

**NORTH DAKOTA**

**PUBLIC SERVICE COMMISSION**

<b>Coyote Creek Mining Co., L.L.C.</b>	)	
<b>Revision 13, Permit NACC-1302</b>	)	<b>Case No. RC-24-244</b>
<b>Renewal 2, Permit NACC-1302</b>	)	<b>Case No. RC-24-245</b>
<b>Applications</b>	)	

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**REPLY IN SUPPORT OF PETITION FOR ATTORNEY’S FEES PURSUANT TO  
N.D.C.C. § 38-14.1-36 AND N.D.A.C. § 69-05.2-01-07**

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[1.] The Voigts’ abuse of the Commission’s formal and informal processes in this case, as well as multiple prior cases spanning the past decade, has been well documented. Not once in the past decade has Coyote Creek Mining Company (“CCMC”) brought any proceeding directly against the Voigts. Counsel for the Voigts objects to these past transgressions being highlighted but it is the Voigts, and not CCMC, who continually insist on bringing up previously litigated issues. The Voigts have yet to prevail on any of these issues.

[2.] The Voigts contend that CCMC is trying to scare them off from public participation. This allegation rings hollow in light of the multitude of cases initiated by the Voigts raising previously litigated and non-jurisdictional issues. CCMC has only filed Petitions in defense, in cases initiated by the Voigts, in order to defend itself from the Voigts’ abusive use of Commission procedures to harass and embarrass CCMC. It is difficult to understand how the Voigts, or any landowner, intending to properly participate in the Commission process in a manner not brought in bad faith or intended to harass or embarrass could in any way be scared from participating in the process.

[3.] Nobody has ever suggested that the Voigts should not be allowed to express their concerns to the Commission. The issue is whether the Voigts should be held accountable for their blatant disregard of Commission requests and directives and their abuse of the system to harass and

embarrass CCMC. Both SMCRA (N.D.C.C. § 38-14.1-36) and the Commission's rules (N.D.A.C. § 69-05.2-01-07) contemplate holding parties accountable for abusing the system and the Voigts' history of abuse and direct defiance of Commission orders and requests, as detailed in CCMC's Petition, justify finally requiring the Voigts to account for their actions.

### **ARGUMENT**

**A. The Voigts ignored direct requests from the Commission Chair and the ALJ to provide a concise statement of their issues.**

[4.] Consistent with their pattern in previous cases, the Voigts mischaracterize what has taken place in the proceedings in this case. They completely ignore the fact that because of the vagueness of their hearing request, the Chair of the Commission asked the Voigts to file a "clear and concise statement of the claims, including non-compliance or violation of applicable statutes or rules, and relief sought by the Voigts." Case No. RC-24-244, Dkt. No. 51. A party with legitimate issues to bring before the Commission and wanting to be heard on those issues would simply respond with a "clear and concise statement of the claims." But rather than comply with this simple and straight forward request from the Chair, counsel for the Voigts ("Counsel") refused and instead demanded the legal authority for the request. Case No. RC-24-244, Dkt. No. 53.

[5.] Counsel suggested that providing a clear and concise statement of the Voigts' claims would somehow make it easier for CCMC to collect attorneys' fees against the Voigts. *Id.* But an award of attorneys' fees in this case is only allowed where it is demonstrated that a person has "participated in the proceeding in bad faith to harass or embarrass the permittee." N.D.A.C. § 69-05.2-01-07(5)(d). Unless the Voigts' claims were in bad faith to harass or embarrass CCMC, there would be absolutely no reason to refuse the Chair's request for a clear and concise statement, as any legitimate claims would not result in attorneys' fees.

[6.] The Commission followed up in response to Counsel’s demand for legal authority by providing a detailed explanation of the statutory basis for the requirement of a clear and concise statement of claims. Case No. RC-24-244, Dkt. No. 54. In addition to the statutory requirement, the Commission explained that “[b]eyond considerations of fairness and efficiency, the clarity and specificity of the filings have practical implications for the Reclamation Division and Commissioners.” *Id.* The Commission further explained that “[b]road and unspecific claims, such as those involving ‘reclamation practices, testing and sampling practices, and reclamation success, as well as general review of the permit and concerns of the landowners’ do not provide an adequate foundation for preparation, review, or to ensuring the appropriate subject matter expertise at the hearing.” *Id.* With the upcoming hearing less than 20 days away, the Commission requested that Counsel communicate a date by which the Commission could expect an updated response to the November 21, 2024, request for a clear and concise statement of the claims. *Id.* The Voigts chose to ignore this Commission request and never responded.

[7.] The Voigts now argue that their issues were contained in their written comments and that they limited the scope of their issues. This is simply not true. The Voigts did nothing. In addition to refusing to respond to the Chair of the Commission’s request for a clear and concise statement, the Voigts didn’t respond to requests to schedule a prehearing conference to address hearing-related issues. A prehearing conference was ultimately noticed and took place two days prior to the formal hearing. Case No. RC-24-244, Dkt. Nos. 66-67. Voigts’ counsel appeared at the prehearing conference but again refused to specify the issues for the hearing to take place in two days. Case No. RC-24-244, Dkt. No. 67. (Letter from ALJ confirming that “Mr. Braaten reiterated at the prehearing conference that he did not believe his clients were required to specify issues for hearing.”).

**B. The Voigts' failure to disclose dust as an issue is a clear example of their attempt to ambush CCMC and the Commission.**

[8.] Despite refusing to provide a clear and concise statement of their claims to the Chair of the Commission or the ALJ prior to the hearing, the Voigts claim they did not intend to ambush CCMC or the Commission. The facts of the case demonstrate otherwise. A clear example of the Voigts' strategy of conducting a hearing by ambush is the issue of dust.

[9.] The Voigts allegedly had concerns of dust that they blame on the mine. At the hearing, they offered photographs of one of their vehicles covered in dust. Exhibit L07. The photos were allegedly taken on October 8, 2024. The Voigts had these photographs and were aware of their concerns about dust when they filed their request for a formal hearing just over a month later on November 15, 2024, yet they did not disclose dust as an issue to be raised at the formal hearing. When asked by the Chair of the Commission for a more concise statement of the issues for hearing, the Voigts did not disclose dust as an issue. When asked by the ALJ at the prehearing conference about the issues to be addressed at hearing, the Voigts did not disclose dust as an issue.

[10.] After refusing to identify dust as an issue despite multiple requests, the Voigts showed up at the hearing with the photographs that they had taken a month before their request for a formal hearing and made dust a hearing issue. The Voigts had these photographs and knew dust was an issue for them each time that they refused to disclose their hearing issues to the Commission Chair and the ALJ. They now try to claim that refusing to identify dust as an issue prior to the hearing and using these photographs that they had all along is not an ambush.

[11.] Ambushing CCMC and the Commission with issues known, but deliberately not disclosed, is not helpful to anyone. The Commission explained that “[b]eyond considerations of fairness and efficiency, the clarity and specificity of the filings have practical implications for the Reclamation Division and Commissioners. ... An adequate filing is necessary to provide Commissioners and

the Reclamation Division opportunity to investigate issues raised, conduct necessary site inspections, review coal mining operations, and assess the permit in relation to the adversely affected person.” Case No. RC-24-244, Dkt. No. 54. While a concise statement of the issues in the hearing request would be fair to all parties and allow the Commission to more effectively investigate and potentially resolve issues, that is not what the Voigts want.

[12.] The Voigts didn’t want the Commission or CCMC to have any advance notice of their dust allegations because any scrutiny or investigation of their claims prior to the hearing would have demonstrated that the claims did not have merit and were brought in bad faith with intent to harass and embarrass CCMC. Casey Voigt, Commission staff and CCMC employees were all at the mine for an inspection from 8:30 a.m. to 1:45 p.m. on October 8, 2024. Case No. 24-244, Dkt. No. 98, at p. 13. Casey Voigt now states in his Declaration that the vehicle dust photographs presented at the hearing were taken October 8, 2024 at 12:19 p.m. and 12:20 p.m. which is when he was at the mine for the inspection. He also now states in his Declaration that the Mine was removing dirt from the *subsoil pile* above his house on October 8, 2024 even though he testified at the hearing that wind erosion from the *spoil pile* above his house was the cause of the dust and he never mentioned anything about dirt removal from the subsoil pile that day. CCMC does not have any record of any work on the subsoil pile on that date and there is no mention of any such work or of dust from that work in the inspection report from that day. The Voigts’ new version of events is inconsistent with the facts set forth in the record and their changing story only further demonstrates bad faith. Case No. 24-244, Dkt. No. 98, at p. 13 (stating that “[t]he inspection report does not mention dusty conditions, nor does it note the Voigts expressing concerns related to dust. Notably, this inspection was conducted on the same day the photograph in Voigt Exhibit L07 was taken.”).

[13.] By refusing to disclose the dust issue and ambushing the Commission and CCMC, the Voigts hoped to slip dust evidence into the record that neither the Commission nor CCMC would have time to contradict. But as demonstrated by CCMC and recognized by the Commission, “the Voigts did not demonstrate the source of the dust or provide evidence of wind erosion that would give the Commission reason to believe that CCMC is in violation of requirement of N.D.C.C. ch. 38-14.1, N.D.A.C. art. 69-05.2, or any permit condition.” Case No. 24-244, Dkt. No. 98, at p. 14.

**C. The Voigts’ attack on the Commission relating to reference areas.**

[14.] In addition to denying simple requests from the Commission Chair and ALJ about their claims and deliberately failing to disclose issues until hearing, the Voigts also continue to push a false narrative regarding reference areas. The Voigts allege that CCMC violated the April 14, 2015 order with respect to reference areas, but in making the allegation, they refuse to acknowledge the plain language of that order. As the Commission points out in its order in this case, “Order provision 2(c) of the Commission’s April 14, 2015 order provides that CCMC needs to consult with the Voigts when selecting and establishing management practices for the reference areas (emphasis added) and not selecting the location of the reference areas.” Case No. 24-244, Dkt. No. 98, at p. 5 (parenthetical in original). The Voigts choose to completely ignore the order language and rely exclusively on their interpretation of a subsequent letter. While ignoring what the order actually says, the Voigts go so far as to allege that “[t]his Commission has gone back on its word; a heavy, dark and destructive action, at least as viewed by the Public of North Dakota.” Voigt Brief, at p. 5. While this is a bold and highly offensive statement directed at the Commission, it is inconsistent with the 2015 order.

[15.] In addition to being extremely inappropriate and difficult to understand, the Voigts' unprovoked attack on the Commission is unnecessary. CCMC has been and continues to be willing to work with the Voigts on reference areas. Contrary to the Voigts' briefing, the record reflects that "Mr. Eckroth, Environmental Manager for CCMC, stated there are no issues modifying the boundaries of the proposed ecological sites and clarified these sites have not been depicted as finalized in Permit NACC-1302." Case No. 24-244, Dkt. No. 98, at p. 5. "Mr. Welch [Permit Administrator for the Commission] stated that the ecological sites are depicted as proposed in Section 2.4.7.1 of Permit NACC-1302 (PSC Exhibit 2). Therefore, the ecological sites for the native grassland reference areas have not been finalized." *Id.* Rather than simply attempt to communicate with CCMC on finalizing potential reference areas, the Voigts make false accusations against the Commission and CCMC and go so far as to threaten further litigation. Voigt Brief, at p. 6 (stating "And for the record engaging in the public participation processes through the Commission may be burdensome but are not as burdensome as complex litigation in federal court.").

### **CONCLUSION**

[16.] This isn't a public participation issue. It is an accountability issue. Awarding attorneys' fees in accordance with statute and Commission regulation for actions designed to harass and embarrass will not in any way limit public participation. Any landowner bringing legitimate issues not designed to harass and embarrass a permittee has nothing to worry about. The Voigts are making this public participation argument because they are abusing the system and want to continue to do so. Awarding fees could limit future abuse of the system, which is the point of the statute and rule. It will not, however, limit any legitimate claims of any landowners or limit public participation for a legitimate purpose. All an award of fees in this case will do is hold the Voigts

and their counsel accountable for the continuous abuse of the system in bad faith to harass and embarrass CCMC. Therefore, CCMC requests that the Commission award CCMC its costs and expenses, including attorney's fees, under N.D.C.C. § 38-14.1-36 and N.D.A.C. § 69-05.2-01-07.

Dated this 14<sup>th</sup> day of April, 2025.

*/s/ Wade C. Mann*

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