

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

May 8, 2025

ORDER ON ATTORNEY FEES

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. 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 27, 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 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 Commission held the Formal Hearing on December 13, 2024. On December 30, 2024, the Commission issued its Findings of Facts, Conclusions of Law, and Order (Order). The Order affirmed the Commission's October 9, 2024 conditional approval of Revision 13 and approval of Renewal 2.

Discussion

Pursuant to N.D.C.C. § 38-14.1-36, “Whenever an order is issued as a result of any administrative proceeding under this chapter . . . a sum equal to the aggregate amount of all costs and expenses, including attorney’s fees as determined by the commission to have been reasonably incurred . . . may be assessed against any party as the Commission deems proper.” N.D. Admin. Code 69-05.2-01-07(5)(d) provides that fees may be awarded to a permittee when the permittee demonstrates that the person initiated a proceeding under N.D.C.C. § 38-14.1-30 or participated in the proceeding in bad faith to harass or embarrass the permittee.

On February 13, 2025, CCMC filed a 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 and provided an attachment of fees. The petition alleges the Voigts misused the Commission’s process and acted in bad faith to harass CCMC. CCMC also alleges that the Voigts’ claims lacked substantial merit and that CCMC incurred unnecessary legal expenses in defending its permit applications.

On March 31, 2025, the Voigts’ responded to CCMC’s petition. The Voigts argued that their objections to the mining permit were legitimate concerns under the public participation provisions of SMCRA (Surface Mining Control and Reclamation Act), not frivolous or harassing actions. They refute claims that they acted in bad faith, citing multiple meetings with Commission staff and efforts to resolve issues prior to formal proceedings. The Voigts maintained that they introduced new and relevant evidence at the hearing and asserted that the mining company failed to consult them as required regarding reference areas. They accuse the company of attempting to intimidate them through repeated fee petitions, which they argue undermines the very public participation rights that SMCRA was designed to protect.

In CCMC’s Reply in Support of Petition for Attorney’s Fees, CCMC argued that the Voigts ignored direct requests from the PSC to clarify their claims, ambushed the Commission with undisclosed issues such as dust concerns, and falsely accused both CCMC and the Commission of misconduct regarding reference areas for reclamation. CCMC insisted this behavior constitutes bad faith and is not protected public participation. They emphasized that they have never initiated action against the Voigts, but have only

responded to their claims, and seek attorney's fees solely to hold them accountable and deter future abuse of the system.

In relation to the reference areas discussed at the formal hearing and Commission's September 25, 2024 response to the comments filed by the Voigts on the applications for Revision 13 and Renewal 2 to Permit NACC-1302, the Commission found that CCMC has not violated provision 2(c) of the Commission's April 14, 2015 order. Case No. RC-13-850. Additionally, the September 25, 2024 response to the Voigts stated, "[T]he Reclamation Division agrees that consultation is required before the proposed native grassland reference sites are approved or finalized." The September 25, 2024 response clarified that approval of the proposed reference sites in Revision 13 does not finalize the reference sites and consultation with the Voigts and approval from the Commission is required prior to finalization. Once the reference areas have been finalized, the finalized reference areas will need to be included in a future permit revision. Furthermore, at the time of the hearing, the Voigts had been consulted regarding the proposed reference areas. This issue has been previously discussed at a formal hearing and Voigts did not demonstrate that CCMC violated the Commission's previous order.

The relocated road (18th Street SW) was litigated previously and 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. The relocation of 18th Street SW falls under the jurisdiction of Mercer County, North Dakota. This jurisdictional determination was previously established in the Commission's February 7, 2020 Findings of Fact, Conclusions of Law, and Order in Case Nos. RC-19-189 and RC-19-190, as well as in the Commission's September 25, 2024 response to the Voigts.

The Voigts' access concerns related to the property they leased to CCMC were previously addressed at formal hearings, and it has been determined that the administration of the Voigts' lease agreement falls outside the Commission's jurisdiction. Case Nos. RC-19-189, RC-19-190, and RC-23-348. The Order again provided that access, as specified in the lease agreement between the Voigts and CCMC, is not jurisdictional to the Commission.

The issue of compaction was not specifically identified in the Voigts' formal hearing request and compaction was previously discussed at a formal hearing in Case No. RC-13-850 and the Commission ordered 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. RC-13-850, Dkt. 125. No reasonable evidence was offered to give the Commission reason to believe that CCMC needs to conduct additional compaction testing. The Commission found that CCMC's reclamation practices and methods to minimize compaction are adequate; therefore, no additional special conditions or permit requirements addressing compaction are warranted.

The topic of yield maps was heard again, in a manner similar to the formal hearing in Case No. RC-23-348, without demonstrating a requirement in statute, regulation, or Commission order for CCMC to monitor production from yield maps. The topic of yield maps was not identified in the Voigts' formal hearing request or included in the formal hearing public notice.

The issue of dust was discussed at the formal hearing, but the Voigts did not demonstrate the source of the dust or provide reasonable evidence of wind erosion. Furthermore, the Commission previously addressed this issue in Case Nos. RC-19-189 and RC-19-190. The jurisdiction and authority to regulate air quality in North Dakota is within the purview of the North Dakota Department of Environmental Quality (DEQ) pursuant to North Dakota Century Code Chapter 23.1-06. The issue of dust was not identified in the Voigts' November 15, 2024 formal hearing request and the Commission found that the Voigts did not demonstrate the sources of the dust or provide evidence of wind erosion that would give the Commission reason to believe that CCMC was in violation of a requirement or permit condition.

At the formal hearing, 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. The Voigts are under the impression that CCMC is capping sodic spoil with only twelve inches of glacial till; however, no data or reasonable evidence were presented to corroborate this claim.

On September 25, 2024, the Commission responded to concerns raised by the Voigts related to graded spoil sampling and stated that the testing depth for graded spoil contained in Policy Memorandum No. 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 on August 5, 2024. Case No. 08-2024-CV-00694

The Commission concluded that 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. The issue of graded spoil sampling was decided in a recent formal hearing and no new evidence was presented by the Voigts.

On March 4, 2020, the Commission issued an order on attorney fees in response to CCMC's request in Case Nos. RC-19-189 and RC-19-190. The Commission's order did not award CCMC attorney fees, but stated: "The Commission is not exercising its discretion to grant attorney fees in the present case, but continued persistence in litigation of claims with little to no merit and repetitive litigation of issues evidence bad faith and harassment. CCMC is correct when it states that a "conversation" may occur outside of the administrative process, even with the participation of the Reclamation Division. A petition for an informal conference by an interested party that is adversely affected or by

the Commission's request may also be necessary. However, once a petition for formal hearing is received, particularly for parties with counsel, the Commission will expect that such claims have a reasonable basis, be supported by sufficient allegations of facts and supporting evidence, and take care to avoid relitigation of issues." RC-19-189, Dkt. No. 185, p. 3; RC-19-190, Dkt. No. 201, p. 3.

N.D.C.C. § 38-14.1-36(1) allows discretion to award attorney's fees reasonably incurred in connection with the party's participation where it is determined to be "proper". N.D.A.C. § 69-05.2-01-07(5)(d) specifies that fees may be awarded to the permittee "where the permittee demonstrates that the person...participated in the proceeding in bad faith to harass or embarrass the permittee." Despite explicit Commission direction, the Voigts refused to provide a clear and concise statement of issues, similar to what was provided in a previous proceeding. Repeated requests from the Commission Chair went unanswered, prompting unnecessary uncertainty in preparation for CCMC and the Commission at the December 13, 2024 formal hearing. It also made it unclear which staff would need to be available during the proceeding, causing reluctance to permit leave or schedule unrelated work and prevented a preliminary investigation regarding the issues.

None of the issues raised at the formal hearing were supported by reasonable evidence, expert testimony, or credible data to rule in favor of the Voigts. No new information or conditions had arisen since prior adjudication. The intent of N.D.C.C. § 38-14.1-36 is to preserve good-faith public participation while protecting permittees from abuse of process. The relitigation of settled issues and their lack of responsiveness wastes resources, incurs unnecessary expenditures, and hinders constructive engagement for the parties and the Commission.

The Commission has the discretion to determine whether a claim is in bad faith to harass or embarrass the permittee and, upon such a determination, the Commission has discretion to award costs and expenses. CCMC asserts that the Voigts brought forth claims with jurisdictional and factual deficiencies. The Commission's agreement with this assertion can be observed in its December 30, 2024, Findings of Fact, Conclusions of Law and Order. A number of the Voigts' claims sidestepped previous jurisdictional conclusions and attempted to revisit well-litigated issues.

Based upon the discussion, the Commission finds that the Voigts brought forth, and continued pursuing these issues through the proceeding in bad faith to harass or embarrass the permittee.

With respect to CCMC's Statement of Account, RC-24-244, Dkt. No. 112; RC-24-245, Dkt. No. 101, the Commission finds the fees are reasonably incurred with the following adjustments:

The fees from August 26, 2024 through November 26, 2024 are removed. The Commission finds these fees would likely have been incurred for a formal hearing regardless of whether the hearing warranted the assessment of attorney fees. (\$10,638.00)

The December 10, 2024 fee of \$654.50 through the December 11, 2024 fee of \$269.50 are removed. These fees would have been incurred for a formal hearing regardless of whether the hearing warranted the assessment of attorney fees. (\$6,094.00)

The fees from December 30, 2024 are omitted. These fees would have been incurred for a formal hearing regardless of whether the hearing warranted the assessment of attorney fees. (\$389.00)

Based on the seven topics outlined in the Commission's December 30, 2024 Findings of Fact, Conclusions of Law, and Order — reference areas, relocated road (18th Street SW), access, compaction, yield maps, dust, and graded spoil sampling — the four topics of access, compaction, yield maps, and dust were not mentioned in the Voigts' August 26, 2024 comments on the applications for Revision 13 and Renewal 2 of Permit NACC-1302. Furthermore, the issue of graded spoil sampling was recently litigated at a formal hearing and the Commission's Findings of Fact, Conclusions of Law, and Order was appealed to district court and upheld. Case No. RC-23-348. Therefore, the Commission is exercising its discretion to proportionately reduce the attorney fees to reflect work performed on the two remaining issues. (\$8,607.00)

The Commission declines to assess attorney fees to the Voigts with respect to the issue of the reference areas and the relocated road (18th Street SW), notwithstanding that the issue had been previously raised and addressed, or being subject to a pending decision by the Mercer County Commission that the Voigts have been advised about.

The affidavit of Wade C. Mann, RC-24-244, Dkt. No. 111 and RC-24-245, Dkt. No. 100, stated that CCMC incurred \$47,245.50 in attorney fees for these matters. After applying the reductions listed above, the Commission finds that it is proper to award CCMC \$21,517.50 in attorney fees.

ORDER

Accordingly, it is ORDERED that CCMC's Petition for Attorney's Fees is APPROVED with the above adjustments. CCMC is awarded \$21,517.50 in attorney fees from the Voigts.

PUBLIC SERVICE COMMISSION


Sheri Haugen-Hoffart
Commissioner


Randy Christmann
Chair


Jill Kringstad
Commissioner