

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Coyote Creek Mining Company, L.L.C.
Revision 13, Permit NACC-1302
Renewal 2, Permit NACC-1302
Application

Case No. RC-24-244
Case No. RC-24-245

December 30, 2024

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES

Commissioners Randy Christmann and Julie Fedorchak.

Derrick Braaten, Attorney-at-Law, 109 North Fourth Street, Suite 100, Bismarck, North Dakota 58501, on behalf of Casey and Julie Voigt.

Wade Mann, Attorney-at-Law, 100 West Broadway, Suite 250, Bismarck, North Dakota 58501, on behalf of Coyote Creek Mining Company, L.L.C.

Brian L. Johnson, Special Assistant Attorney General, Public Service Commission, State Capitol, Bismarck, North Dakota 58505, on behalf of the Public Service Commission.

Hope L. Hogan, Administrative Law Judge, Office of Administrative Hearings, 2911 N. 14th Street, Suite 303, Bismarck, North Dakota 58503, as Procedural Hearing Officer.

PRELIMINARY STATEMENT

On June 18, 2024, Coyote Creek Mining Company, L.L.C. (CCMC) filed the application for Revision 13 to Surface Coal Mining Permit NACC-1302 for its Coyote Creek Mine south of Zap in Mercer County. Revision 13 identifies the next five-year coal removal subarea and updates the mining and reclamation plans prior to the permit renewal. Revision 13 was assigned Case No. RC-24-244.

On June 18, 2024, CCMC filed an application for Renewal 2 to Surface Coal Mining Permit NACC-1302. Renewal 2 will allow CCMC to continue to engage in surface coal mining and reclamation operations within Permit NACC-1302 until October 22, 2029. Renewal 2 was assigned Case No. RC-24-245.

On July 11, 2024, the Public Service Commission ("Commission") issued a Notice of Receipt of Renewal and Revision Applications for Renewal 2 and Revision 13 to Permit

NACC-1302 informing the public that written comments, objections, or requests for an informal conference must be filed with the Commission by August 26, 2024.

On August 26, 2024, Derrick Braaten, counsel for Casey and Julie Voigt (Voigts) filed comments on the applications for Revision 13 and Renewal 2 of Permit NACC-1302 but did not request an informal conference. The Voigts expressed concerns about reference areas; the relocated road in the S½ of Section 36, T143N, R89W; the testing depth for sampling graded spoil; public participation; and acres released from bond in North Dakota.

On September 25, 2024, the Commission responded to the comments filed by the Voigts regarding reference areas; the relocated road in the S½ of Section 36, T143N, R89W; the testing depth for sampling graded spoil; public participation; and acres released from bond in North Dakota. Additionally, CCMC responded to the Voigts' comments on September 25, 2024.

On October 9, 2024, the Commission conditionally approved Revision 13 and approved Renewal 2. Special Condition No. 6 attached to Revision 13 requires "Coyote Creek Mining Company, L.L.C. must provide the Commission with copies of Mercer County road authority's approval documents to close or relocate County Road No. 13 and other approval documents to conduct surface coal mining activities within one hundred feet of the outside right-of-way of County Road No. 13 as required by NDAC 69-05.2-04-01.3(4). These documents must be provided to the Commission within thirty days from the road authority's approval date and include the written findings made by the road authority. If the road authority did not provide for a public comment period and make a written finding as part of its approval process as specified in subsection 3 of North Dakota Administrative Code Section 69-05.2-04-01.3, no mining activities may be conducted within one hundred feet of the outside right-of-way of County Road No. 13 until the Commission provides public notice and makes the written finding." Special Condition No. 7 attached to Revision 13 requires "Coyote Creek Mining Company, L.L.C. must provide detailed plans for relocated County Road No. 13 and haul roads and corridors passing over or under existing or relocated County Road No. 13. These detailed plans must be included in Permit NACC-1302 with a revision application."

The Commission's conditional approval of Revision 13 was subject to the right of any person with an interest who is or may be adversely affected to request a formal hearing on the decision.

On November 15, 2024, the Commission received a request for a Formal Hearing on the approved applications from the Voigts. The Voigts' formal hearing request stated, "Issues to be raised at the formal hearing include reclamation practices, testing and sampling practices, and reclamation success, as well as general review of the permit and concerns of the landowners hosting this Mine on their property."

On November 20, 2024, the Commission issued a Notice of Formal Hearing scheduling the hearing for December 13, 2024. The hearing notice was served on the parties and it was published in the Hazen Star on November 28, 2024, and December 5, 2024 and in the Bismarck Tribune on November 29, 2024, and December 6, 2024.

On November 21, 2024, the Chair of the Commission filed and served a request for an updated filing that should include a clear and concise statement of claims, including non-compliance or violation of applicable statutes or rules, and relief sought by November 27, 2024 — since more particularity is required for petitions or requests that initiate a formal hearing subject to judicial review.

On November 26, 2024, the Voigts responded to the Chair's letter requesting updated filings and stated that they will not comply with the request by November 21, 2024 and requested the specific legal authority that requires a formal hearing request to provide a clear and concise statement of claims, including non-compliance or violation of applicable statutes or rules, and relief sought.

On November 27, 2024, the Chair responded to the Voigts with authority for the request, as well as the practical implications for the request that was refused. The Chair's response requested that the Voigts communicate a date by which the Commission can expect an updated response. The Voigts did not respond or provide an updated filing to the Chair's November 27, 2024 request.

On December 12, 2024, the Commission issued an Order on Specification of Issues for the Formal Hearing scheduled for December 13, 2024 that stated, "The Commission Orders the hearing topics to be limited to new issues or concerns not previously raised at a formal hearing about reclamation practices, reclamation success, general review of the permit, testing and sampling practices, and land owner concerns unless there is new evidence regarding any issues raised in previous formal hearings."

The Formal Hearing was held on December 13, 2024. Having allowed all interested persons an opportunity to be heard and having heard, reviewed, and considered the record, the Commission makes the following:

FINDINGS OF FACT

1. On October 22, 2014, the Commission issued Surface Coal Mining Permit NACC-1302 to allow CCMC to conduct surface coal mining and reclamation operations at the Coyote Creek Mine.
2. On June 18, 2024, Coyote Creek Mining Company, L.L.C. (CCMC) filed the application for Revision 13 to Surface Coal Mining Permit NACC-1302 for its Coyote Creek Mine south of Zap in Mercer County. Revision 13 identifies the next five-year coal removal subarea and updates the mining and reclamation plans prior to the permit renewal.

3. On June 18, 2024, CCMC filed an application for Renewal 2 to Surface Coal Mining Permit NACC-1302. Renewal 2 will allow CCMC to continue to engage in surface coal mining and reclamation operations within Permit NACC-1302 until October 22, 2029.
4. On October 9, 2024, the Commission conditionally approved Revision 13 and approved Renewal 2 to Surface Coal Mining Permit NACC-1302 to allow CCMC to conduct surface coal mining and reclamation operations at the Coyote Creek Mine until October 22, 2029.
5. On November 15, 2024, the Commission received a request for a Formal Hearing on the approved applications from Casey and Julie Voigt with concerns about reclamation practices, reclamation success, general review of the permit, testing and sampling practices, and landowner concerns.
6. According to the Commission's October 9, 2024 approval form for Revision 13 to Permit NACC-1302, the Commission made the finding that CCMC has demonstrated that reclamation as required by NDCC Chapter 38-14.1 and NDAC Article 69-05.2 can be accomplished under the reclamation plan contained in the permit application [NDCC 38-14.1-21(3)(b)]. The reclamation methods and practices used by CCMC have proven effective in the past. Similar lands have been surface mined and successfully reclaimed at mines in Mercer County using comparable reclamation methods (PSC Exhibit 1).

Reference Areas

7. The Voigts stated that the Commission previously issued an order requiring the Voigts be consulted when CCMC is selecting reference areas for determining reclamation success on native grassland by referencing the Commission's April 14, 2015 order in Case No. RC-13-850 (Voigt Exhibit L01).
8. The Commission's April 14, 2015 order, item number 2c on page 17 of Voigt Exhibit L01, required CCMC to submit a permit revision detailing plans to consult the Voigts when selecting and establishing management practices for reference areas on undisturbed native grasslands. These reference areas will be used to demonstrate reclamation success on reclaimed native grasslands owned by the Voigts. Based on the Voigts' interpretation of the Commission's order, CCMC is required to consult with the Voigts before CCMC selects any potential reference areas.
9. The Voigts stated that they were not consulted prior to CCMC selecting reference areas with the assistance of Kelly Krabbenhoft of KDK Consulting. Additionally, they stated CCMC did not comply with the Commission's April 14, 2015 order until

they filed comments on August 26, 2024 in reference to Revision 13 and Renewal 2 to Permit NACC-1302.

10. The Voigts, CCMC, Commission staff, and staff from the Natural Resources Conservation Service (NRCS) conducted an inspection of the proposed reference areas on October 8, 2024 at the mine (Voigt Exhibit L02). The inspection report found that some of the reference area boundaries may need to be revised to account for soil variations in these sites.
11. Mr. Welch, Permit Administrator for the Commission, provided during the October 8, 2024 inspection, all of the proposed native grassland reference areas were visited. The proposed reference areas were proposed by Kelly Krabbenhoft based on the detailed soil survey from Permit NACC-1302.
12. Mr. Welch 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.
13. 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.
14. 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.
15. On September 25, 2024, the Commission responded to the Voigts' concerns regarding the reference areas included in Revision 13 by stating that the proposed reference areas in Revision 13 do not finalize the sites, and once the reference areas have been finalized, the finalized reference areas will need to be included in a future permit revision. Furthermore, Revision 13 provides more specificity to the permit by stating that the Voigts will be consulted on the selection and management of reference areas to be used to demonstrate reclamation success of the Voigt-owned native grasslands.
16. N.D.A.C. 69-05.2-01-02(87) defines reference areas as a land unit maintained under appropriate management for the purpose of measuring vegetation ground cover, productivity, and plant species diversity that are produced naturally or by crop production methods approved by the commission.
17. N.D.A.C. 69-05.2-08-08(2) states that the proposed reference areas must adequately characterize the soil mapping units they are proposed to represent according to methods approved by the Commission when selecting methods to determine revegetation success required in N.D.A.C. 69-05.2-22-07.

18. N.D.A.C. 69-05.2-22-07 provides that ground cover and productivity of the permit area must be equal to or greater than that of the approved reference area at the time of final bond release. Therefore, the Commission has the authority to make the final decision regarding approval of the proposed reference areas.
19. The reference areas proposed in Revision 13 are based on dominant ecological sites that will be mined on Voigt owned property. CCMC has not violated the Commission's April 14, 2015 order and the reference areas have not been approved by the Commission.
20. The Commission finds that CCMC has not violated provision 2(c) of the Commission's April 14, 2015 order.

Relocated Road (18th Street SW)

21. The Voigts alleged that CCMC is illegally relocating 18th Street SW on their property in the S $\frac{1}{2}$ of Section 36, T143N, R89W. They also asserted that CCMC is constructing the road in an area where they do not have permission since it is depicted in the approved mining permit.
22. In the Commission's September 25, 2024 response to the Voigts' comments regarding Revision 13, the Commission stated that during the formal hearing in Case Nos. RC-19-189 and RC-19-190, the Voigts requested that CCMC submit a permit revision to describe their future plans for 18th Street SW. As a result of their request, the Commission's February 7, 2020 order in Case Nos. RC-19-189 and RC-19-190 issued Special Condition No. 1 to Revision 9 requiring 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.
23. Mr. Eckroth stated that 18th Street SW dissected the Voigts' property in the SE $\frac{1}{4}$ of Section 36 prior to mining and the original resolution from Mercer County contained an agreement to construct 18th Street SW on the quarter line of Section 36, T143N, R89W. However, the Voigts never liked the original agreement from Mercer County to reconstruct the road on the quarter line of Section 36 and CCMC agreed with the Voigts on this issue since the reconstructed road would be constructed through several ravines, which would not be an ideal location to reconstruct the road. Therefore, CCMC met with the Voigts to discuss an alternative road location and came to a verbal agreement, which is why it is shown as a proposed location in the permit since its final location requires approval from North Dakota's Department of Trust Lands (ND DTL) and Mercer County.
24. In September 2024, Mr. Eckroth sent the Voigts an email describing alternative locations for the reconstructed road after learning that its location remained a concern for the Voigts, as outlined in their August 26, 2024, comments on the applications for Revision 13 and Renewal 2 to Permit NACC-1302. However, the Voigts never responded to Mr. Eckroth's email.

25. Mr. Eckroth stated grade approval requests were submitted to the Commission for approval that encompass portions of the proposed location of the reconstructed road — 18th Street SW. Since the final location of the reconstructed road has not been finalized, CCMC decided to place subsoil in its location since this issue is delaying final reclamation. CCMC does not have strong opinions regarding the final location of the reconstructed road, but they need a decision from the Voigts so they can finish reclaiming this area. However, Mercer County is required to obtain easements from the Voigts and ND DTL before the reconstructed road can be finalized.
26. Based on Mr. Eckroth's experience working at another coal mine in North Dakota, the proposed location of the reconstructed road, 18th Street SW, is unique because such roads are typically reconstructed along statutory section line rights-of-way rather than transecting private property. To his knowledge, he has not encountered a situation like this in his twenty-four and a half years working at coal mines in North Dakota.
27. In the Commission's September 25, 2024 response to the Voigts' comments regarding Revision 13, the Commission explained that the depiction and description of 18th Street SW in Revision 13 is proposed and not finalized. The final location of the road will not be determined until the required easements have been secured and CCMC receives approval from Mercer County. The Commission also stated that the language in the permit regarding this road was approved with Revision 12 and CCMC is not proposing any changes to this road with Revision 13.
28. The final location of the reconstructed 18th Street SW will not be added to Permit NACC-1302 until the required easements are acquired. Once the easements are acquired, a permit revision will be submitted depicting the road's final location.
29. The Commission finds that CCMC is complying with the Commission's February 7, 2020 order and N.D.A.C. 69-05.2-09-07 by describing, with appropriate maps and cross sections, the measures the permit applicant will take to ensure that the interests of landowners and the public are protected.

Access

30. The Voigts mentioned the May 9, 2024 letter from CCMC to the Voigts outlining the requirements that they must comply with in order to access the mine (Voigt Exhibit L03).
31. Mr. Eckroth provided that safety is the main reason why there are access limitations or requirements to access the mine. Since the area is an active mine, CCMC is liable if someone is injured or killed while onsite. Therefore, access needs to be controlled, and those rules apply to everyone — not just the Voigts.

32. Mr. Eckroth explained that the reclaimed land, which the Voigts have raised access concerns about, is situated within an active mining area containing haul roads and truck traffic. As a result, controlled access is necessary to ensure safety. Furthermore, to his knowledge, CCMC has never denied the Voigts access to their land.
33. The access requirements for the Voigts are outlined in their coal lease agreement with CCMC. The Commission does not have jurisdiction over coal or surface leasing terms, conditions, or practices.
34. The Commission finds that access, as specified in the lease agreement between the Voigts and CCMC, is not within the jurisdiction of the Commission.

Compaction

35. The Voigts testified that the Commission's April 14, 2015 order required compaction testing of graded spoil and that CCMC is not conducting this testing in accordance with the order.
36. The Commission's April 14, 2015 order in Case No. RC-13-850 (Voigt Exhibit L01) required CCMC to submit a permit revision to describe detailed methods that will be used to minimize compaction of topsoil and subsoil that is replaced on reclaimed land, provide a testing plan to determine if there is any excess compaction in the replaced topsoil and subsoil, and describe measures that will be used to alleviate excess compaction if detected. The April 14, 2015 order does not provide requirements for conducting testing of the graded spoil.
37. During the formal hearing, the Voigts expressed that they want to require CCMC to conduct additional compaction testing of the graded spoil prior to suitable plant growth material (SPGM) respread, rip the graded spoil prior to SPGM respread if compaction was identified, and keep all records of compaction testing.
38. The specific methods CCMC utilizes to minimize compaction are outlined in Section 3.1.1.1 in Permit NACC-1302 (PSC Exhibit 3). For example, SPGM respread will generally be avoided during excessively wet conditions, driving on respread subsoil will generally be avoided, and a dozer will be utilized to respread subsoil in a manner that reduces excess passes over any given area. These details were initially added to Permit NACC-1302 with Revision 2 which was approved on June 27, 2018.
39. The Voigts stated that they are aware that CCMC had to describe methods to minimize compaction, but they have not seen these details. Furthermore, the Voigts stated they were not aware of CCMC implementing any measures to address compaction until they started voicing their concerns. The Voigts admitted

that the Commission informed them of CCMC's purchase of a deep ripper to address compaction.

40. The Voigts made arrangements with the agronomy center of Beulah to come to the mine to conduct soil testing around May 18, 2024. A truck mounted probe from the agronomy center was used for soil testing. The Voigts stated that the probe had issues penetrating the ground due to compaction; therefore, soil testing was limited.
41. The Voigts testified that Lance Loken of Western Plains Consulting, Inc. was hired by the Voigts to conduct additional soil testing on August 27, 2024 with a geo probe. Based on their observations, the soil was compacted between 36 and 48 inches below the surface, raising concerns for the Voigts about the rooting depth of vegetation, as native grasses typically root to about six feet and alfalfa roots to approximately ten feet. However, soil compaction testing was not conducted on undisturbed lands to create a baseline for comparison to reclaimed lands. The Voigts acknowledged that soil penetration resistance increases as soil moisture decreases.
42. The Voigts testified that concerns with compaction of reclaimed land was based on common sense observations without any specific data or measurements. They further stated, based on conversations with soil scientists, productivity of vegetation is reduced if the soil is compacted to a pressure of 200 pounds per square inch (psi) or more.
43. The Voigts stated that they were not aware of any law or regulation that sets a compaction limit for reclaimed lands.
44. The soil testing results from the agronomy center of Beulah were not submitted as evidence during the formal hearing.
45. The soil testing results from Western Plains Consulting, Inc. were not offered as evidence during the formal hearing by the Voigts.
46. CCMC testified to the current methods used to minimize compaction during respread operations. These methods include avoiding respreading operations during excessively wet conditions, minimizing traffic on subsoil by operating equipment on adjacent areas, strictly avoiding the use of wheeled equipment on topsoil, and distributing the placed topsoil or subsoil with a bulldozer. In instances where compaction is a concern or cannot be avoided, CCMC will rip the material using a motor grader, dozer, or tillage equipment such as a disk or subsoiler.
47. Mr. Eckroth stated that CCMC rips graded spoil at times to address compaction and there is a requirement in Permit NACC-1302 that requires slopes with a grade of 12% or greater to be scarified prior to placing subsoil to avoid slippage of the

subsoil. Mr. Eckroth testified that spoil compaction is not a factor impacting reclamation success.

48. Mr. Eckroth stated that CCMC purchased a CTS-1000 soil penetrometer to measure compaction. When CCMC conducts compaction testing of reclaimed areas, adjacent undisturbed areas are tested so the compaction readings from the reclaimed areas can be compared. The penetrometer is capable of measuring pressure to a depth of 24 inches, but CCMC usually records measurements to a depth of 20 inches due to equipment constraints.
49. CCMC stated that drier soil conditions can result in higher compaction readings and the Commission does not have any measurable performance standards that must be met for compaction.
50. CCMC presented maps depicting the location of compaction readings from 2024 and 2022 along with their corresponding graphs (CCMC Exhibit 5, 6, 7, and 8). The graphs depict the depth versus pressure reading from all of the compaction tests conducted on reclaimed and undisturbed land. On average, the 2024 results showed that reclaimed land had a pressure reading slightly below 600 psi from a depth of approximately 7 inches to 20 inches. The undisturbed land measured 600 psi within the top five inches and exceeded the penetrometer's maximum value of 1,200 psi at a depth of approximately three to seven inches. The 2022 test results indicated similar pressure readings of the reclaimed land compared to undisturbed areas, but the reclaimed land had pressure values of approximately 300 psi less than the undisturbed areas at a depth of 15 to 20 inches.
51. Mr. Eckroth testified that based on their compaction tests, compaction of reclaimed land is not greater than undisturbed areas.
52. Mr. Eckroth noted that the Voigts expressed satisfaction with the productivity of their undisturbed land. CCMC's 2024 compaction testing results (CCMC Exhibit 6) recorded pressure readings of 1,200 psi on undisturbed land at a depth of 3 to 7 inches, while CCMC's 2022 compaction testing results (CCMC Exhibit 8) demonstrated that reclaimed land generally exhibited lower compaction levels than undisturbed land.
53. The Voigts acknowledged (CCMC Exhibit 1) that they are the owners of Section 25, T143N, R89W, the SE $\frac{1}{4}$ of Section 36, T143N, R89W, and Section 1, T142N, R89W. Additionally, they stated areas of Section 1, T142N, R89W had areas with less topsoil and poorer vegetation, compared to the other areas referenced, but they were satisfied with the native grassland production because it produced well with rotational grazing to alleviate pressure on the other pastures that were used. The Voigts utilize cross fencing, water supply systems, and rotational grazing on their tracts.

54. Mr. Welch testified that during his November 13, 2024 inspection of the Coyote Creek Mine, CCMC was ripping graded spoil on an area with slopes at a grade of 4% or 5% (Voigt Exhibit L04).
55. Mr. Welch testified there are no requirements specified in statute or regulation or contained in CCMC's mining permit that require the rooting depth of vegetation to obtain a certain depth.
56. The Voigts testified that CCMC sought approval to conduct deep ripping in Section 19, T143N, R88W after they filed their August 26, 2024 comments regarding Revision 13 and Renewal 2 to Permit NACC-1302. The Voigts did not allow CCMC to deep rip their land because they thought it would damage the land and add little benefit.
57. The Voigts had concerns about deep ripping topsoil and subsoil after it has been respread and said the deep ripper cannot rip through the base of the subsoil if the respread depth is thirty-six or forty-eight inches. They were also concerned if the spoil was ripped after topsoil and subsoil were placed, topsoil and subsoil would be mixed with spoil — based on research they have done.
58. The definitive indicator of reclamation success is the land's productivity and its qualification for final bond release. The evidence presented failed to substantiate or sufficiently challenge the mine's ability to meet this standard under its current practices
59. The Voigts offered a letter to Mr. Welch from North Dakota's Department of Trust Lands restricting grazing capacity on reclaimed land in Section 36, T144N, R89W.
60. Upon reviewing the letter, Mr. Welch testified that the SW¼ of Section 36, T144N, R89W is reclaimed land located approximately three miles north of the Coyote Creek Mine, south of Zap. He explained that this area was part of the Indian Head Mine and only a small sliver on the far western edge of the southwest quarter is subject to current reclamation laws. The land was reclaimed under various regulatory frameworks, including North Dakota's current law, the 1978 interim rules, the 1977 law, the 1975 law, and potentially even earlier regulations. Part of this area was previously used as a haul road for the Indian Head Mine, subject to a 10-year revegetation responsibility period. The reclamation requirements for this land were based on the regulations in effect at the time of mining. Therefore, this tract likely consists primarily of reclamation completed before the enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and provided little demonstrative value to the current reclamation practices.
61. Mr. Welch offered Section 2.4.7.2 of Permit NACC-1302 (PSC Exhibit 4) which describes the acres of ecological sites within the permit by surface owner. The ecological sites were reviewed in relation to rooting depths, shallow soils, and the

presence of restrictive layers that would restrict water movement or root penetration. Within Permit NACC-1302, approximately 44% or 3,062 acres of the pre-mine native grassland ecological sites consisted of soils that had restrictive claypan or sandstone layers or shallow soils that limited rooting depths and/or water penetration. The table provided a sense of the available topsoil and subsoil that was available within Permit NACC-1302 pre-mine.

62. Mr. Welch stated that he was not concerned with CCMC meeting the native grassland productivity performance standards. Based on his experience working for the Commission for twenty-seven years, the productivity of native grassland has not been an issue for achieving final bond release.
63. Mr. Welch stated that order provisions 2(a) and 2(b) of the Commission's April 14, 2015 order, which required CCMC to describe detailed methods for minimizing compaction of topsoil and subsoil, provide a testing plan to detect excess compaction in the replaced topsoil and subsoil, and outline measures to alleviate excess compaction if detected, are more prescriptive than what the Commission requires in other surface coal mining permits.
64. According to the Commission's October 9, 2024 approval form for Revision 13 to Permit NACC-1302, the Commission made the finding that CCMC has affirmatively demonstrated that reclamation as required by NDCC Chapter 38-14.1 and NDAC Article 69-05.2 can be accomplished under the reclamation plan contained in the permit application [NDCC 38-14.1-21(3)(b)]. The reclamation methods and practices used by CCMC have proven effective in the past. Similar lands have been surface mined and successfully reclaimed at mines in Mercer County using comparable reclamation methods (PSC Exhibit 1).
65. The Commission finds CCMC's reclamation practices and methods to minimize compaction are adequate; therefore, no additional special conditions or permit requirements addressing compaction are warranted.

Yield Maps

66. The Voigts described production yield maps produced by John Weinand who farms some land the Voigts own within Permit NACC-1302 that was partially disturbed by mining operations (Voigt Exhibit L05).
67. The area depicted in the yield maps is in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 19, T143N, R88W. The yield maps depict yields from 2009 to 2024 with crops such as wheat, canola, peas, corn, and sunflowers.
68. The Voigts testified that the yield maps were created using different monitors over the years as they were upgraded, but the technology stayed the same.

69. Mr. Eckroth pointed out that the areas depicted in the yield maps were not mined and are associated disturbance areas with a total disturbance area of three or four acres. He further stated that he has tested this area for compaction and is aware that it is an issue that CCMC is trying to correct. He testified that he approached the Voigts in the summer of 2024 to see if they would like CCMC to alleviate the compaction with deep ripping, but the Voigts were not agreeable.
70. Mr. Eckroth pointed out that the yield maps can depict areas of decreased yield where farm equipment enters a field and the boundaries of a field usually depict less yield since that is where a combine will turn and not collect accurate yield measurements.
71. Cropland production data are not collected until after year six of the responsibility period for the purpose of determining revegetation success, as outlined in N.D.A.C. 69-05.2-22-07(4)(c).
72. There are no requirements in the Commission's statutes, rules, or orders for CCMC to collect yield maps and the Commission finds the Voigts did not demonstrate that additional monitoring is warranted.

Dust

73. The Voigts stated that dust from the mine is still an ongoing issue and offered a picture of their vehicle covered in dust from October 8, 2024 (Voigt Exhibit L07). The Voigts expressed that the dust was the result of wind erosion from stockpiles at the mine. Additional photographs of stockpiles, illustrating their vegetation, were submitted with dates of April 26, 2023, and August 30, 2022 (Voigt Exhibit L08). The Voigts believed the main source of the dust was from the spoil stockpile directly above their house.
74. The photographs of the stockpile presented in Voigt Exhibit L08 were taken approximately a year-and-a-half and two years, respectively, prior to the photograph of the dusty vehicle in Voigt Exhibit L07. As such, the vegetative cover of the stockpile shown in Voigt Exhibit L08 does not serve as a reference for the condition of the stockpile's vegetative cover at the time Voigt Exhibit L07 was captured.
75. On October 8, 2024, the Commission conducted an inspection with CCMC, the Voigts, and staff from the NRCS to inspect the proposed native grassland reference areas (Voigt Exhibit L02). The inspection report states that the inspection was conducted between 8:30 a.m. and 1:45 p.m., under mostly sunny skies with light winds from the south. The 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.

76. The issue of dust was not identified in the Voigts' formal hearing request as a matter to be addressed during the formal hearing; therefore, the Commission was not prepared to consider concerns related to dust from wind erosion. However, no remedy related to dust was offered by the Voigts.
77. Wind erosion concerns would be more appropriately addressed by submitting a request for an inspection to the Commission, in accordance with N.D.A.C. 69-05.2-28.
78. N.D.A.C. 69-05.2-28 provides for a person to request an inspection of a surface coal mining and reclamation operation by filing a signed written statement that gives the Commission reason to believe that any requirement of N.D.C.C. ch. 38-14.1, N.D.A.C. art. 69-05.2, or any permit condition, has not been complied with.
79. The Department of Environmental Quality has exclusive jurisdiction over permitting of air quality in North Dakota pursuant to the Clean Air Act. The Commission does not have authority to enforce provisions of the Clean Air Act, but as a state-approved program, has adopted a specific rule governing what an applicant must set forth in the permit application with respect to air quality. The Commission's rule set forth in N.D.A.C. 69-05.2-09-05, provides that "[t]he applicant shall specify the measures to comply with the air pollution control requirements of the [Department of Environmental Quality] and any other measures necessary to effectively control wind erosion and attendant air pollution." See Case Nos. RC-14-846, RC-19-189, and RC-19-189.
80. Once a permit is granted, the Commission has statutory standards that must be met. N.D.C.C. 38-14.1-24 establishes environmental protection performance standards. This section provides in part that "[g]eneral performance standards are applicable to all surface coal mining and reclamation operations and must require the permittee at a minimum to . . . stabilize and protect all surface areas, including spoil piles affected by the surface coal mining and reclamation operation, to effectively control erosion and attendant air and water pollution." The Commission has adopted a rule requiring that "[t]he permittee shall comply with all applicable air pollution control laws and rules of the [Department of Environmental Quality] and stabilize and protect all surface areas." N.D.A.C. 69-05.2-13-07.
81. The Commission finds that 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. The issue of dust is primarily subject to the jurisdiction of the Department of Environmental Quality; therefore, no special conditions or permit requirements addressing dust are warranted.

Graded Spoil Sampling

82. The Voigts mentioned that they are still concerned about sampling the graded spoil to a depth of twelve inches to determine the graded spoil properties for compliance with N.D.A.C. 69-05.2-15-04. They would prefer sampling the graded spoil to the maximum depth of the probe that is sampling the spoil since their primary concern is capping sodic spoil with glacial till or low sodium adsorption ratio (SAR) spoil. The Voigts are under the impression that CCMC is capping sodic spoil with twelve inches of glacial till; however, no data were presented to corroborate this claim.
83. Furthermore, the Voigts claimed that they discovered six to eight inches of glacial till placed over sodic spoil based on Western Plains Consulting, Inc.'s soil investigation conducted at the mine this past August.
84. The Voigts failed to present any evidence from Western Plains Consulting, Inc.'s soil investigation to substantiate these alleged findings.
85. The Voigts testified that if six inches of spoil with an SAR of 20 is placed beneath six inches of glacial till with an SAR of 2, the resulting composite sample would have an SAR of 11.
86. The Voigts did not submit any quantitative data to support their interpretation, nor did they provide evidence of methodology or calculations to validate the claimed composite SAR value of 11.
87. N.D.A.C. or N.D.C.C. do not specify the depth at which graded spoil needs to be sampled to comply with the suitable plant growth redistribution requirements of N.D.A.C. 69-05.2-15-04. Policy Memorandum No. 17 to Mine Operators is a guidance document that specifies that graded spoil must be sampled to a depth of twelve inches. The Voigts did not provide an adequate justification to depart from current sampling practices.
88. As stated to the Voigts on September 25, 2024 in response to their comments on Revision 13, 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. Subsequently, the Commission's February 14, 2024 order was appealed to district court and the district court affirmed the Commission's Findings of Fact, Conclusions of Law and Order.
89. The Commission's September 25, 2024 letter stated: "[i]t is the Reclamation Division's opinion that the current sampling methodology for mining operations is adequate to assure reclamation success and [is] 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."

90. The Voigts did not demonstrate that the graded spoil sampling procedures outlined in N.D.A.C. and Policy Memorandum No. 17 are deficient; therefore, no special conditions or permit requirements addressing graded spoil sampling are warranted.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over CCMC's planned mining and reclamation operations in North Dakota, including Permit NACC-1302, Revision 13 and Renewal 2 thereto.
2. CCMC's Revision 13 application to Surface Coal Mining Permit NACC-1302 meets all permit revision standards under N.D.C.C. ch. 38-14.1 and N.D. Admin. Code, art. 69-05.2.
3. CCMC's Renewal 2 application to Surface Coal Mining Permit NACC-1302 meets all permit renewal standards under N.D.C.C. ch. 38-14.1 and N.D. Admin. Code, art. 69-05.2 and carries "with it the right of successive renewal".
4. Pursuant to N.D.C.C. 38-14.1-22(2), the Voigts have the burden to demonstrate that Permit NACC-1302 should not be renewed.
5. The ecological site reference areas within Revision 13 to Permit NACC-1302 are proposed and have not been approved by the Commission as required by N.D.A.C. 69-05.2-22-07.
6. CCMC has complied with item 2(c) in the Commission's April 14, 2015, order in Case No. RC-13-850 by consulting the Voigts to provide input on the proposed reference areas.
7. The Voigts' concerns related to access are conditions described in their lease with CCMC. The Commission does not have any jurisdiction over coal or surface leasing terms, conditions, or practices.
8. The road identified by the Voigts under their access concerns, 18th Street SW, is subject to the jurisdiction of Mercer County, North Dakota.

9. CCMC has complied with the Commission's February 7, 2020 order that attached a special condition to Permit NACC-1302. The special condition 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.
10. CCMC's application complies with N.D.A.C. § 69-05.2-09-07 by describing, with appropriate maps and cross sections, the measures the permit applicant will take to ensure that the interests of landowners and the public are protected.
11. CCMC has complied with the Commission's April 14, 2015, order to revise Permit NACC-1302 by adding plans to: describe detailed methods for minimizing compaction on the replaced subsoil and topsoil; conduct testing to detect excess compaction in the replaced topsoil and subsoil on reclaimed lands; and outline measures to alleviate excessive compaction if detected.
12. The Commission does not have performance standards that define the limits of excess compaction.
13. The Voigts did not demonstrate that graded spoil requires compaction testing or that compaction testing of graded spoil is warranted.
14. The jurisdiction and authority to regulate air quality in North Dakota is within the purview of the DEQ pursuant to North Dakota Century Code Chapter 23.1-06.
15. The Voigts did not demonstrate an adequate basis to depart from the graded spoil sampling practices outlined in N.D.C.C. ch. 38-14.1, N.D. Admin. Code, art. 69-05.2, or Policy Memorandum No. 17.
16. The Voigts did not demonstrate that CCMC is in violation of a statute, regulation, or permit condition.

ORDER

1. The Commission's October 9, 2024, conditional approval of Revision 13 to Permit NACC-1302 is AFFIRMED;
2. The Commission's October 9, 2024, approval of Renewal 2 to Permit NACC-1302 is AFFIRMED;

PUBLIC SERVICE COMMISSION

Sheri Haugen-Hoffart

**Sheri Haugen-Hoffart
Commissioner**

Randy Christmann

**Randy Christmann
Chair**

Julie Fedorchak

**Julie Fedorchak
Commissioner**