread here, Mr. Voigt simply responded that his belief came "[f]rom my understanding of the North Dakota Century Code." *Id.* at 115:18–115:24. Asked whether he could cite any statutory or regulatory support for his understanding, Mr. Voigt responded: "No." *Id.* at 133:23–133:24. And asked whether anything in his coal lease required a 48-inch SPGM respread, Mr. Voigt responded that the lease "does not spell out 48 inches directly, no." *Id.* at 134:1–134:9.

[¶17] Mr. Voigt nevertheless maintained that the PSC should require CCMC to provide a 48-inch SPGM respread across the disputed grade approvals. Asked to apply the undisputed graded spoil texture and SAR values with N.D.A.C. § 69-05.2-15-04(4)(a)(2) to determine the SPGM respread across a particular area, Mr. Voigt refused. *Id.* at 120:10–125:22. Mr. Voigt claimed that insufficient data existed to determine the appropriate SPGM respread depths because the drill testing should be greater than 12 inches. *Id.* Asked what statute or regulation requires that deeper drilling, Mr. Voigt responded: "Point me in the regulation where it says we're not supposed to [check SAR values below 12 inches] and we're only supposed to check 12 inches." *Id.* at 122:22–122:25. Mr. Voigt never identified any statute or regulation that requires CCMC to drill deeper than the first 12 inches of in-place spoil to test the corresponding SAR values. *See id.* at 96:17–143:15. Mr. Voigt also presented no evidence or testimony concerning what the SAR values may have been had drilling occurred below the first 12 inches of the in-place spoil. *See id.*

3. John Weinand testifies about cherry-picked data on inapposite lands.

[¶18] The Voigts finally called John Weinand to testify. *Id.* at 144:12. Mr. Weinand farms land located near another North Dakota coal mine, some of which was used for storage of topsoil or subsoil from other lands being mined at that other mine. *Id.* Based upon combine yields that Mr. Weinand hand selected for a limited time period, he testified that the lands affected by the prior mining had yields between 50% and 70% of the undisturbed lands. *Id.* at 146:4–146:21.

[¶19] Upon cross-examination, Mr. Weinand clarified his testimony regarding the prior mining. Specifically, he clarified that his affected lands were not actually mined. *Id.* at 150:13–150:18. Instead, the property about which he testified was only used for storage of excess soils produced from mining operations that did not occur at Coyote Creek Mine. *Id.* And while he testified concerning the productivity of the affected lands in comparison to undisturbed lands, Mr. Weinand had no baseline data from which he could do a before and after analysis concerning the property's productivity. *Id.* at 151:2–151:8. Finally, Mr. Weinand had no explanation for why productivity on the affected areas was better in some years than others. *Id.* at 154:4–154:17.

4. Donn Steffen explains CCMC's extensive reclamation efforts.

[¶20] After the Voigts concluded their presentation, CCMC presented testimony from Donn Steffen. *Id.* at 158:11. Mr. Steffen is operations manager for CCMC, where he is in charge of operations at the Coyote Creek Mine. *Id.* at 158:20–158:23; *id.* at 159:3–159:5.

[¶21] Mr. Steffen has a degree in civil engineering and is a registered engineer in North Dakota. *Id.* at 158:24–159:2. Mr. Steffen has over thirty years' experience in the North Dakota coal industry, which has included nearly every environmental aspect of coal mining. *Id.* at 159:6–159:11. During that time, he estimated that he has been involved with between 100 and 150 grade approval requests with the PSC. *Id.* 159:15–159:18. He has also been involved with securing bond releases for thousands of acres of minded lands. *Id.* at 193:15–193:19.

[¶22] Mr. Steffen testified at length about the process for determining the appropriate SPGM respread depth. 168:1–172:15; *id.* at 179:11–180:11. In short, Mr. Steffen’s testimony matched the testimony of PSC Environmental Scientist III, Monty Johnson. As to the disputed grade approvals, Mr. Steffen testified that CCMC’s grade approval requests complied with N.D.A.C. § 69-05.2-15-04(4)(a)(2). *Id.* at 172:16–173:10.

[¶23] Mr. Steffen also addressed the practical realities of the Voigts’ request for 48-inch SPGM across the disputed grade approvals. Mr. Steffen testified that the Voigts own hundreds of acres of land that originally had less than 20 inches of subsoil. *Id.* at 189:23–190:22. The Voigts’ request to have 48 inches of SPGM spread across the entirety of the disputed grade approvals would result in more SPGM than what originally existed on the property. *See id.* As a result, accommodating the Voigts’ request for 48 inches of SPGM would require an “[e]xtreme amount [of] extra material to accomplish” a result that the law does not require. *Id.* at 192:7–192:20.

[¶24] Mr. Steffen testified that the North Dakota Department of Trust Lands owns two of the six disputed grade approvals. *Id.* at 166:13–167:8. Mr. Steffen reiterated that the Department of Trust Lands has never expressed any concerns about the SPGM respread on the grade approval areas that it owns. *Id.* 167:9–167:12. In Mr. Steffen’s experience, he has never seen a situation in which the PSC’s required SPGM respread depth was insufficient to meet the performance standards necessary to achieve bond release. *Id.* at 193:20–194:3.

C. The PSC enters the Order that the Voigts then appeal to this Court.

[¶25] On February 14, 2024, the PSC entered the Order. Docket No. 116. The PSC concluded that “[g]rade 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).” *Id.* at ¶ 2, p. 14. The PSC further concluded that the “Voigts have not demonstrated that 48 inches of actual SPGM respread is required in accordance with current statutes and regulations.” *Id.* at

¶ 3, p. 14. Accordingly, the PSC affirmed and dismissed the Voigts' Complaint. *Id.* at ¶¶ 1–2, p. 14. The Voigts thereafter appealed that Order, resulting in the current appeal. Docket No. 1.

STANDARD OF REVIEW

[¶26] Courts must “exercise limited review in appeals from administrative agency decisions under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32.” *Dakota Res. Council v. N.D. Pub. Serv. Comm'n*, 2012 ND 72, ¶ 5, 815 N.W.2d 286 (quoting *Indus. Contractors, Inc. v. Workforce Safety & Ins.*, 2009 ND 157, ¶ 4, 772 N.W.2d 582). The North Dakota Supreme Court outlined that limited standard of review in the Voigts' previous appeals. *See Voigt v. N.D. Public Serv. Comm'n*, 2017 ND 76, ¶ 8, 892 N.W.2d 149. Under the limited standard of review, this Court must affirm unless one of eight specific circumstances of which the Court is well-aware has occurred. *See id.*; *see also* N.D.C.C. § 28-32-46 (listing those eight circumstances).

ARGUMENT

[¶27] The Voigts' opposition to the disputed grade approvals has continuously evolved during the administrative proceeding and now this appeal. For example:

- At the PSC, the Voigts complained that CCMC was incorrectly calculating the SPGM respread under N.D.A.C. § 69-05.2-15-04(4)(a)(2) and their coal lease. Docket No. 12, at ¶¶ 19, 25. But they do not raise that issue on appeal after CCMC explained and the PSC concurred that the Voigts were wrongly conflating projected and actual SPGM respread and their coal lease did not concern SPGM. *See* Docket No. 132.
- At the PSC, the Voigts requested the PSC require the maximum 48-inch SPGM respread across all of the disputed grade areas. Docket No. 12, at ¶ 27. But they do not ask for that relief on appeal after CCMC explained and the PSC concurred that none of the data presented to the PSC supported that sweeping request. *See* Docket No. 132.
- At the PSC, the Voigts requested the PSC require crop productivity and sodium migration monitoring. Docket No. 116, at ¶ 41, p. 9; *id.* at ¶ 50, p. 11. But they do not ask for that relief on appeal after CCMC explained that no statute or regulation requires that monitoring. *See* Docket No. 132.

Other examples exist, but the point is clear—the Voigts have simply invented a new theory to contest the disputed grade approvals each time CCMC explained why their previous positions were incorrect. This appeal is no different.

[¶28] Despite the multiple of issues raised in their Notice of Appeal, Docket No. 1, the Voigts now limit their appellate brief to arguing that insufficient data supported the grade approvals. *See* Docket No. 132. The Voigts’ Complaint notably does not contain that allegation. *See* Docket No. 12. Regardless of its omission from the Complaint, the Voigts’ newfound argument is devoid of merit because the applicable statutes and regulations only require representative (not exhaustive) sampling of the graded spoil. The Voigts’ arguments to the contrary seek to rewrite the existing regulations in a manner that amounts to improper rulemaking in this adjudicative proceeding. N.D.C.C. § 28-32-01(1). Under N.D.C.C. ch. 28-32’s limited review, this Court should affirm, as have other courts in the Voigts’ previous appeals. *See Voigt*, 2017 ND 76, at ¶ 45.

I. Permitting and performance standards concerning SPGM.

[¶29] The statutes “governing North Dakota’s surface coal mining and reclamation program are contained in N.D.C.C. ch. 38–14.1.” *Id.* at ¶ 11. As a general overview, the North Dakota Supreme Court has said:

Chapter 38–14.1, N.D.C.C., is part of North Dakota’s surface coal mining and reclamation program established in accordance with the requirements of the federal Surface Mining Control and Reclamation Act of 1977 [“SMCRA”]. *See* 30 U.S.C. § 1253. The North Dakota program makes the [PSC] “the state regulatory authority for all purposes relating to the Surface Mining Control and Reclamation Act of 1977.” N.D.C.C. § 38–14.1–02(4). The [PSC] has several program-related powers and duties, including “issu[ing] permits for surface coal mining operations” and “promulgat[ing] such regulations as may be necessary to carry out the purposes and provisions of this chapter and the Surface Mining Control and Reclamation Act of 1977.” N.D.C.C. § 38–14.1–03(10)–(11).

Id. (quoting *Dakota Res. Council*, 2012 ND 72, at ¶ 6). Chapter 69-05.2, N.D.A.C, contains a comprehensive list of PSC regulations that apply to all aspects of mining in North Dakota.

[¶30] The Voigts’ current appeal primarily challenges how the PSC regulates SPGM. “Suitable plant growth material” means “that soil material (normally the A, B, and portions of the C horizons) located within the proposed permit area which, based upon a soil survey, is found by the [PSC] to be the most acceptable as a medium for plant growth when respread on the surface of regraded areas.” N.D.C.C. § 38-14.1-02(33). The PSC’s regulations recognize that SPGM is “commonly referred to as topsoil . . . and subsoil.” N.D.A.C. § 69-05.2-15-02(2)(a). As is relevant here, SPGM bears upon pre-mine planning, post-mining reclamation, and bond release.

A. Pre-Mine Soil Plan and Projected SPGM Respread Depths.

[¶31] Before any mining may occur, an applicant must submit a proposed mining application. Among myriad other requirements, that application must contain “a soil survey of all the suitable plant growth material within the permit area.” N.D.C.C. § 38-14.1-14(t); *see also* N.D.A.C. § 69-05.2-08-10 (detailing what information must be included with that soil survey). The application must also contain a reclamation plan that includes:

A plan for the removal, storage, and redistribution of suitable plant growth material and other suitable strata to meet the requirements of chapter 69-05.2-15. This plan must provide the volumes, by ownership, of topsoil and subsoil available in all areas to be disturbed. These volumes must be determined from the soil survey required by section 69-05.2-08-10.

N.D.A.C. § 69-05.2-09-11(5). Once approved and mining begins, various statutes and regulations impose performance standards for the removal and storage of removed SPGM while mining occurs. *See* N.D.C.C. § 38-14.1-24(5); N.D.A.C. § 69-05.2-15-02; N.D.A.C. § 69-05.2-15-03.

B. Post-Mining SPGM Respread.

[¶32] Reclamation begins upon the completion of mining. As is relevant here, the permittee must grade the mined lands so that “all areas affected by surface coal mining operations [have] the gentlest topography consistent with adjacent unmined landscape elements in order to develop” the postmining landscape. N.D.C.C. § 38-14.1-24(3). This grading may use slopes equal to or less

than the approximate original contour of the land that existed prior to mining. *See id.*; *see also* N.D.C.C. § 38-14.1-02(2) (defining “approximate original contour”). That grading occurs through use of “spoil.” N.D.A.C. § 69-05.2-01-01(101) (defining “spoil” to mean “overburden that has been disturbed during surface coal mining operations.”); *see also* N.D.C.C. § 38-14.1-02(13) (defining “overburden” to mean all materials above natural deposits of coal, other than SPGM).

[¶33] Once that grading is accomplished, and once a grade approval request is submitted to the PSC, redistribution may begin. N.D.A.C. § 69-05.2-21-06. The subsoil is first redistributed on the graded tract in a manner approved by the PSC. N.D.A.C. § 69-05.2-15-04(2). The topsoil is then redistributed on the graded tract in a manner also approved by the PSC. N.D.A.C. § 69-05.2-15-04(3). As discussed above, the total SPGM depth must satisfy N.D.A.C. § 69-05.2-15-04(4)(a). That depth is determined by considering the in-place spoil’s texture and SAR. *Id.*

[¶34] That texture and SAR “will be determined by a [PSC] evaluation of the premine overburden data, sample analyses of the graded spoil conducted by the operator, or by a combination of these methods.” N.D.A.C. § 69-05.2-15-04(4)(a)(2)(b). The PSC has provided guidance to mine operators in how to drill for and collect that information in *Policy Memorandum No. 17 to Mine Operators*. Docket No. 69. As is relevant, the required samples “must be taken to a 12 inch depth.” *Id.* at p. 4. Once the PSC determines the appropriate SPGM resread based upon those drilling results and approves a grade request, the mine operator resreads the SPGM. In doing so, the “minimum thickness of redistributed [SPGM] in any random location must be within six inches . . . of the average thickness required for an area based on the graded spoil characteristics as determined by representative sampling.” N.D.A.C. § 69-05.2-15-04(4)(a)(2)(a).

C. Performance Standards and Bond Release.

[¶35] To secure performance of all reclamation obligations, a permittee must post an appropriate bond. *See* N.D.C.C. § 38-14.1-16. That bond remains in place until a permittee satisfies numerous

performance standards. *See* N.D.C.C. § 38-14.1-17. As is relevant here, the PSC may partially release the bond once SPGM is respread. N.D.C.C. § 38-14.1-17(7)(b). The PSC may fully release the bond “when the permittee has successfully completed all surface coal mining and reclamation operations, and after the period set by subsection 18 of section 38-14.1-24.” N.D.C.C. § 38-14.1-17(7)(d). That includes all revegetation performance standards. The PSC retains jurisdiction until all necessary reclamation and the subsequent bond release occurs. N.D.C.C. § 38-14.1-17(8).

II. The Voigts’ specifications of error are meritless.

[¶36] In the prior PSC proceeding involving SPGM, “Mr. Braaten and the Voigts admitted that they did not fully understand Policy Memorandum No. 17 to Mine Operators and how the [SPGM] calculations are conducted.” PSC Case No. RC-22-233, Docket No. 52, at ¶ 36. The legally and factually incorrect statements in their appellate brief indicate that the Voigts either still do not understand or simply refuse to accept the current rules governing SPGM respread. Neither their misunderstanding nor their dislike of the current regulations warrants reversal, and this Court should affirm under the deferential standard owing to the PSC. *See Voigt*, 2017 ND 76, at ¶ 8.

A. The Voigts’ position is reliant upon incorrect factual assertions.

i. The Voigts make numerous factual misrepresentations.

[¶37] The first sentence of the Voigts’ argument states: [1] the “challenged grade approvals require less than 48 inches of [SPGM] to be respread [2] on the Voigt ranch.” Docket No. 132, at ¶ 13. But three of the six disputed grade approvals actually require 48 inches of SPGM. *See, e.g.*, Docket No. 39, at p. 2 (COY-035) (48 inches for the entire tract); Docket No. 57, at p. 2 (COY-039) (same); *see also* Docket No. 43 (COY-036) (requiring 48 inches for part of the tract). And the Voigts do not own or lease all of the tracts, as even Casey Voigt admitted that the State owns

the tracts covered by grade approvals COY-35 and COY-39. Docket No. 24, at 130:19–130:24.¹ These factual misstatements in the very first sentence of the Voigts’ argument demonstrate one of the many reasons why deference to the PSC is appropriate here. The PSC has the expertise on this matter and reviewed the actual facts presented in the case as opposed to the distorted and unreliable version of the facts presented by the Voigts. Just as the PSC did, the Court must determine this case on the testimony and evidence presented, not the Voigts’ representations of the record.

ii. The Voigts have numerous technical misunderstandings.

[¶38] The Voigts focus on how the PSC-required drilling for the graded spoil is allegedly insufficient to account for sodium migration following mining. The Voigts allege that “toxic-forming materials,” such as sodic soils, “are also often referred to as ‘spoil.’” Docket No. 132, at ¶ 14. The Voigts then suggest “salt” and “sodium” are synonymous, alleging “salts in the spoil can migrate upwards through the soil and contaminate the topsoil,” Docket No. 132, at ¶ 17, alleging “how far salts from sodic spoil can migrate into SPGM,” *id.* at ¶ 21, and so on.

[¶39] “Spoil” and “toxic-forming materials” are not synonyms. “Spoil” means “overburden that has been disturbed during surface coal mining operations.” N.D.A.C. § 69-05.2-01-01(101). By contrast, “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(116). Contrary to the Voigts’ suggestion, not all spoil contains toxic forming materials.

[¶40] As PSC staff member Monty Johnson testified, “sodium and sodic soils [are] the main concern when we’re talking about toxic-forming materials that would have an adverse effect on reclamation.” Docket No. 24, at 80:1–80:4. Salinity, which “correlates to, like salts,” has “not

¹ Notably, the State has not expressed any concerns about the SPGM respread. *Id.* at 132:5–132:11.

been identified as being a concern throughout where our [coal] mines are located.” *Id.* at 80:4–80:11. Even the Voigts’ exhibits make that point, noting “soluble salts do not appear to be a serious problem in reclaimed soils in North Dakota.” Docket No. 88, at p. 21. That is why the PSC’s SPGM regulations concern sodium, not salt. Whereas the SAR value indicates sodium and “sodic soil,” salt “is usually measured by electrical conductivity and not sodium absorption ratio.” Docket No., 24, at 34:18–23. The Voigts’ attempt to conflate sodium with salt is simply wrong.

[¶41] These technical distinctions are ignored in the Voigts’ briefing. The PSC has the expertise necessary to address these issues. The Voigts do not, as shown by their briefing. The Court should defer to the PSC’s technical expertise. *See Voigt*, 2017 ND 76, at ¶ 34.

B. Nothing requires the graded spoil be tested at a depth deeper than 12 inches.

[¶42] As noted above, the Voigts have abandoned the issues raised in their Complaint. Their appellate briefing now challenges the disputed grade approvals based upon the PSC’s application of *Policy Memorandum No. 17*, Docket No. 69, to test the graded spoil to a 12-inch depth. According to the Voigts, *Policy Memorandum No. 17* “is in direct conflict with the applicable regulation as N.D.A.C. § 69-05.2-15-04(4) which requires that the SPGM respread depths be based on the ‘graded spoil characteristics’ and not merely ‘the top 12 inches of graded spoil.’” *Id.* The Voigts request an order that the PSC test all of the “graded spoil.”² *Id.* at ¶ 38.

[¶43] The Voigts correctly note that the SPGM respread “must be based on the graded spoil characteristics.” N.D.A.C. § 69-05.2-15-04(4)(a). But the Voigts ignore the rest of the regulation that contradicts their argument. Unaddressed by the Voigts, the regulation goes on to provide that the “texture, sodium adsorption ratio, and saturation percentage of the graded spoil materials will

² It is unclear what relief, if any, the Voigts seek for those grade approvals in which the PSC already required the maximum 48-inch SPGM respread. No amount of additional drill testing will change what those grade approvals already provide under the current regulations.

be determined by a commission evaluation of the premine overburden data, sample analyses of the graded spoil conducted by the operator, or by a combination of these methods.” N.D.A.C. § 69-05.2-15-04(4)(a)(2)(b) (emphasis added). And further unaddressed by the Voigts, the “minimum thickness of redistributed suitable plant growth material in any random location must be within six inches . . . of the average thickness required for an area based on the graded spoil characteristics as determined by representative sampling.” N.D.A.C. § 69-05.2-15-04(4)(a)(2)(a) (emphasis added). The regulation clearly contemplates sample testing.

[¶44] Nothing in the regulation requires all graded spoil be tested, as the Voigts suggest. Docket No. 132, at ¶ 21. Nothing in the regulation says anything about “the top 12 inches of graded spoil” being insufficient, as the Voigt’s use of quotations wrongly suggests. *Id.* Instead, the PSC has the authority and expertise to determine the amount of sampling that is necessary to obtain the information relevant to SPGM respread under N.D.A.C. § 69-05.2-15-04(4)(a). Applying that expertise, *Policy Memorandum No. 17* concluded that testing the top 12 inches of the graded spoil suffices. *See* Docket No. 69, at p. 4. That policy has been in place for nearly 40 years and the PSC would have changed it had the 12-inch testing been insufficient—the PSC has not.

[¶45] The inconsistent positions in the Voigts’ briefing confirms that their argument has no basis in the applicable regulations. On the one hand, the Voigts argue that “all of the ‘graded spoil’” must be tested. Docket No. 132, at ¶ 38 (emphasis added). On the other hand, the Voigts argue “it is elementary that [testing] data should be collected at least to the rooting depth of the plants intended to be planted post-reclamation.” *Id.* at ¶ 23 (emphasis added). The Voigts provide no explanation for which testing depth they think is appropriate, which can vary dramatically based upon the Voigts’ standards. Whereas some plant rooting can be 4 feet deep, Docket No. 24, at 57:16–57:21, graded spoil can often be over 100 feet deep. *See, e.g., id.* at 162:18–163:4. *Policy Memorandum No. 17* makes clear that 12 inches, not the Voigts’ preferences, suffices.

[¶46] The Voigts’ arguments are nothing more than invitations for the Court to second guess the PSC and its decades’ worth of experience and expertise. As the North Dakota Supreme Court already told the Voigts, courts must “defer to the [PSC’s] reasonable interpretation of its own regulation when the language is so technical that only a specialized agency has the experience and expertise to understand it.” *Voigt*, 2017 ND 76, at ¶ 34. That is exactly the situation here, as the PSC determined what suffices for the representative sampling contemplated by N.D.A.C. § 69-05.2-15-04(4)(a)(2). Nothing in N.D.A.C. § 69-05.2-15-04(4)(a) requires the testing that the Voigts seek, and the Voigts cannot use this adjudicative proceeding for rulemaking purposes. *See* N.D.C.C. § 28-32-01(1) (an “adjudicative proceeding does not include rulemaking under” N.D.C.C. ch. 28-32). The Court should affirm. *Voigt*, 2017 ND 76, at ¶ 43.

C. The Voigts’ factual allegations are unsubstantiated and contrived.

[¶47] Because N.D.A.C. § 69-05.2-15-04(4)(a)(2) does not require the testing that the Voigts want, they resort to a parade of horribles based upon the supposed “facts” that they claim to have proven at the hearing. These arguments are, at best, distortions of the record.

1. The Voigts have not shown any sodium migration is occurring.

[¶48] The Voigts spend the majority of their appellate briefing arguing about how sodium migration could impact the SAR values for the SPGM respread. According to the Voigts, it is “a proven fact that respreading SPGM on sodic spoil will cause an increase in the sodicity of overlying SPGM.” Docket No. 132, at ¶ 19 (emphasis added). As support, the Voigts rely on a decades old study that shows sodium migration, in theory, may occur, *see* Docket No. 75, for why *Policy Memorandum 17* should not apply. There are multiple problems here.

[¶49] First, the Voigts presented nothing other than an academic study to support their theory of sodium migration. In doing so, the PSC recognized that the Voigts “did not provide an expert

familiar with the provided articles.” Docket No. 116, at ¶ 45. As a result, neither the PSC nor CCMC had the opportunity to cross-examine or question the material. *Id.*

[¶50] Second, the Voigts presented no actual data that *Policy Memorandum 17* was somehow insufficient to address any sodium migration that may occur. The Voigts did not call any expert witness who could testify that sodium migration was occurring on the disputed grade areas. And the Voigts did not call any expert witness who could testify that the actual SPGM respread depth across their property was insufficient to account for sodium migration (if any) that was occurring. In short, the Voigts presented no evidence or testimony that contradicts the extensive studying and testing that went into the PSC articulating *Policy Memorandum 17*. No evidence or testimony ties the Voigts’ abstract theories to the facts of this case.

[¶51] The Voigts had the burden of proof to show that the disputed grade approvals did not comply with N.D.A.C. § 69-05.2-15-04(4)(a). The PSC concluded that the Voigts failed in that regard. Docket No. 116, at ¶ 2, p. 14. The Voigts cannot rely on theory to escape reality.

2. CCMC has no incentive to shortchange the Voigts on SPGM.

[¶52] Because they could not connect their theories to the facts, the Voigts continue by accusing CCMC of manipulating the test data on which the PSC determined the appropriate SPGM respread. According to the Voigts, CCMC places 12 inches of higher quality spoil atop more sodic spoil so as to avoid the deeper SPGM respread depths that the more sodic spoil would require. The Voigts solely rely on what Casey Voigt supposedly witnessed/photographed and was told. *Id.* The Voigts argue the Court should require deeper testing because CCMC is trying to “short the Voigts on the amounts of SPGM being respread” and “could reduce the productivity of the soils being respread.” *Id.* at ¶ 19. This argument is just as factually wrong as it is disingenuous.

[¶53] Donn Steffen explained why Casey Voigt was wrong. Mr. Steffen testified that he was familiar with the area to which Casey Voigt testified. Docket No. 24, at 164:12–165:4. In no

uncertain terms, Mr. Steffen explained that they had “40 feet of pre-bench³ spoil placed there at the time of that picture. 40 feet was placed there.” *Id.* (emphasis added). Accordingly, Casey Voigt either did not understand or refuses to understand what he witnessed at the mine. There is simply nothing in the record showing that CCMC somehow manipulated the drilling data.

[¶54] A simple reality also belies the Voigts’ accusations. Chapter 38-14.1, N.D.C.C., and the PSC’s regulations impose performance standards that a mine operator must achieve before lands can be released from reclamation bonding, including vegetation productivity. Because of those productivity requirements, PSC-staff member Monty Johnson noted that “it is in the best interest of [the mine operator] 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.” Docket No. 116, at ¶ 24 (emphasis added); Docket No. 24, at 83:19–83:25. Complying with N.D.A.C. § 69-05.2-15-04(4)(a) is in CCMC’s best interests because spreading an insufficient amount of SPGM would be cost-prohibitive if reclaimed lands continually failed to reach the productivity standards necessary for bond release.

[¶55] The Voigts’ accusations concerning the drilling data ignore that SPGM respread is only one part of an exhaustive reclamation process. Manipulating drilling data so as to lessen the SPGM respread depth in the short term would undermine CCMC’s long-term goals of achieving bond release and putting the reclaimed lands back into agriculture production. CCMC has no incentive to undercut its own reclamation efforts.

³ Mr. Steffen previously explained that “pre-bench spoil” refers to the spoiled overburden that must be removed before a bench can be constructed on which the dragline would mine deeper depths, as a dragline can typically handle 85 feet of overburden. *Id.* at 162:24–163:20.

3. The record does not support the Voigts' other allegations.

[¶56] The Voigts conclude by arguing that “the lack of data is significant because there is a general concern from farmers about the actual success or reclamation at some mines.” Docket No. 132, at ¶ 33. The Voigts called John Weinand, who according to the Voigts, “submitted yield maps showing significantly decreased [crop] yield on land used by another mine.” *Id.* (emphasis added). This is another misrepresentation of the record.

[¶57] The property for which Mr. Weinand provided limited data was not mined. The Voigts know this, as Mr. Weinand testified that the lands were “actually just used for a topsoil pile or subsoil.” Docket No. 24, at 150:13–150:21. Mr. Weinand’s testimony was wholly irrelevant to the Voigts’ claims because, as the PSC concluded, these “were areas of associated disturbance, not areas subject to SPGM respread based on graded spoil properties.” Docket No. 116, at ¶ 52. As the PSC correctly recognized, Mr. Weinand’s “assertions of reduced yields are not applicable to the Voigt mined lands.” *Id.* The Voigts cannot run from that testimony by saying Mr. Weinand’s property was “used” to suggest that it was mined and somehow relevant here.

[¶58] Mr. Weinand’s testimony and evidence suffered from other glaring holes. Although he “has leased the property for over 10 years,” Docket No. 116, at ¶ 52, the PSC correctly recognized that Mr. Weinand only “provided readings on selected years.” *Id.* at ¶ 51. Both the PSC and CCMC were left to guess what the readings looked like in a different year, including the possibility that Mr. Weinand simply chose to highlight a low yield year. Again, the Voigts provided no explanation for why they did not include those additional readings. Mr. Weinand’s testimony provides nothing to the Voigts’ strained efforts to find something to support their arguments.

III. SMCRA does not encourage vexatious landowner litigation.

[¶59] The Voigts conclude with an argument that their participation in this proceeding “is precisely the kind of landowner involvement and participation that is specifically encouraged by

coal mine reclamation laws.” Docket No. 132, at ¶ 35. Not so. CCMC has always and continues to encourage reasonable landowner participation in administrative proceedings. But the rule of reason has limits, as recognized by the Legislature allowing an award of attorney’s fees and costs by the PSC and the Court. N.D.C.C. §§ 38-14.1-36(1), (2).

[¶60] This appeal is nothing more than the latest frivolous effort to impede CCMC’s operations under a coal lease that the Voigts freely negotiated and from which they continue to benefit. As CCMC has repeatedly disproven each of their assertions in this proceeding, the Voigts have simply contrived others. That includes this appeal, as they hide behind claims of insufficient drilling data to distract from the lack of any support for their positions, abstract theories with no proven application to the disputed grade approvals, and testimony from an area landowner with no relevance to this case. The Voigts had the burden in this case, which they did not satisfy.

CONCLUSION

[¶61] CCMC recognizes and takes seriously its reclamation responsibilities, including compliance with the SPGM requirements. The PSC fully reviewed the evidence and testimony presented and concluded that the “Voigts have not met a burden of demonstrating that CCMC is in violation of a statute or regulation.” Docket No. 116, at ¶ 64, p. 13. Applying its technical expertise, the PSC concluded “[g]rade approval requests COY-034, COY-035, COY-036, COY-037, COY-038, COY-039 were approved in accordance with the requirements of N.D.A.C. § 69-05.2-15-04(4)(a)(2).” Docket No. 116, at ¶ 2, p. 14.

[¶62] The North Dakota Supreme Court has already told the Voigts that the courts “will not substitute [their] judgment for that of the Commission or make independent findings.” *Voigts*, 2017 ND 76, at ¶ 36. At its core, that is nevertheless what the Voigts ask of the Court in this appeal. Under the deferential standard of review owing to the PSC, the Court should affirm this frivolous appeal that has already consumed too much of the PSC and CCMC’s time and resources.

Dated this 4th day of June, 2024.

/s/ Wade C. Mann
Wade C. Mann (ND ID #05871)
wmann@crowleyfleck.com
Zachary R. Eiken (ND ID #07832)
zeiken@crowleyfleck.com
CROWLEY FLECK PLLP
*Attorneys for Appellee Coyote Creek Mining
Company, L.L.C.*
100 West Broadway Ave., Suite 250
P.O. Box 2798
Bismarck, ND 58502-2798
Phone: (701) 223-6585
Fax: (701) 222-4853