

Public Service Commission

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Dear Mr. Braaten:

On August 26, Casey and Julie Voigt (Voigts) submitted comments on Coyote Creek Mining Company’s (CCMC) applications for Revision 13 and Renewal 2 of Permit NACC-1302. The Reclamation Division has reviewed the comments and provide the following responses to the issues related to the permit and issues not specific to the applications.

Coyote Creek Mining Company did not consult with the Voigts in selection of reference areas.

In the comments, the Voigts assert that the “Voigts were supposed to choose the reference areas but the Commission is allowing the Mine to shirk its responsibility again.” In further comment, the Voigts state that CCMC unilaterally chose reference areas to demonstrate reclamation success on the Voigt’s property, did not consult with the Voigts in selection of the reference areas, and now requests to revise Section 4.3.1 of the permit to provide that it will “consult with Casey Voigt in the summer of 2024” to paper over its noncompliance.

The Commission’s April 14, 2015 order in Case No. RC-13-850 states, “Coyote Creek Mining Company shall submit a revision application to Permit NACC-1302 by July 1, 2015, to add plans for [c]onsulting with Casey Voigt when selecting and establishing management practices for the reference areas on undisturbed native grasslands that will be used when demonstrating reclamation success on reclaimed native grasslands that Mr. Voigt owns.”

Section 4.3.1 of Permit NACC-1302 with pending Revision No. 13 states, “In 2022, Coyote Creek with the assistance of Kelly Krabbenhoft (KDK Consulting) established proposed reference sites on the the Voigt lands and State of North Dakota lands grazed by the Voigts. Coyote Creek is proposing these 6 ecological sites on the Voigt/State of ND properties to represent the dominant ecosites the will be mined and reclaimed on the Voigt property as well as State of ND. An initial field inspection of the sites was conducted with the NDPSA in late 2023 during a routine NDPSA inspection. Coyote Creek is currently working with Casey Voigt to setup a field visit to review and discuss the proposed reference sites. The plan is to conduct this field visit in the late summer/early fall of 2024. If weather or schedules do not allow, the field visit would then take place in 2025. After Casey Voigt and the PSC review the proposed reference area sites and they have been approved, they will be added to the permit as “approved reference areas”. The proposed reference areas are shown on the Ecological Site Map in Section 2.4.7.1 and the data collected by KDK Consulting are summarized in 4.3.1.1 – Proposed Native Grassland Reference Area Data.” Approval of the proposed reference sites in Revision No. 13 does not finalize the reference sites. Prior to finalization,

consultation with the Voigts and approval from the Commission is required. Once the reference areas have been finalized, the finalized reference areas will need to be included in a future permit revision.

This proposed revision provides more specificity to Section 4.3.1 which currently provides that Mr. Voigt will be consulted on the selection and management of reference areas to be used to demonstrate reclamation success of the Voigt owned native grasslands.

The reference areas proposed in Revision No. 13 are based on dominant ecological sites that will be mined on Voigt owned property. Currently, CCMC has not violated the Commission's order or current permit, but the Reclamation Division agrees that consultation is required before the proposed native grassland reference sites are approved or finalized.

CCMC is proposing to relocate a road in violation of Voigt's property rights.

The relocated road in the S½ of Section 36, T143N, R89W referenced in your comments is identified as proposed, and is not necessarily the final location. Section 4.1.1 of Permit NACC-1302 with pending Revision No. 13 states, "CCMC has verbal agreement from the Voigts and the ND Dept of Trust Lands on an alignment for the reclaimed farmer access road through Section 36, T143N, R[89]W. Revision 12 updated the road alignment in the Post-Mining Topography and Land Use Map - Section 4.1.2. CCMC is continuing to work with Mercer County to obtain the easements required for the construction of the road. Once all easements have been obtained and mining progresses, the farmer access road will be constructed of subsoil." Language regarding this road was approved with Revision No. 12 and CCMC is not proposing any changes to this road with Revision No. 13.

Special Condition No. 1 was added to Revision No. 9 to Permit NACC-1302 which required CCMC to depict the proposed permanent road (18th Street SW) on the Post Mining Topography and Land Use Map in Permit NACC-1302 with the next permit revision. See Case No. RC-19-189 and RC-19-190. Special Condition No. 1 was added to Permit NACC-1302 as a result of a formal hearing requested by the Voigts after the approval of Revision No. 9 and Renewal No. 1 to Permit NACC-1302.

The closing arguments, along with the proposed findings of fact, conclusions of law, and order submitted by the Voigts in Case No. RC-19-189 and RC-19-190, included a proposed order concerning 18th Street SW. The proposed order stated, "CCMC shall submit a revision application to Permit NACC-1302 by April 1, 2020 that describes CCMC's future plans for 18th St. Southwest, and whether it will relocate the road. This description must comply with to N.D.A.C. § 69-05.2-09-07 and must include, at the minimum, discussion of whether CCMC expects to reconstruct this road, when CCMC expects to reconstruct this road, and the timeframe for these plans."

Based upon the Reclamation Division's discussions with the Voigts and the comments provided, we understand the Voigts do not concur with the proposed plans in the approved permit for 18th Street SW, but the final location of this road will not be determined until the required easements have been secured and CCMC has received county approval. The location of 18th Street SW in Revision 13 reflects current future plans, but the final location has yet to be determined. If necessary, agreements including the Voigt's easement, cannot be reached on the location of the road, a revision to Permit NACC-1302 will be required to change the design and location of the final road. The Reclamation Division will continue to monitor this issue as a final determination on location is evaluated.

The testing depth for graded spoil contained in Policy Memo 17 is insufficient and should be changed or at least adjusted based on site-specific concerns.

The testing depth for graded spoil contained in Policy Memorandum 17 was brought up during a formal hearing by the Voigts in Case No. RC-23-348. During the hearing, the Voigts did not meet the burden of demonstrating that the current sampling methodology was inadequate or in violation of regulation. This is the subject of the Voigt's recent appeal which affirmed the Commission's decision in District Court Case No. 08-2024-CV-00694 on August 15, 2024.

It is the Reclamation Division's opinion that the current sampling methodology for mining operations is adequate to assure reclamation success and in compliance with applicable laws and regulations. However, as testified by Mr. Johnson during Case No. RC-23-348, Policy Memorandum 17 needs to be updated due to changes in regulations related to saturation percentage as a parameter for determining respread thickness. As the Reclamation Division updates and evaluates the outstanding changes in the upcoming quarters, they will review the Voigts' concerns regarding Policy Memorandum 17 to determine if additional guidance on sampling methodology, including sampling depth, is needed.

Other Comments related to dampening of public participation and bond release.

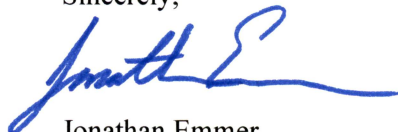
The Commission received your comments on public participation and concerns related to bond release.

There are many forms of public participation available to the Voigts in relation to the Commission's Reclamation Program. The Voigts have exercised their rights as provided in statute and regulation and there has been no curtailment or obstruction from participation in administrative proceedings. The Reclamation Division believes the Commission has been significantly open to hearing the issues presented by the Voigts informally or formally. Similarly, CCMC has exercised its right to request attorney fees pursuant to N.D.C.C. § 38-14.1-36 and N.D.A.C. § 69-05.2-01-07. Despite the Voigts' participation in proceedings, the Commission has not assessed attorney fees to date. The Commission will continue to evaluate the issues and arguments presented by the Voigts and CCMC in the application to appropriate statutes and regulations.

Regarding the comments and table provided depicting cropland bond released for numerous mines in North Dakota, it appears that the data provided from your open records request have been misinterpreted or misunderstood. The Reclamation Division would like to clarify that the table created by the Voigts from the information provided is misleading because it does not take into account if the cropland has been disturbed by mining, when the cropland was reclaimed, and if the cropland is even eligible for bond release since the revegetation responsibility period is a minimum of 10 years. Furthermore, numerous mines listed in your table have been completely bond released. Regardless, the Reclamation Division understands the Voigts' concerns.

Thank you for your comments. Pursuant to N.D.C.C. § 38-14.1-30(1), you will have an opportunity to request a formal hearing once the Commission issues a ruling on Revision 13 and Renewal 2 to Permit NACC-1302. If you have any questions, please contact this office.

Sincerely,



Jonathan Emmer
Director
Reclamation Division

Mr. Braaten
September 25, 2024
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cc via email only: Jeremy Eckroth (jeremy.eckroth@nacoal.com)
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