

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.

Case No. 08-2024-CV-00694

**ORDER AFFIRMING PSC'S
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER**

INTRODUCTION

[¶1] This matter is before the Court on the Appellants', Casey and Julie Voigts', administrative appeal of the Public Service Commission ("PSC") affirmation of grade approval requests COY-034, COY-035, COY-036, COY-037, CO-038, and COY-039 and dismissal of the complaint the Voigts filed against Coyote Creek Mining Company (CCMC). On February 14, 2024, the PSC issued its *Findings of Fact, Conclusions of Law and Order. Docket No. 116.*

[¶2] The substance of the Voigts' complaint and appeal is their belief that the Appellees did not comply with the requirements of N.D.A.C. § 69-05.2-15-04, during the process of their land's soil reclamation. Specifically, the Voigts argue the Appellees erred when it only sampled the top twelve inches of the spoil to determine the amount of minimum Suitable Plant Growth Material (SPGM) respreads depth required. The Voigts second argument, is that the CCMC was required to place 48 inches of SPGM under N.D.A.C. § 69-05.2-15-04.

[¶3] The Court has reviewed the briefing of both parties on appeal and the relevant exhibits. Considering the filings and arguments made, the Court makes the following findings and Order.

STANDARD OF REVIEW

[¶4] This Court exercises a limited review in appeals from administrative agency decisions. *Bergum v. North Dakota Workforce Safety & Ins.*, 2009 ND 52, ¶ 8, 764 N.W.2d 178. Section 28-32-46 of the North Dakota Century Code provides that a district court shall affirm the order of an agency unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

[¶5] This Court "do[es] not make independent findings of fact or substitute [its] judgment for that of the agency." *Vanlighthout v. N.D. Dep't of Transp.*, 2011 ND 138, ¶ 12, 799 N.W.2d 397, 400. This Court "determine[s] only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record. *Id.* "An agency's decisions on

questions of law are fully reviewable.” *Kiecher v. North Dakota Dep’t of Transp.*, 2005 ND 23, ¶ 8, 691 N.W.2d 266. Restraint is exercised in reviewing an agency’s findings of fact. *Bergum*, ¶ 8, 764 N.W.2d at 181.

LAW AND DECISION

[¶6] The Voigts argue the PSC erred on two separate grounds: 1) the PSC violated § 69-05.2-15-04(4)(a)(2) when it only tested the top twelve inches of the graded spoil; 2) the PSC violated N.D.A.C. § 69-05.2-15-04(4)(a)(2) when it did not place forty-eight inches of respread over the property.

1. Whether testing twelve inches of the graded spoil is sufficient under N.D.A.C. § 69-05.2-15-04(4)(a)(2).

[¶7] North Dakota Administrative Code § 69-05.2-15-04(4), state:

Amount of suitable plant growth material to be redistributed.

a. In areas where the graded spoil material occur:

- (1) All suitable plant growth material inventoried and removed according to the soil survey and any other suitable strata required to satisfy section 69-05.2-21-03 must be uniformly redistributed; or
- (2) The amount of redistributed suitable plant growth material must be based on the graded spoil characteristics as follows:

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)
aaa1	> 20	48	(122)

* Loam or finer

** Sandy loam or coarser

*** Not applicable

(a) The minimum thickness of redistributed suitable plant growth material in any random location must be within six inches [15.24 centimeters] of the average thickness required for an area based on the graded spoil characteristics as determined by representative sampling. However, the commission may approve redistribution thickness less than those listed in the table if chemical and physical analyses and any available field trials, greenhouse test results or current research findings demonstrate that the overburden materials are equal to or more suitable than the subsoil for sustaining vegetation. In addition, the commission may approve a lesser redistribution thickness if an insufficient amount of material exists based on the results of the soil survey and the availability of other suitable strata pursuant to subdivision b of subsection 5 of section 69-05.2-15-02.

(b) The texture, sodium adsorption ration, and saturation percentage of the graded spoil materials will 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.

[¶]8 North Dakota Administrative Code § 69-05.2-15-04(4)(a)(2) specifically outlines

the amount of redistributed SPGM required based on the graded spoil characteristics. The determination of how to acquire said graded spoil characteristics is not contained within the administrative code. Rather, as outlined by the Appellees, the parameters in which to determine the graded spoil characteristics is outlined in the PSC's Policy Memorandum No. 17 and states:

Graded spoil sampling will be required until an acceptable model to accurately predict postmine graded spoil properties from premine overburden data is developed. Exceptions will be made if the SPGM replacement thickness is 48 inches. Once final grading has been completed in an area, final graded spoil samples must be taken to determine the physical and chemical properties of the spoil. These samples must be taken to a 12 inch depth on a grid with approximately 400 foot intervals. If grade approval areas tend to be narrow strips (i.e., less than 400 feet wide), an alternate sampling scheme may be approved by the Reclamation division to ensure that each grade approval area is adequately sampled.

It is recommended that at least 3 or 4 samples be randomly collected around each grid point and then combined into a composite sample for analyses. The composite samples must be analyzed for SAR, SP and texture (including percent sand, silt and clay) and the results submitted to the Commission with grade approval requests. The grade approval requests must include a map showing the location of grid points where the composite sample was taken. From these data the Commission will determine and specify the SPGM replacement thickness (or thicknesses if the spoil properties vary within a grade approval area). However, this sampling requirement may be modified or dropped by the Commission if premine data show that overburden properties are generally uniform throughout an area.

Doc. No. 71, page 10.

[¶9] The Voigts argue the PSC violated N.D.A.C. § 69-05.2-15-04(4)(a)(2) by only testing the spoil to the depth of twelve inches to determine the SPGM. They argue “[t]his reduced requirement for testing is in direct conflict with the applicable regulations as N.D.A.C. § 69-05.2-15-04(4) which requires that the SPGM respreads depth be based on the ‘graded spoil characteristics’ and not merely ‘the top 12 inches of graded spoil.’”

Docket No. 132, ¶ 22.

[¶10] As stated above, the determination of how to acquire the graded spoil characteristics is not contained within the administrative code § 69-05.2-15-04(4). “Agency expertise is entitled to appreciable deference if the subject matter is highly technical.” *Capital Elec. Coop.*, 2006 ND 73, ¶ 6, 877 N.W.2d 304. Additionally, in *Voigt v. North Dakota Public Service Commission*, 2017 ND 76, ¶ 28, 892 N.W.2d 149, the North Dakota Supreme Court explained the additional deference given to agencies when interpreting their own regulations, stating:

An administrative agency’s reasonable interpretation of regulation is entitled to deference. Courts generally defer to an agency’s reasonable interpretation when the language is so technical that only a specialize agency has the experience and expertise to understand it or when the language is ambiguous. An agency has 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.

[¶11] The Court finds it is well within the PSC’s authority to implement regulations to conform with the administrative code. The PSC’s policy is not in conflict with § 69-05.2-15-04(4). As much as the Voigts wish the policy was more stringent or tested greater areas of spoil, the fact remains that such requirements do not exist in the code. Additionally, the PSC’s policy for testing the top twelve inches of spoil to determine the graded spoil characteristics has been in place for almost thirty years. *Doc. No. 71, page 8.*

[¶12] The Voigts specifically challenged the PSC’s *Findings of Fact, Conclusions of Law and Order*, alleging it was not in accordance with law. The Court finds the PSC’s policy is not in conflict with § 69-05.2-15-04(4) and therefore, is in accordance with law.

2. Whether the PSC violated N.D.A.C. § 69-05.2-15-04(4)(a)(2) when it did not place forty-eight inches of respread over the property.

[¶13] As outlined above, the amount of respread required to be placed is contained within N.D.A.C. § 69-05.2-15-04(4)(a)(2). Here, the PSC determined the level of respreads required over all six parcels of land after obtaining spoil samples in conformity to their policy. The Voigts are not contesting the numbers and data acquired by the PCS to make its determination of the required redistribution thickness under § 69-05.2-15-04(4)(a)(2). Rather, the Voigts allegations stem from their belief that the PSC's testing of the top twelve inches of spoil was improper, thereby necessitating the maximum of 48 inches of respread under N.D.A.C. § 69-05.2-15-04(4)(a)(2).

[¶14] It is important for the Court to point out that the Voigts have not appealed any findings of fact by the PSC, only the PSC's legal conclusions. The Voigts have not contested the actual findings of the Sodium Adsorption Ratio by the PSC. Therefore, because the Court found the PSC's acquisition of its data, through testing the top twelve inches of spoil, was not in conflict with the law, the PSC's data is valid. Because the data acquired is valid and has not been appealed by the Voigts, the Court finds the PCS's finding that 48 inches of respreads was not required to be placed over the entirety of all six parcels, is in accordance with the law.

CONCLUSION

[¶15] For the foregoing reasons, this Court concludes the PSC's decision and findings were in accordance with the law. The PSC's *Findings of Fact, Conclusions of Law and Order* is hereby AFFIRMED.

IT IS SO ORDERED.

Dated this 5 day of August, 2024.

BY THE COURT:

A handwritten signature in black ink, appearing to read "D. Bergen", written over a horizontal line.

Daniel Bergen, District Judge
South Central Judicial District