



# Public Service Commission

Sheri Haugen-Hoffart

Randy Christmann

Jill Kringstad

600 East Boulevard Ave  
Dept. 408  
Bismarck, ND 58505-0480  
701-328-2400  
ndpsc@nd.gov

*sent via email only*

July 24, 2025

Mr. Jeff Fleischman, Chief  
Denver Field Division  
Office of Surface Mining  
P.O. Box 11018  
Casper, WY 82601

**RE: Second Amendment Request for Authorization to Proceed for the 2025 Buechler Velva Phase 3 AML Project in North Dakota.**

Dear Mr. Fleischman:

We are amending our request for ATP. The only change in the amendment is to add grant number **S25AF00127** to the list below.

Enclosed is the documentation to support our Request for Authorization to Proceed for the 2025 Buechler Velva Phase 3 AML Project in North Dakota. The environmental assessment is attached for the proposed project.

We have requested concurrence for our proposed project from the U.S. Army Corps of Engineers, the State Historical Society of North Dakota, the U.S. Fish and Wildlife Service, the North Dakota Parks and Recreation Department, and the North Dakota Department of Environmental Quality. Copies of our letters and the responses we received are attached.

A public meeting was held at Velva, ND, on November 13, 2024, regarding proposed work near Velva. All affected property owners for this project have been contacted and consents for right-of-entry will be executed before any work begins.

The e-AMLIS Problem Area Description number for the proposed site is ND000004 (Buechler Knorr). The approved grants for funding this project are **S23AF00037** (FY2022 North Dakota BIL AML) **S24AF00018** and (FY2023 North Dakota BIL AML). **This update proposes to add grant S25AF00127 (FY2024 North Dakota IIJA AML).** We have posted updated priority documentation for this project in the documents section in e-AMLIS. If you need more information or have any questions, please call Matt Fischer at 701-328-4779 or me at 701-328-4094.

Sincerely,

Jonathan Emmer  
Director  
Reclamation and AML Divisions

Enclosures

cc via email only: John Sieving

**List of Attachments**

A brief narrative about the proposed 2025 Buechler Velva Phase 3 AML Project.

Standardized environmental assessment for the proposed 2025 Buechler Velva Phase 3 AML Project.

Our requests for concurrence for the 2025 Buechler Velva Phase 3 AML Project and the responses received from:

ND State Historical Society (response included).

ND Department of Environmental Quality (response included).

ND Parks & Recreation Department (response included).

U.S. Fish and Wildlife Service (response included).

U.S. Army Corps of Engineers (response included).

Eligibility determination for the proposed 2025 Buechler Velva Phase 3 AML Project.

AMLIS PAD Numbers for proposed 2025 Buechler Velva Phase 3 AML Project:

<b>PAD No.</b>	<b>PAD Name</b>	<b>Project Type</b>
ND000004	Buechler Knorr	Highwall Backfilling/Backsloping

## Project Narrative

The 2025 Buechler Velva Phase 3 AML Project: The 2025 Buechler Velva Phase 3 AML Project involves backsloping and backfilling approximately 2,900 feet of dangerous highwall on an abandoned surface coal mine. The site is approximately 9 miles southwest of Velva, North Dakota, in Ward County. The proposed reclamation will disturb approximately 81 acres. The surface mine portion is characterized by steep eroding highwalls approximately 35 feet high. The proposed work is planned in two phases: a tree removal phase between December 2024 and March 2025 and a construction phase between May and November 2025. The proposed construction work involves backsloping and backfilling the highwalls with earthen material from adjacent spoil piles. Affected areas will be reseeded with locally adapted grass species native to western North Dakota. Erosion and sedimentation will be controlled. The estimated cost for this project is \$1,948,500.

\\AML\2025\Buechler Velva Phase 3\ATP\Requests sent to OSMRE\2 Project Narrative

**STANDARDIZED ENVIRONMENTAL ASSESSMENT**

**Buechler\Velva Phase 3 AML Project  
ND0004  
Ward County, North Dakota**

**Prepared by**

**North Dakota Public Service Commission**

**In Cooperation With**

**United States Department of Interior  
Office of Surface Mining Reclamation and Enforcement  
Casper Field Office**

**November 2024**

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## Chapter 1

### Purpose and Need for the Proposal

#### A. Need for the Action

The principal objective of the Abandoned Mine Lands (AML) Division of the North Dakota Public Service Commission (PSC) is to reclaim potentially hazardous abandoned surface and underground coal mines in North Dakota.

The Buechler Knorr problem area is composed of numerous and extensive surface and underground coal mines on approximately 13,440 acres located in Ward County, T152N, R82W, Sections 15, 23, 24, and 25 and T152N, R81W, Sections 19, 27, 28, 29 and 30 and T151N, R81W, Sections 1 and 2. This AML site is characterized by dangerous highwalls near trails and numerous sinkholes caused by underground mine collapse. The area is within nine miles of the corporate limits of Velva, North Dakota. Surface and underground mining was conducted from about 1910 to 1970. The proposed 2025 Buechler Velva Phase 3 AML Project will eliminate approximately 2,900 feet of dangerous highwalls..

The mine is approximately nine miles southwest of Velva, North Dakota, which has a population of 1,086 (2020 Census). Numerous highwalls in the Buechler Knorr problem area are located near section line roads, local trails, and field borders with uncontrolled access. The 2025 Buechler Velva Phase 3 AML Project includes approximately 70 acres.

To our knowledge, no instances of death or personal injury attributable to the abandoned mines at the 2025 Buechler Velva Phase 3 AML Project have been reported; however, the potential for death or injury is inherent due to the location of the abandoned mines.

#### B. Project Background

The AML site is located in the E ½ Section 1, T151N, R81W and contains 2,900 feet of a steep final pit highwall ranging in height up to approximately 40 feet. Slides, piping, and sloughing along the highwall are indications of its instability. Exact mining dates are unknown for this area, but historic aerial images show the mining activity occurred before 1977. The coal seam ranges from 11 to 14 feet thick. In 2010 the PSC reclaimed highwalls four miles east of this site in the Buechler Velva Phase I Project. The 2021 Buechler Velva Phase II project involved surface mine reclamation adjacent to the Phase I site. A trail on the quarter line makes the highwall accessible. The landowner is also concerned about erosional gullies cutting into adjacent farmland. The current land use of the area is designated as agricultural, and the anticipated land use of the area will remain agricultural.

## **Chapter 2**

### **Proposed Action and Appropriate Alternatives**

#### **A. No Action Alternative**

The no action option does not solve the potentially hazardous AML conditions at the site.

#### **B. Proposed Action**

The proposed reclamation project will be beneficial to the property owner and the general public and meets the requirements of federal and state law for reclamation. This project will eliminate the hazard of the highwall and steep sloping spoil piles, and improve agricultural productivity.

The plan of action for the proposed reclamation activity will be to backfill hazardous highwalls with material from adjacent spoil piles. Backfilling is the preferred option for reclamation of abandoned highwalls and sinkholes. The approved North Dakota Abandoned Mine Lands State Reclamation Plan identifies backfilling as an effective reclamation technique. Erosional gullies and washouts will be repaired and reestablished to non-erosive slopes.

To the degree possible, topsoil will be salvaged from the disturbed areas and respread once the earthwork has been completed. Approximately 2,900 feet of hazardous highwalls will be eliminated through the proposed reclamation project. The reclaimed areas will be seeded with locally adapted grass species native to western North Dakota.

The proposed reclamation activities should have no long-term adverse effects on the environment. Any temporary disruption of wildlife habitat will be a short-term effect.

#### **C. Other Reasonable Alternatives**

Alternative reclamation methods include property buy-out or condemnation and fencing of hazardous areas. Property buy-out or condemnation does not solve the AML problems at the site. Fencing is not considered a long-term viable option.

## **Chapter 3**

### **Environmental Impacts**

**A. Cultural or historic resource values (the Archaeological Resources Protection Act of 1979; the Archaeological and Historic Preservation Act of 1974; the National Historic Preservation Act of 1986, as amended; the Antiquities Act of 1906, Executive Order 11593, concerning the protection and enhancement of the cultural environment; the American Indian Religious Freedom Act of 1978; the Historic Sites Act of 1935; and OMB Circular A-102).**

Reclamation activities will be conducted in a manner that should have no significant effect on cultural or historic resources.

**B. Water Quality Values (Clean Water Act, as amended)**

Reclamation will be conducted in a manner that should have no significant effect on surface or groundwater quality or quantity.

The east half of the abandoned mine site is located within the Blacktail Coulee subwatershed. Runoff flows through naturally established drainage channels in a northeastern direction entering Spring Creek and eventually discharging into the Souris River. After reclamation, the runoff pattern will remain unchanged and the hydrologic impact should be negligible.

The west half of the abandoned mine site is located within the Spring Creek subwatershed. Runoff flows northeast through naturally established drainage channels into Spring Creek which eventually enters the Souris River. The reclamation of this site should not affect runoff in this watershed.

Drainage patterns in each subwatershed will remain unchanged after construction. All site runoff will flow into the natural drainages adjacent to the site. During construction, runoff will be controlled using silt fences, mulching, erosion control blankets, and other erosion control measures as needed.

**C. Wetlands values (Clean Water Act, Executive Order 11990, and Army/EPA Memorandum of Agreement (MOA) Concerning the Determination of Mitigation under Section 404(b) (1) Guidelines)**

Reclamation activities within the 2025 Buechler Velva Phase 3 AML Project sites will have no significant effect on wetlands.

#### **D. Floodplain values (Executive Order 11988)**

No reclamation activities are within an identified floodplain.

#### **E. Wildlife (Endangered Species Act and Fish and Wildlife Coordination Act)**

Reclamation activities will be conducted in a manner that should have no significant effect on fish or wildlife. Threatened, Endangered or Candidate species in Ward County identified by the U.S. Fish and Wildlife Service include; The Dakota Skipper (*Hesperia dacotae*), Whooping Crane (*Grus Americana*), Piping Plover (*Charadrius melodus*), Northern Long-Eared Bat (*Myotis septentrionalis*), and the Rufa Red Knot (*Calidris cantus rufa*). None of these species are likely to be found or disturbed by the 2025 Buechler Velva Phase 3 AML Project.

#### **F. Prime and unique farmland values (Farmland Protection Policy Act)**

No prime farmland within the 2025 Buechler Velva Phase 3 AML Project area has been identified.

#### **G. Recreational resource values (Wild and Scenic Rivers Act, Clean Air Act)**

No lands in the proposed project area are classified as wilderness areas or lands being studied for wilderness designation.

No lands in the proposed project area are identified as areas of critical environmental concern.

No lands in the proposed project area are included in the wild and scenic rivers category.

No parks or areas of critical ecological or aesthetic concern are found in the proposed project area.

#### **H. Air quality (Clean Air Act)**

The proposed project area is not in or near a Class I air quality region, and this project should not adversely affect air quality.

#### **I. Socioeconomic factors**

Factors such as noise, traffic control, and dust suppression will be addressed in the Invitation for Bid (IFB) package.

Reclamation will not affect socioeconomic factors related to farming and ranching.

## **J. Political factors**

Portions of the project area are under zoning jurisdictions of Ward County, several township authorities, and the State of North Dakota, as well as private ownership. Meetings between the North Dakota Public Service Commission and all governing and private entities are ongoing and will continue throughout project completion. A public meeting will be held in November 2024 to discuss the 2025 Buechler Velva Phase 3 AML Project. Notices were mailed to landowners, governmental authorities, and other interested parties; and public service announcements were made in local newspapers.

## **K. Existing vegetative cover**

Existing vegetation varies with land use within the project area. It includes hayland, tame grass, legume pastures, and farm trails. Tame grasses are predominant and include alfalfa, crested wheatgrass, and smooth brome grass. Volunteer cottonwoods and Russian Olive are located within the project area. Trees will be felled and disposed of off-site. Long-term effects of the project on vegetation should be minimal.

## **L. Threatened and endangered plant species**

To the best of our knowledge, no threatened or endangered plant species have been identified within the project area. The only federally-listed threatened or endangered plant in North Dakota is the Western Prairie Fringed Orchid (*Platanthera praeclara*). Known locations of this plant are within moist, tallgrass prairie and sedge meadows of the Sheyenne National Grasslands in the southeastern corner of the state. This plant is not likely to inhabit the proposed project areas.

## **M. Anticipated dates of reclamation**

The reclamation performance period for the 2025 Buechler Velva Phase 3 AML Project is expected to begin in December 2024 and be completed in November 2025.

## **N. Estimated construction cost**

The engineer's estimate for the 2025 Buechler Velva Phase II AML Project is \$1,900,000.

## **O. Off-site borrow and disposal Areas**

If offsite borrow or disposal issues arise, applicable environmental regulations will be addressed through the North Dakota Department of Environmental Quality.

### **P. Noise pollution**

Noise pollution problems are not anticipated; however, if problems arise, remedial action measures will be addressed through the North Dakota Department of Environmental Quality.

### **Q. Environmental justice policy**

Construction work may result in a slight increase in employment and revenues, but no significant direct or indirect impact on minority or low-income populations is expected.

## Chapter 4 Consultation and Coordination

A letter was sent to the U.S. Army Corps of Engineers (Corps) on September 18, 2023, requesting a jurisdictional determination for the 2025 Buecher/Velva Phase 3 AML Project. The response dated February 2, 2024, indicated that planned activities are non-jurisdictional and do not meet the definition of waters of the United States.

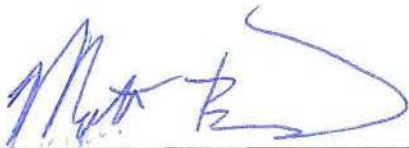
A letter to the U.S. Fish and Wildlife Service was sent on October 8, 2024, requesting concurrence for the 2025 Buecher Velva Phase 3 AML Project. A response dated October 24 2024, indicated no significant impact on fish and wildlife resources, and no endangered or threatened species are known to occupy the project area as described.

A letter was sent to the State Historical Society of North Dakota on October 8, 2024, requesting concurrence for the 2025 Buecher Velva Phase 3 AML Project. A response dated October 31, 2024, indicated that planned activities should have no significant impact on any historical or archaeological resources.

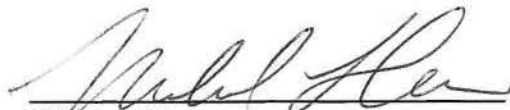
A letter was sent to the North Dakota Department of Environmental Quality on October 8, 2024, requesting concurrence for the 2025 Buecher/Velva Phase 3 AML Project. The response dated November 12, 2024, indicated that planned activities are not likely to adversely affect surface or groundwater resources.

A letter was sent to the Natural Heritage Program of the North Dakota Parks and Recreation Department on October 8, 2024, requesting concurrence for the 2025 Buecher Velva Phase 3 AML Project. The response dated November 4, 2024, indicated that planned activities do not appear to affect any properties that NDPRD owns, leases, or manages. Planned activities do not affect properties protected under Section 6(f) of the Land and Water Conservation Fund.

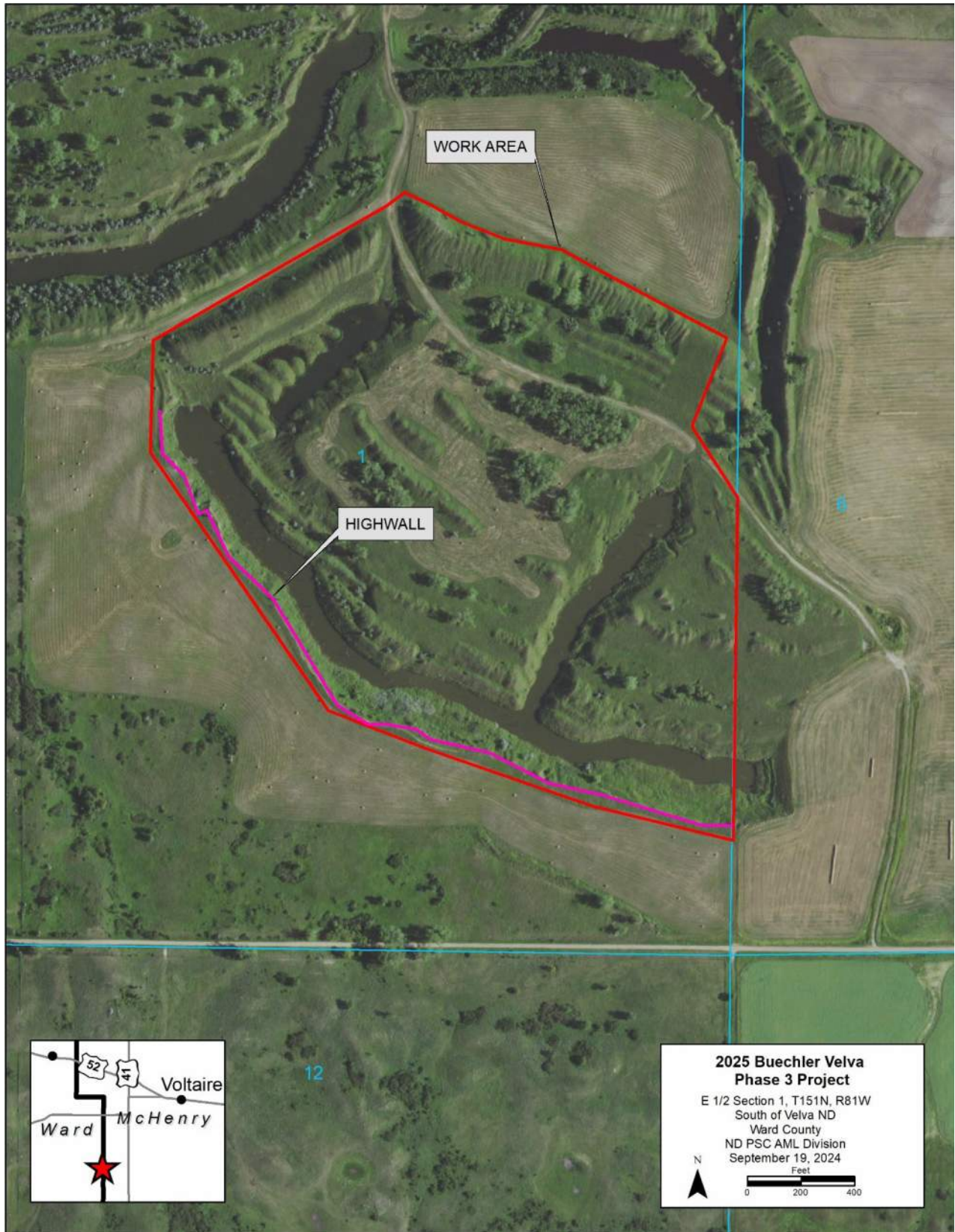
### Preparers



Matt Fischer  
Assistant Director - AML Division  
ND Public Service Commission



Michael Howe  
Environmental Engineer - AML  
ND Public Service Commission





# Public Service Commission

Sheri Haugen-Hoffart

Randy Christmann

Julie Fedorchak

600 East Boulevard Ave  
Dept. 408  
Bismarck, ND 58505-0480  
701-328-2400  
ndpsc@nd.gov

*sent via email only*

October 8, 2024

Mr. Karl Rockeman, P.E.,  
Director, Division of Water Quality  
North Dakota Department of Environmental Quality  
4201 Normandy Street  
Bismarck, ND 58503  
krockema@nd.gov

Dear Mr. Rockeman:

The Public Service Commission is planning a reclamation project in 2025 at an Abandoned Mine Lands (AML) site near Velva. The contractor will be selected through competitive bidding.

As part of the project approval process, our office requests concurrence that the proposed reclamation work, as described below, will not adversely affect any surface or groundwater resources. Please reply regarding these proposed projects by **November 8, 2024**.

The 2025 Buechler/Velva Phase 3 AML Project: The Buechler/Velva Phase 3 abandoned surface coal mine contains 3060 feet of steep highwall that is approximately 35 feet high. The proposed work is planned in two phases: a tree removal phase between December 2024 and March 2025 and a construction phase between May and November 2025. The proposed reclamation work involves backsloping and backfilling the highwall with on-site mine spoil to reduce the hazard. The property owners support the proposed reclamation project. Affected areas will be reseeded with locally adapted grass species native to western North Dakota. Erosion and sedimentation will be controlled. The total area affected is around 82 acres. The estimated cost for this project is \$2,000,000.

We expect this project to be completed during the 2025 construction season. The attached map provides more information and shows proposed project locations.

Thank you for your assistance in this matter. If you have any questions or need more information, please contact Matt Fischer at [mjfischer@nd.gov](mailto:mjfischer@nd.gov) or 701-328-4779.

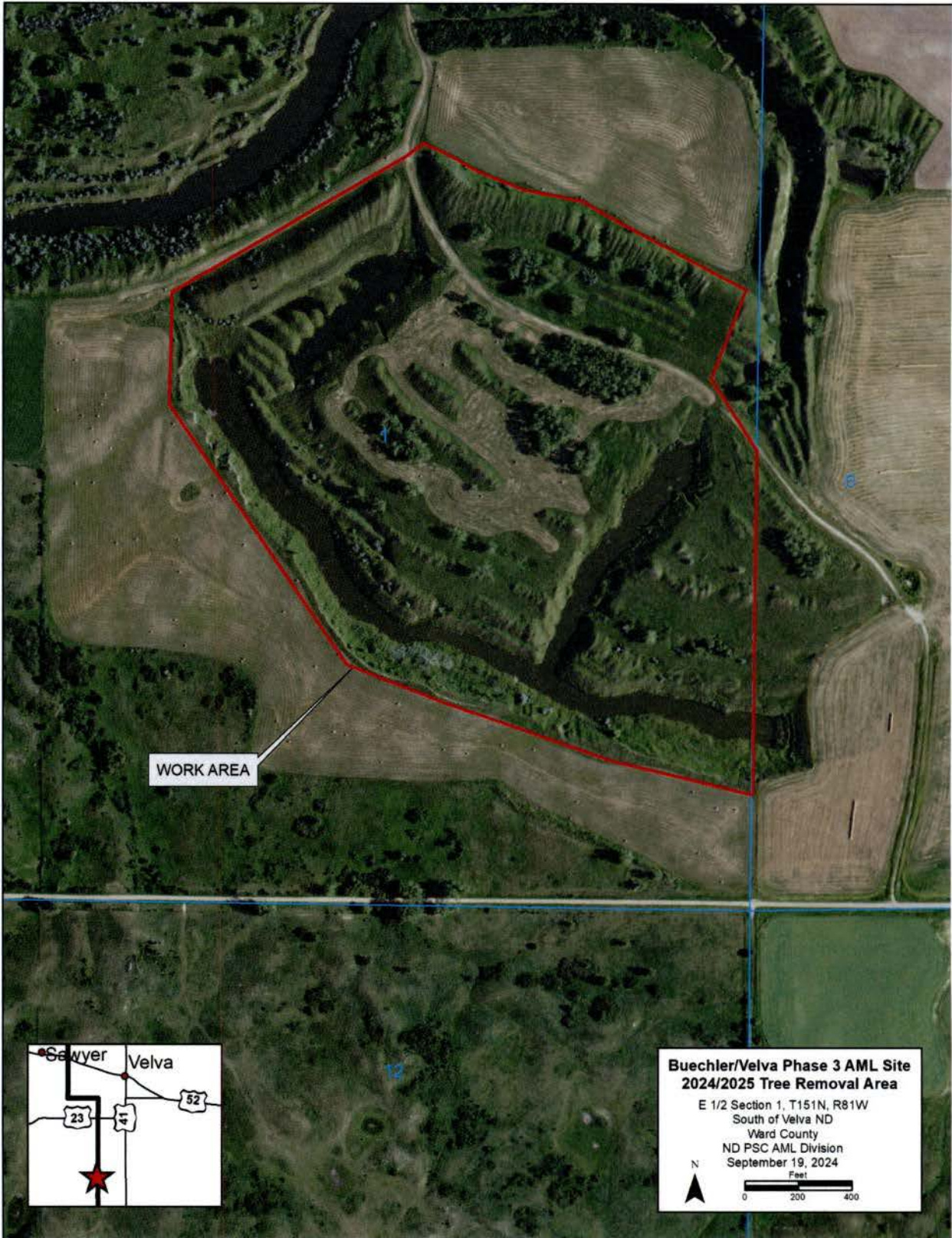
Sincerely,

A handwritten signature in blue ink, appearing to read "Jonathan Emmer".

Jonathan Emmer  
Director  
Abandoned Mine Lands Division

Enclosure

AML\2025\2025 Buechler/Velva\ATP\Concurrence Letters\2025\_Advsry\_auth\_to\_proceed\_ltr\_10-8-24



November 12, 2024

Jonathan Emmer  
Director  
Abandoned Mine Lands Division  
Public Service Commission  
600 East Boulevard Ave.  
Dept. 408  
Bismarck, ND 58505-0408

**RECEIVED**

NOV 13 2024

NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

RE: 2025 Proposed Abandoned Mine Land Reclamation Activities

Dear Mr. Emmer,

The North Dakota Department of Environmental Quality, Division of Water Quality reviewed the proposed 2025 Abandoned Mine Land (AML) reclamation activities summarized in your October 8, 2024 letter. The 2025 Buechler/Velva Phase 3 AML Project involves backsloping and backfilling a highwall to reduce the hazard. Coverage under the North Dakota Pollutant Discharge Elimination System (NDPDES) general construction permit will be required for the project if reclamation work disturbs one or more acres of land.

We appreciate the opportunity to review the planned reclamation activity. Should you have any questions, please contact me at (701) 328-5242 or at [dgrossma@nd.gov](mailto:dgrossma@nd.gov).

Sincerely,



Dallas Grossman  
Environmental Engineer  
Division of Water Quality

NORTH  
**Dakota** | Environmental Quality  
Be Legendary.™

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November 12, 2024

Jonathan Emmer  
Director  
Abandoned Mine Lands Division  
North Dakota Public Service Commission  
600 E Boulevard Ave, Dept 408  
Bismarck, ND 58505-0480

Mr. Emmer,

The North Dakota Department of Environmental Quality (NDDEQ) has reviewed your October 8, 2024, letters discussing your proposed reclamation projects near New Salem and Velva. We do not object to the proposed projects as long as the planned activities do not result in the release of contaminants that could negatively impact groundwater quality. All spills must be immediately reported to this Department and appropriate remedial actions should be performed.

Please feel free to give me a call at 328-5213 if you have any questions.

Sincerely,



Carl Anderson  
Groundwater Protection Program Manager  
NDDEQ – Division of Water Quality



# Public Service Commission

Sheri Haugen-Hoffart

Randy Christmann

Julie Fedorchak

600 East Boulevard Ave  
Dept. 408  
Bismarck, ND 58505-0480  
701-328-2400  
ndpsc@nd.gov

*sent via email only*

October 8, 2024

Kathy Duttonhefner  
Natural Resources Management Coordinator  
ND Parks & Recreation Department  
1600 East Century Ave. Suite 3  
Bismarck, ND 58503  
kgduttonhefner@nd.gov

Dear Ms. Duttonhefner:

The Public Service Commission is planning a reclamation project in 2025 at an Abandoned Mine Lands (AML) site near Velva. The contractor will be selected through competitive bidding.

As part of the project approval process, our office requests concurrence that the proposed reclamation work, as described below, will not adversely affect any threatened, endangered, or rare plant species. Please reply regarding these proposed projects by **November 8, 2024**.

The 2025 Buechler/Velva Phase 3 AML Project: The Buechler/Velva Phase 3 abandoned surface coal mine contains 3,060 feet of steep highwall that is approximately 35 feet high. The proposed work is planned in two phases: a tree removal phase between December 2024 and March 2025 and a construction phase between May and November 2025. The proposed reclamation work involves backsloping and backfilling the highwall with on-site mine spoil to reduce the hazard. The property owners support the proposed reclamation project. Affected areas will be reseeded with locally adapted grass species native to western North Dakota. Erosion and sedimentation will be controlled. The total area affected is around 82 acres. The estimated cost for this project is \$2,000,000.

We expect this project to be completed during the 2025 construction season. The attached map provides more information and shows proposed project locations.

Thank you for your assistance in this matter. If you have any questions or need more information, please contact Matt Fischer at [mjfischer@nd.gov](mailto:mjfischer@nd.gov) or 701-328-4779.

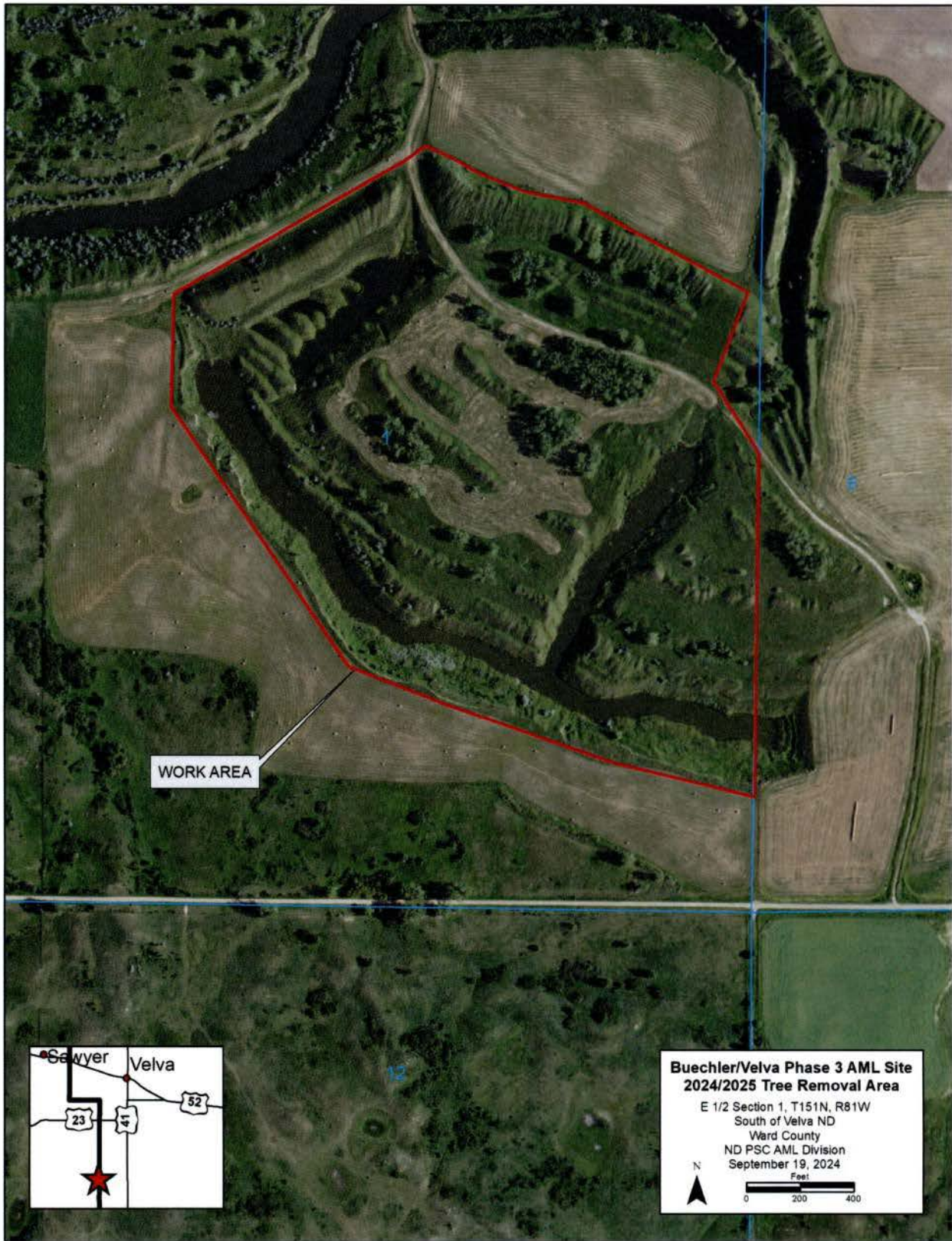
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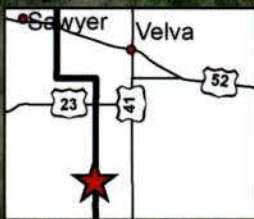
Jonathan Emmer  
Director  
Abandoned Mine Lands Division

Enclosure

AML\2025\2025 Buechler/Velva\ATP\Concurrence Letters\2025\_Advsry\_auth\_to\_proceed\_ltr\_10-8-24



WORK AREA



**Buechler/Velva Phase 3 AML Site  
2024/2025 Tree Removal Area**  
E 1/2 Section 1, T151N, R81W  
South of Velva ND  
Ward County  
ND PSC AML Division  
September 19, 2024

N  
0 200 400  
Feet

NOV 15 2024

NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

October 18, 2024

ND Public Service Commission  
State Capitol, 13<sup>th</sup> Floor  
600 East Blvd. Ave.  
Bismarck, ND 58505-0480

Re: 2025 AML – Sites near Velva

Dear Commission,

The North Dakota Parks and Recreation Department (NDPRD) has reviewed the above-referenced proposed Abandoned Mine Lands site near Velva, North Dakota.

NDPRD's scope of authority and expertise covers properties that NDPRD owns, leases, or manages; properties protected under Section 6(f) of the Land and Water Conservation Fund (LWCF); rare plants; and ecological communities established through the Natural Heritage Program.

The project does not appear to affect properties NDPRD owns, leases, or manages.

The project does not appear to affect any properties protected under Section 6(f) of the LWCF.

A North Dakota Natural Heritage biological conservation database query determines if any current or historical plant or animal species of concern or other significant ecological communities are known to occur within an approximate one-mile radius of the project area. Based on this review, no known plant and animal species of concern or significant ecological communities are documented within or immediately adjacent to the project site.

We appreciate your commitment to rare plant, animal, and ecological community conservation, management, and inter-agency cooperation. For additional information, please contact Kathy Duttenhefner at 701-328-5370, 701-220-3377 (cell), or [kgduttenhefner@nd.gov](mailto:kgduttenhefner@nd.gov).

Thank you for the opportunity to comment on the proposed project.

Sincerely,

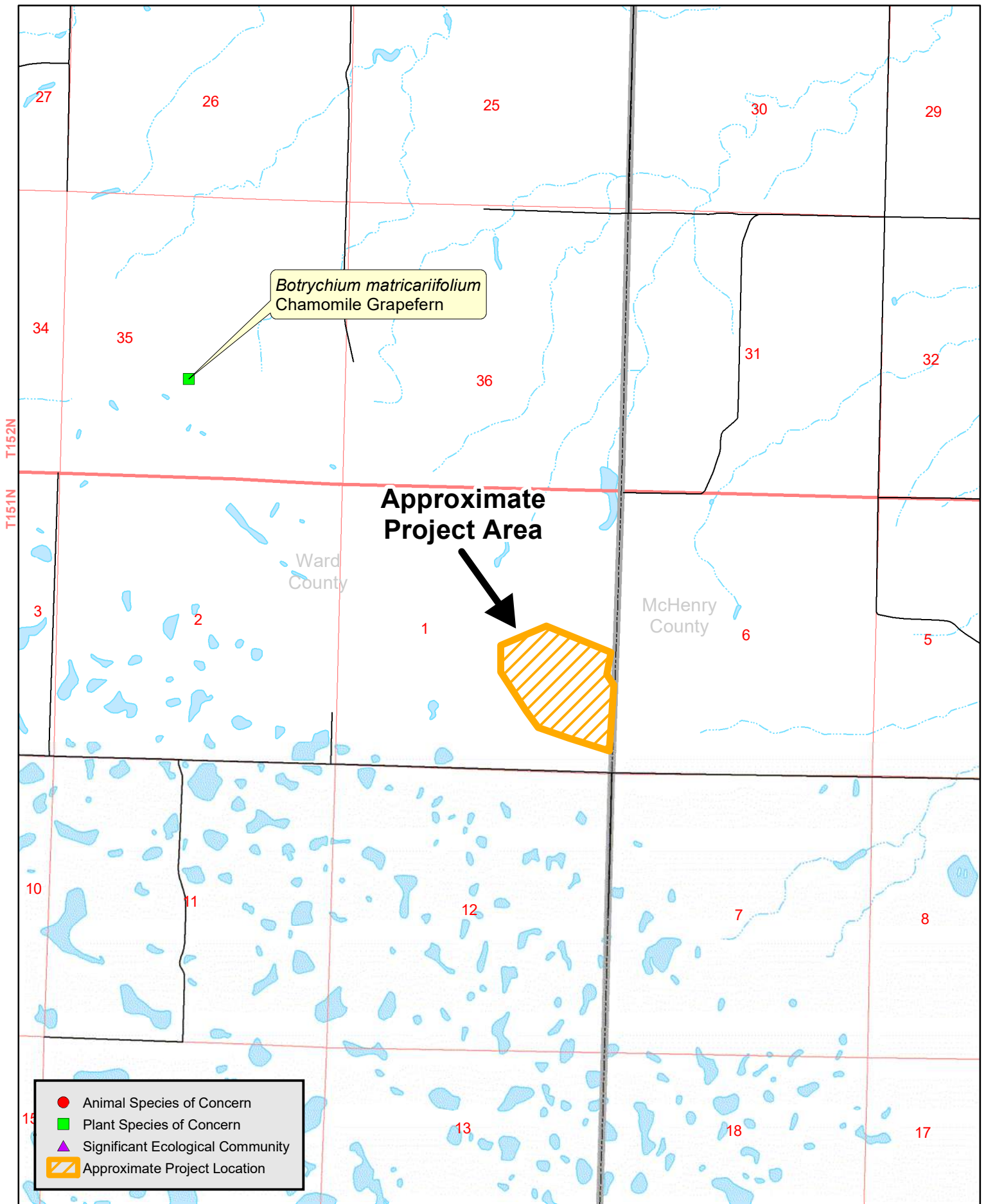


Kathy Duttenhefner, Chief Natural Resources Division

North Dakota Natural Heritage Inventory  
Rare Animal and Plant Species and Significant Ecological Communities

State Scientific Name	State Common Name	State Rank	Global Rank	Federal Status	Township Range Section	County	Last Observation	Estimated Representation Accuracy	Precision
Botrychium matricariifolium	Chamomile Grapefern	S1	G5		152N081W - 35; 152N081W - 20; 152N082W - 24; 151N080W - 04; 152N081W - 30; 151N081W - 13; 151N080W - 05; 151N081W - 23; 151N081W - 12; 151N081W - 22; 151N080W - 03; 152N080W - 08; 151N081W - 14; 152N081W - 14; 151N081W - 24; 152N081W - 27; 152N080W - 19	McHenry, Ward	1974-06-18		G

# North Dakota Parks and Recreation Department North Dakota Natural Heritage Inventory





# Public Service Commission

Sheri Haugen-Hoffart

Randy Christmann

Julie Fedorchak

600 East Boulevard Ave  
Dept. 408  
Bismarck, ND 58505-0480  
701-328-2400  
ndpsc@nd.gov

*sent via email only*

October 8, 2024

William Peterson, Ph.D.  
State Historic Preservation Officer  
State Historical Society of North Dakota  
612 East Boulevard Avenue  
Bismarck, ND 58505-0830  
billpeterson@nd.gov

Dear Dr. Peterson:

The Public Service Commission is planning a reclamation project in 2025 at an Abandoned Mine Lands (AML) site near Velva. The contractor will be selected through competitive bidding.

As part of the project approval process, our office requests concurrence that the proposed reclamation work, as described below, will not adversely affect any historical or archaeological resources. Please reply regarding these proposed projects by **November 8, 2024**.

The 2025 Buechler/Velva Phase 3 AML Project: The Beuchler/Velva Phase 3 abandoned surface coal mine contains 3,060 feet of steep highwall that is approximately 35 feet high. The proposed work is planned in two phases: a tree removal phase between December 2024 and March 2025 and a construction phase between May and November 2025. The proposed reclamation work involves backsloping and backfilling the highwall with on-site mine spoil to reduce the hazard. The property owners support the proposed reclamation project. Affected areas will be reseeded with locally adapted grass species native to western North Dakota. Erosion and sedimentation will be controlled. The total area affected is around 82 acres. The estimated cost for this project is \$2,000,000.

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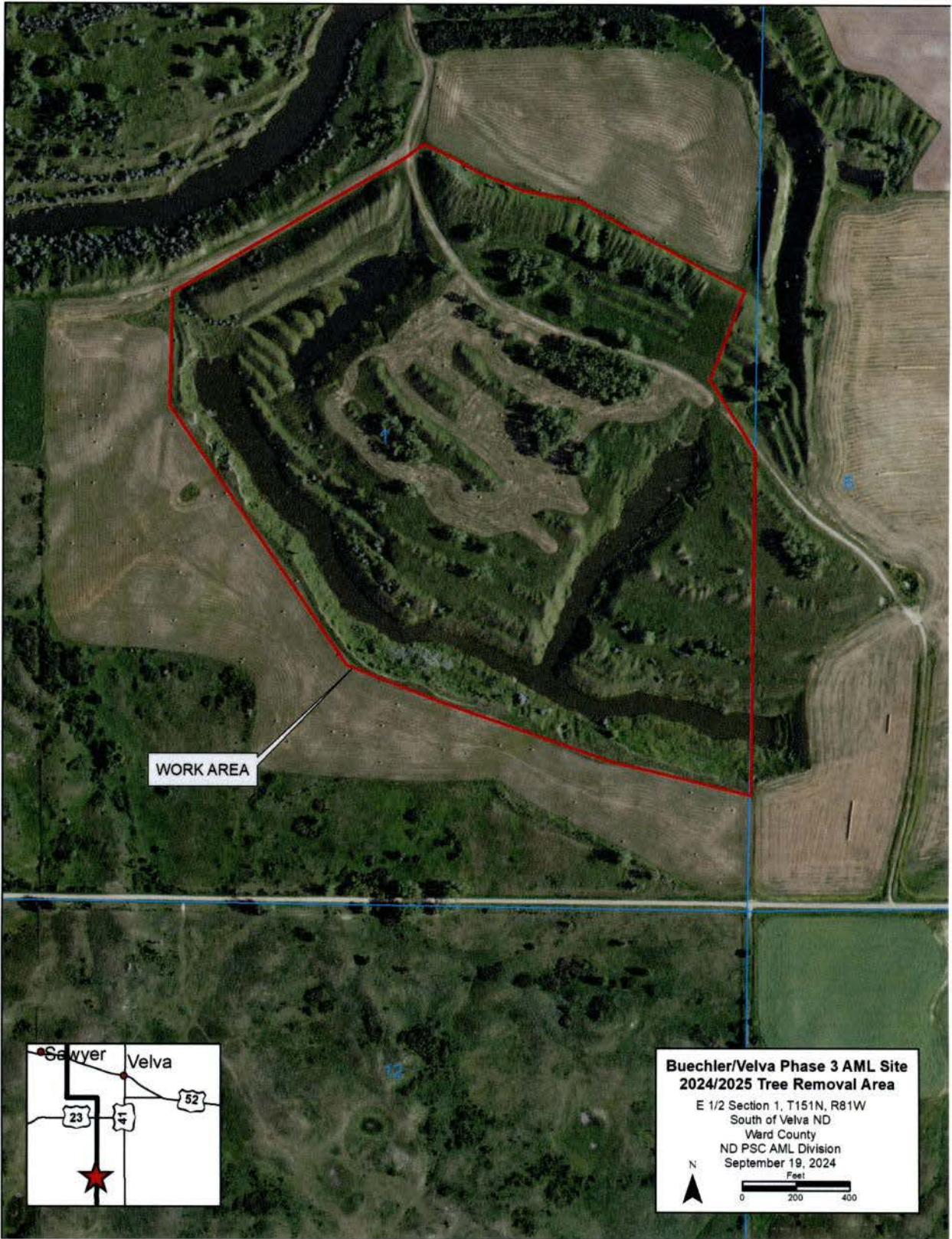
Thank you for your assistance in this matter. If you have any questions or need more information, please contact Matt Fischer at [mjfischer@nd.gov](mailto:mjfischer@nd.gov) or 701-328-4779.

Sincerely,

A blue ink signature of Jonathan Emmer, written in a cursive style.

Jonathan Emmer  
Director  
Abandoned Mine Lands Division

Enclosure





October 31, 2024

Jonathan Emmer  
Abandoned Mines Division  
600 East Boulevard, Dept 408  
Bismarck, ND 58505

**ND SHPO Ref: 25-0005 2025 Reclamation Beuchler/Velva Phase 3 in portions of [T151N R81W Section 1] Ward County, North Dakota**

Dear Jonathan,

We've reviewed project ND SHPO Ref: 25-0005 2025 Reclamation Beuchler/Velva Phase 3 in portions of [T151N R81W Section 1] Ward County, North Dakota as received by our office on October 8, 2024.

We concur with a determination of "No Historic Properties Affected" for the project provided it takes place in the manner and location described in the documentation and all borrow comes from an approved source.

Thank you for the opportunity to review this project. For future correspondence regarding this project, please include the ND SHPO Reference number indicated in this letter. If you have any questions, please contact Margie Patton, Research Archaeologist at 701-328-3576 or [mmpatton@nd.gov](mailto:mmpatton@nd.gov).

Sincerely,

for William D. Peterson, PhD  
State Historic Preservation Officer  
(North Dakota)

25-0005



# Public Service Commission

Sheri Haugen-Hoffart

Randy Christmann

Julie Fedorchak

600 East Boulevard Ave  
Dept. 408  
Bismarck, ND 58505-0480  
701-328-2400  
ndpsc@nd.gov

*sent via email only*

October 8, 2024

Luke Toso  
U.S. Fish and Wildlife Service  
Ecological Services  
3425 Miriam Avenue  
Bismarck, ND 58501-7926  
luke\_toso@fws.gov

Dear Mr. Toso:

The Public Service Commission is planning a reclamation project in 2025 at an Abandoned Mine Lands (AML) site near Velva. The contractor will be selected through competitive bidding.

As part of the project approval process, our office requests concurrence that the proposed reclamation work, as described below, will not adversely affect any threatened, endangered, or rare animal or plant species. Please reply regarding these proposed projects by **November 8, 2024**.

The 2025 Buechler/Velva Phase 3 AML Project: The Buechler/Velva Phase 3 abandoned surface coal mine contains 3,060 feet of steep highwall that is approximately 35 feet high. The proposed work is planned in two phases: a tree removal phase between December 2024 and March 2025 and a construction phase between May and November 2025. The proposed reclamation work involves backsloping and backfilling the highwall with on-site mine spoil to reduce the hazard. The property owners support the proposed reclamation project. Affected areas will be reseeded with locally adapted grass species native to western North Dakota. Erosion and sedimentation will be controlled. The total area affected is around 82 acres. The estimated cost for this project is \$2,000,000.

The proposed project area was reviewed by Mr. Guy Welch, PSC Range Scientist. We have included his inspection report, supporting documentation, and an environmental assessment finding. There is no proposed or designated critical habitat in or adjacent to the project area. Reclamation activities at the 2025 Buechler/Velva Phase 3 AML Project will not jeopardize or adversely affect any proposed, threatened, or endangered species or proposed or designated critical habitat.

We expect this project to be completed during the 2025 construction season. The attached map provides more information and shows proposed project locations.

Thank you for your assistance in this matter. If you have any questions or need more information, please contact Matt Fischer at [mjfischer@nd.gov](mailto:mjfischer@nd.gov) or 701-328-4779.

Sincerely,

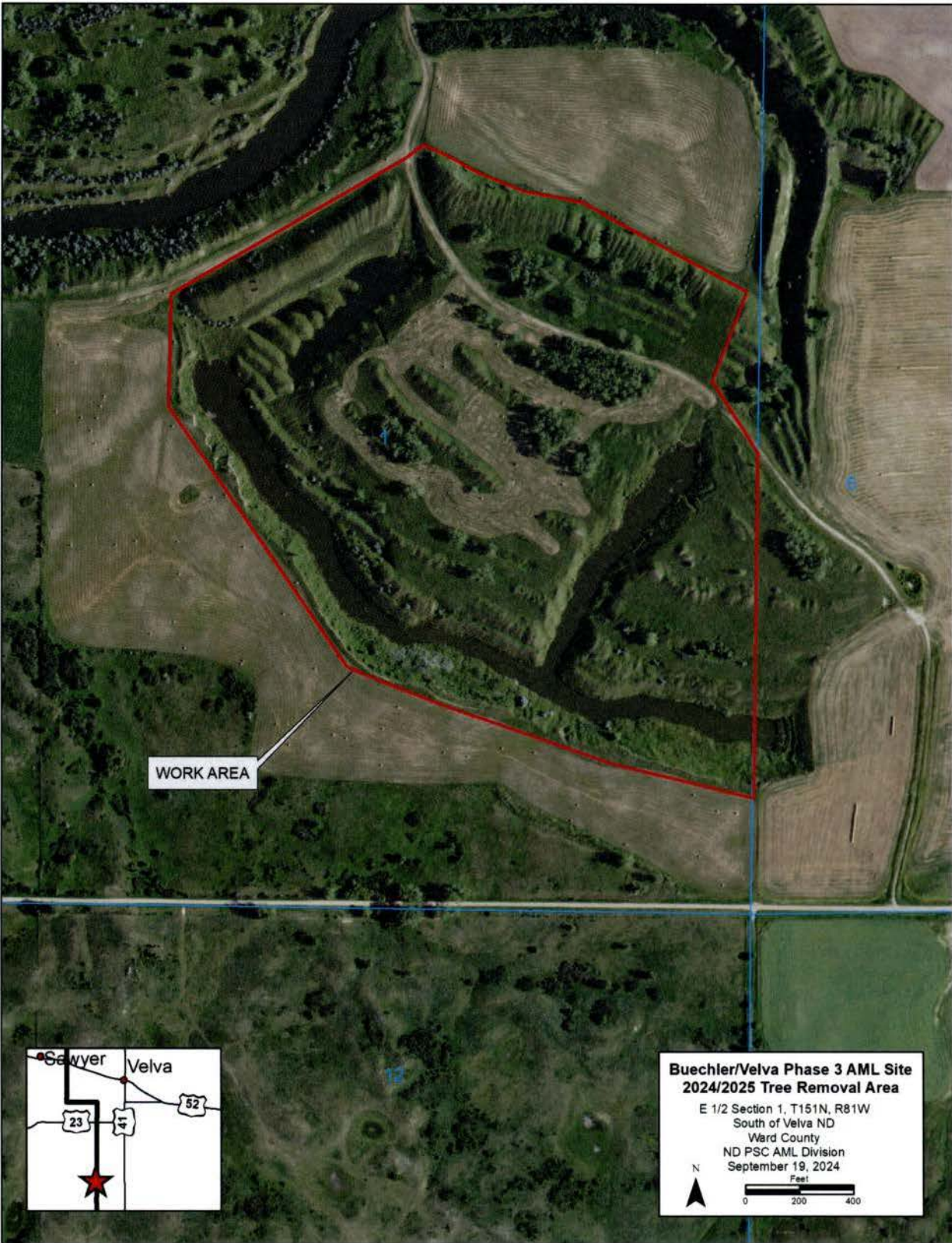


Jonathan Emmer  
Director  
Abandoned Mine Lands Division

Enclosures

cc via email only: Jerry Reinisch (jerry\_reinisch@fws.gov)

AML\2025\2025 Buechler/Velva\ATP\Concurrence Letters\2025\_Advsry\_auth\_to\_proceed\_ltr\_10-8-24





# Public Service Commission

## State of North Dakota

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### COMMISSIONERS

Julie Fedorchak  
Randy Christmann  
Sheri Haugen-Hoffart

600 East Boulevard, Dept. 408  
Bismarck, North Dakota 58505-0480  
Web: [www.psc.nd.gov](http://www.psc.nd.gov)  
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Fax: 701-328-2410  
TDD: 800-366-6888 or 711

### INSPECTION REPORT

DATE OF INSPECTION: October 18, 2022

TYPE OF INSPECTION: Land Use - Habitat Evaluation of the Buechler-Velva AML Project

PERSONS ACCOMPANYING INSPECTORS: Mike Howe, AML Engineer

INSPECTION CONDITIONS: The inspection was conducted between 1:15 p.m. and 2:30 p.m. CDT. Skies were sunny. The temperature was 45 to 50 ° F. Access was unrestricted.

### GENERAL

The purpose of this inspection was to determine if native prairie grassland was present in and around the Buechler-Velva AML Project. This project is located in portions of Section 1, T151N, R81W, Ward County and Section 6, T151N, R80W, McHenry County. This AML project proposes to eliminate highwalls, pits, and surface irregularities formed by coal mining activities that occurred prior to North Dakota's first Surface Coal Mining and Reclamation Law in 1969.

The action area consists of orphan spoil, pits, and associated surface irregularities that formed when a dragline excavated coal. The orphan spoil material appears to consist of glacial till that is clearly capable of supporting vegetation. Herbaceous and woody species are generally well established on the orphan spoil except in areas ponding deep water. Smooth brome grass is the dominant grass species established on the orphan spoil. The action area is not native prairie grassland. Figure 1, attached, identifies the action area on 2021 NAIP aerial imagery. Figures 2, 3, and 4 provide pictures of the action area.

Land uses surrounding the action area consist of hayland, cropland, and other areas of orphan spoil as labeled in Figure 1. Alfalfa, smooth brome grass, and Kentucky bluegrass are the principal species established on the hayland fields surrounding the action area (Figures 5 and 6). The land use of the property east of the project area in Section 6 is cropland (Figure 7). Orphan spoil north and northwest of the action area is established with smooth brome and volunteer trees and shrubs and is managed as grazing land (Figure 8).

Native grassland is located adjacent to the hayland field south of the action area in the SE $\frac{1}{4}$  of Section 1. This native grassland is fenced with the adjacent hayland field, but it is not managed as hayland. This native grassland appears to have been idle for a long time and the native plant community has been largely displaced by smooth brome grass (Figure 9).

Native grassland west of the idle native grassland in SW $\frac{1}{4}$  of Section 1 has been heavily grazed during the growing season and cattle were observed grazing the tract (Figure 10). It was difficult to determine

the species composition of this heavily grazed tract but little bluestem, big bluestem, green needlegrass, and needle and threadgrass were not observed in significant quantities. It appears this native grassland has transitioned to a Kentucky bluegrass community phase as described by NRCS in the loamy and thin loamy ecological site descriptions for Major Land Resource Areas 53B and silverberry was generally prevalent on the site.

Native grassland was also observed in the NE¼ of Section 12, T151N, R81W (Figure 11). Access to this native grassland was not provided but it appeared to be in reasonable ecological condition. Little bluestem was observed in scattered patches on hillside slopes where calcareous soils are close to the soil surface. This native grassland is located approximately 150 meters south of the action area.

The Ward County Soil Survey classifies all this native grassland as a hilly phase of the Max-Bowbells-Zahl loams soil complex, mapping unit (M1E), which translates to loamy (Max and Bowbells) and thin loamy (Zahl) ecological sites. The historic climax plant community (HCPC) of the thin loamy ecological site is dominated by a bluestem-needlegrass-sideoats grama plant community which can be interpreted as suitable Dakota skipper Type B habitat. The historic climax plant community (HCPC) of the loamy ecological site is dominated by a green needlegrass-western wheatgrass plant community that may not be suitable Dakota skipper habitat.

The Buechler-Velva AML project is adjacent to the northeast corner of the Ruso Wind Project. A Dakota skipper habitat and occupancy survey were conducted for the Ruso Wind Project in 2018. Western Ecosystems Technology, Inc. (WEST) retained HDR Engineering Inc., and they conducted habitat assessment and flight surveys to determine the presence or absence of Dakota skipper in the project area. The native grassland in the vicinity of the Buechler-Velva action area was classified as habitat that falls below the minimum requirements for the Dakota skipper.


  
\_\_\_\_\_  
Guy A. Welch  
Permit Administrator

Figure 1: Buechler- Velva AML Project

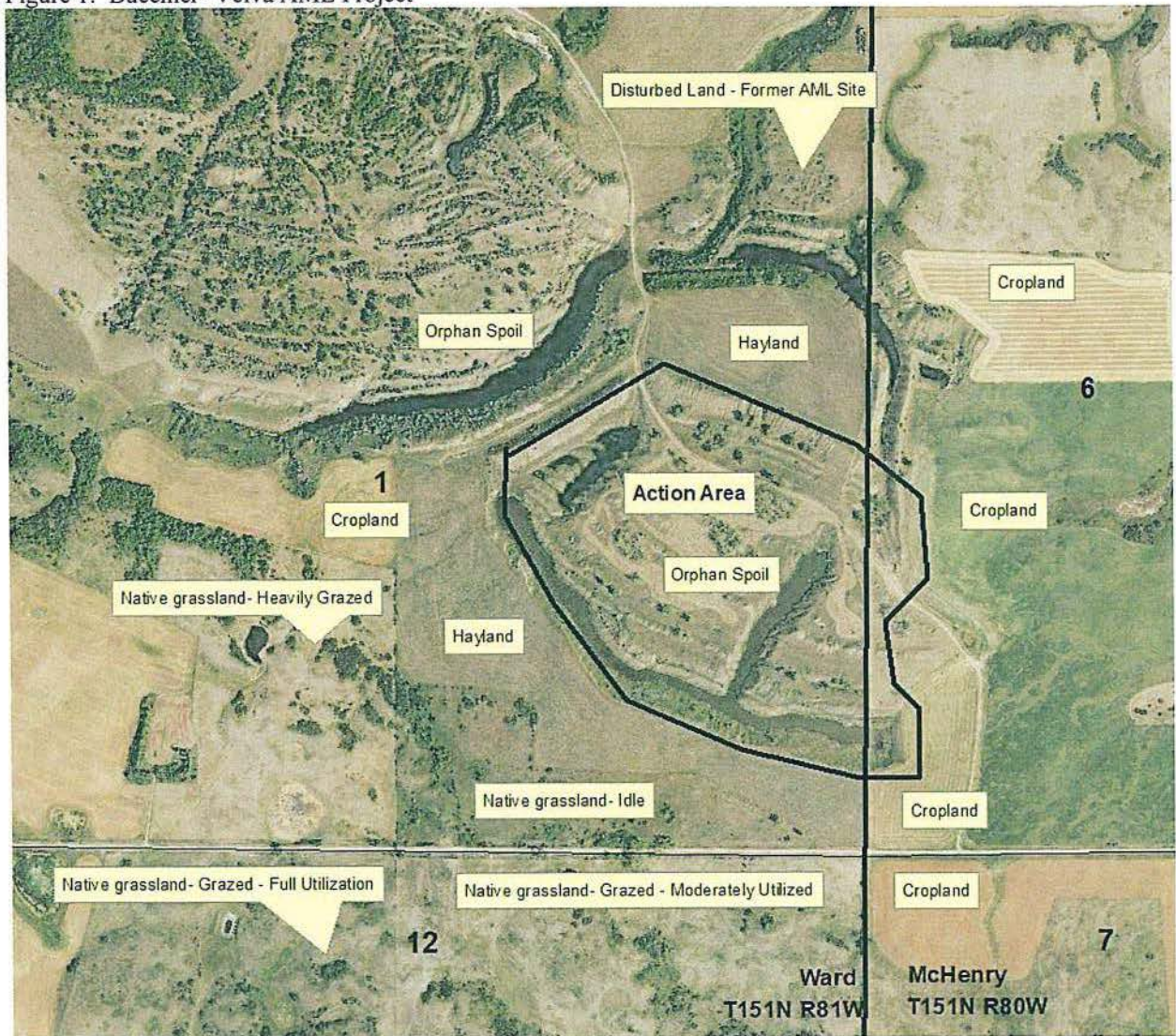


Figure 2: Orphan Spoil Action Area



Figure 3: Orphan Spoil Action Area



Figure 4: Orphan Spoil Action Area



Figure 5: Hayland North of Action Area



Figure 6: Hayland South of Action Area



Figure 7: Cropland East of Action Area



Figure 8: Orphan Spoil Northwest of Action Area

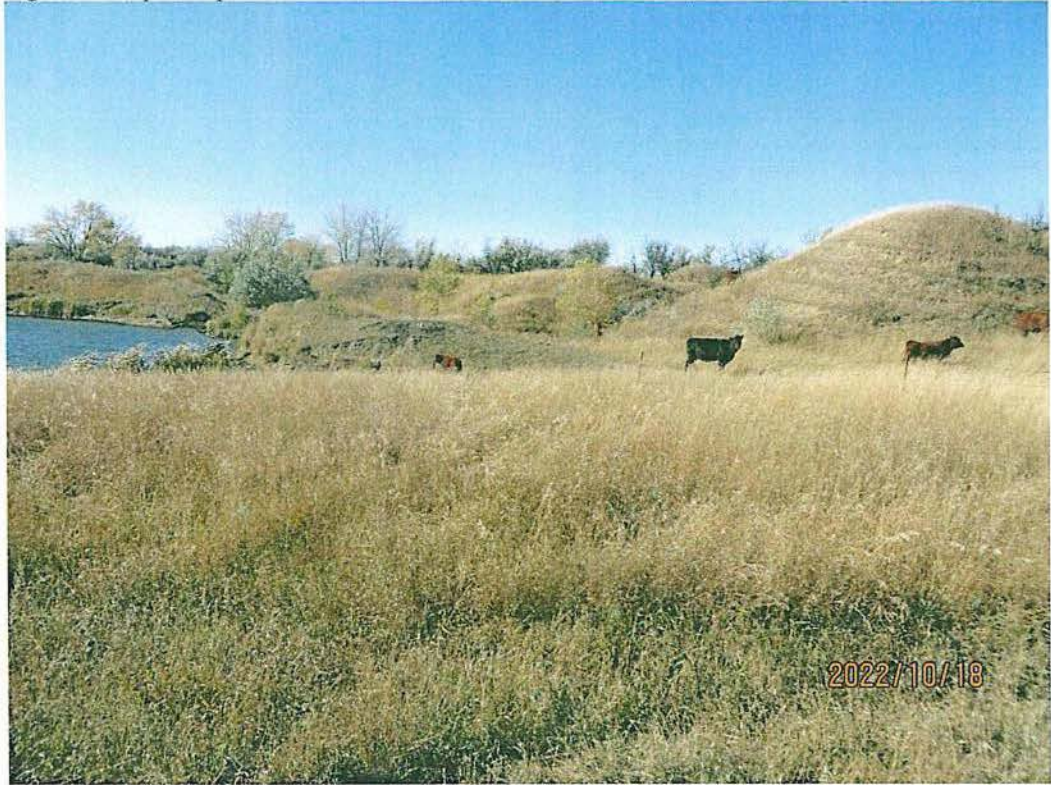


Figure 9: Idle Native Grassland in Section 1 — South of Action Area



Figure 10: Heavily Grazed Native Grassland in Section 1 — Southwest of Action Area



Figure 11: Native Grassland in Section 12





# United States Department of the Interior



FISH AND WILDLIFE SERVICE  
North Dakota Ecological Services Field Office  
3425 Miriam Avenue  
Bismarck, ND 58501-7926  
Phone: (701) 250-4481 Fax: (701) 355-8513

In Reply Refer To:

10/02/2024 16:18:29 UTC

Project code: 2025-0000866

Project Name: 2025 Buechler/Velva Phase 3 AML Project

Federal Nexus: yes

Federal Action Agency (if applicable): Office of Surface Mining Reclamation and Enforcement

**Subject:** Record of project representative's no effect determination for '2025 Buechler/Velva Phase 3 AML Project'

Dear Michael Howe:

This letter records your determination using the Information for Planning and Consultation (IPaC) system provided to the U.S. Fish and Wildlife Service (Service) on October 02, 2024, for '2025 Buechler/Velva Phase 3 AML Project' (here forward, Project). This project has been assigned Project Code 2025-0000866 and all future correspondence should clearly reference this number. **Please carefully review this letter.**

## **Ensuring Accurate Determinations When Using IPaC**

The Service developed the IPaC system and associated species' determination keys in accordance with the Endangered Species Act of 1973 (ESA; 87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.) and based on a standing analysis. All information submitted by the Project proponent into IPaC must accurately represent the full scope and details of the Project.

Failure to accurately represent or implement the Project as detailed in IPaC or the Northern Long-eared Bat Rangewide Determination Key (Dkey), invalidates this letter. ***Answers to certain questions in the DKey commit the project proponent to implementation of conservation measures that must be followed for the ESA determination to remain valid.***

## **Determination for the Northern Long-Eared Bat**

Based upon your IPaC submission and a standing analysis, your project has reached the determination of "No Effect" on the northern long-eared bat. To make a no effect determination, the full scope of the proposed project implementation (action) should not have any effects (either positive or negative), to a federally listed species or designated critical habitat. Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed

action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (See § 402.17).

Under Section 7 of the ESA, if a federal action agency makes a no effect determination, no consultation with the Service is required (ESA §7). If a proposed Federal action may affect a listed species or designated critical habitat, formal consultation is required except when the Service concurs, in writing, that a proposed action "is not likely to adversely affect" listed species or designated critical habitat [50 CFR §402.02, 50 CFR§402.13].

### **Other Species and Critical Habitat that May be Present in the Action Area**

The IPaC-assisted determination for the northern long-eared bat does not apply to the following ESA-protected species and/or critical habitat that also may occur in your Action area:

- Dakota Skipper *Hesperia dacotae* Threatened
- Monarch Butterfly *Danaus plexippus* Candidate
- Piping Plover *Charadrius melodus* Threatened
- Rufa Red Knot *Calidris canutus rufa* Threatened
- Western Regal Fritillary *Argynnis idalia occidentalis* Proposed Threatened
- Whooping Crane *Grus americana* Endangered

You may coordinate with our Office to determine whether the Action may affect the animal species listed above and, if so, how they may be affected.

### **Next Steps**

Based upon your IPaC submission, your project has reached the determination of “No Effect” on the northern long-eared bat. If there are no updates on listed species, no further consultation/coordination for this project is required with respect to the northern long-eared bat. However, the Service recommends that project proponents re-evaluate the Project in IPaC if: 1) the scope, timing, duration, or location of the Project changes (includes any project changes or amendments); 2) new information reveals the Project may impact (positively or negatively) federally listed species or designated critical habitat; or 3) a new species is listed, or critical habitat designated. If any of the above conditions occurs, additional coordination with the Service should take place to ensure compliance with the Act.

If you have any questions regarding this letter or need further assistance, please contact the North Dakota Ecological Services Field Office and reference Project Code 2025-0000866 associated with this Project.

**Action Description**

You provided to IPaC the following name and description for the subject Action.

**1. Name**

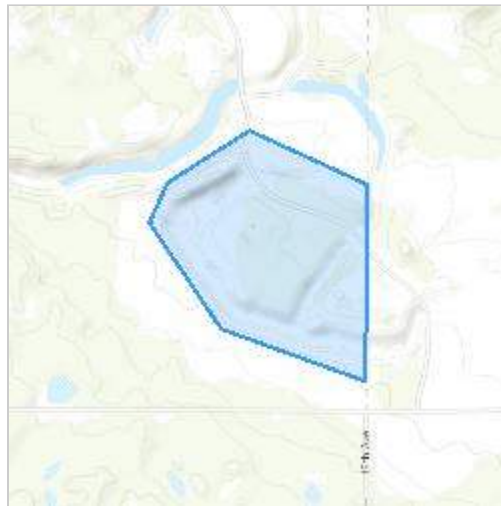
2025 Buechler/Velva Phase 3 AML Project

**2. Description**

The following description was provided for the project '2025 Buechler/Velva Phase 3 AML Project':

The 2025 Buechler/Velva Phase 3 AML Project involves back sloping and backfilling approximately 2,950 feet of steep highwalls which are 30 to 45 feet high at an abandoned surface coal mine located ten miles southwest of Velva ND. On-site mine spoil will be used to reduce the steepness of the highwalls. Affected areas will be reseeded with locally adapted grass species native to western North Dakota. Erosion and sedimentation will be controlled. The total area affected is about 90 acres.

The approximate location of the project can be viewed in Google Maps: <https://www.google.com/maps/@47.92435985,-100.97470736789924,14z>



## DETERMINATION KEY RESULT

Based on the information you provided, you have determined that the Proposed Action will have no effect on the Endangered northern long-eared bat (*Myotis septentrionalis*). Therefore, no consultation with the U.S. Fish and Wildlife Service pursuant to Section 7(a)(2) of the Endangered Species Act of 1973 (87 Stat. 884, as amended 16 U.S.C. 1531 *et seq.*) is required for those species.

## QUALIFICATION INTERVIEW

1. Does the proposed project include, or is it reasonably certain to cause, intentional take of the northern long-eared bat or any other listed species?

**Note:** Intentional take is defined as take that is the intended result of a project. Intentional take could refer to research, direct species management, surveys, and/or studies that include intentional handling/encountering, harassment, collection, or capturing of any individual of a federally listed threatened, endangered or proposed species?

No

2. The action area does not overlap with an area for which U.S. Fish and Wildlife Service currently has data to support the presumption that the northern long-eared bat is present. Are you aware of other data that indicates that northern long-eared bats (NLEB) are likely to be present in the action area?

Bat occurrence data may include identification of NLEBs in hibernacula, capture of NLEBs, tracking of NLEBs to roost trees, or confirmed NLEB acoustic detections. Data on captures, roost tree use, and acoustic detections should post-date the year when white-nose syndrome was detected in the relevant state. With this question, we are looking for data that, for some reason, may have not yet been made available to U.S. Fish and Wildlife Service.

No

3. Does any component of the action involve construction or operation of wind turbines?

**Note:** For federal actions, answer 'yes' if the construction or operation of wind power facilities is either (1) part of the federal action or (2) would not occur but for a federal agency action (federal permit, funding, etc.).

No

4. Is the proposed action authorized, permitted, licensed, funded, or being carried out by a Federal agency in whole or in part?

Yes

5. Is the Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), or Federal Transit Administration (FTA) funding or authorizing the proposed action, in whole or in part?

No

6. Are you an employee of the federal action agency or have you been officially designated in writing by the agency as its designated non-federal representative for the purposes of Endangered Species Act Section 7 informal consultation per 50 CFR § 402.08?

**Note:** This key may be used for federal actions and for non-federal actions to facilitate section 7 consultation and to help determine whether an incidental take permit may be needed, respectively. This question is for information purposes only.

*No*

7. Is the lead federal action agency the Environmental Protection Agency (EPA) or Federal Communications Commission (FCC)? Is the Environmental Protection Agency (EPA) or Federal Communications Commission (FCC) funding or authorizing the proposed action, in whole or in part?

*No*

8. Is the lead federal action agency the Federal Energy Regulatory Commission (FERC)?

*No*

9. Have you determined that your proposed action will have no effect on the northern long-eared bat? Remember to consider the [effects of any activities](#) that would not occur but for the proposed action.

If you think that the northern long-eared bat may be affected by your project or if you would like assistance in deciding, answer “No” below and continue through the key. If you have determined that the northern long-eared bat does not occur in your project’s action area and/or that your project will have no effects whatsoever on the species despite the potential for it to occur in the action area, you may make a “no effect” determination for the northern long-eared bat.

**Note:** Federal agencies (or their designated non-federal representatives) must consult with USFWS on federal agency actions that may affect listed species [50 CFR 402.14(a)]. Consultation is not required for actions that will not affect listed species or critical habitat. Therefore, this determination key will not provide a consistency or verification letter for actions that will not affect listed species. If you believe that the northern long-eared bat may be affected by your project or if you would like assistance in deciding, please answer “No” and continue through the key. Remember that this key addresses only effects to the northern long-eared bat. Consultation with USFWS would be required if your action may affect another listed species or critical habitat. The definition of [Effects of the Action](#) can be found here: <https://www.fws.gov/media/northern-long-eared-bat-assisted-determination-key-selected-definitions>

*Yes*

## **PROJECT QUESTIONNAIRE**

Will all project activities be completed by November 30, 2024?

*No*

## IPAC USER CONTACT INFORMATION

Agency: State of North Dakota  
Name: Michael Howe  
Address: 600 E. Blvd Ave - Dept 408  
City: Bismarck  
State: ND  
Zip: 58505  
Email: mthowe@nd.gov  
Phone: 7013284188

## LEAD AGENCY CONTACT INFORMATION

Lead Agency: Office of Surface Mining Reclamation and Enforcement  
Name: Michael Howe  
Email: mthowe@nd.gov  
Phone: 7013284188

You have indicated that your project falls under or receives funding through the following special project authorities:

- BIPARTISAN INFRASTRUCTURE LAW (BIL) (OTHER)



# United States Department of the Interior



FISH AND WILDLIFE SERVICE  
North Dakota Ecological Services Field Office  
3425 Miriam Avenue  
Bismarck, ND 58501-7926  
Phone: (701) 250-4481 Fax: (701) 355-8513

In Reply Refer To:

10/02/2024 16:13:37 UTC

Project code: 2025-0000866

Project Name: 2025 Buechler/Velva Phase 3 AML Project

Subject: Concurrence letter for '2025 Buechler/Velva Phase 3 AML Project' for specified federally threatened and endangered species and designated critical habitat that may occur in your proposed project area consistent with the North Dakota Determination Key (DKey) for project review and guidance for federally listed species.

Michael Howe:

The U.S. Fish and Wildlife Service (Service) received on **October 02, 2024** your effects determination for the '2025 Buechler/Velva Phase 3 AML Project' (the Action) using the North Dakota DKey for project review and guidance for federally-listed species within the Information for Planning and Consultation (IPaC) system. The Service developed this system in accordance with the Endangered Species Act of 1973 (ESA) (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.).

Based on your answers and the assistance of the Service's North Dakota DKey, you made the following effect determination(s) for the proposed Action:

<b>Species</b>	<b>Listing Status</b>	<b>Determination</b>
Dakota Skipper ( <i>Hesperia dacotae</i> )	Threatened	No effect
Piping Plover ( <i>Charadrius melodus</i> )	Threatened	NLAA
Rufa Red Knot ( <i>Calidris canutus rufa</i> )	Threatened	NLAA
Whooping Crane ( <i>Grus americana</i> )	Endangered	NLAA

The Service concurs with the NLAA determination(s) for the species listed above. No further consultation for this project is required for these species. Your agency has met consultation requirements by informing the Service of the "No Effect" determinations.

This concurrence letter confirms you may rely on effect determinations provided in the North Dakota Determination Key for project review and guidance for federally listed species to satisfy agency consultation requirements under Section 7(a)(2) of the ESA.

In addition to the species listed above, the following species and/or critical habitats may also occur in your project area and **are not** covered by this conclusion:

- Monarch Butterfly *Danaus plexippus* Candidate
- Northern Long-eared Bat *Myotis septentrionalis* Endangered
- Western Regal Fritillary *Argynnis idalia occidentalis* Proposed Threatened

The Service recommends that your agency contact the North Dakota Ecological Services Field Office or re-evaluate the project in IPaC if: 1) the scope, timing, duration, or location of the proposed project changes, 2) new information reveals the action may affect listed species or designated critical habitat; 3) a new species is listed or critical habitat designated. If any of the above conditions occurs, additional consultation with the North Dakota Ecological Services Field Office should take place before project changes are final or resources committed.

**Bald and Golden Eagle Protection Act(BGEPA):** The following resources are provided to project proponents and consulting agencies as additional information. Bald and golden eagles are not included in this section 7(a)(2) consultation and this information does not constitute a determination of effects by the Service.

The Service developed the National Bald Eagle Management Guidelines to advise landowners, land managers, and others who share public and private lands with Bald Eagles when and under what circumstances the protective provisions of the BGEPA may apply to their activities. The guidelines should be consulted prior to conducting new or intermittent activity near an eagle nest. This document may be downloaded from the following site: <https://www.fws.gov/media/national-bald-eagle-management-guidelines-0>

To determine if your proposed activity is likely to take or disturb Golden or Bald Eagles, please call our office at 701-250-4481 for further review.

If the recommendations detailed in the National Bald Eagle Management Guidelines cannot be followed, you may apply for a permit to authorize removal or relocation of an eagle nest in certain instances. The application form is located at <http://www.fws.gov/forms/3-200-72.pdf>.

**Action Description**

You provided to IPaC the following name and description for the subject Action.

**1. Name**

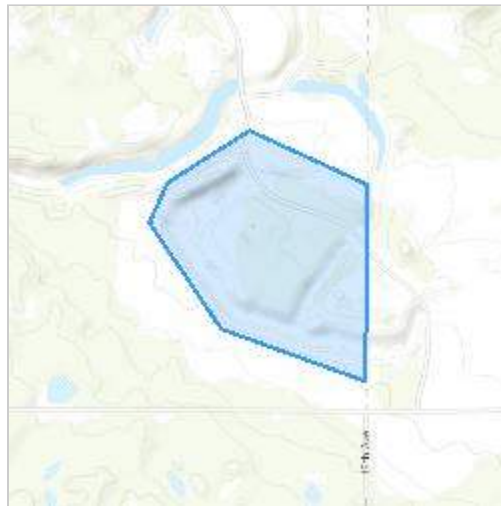
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The approximate location of the project can be viewed in Google Maps: <https://www.google.com/maps/@47.92435985,-100.97470736789924,14z>



## QUALIFICATION INTERVIEW

1. Is your project a federal project or have a federal nexus (funded, permitted or other authorization by a federal agency)?

*Yes*

2. Does your project consist solely of interior or exterior rehabilitation and renovations of existing residential, commercial buildings and public facilities?

**Note:** These activities may involve exterior painting, replacement of doors, windows, siding or roofing.

*No*

3. Does your project consist solely of work done within the existing footprint of a building such as electrical, heating plumbing, basement and foundation repairs?

*No*

4. Does your project consist solely of additions onto an existing structure?

*No*

5. Does your project consist solely of renting or purchasing existing buildings?

*No*

6. Does your project consist solely of demolition of structures within Incorporated City Boundaries?

*No*

7. Does your project consist solely of repair or replacement of existing parking lots, sidewalks, roads or other paved or graveled surfaces?

*No*

8. Does your project consist solely of repair or replacement or upgrading playground equipment?

*No*

9. Is your project a wind farm?

*No*

10. Is your project a new construction on an existing residential infill lot within Incorporated City Boundaries?

*No*

11. Are you building overhead power lines?

*No*

12. Are you constructing a communication tower or other permanent structure **less than 199 feet** above ground **level and** without guy wires?

*No*

13. Are there any wetlands in your project area?

*No*

14. Will the project impact a wetland?

**Note:** Common impacts to wetlands include filling, grading, removal of vegetation, building construction and changes in water levels and drainage patterns.

*No*

15. Is your project located entirely within a developed area?

**Note:** A developed area is an area that is already paved or supports structures and the only vegetation is limited to frequently mowed grass or conventional landscaping.

*No*

16. [Semantic] Does the action area intersect the Dakota Skipper area of influence?

**Automatically answered**

*Yes*

17. Is the project area on disturbed land (e.g. urban areas, previously cropped areas, non-native haylands, pasture or other grassland that is dominated by non-native species, or in areas where trees or shrubs predominate)?

*Yes*

18. [Semantic] Does the action area intersect the Whooping Crane area of influence?

**Automatically answered**

*Yes*

19. If a whooping crane is spotted within one-mile of construction, will you stop construction and immediately call the USFWS North Dakota Ecological Service Office?

*Yes*

20. [Semantic] Does the action area intersect the Piping Plover area of influence?

**Automatically answered**

*Yes*

21. Will the project result in changes to river hydrology (i.e. via construction of lock & dams, major waterbody diversion/major (over 1,000,000 gallons/day water withdrawals, etc.)?

*No*

22. Is the project a cooling water intake for a power plant regulated under section 316 of the Clean Water Act?

**Note:** This applies to facilities that are designed to withdraw at least two million gallons per day of cooling water from waters of the U.S.

*No*

23. Is this an instream sand and gravel mining project?

*No*

24. Will this project completely cross the Missouri River or Lake Sakakawea?

**Note:** This includes project under, over and through the Missouri River or Lake Sakakawea, such as a bridge, buried cable and pipelines including HDD pipelines.

*No*

25. Will the project directly impact suitable piping plover nesting habitat?

**Note:** Direct impacts include any off road vehicle access including use of mat roads, soil compaction, digging, seismic survey, directional drilling, heavy equipment, grading, trenching, placement of fill, vegetation management (including removal or maintenance using equipment or chemicals), cultivation, development, etc.)

*No*

26. Will work be conducted within ½ mile of suitable piping plover nesting habitat.

*No*

27. [Semantic] Does the action area intersect the Rufa Red Knot area of influence?

**Automatically answered**

*Yes*

28. Will the project construction or other impacts occur between April 1-May 31 or between August 15-October 31?

*Yes*

29. Are you the Federal agency or designated non-federal representative?

*Yes*

## **IPAC USER CONTACT INFORMATION**

Agency: State of North Dakota  
Name: Michael Howe  
Address: 600 E. Blvd Ave - Dept 408  
City: Bismarck  
State: ND  
Zip: 58505  
Email: mthowe@nd.gov  
Phone: 7013284188

## **LEAD AGENCY CONTACT INFORMATION**

Lead Agency: Office of Surface Mining Reclamation and Enforcement  
Name: Michael Howe  
Email: mthowe@nd.gov  
Phone: 7013284188

You have indicated that your project falls under or receives funding through the following special project authorities:

- BIPARTISAN INFRASTRUCTURE LAW (BIL) (OTHER)

# 2025 BUECHLER/VELVA PHASE 3 AML PROJECT

## BIOLOGICAL ANALYSIS

Prepared using IPaC

Generated by Michael Howe (mthowe@nd.gov)

October 3, 2024

The purpose of this document is to assess the effects of the proposed project and determine whether the project may affect any federally threatened, endangered, proposed, or candidate species. If appropriate for the project, this document may be used as a biological assessment (BA), as it is prepared in accordance with legal requirements set forth under [Section 7 of the Endangered Species Act \(16 U.S.C. 1536 \(c\)\)](#).

In this document, any data provided by U.S. Fish and Wildlife Service is based on data as of October 2, 2024.

Prepared using IPaC version 6.114.0-rc2

# 2025 BUECHLER/VELVA PHASE 3 AML PROJECT BIOLOGICAL ASSESSMENT

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# 1 DESCRIPTION OF THE ACTION

## 1.1 PROJECT NAME

2025 Buechler/Velva Phase 3 AML Project

## 1.2 EXECUTIVE SUMMARY

The Buechler/Velva Phase 3 operations will not affect the continued existence of any threatened, endangered, or proposed species or result in the destruction or adverse modification of proposed or designated critical habitats.

## 1.3 EFFECT DETERMINATION SUMMARY

SPECIES (COMMON NAME)	SCIENTIFIC NAME	LISTING STATUS	PRESENT IN ACTION AREA	EFFECT DETERMINATION
Dakota Skipper <sup>†</sup> . <b>This species or critical habitat is covered by a DKey.</b>	Hesperia dacotae	Threatened		NE
<a href="#">Monarch Butterfly</a>	Danaus plexippus	Candidate	Excluded from analysis	Excluded from analysis
Northern Long-eared Bat <sup>†</sup> . <b>This species or critical habitat is covered by a DKey.</b>	Myotis septentrionalis	Endangered		NE
Piping Plover <sup>†</sup> . <b>This species or critical habitat is covered by a DKey.</b>	Charadrius melodus	Threatened		NLAA
Rufa Red Knot <sup>†</sup> . <b>This species or critical habitat is covered by a DKey.</b>	Calidris canutus rufa	Threatened		NLAA
<a href="#">Western Regal Fritillary</a>	Argynnis idalia occidentalis	Proposed Threatened	Excluded from analysis	Excluded from analysis
Whooping Crane <sup>†</sup> . <b>This species or critical habitat is covered by a DKey.</b>	Grus americana	Endangered		NLAA

<sup>†</sup> This species or critical habitat has been analyzed through a Determination Key.

## 1.4 PROJECT DESCRIPTION

### 1.4.1 LOCATION



#### LOCATION

McHenry and Ward counties, North Dakota

### 1.4.2 DESCRIPTION OF PROJECT HABITAT

The action area consists of orphan spoil, pits, and associated surface irregularities that formed when a dragline excavated coal. The orphan spoil material appears to consist of glacial till that is clearly capable of supporting vegetation. Herbaceous and woody species are generally well established on the orphan spoil except in areas ponding deep water. Smooth brome grass is the dominant grass species established on the orphan spoil. The action area is not native prairie grassland.

#### RELEVANT DOCUMENTATION

- [Inspection18Oct2022](#)

### 1.4.3 PROJECT PROPONENT INFORMATION

*Provide information regarding who is proposing to conduct the project, and their contact information. Please provide details on whether there is a Federal nexus.*

#### REQUESTING AGENCY

State of North Dakota

#### FULL NAME

Michael Howe

#### STREET ADDRESS

600 E. Blvd Ave - Dept 408

#### CITY

Bismarck

#### STATE

ND

#### ZIP

58505

#### PHONE NUMBER

7013284188

#### E-MAIL ADDRESS

mthowe@nd.gov

#### LEAD AGENCY

Department of Interior

Office of Surface Mining Reclamation and Enforcement

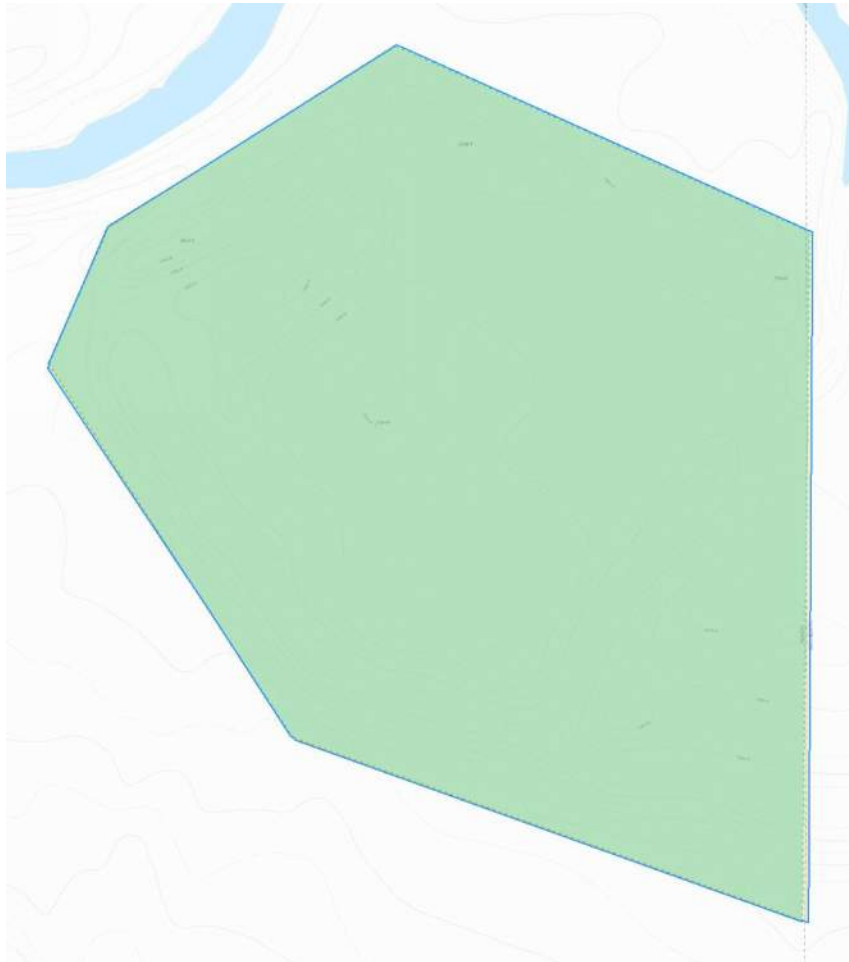
### 1.4.4 PROJECT PURPOSE

The area contains 2,950 feet of dangerous surface mine highwalls. The dangerous highwalls average thirty-five feet in height. Most land in the area is used agriculturally, with the highwalls bordering cultivated fields. Trails for farm equipment allow public access to the highwalls. The mine site is also characterized by ponding water in the valleys below the highwalls and wooded draws between the spoil piles. The combination of crops, trees, and ponds make this site a prime hunting area. Deer hunting tree stands are prevalent. Dangerous highwalls within the Buechler Knorr area are a serious hazard to residents, property owners, farmers, ranchers, hunters, and the general public.

### 1.4.5 PROJECT TYPE AND DECONSTRUCTION

This project is a reclamation of abandoned coal mine project.

### 1.4.5.1 PROJECT MAP



#### LEGEND



Project footprint



Layer 1: Restored habitat (structure)



Layer 2: Reclamation of an abandoned coal mine



Layer 3: Restore site contours

#### 1.4.5.2 RESTORED HABITAT

**STRUCTURE COMPLETION DATE**

November 01, 2025

**REMOVAL/DECOMMISSION DATE (IF APPLICABLE)**

*Not applicable*

**STRESSORS**

- [Change in soil disturbance](#)

**DESCRIPTION**

The abandoned spoil piles will be reclaimed leading to a more gentle topography improving vegetation stance and reducing invasive grass and forbs species.

#### 1.4.5.3 RECLAMATION OF AN ABANDONED COAL MINE

**ACTIVITY START DATE**

December 01, 2024

**ACTIVITY END DATE**

November 01, 2025

**STRESSORS**

- [Change in vehicle traffic](#)

**DESCRIPTION**

The reclamation activities require heavy equipment to move dirt and soil. This traffic is temporary and will cease once the project is complete.

#### **1.4.5.4 RESTORE SITE CONTOURS**

**ACTIVITY START DATE**

November 01, 2024

**ACTIVITY END DATE**

November 01, 2025

**STRESSORS**

- [Change in noise](#)

**DESCRIPTION**

The heavy vehicle traffic required to move spoil will increase the noise level during the project. This effect is temporary and will stop once the project is complete.

#### **1.4.6 ANTICIPATED ENVIRONMENTAL STRESSORS**

*Describe the anticipated effects of your proposed project on the aspects of the land, air and water that will occur due to the activities above. These should be based on the activity deconstructions done in the previous section and will be used to inform the action area.*

##### **1.4.6.1 HUMAN ACTIVITIES**

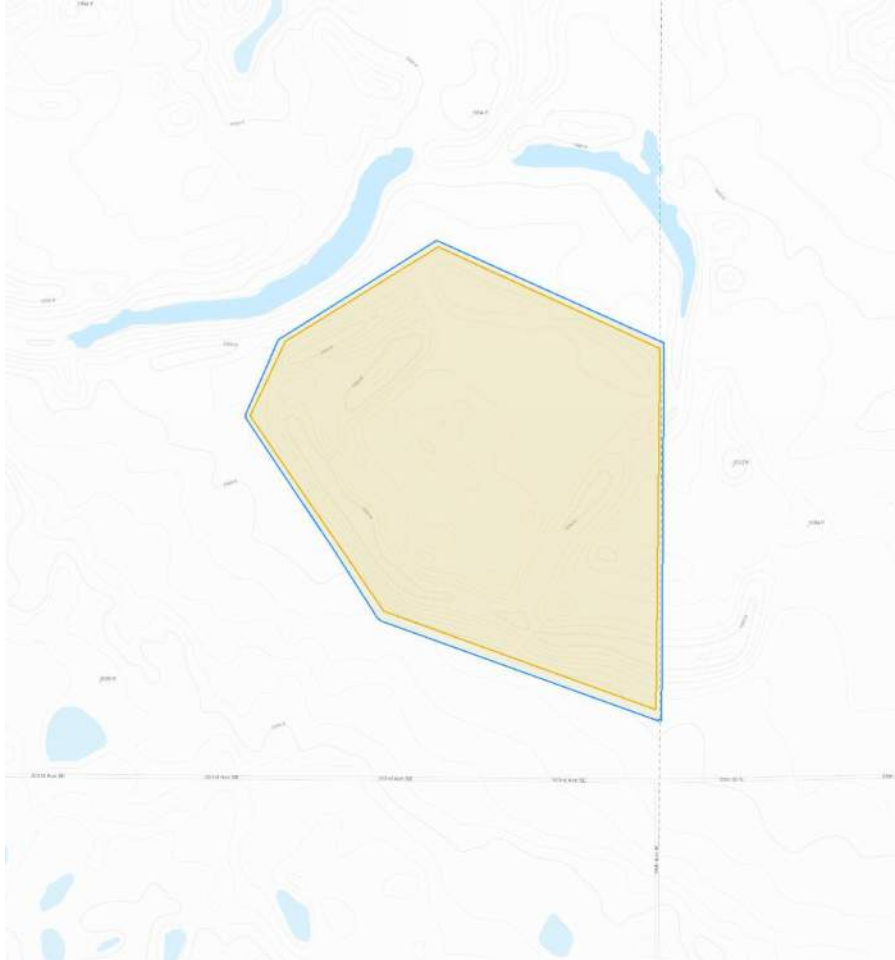
Human actions in the environment (e.g., fishing, hunting, farming, walking, etc.).

### 1.4.6.1.1 CHANGE IN NOISE



#### ANTICIPATED MAGNITUDE

A temporary change in noise will not have a significant affect on the area since it is an agricultural region with currently has heavy equipment noises.

#### STRESSOR LOCATION



#### LEGEND

-  Project footprint
-  Stressor location

**CONSERVATION MEASURES**

*No conservation measures for this stressor*

**STRUCTURES AND ACTIVITIES**

- [Restore site contours](#)

**1.4.6.1.2 CHANGE IN SOIL DISTURBANCE**

**ANTICIPATED MAGNITUDE**

This stressor is not expected to occur; the following explanation has been provided:

All available soil material will be segregated and respread after the spoil grading has been completed.

**CONSERVATION MEASURES**

- [Soil reclamation](#)

**STRUCTURES AND ACTIVITIES**

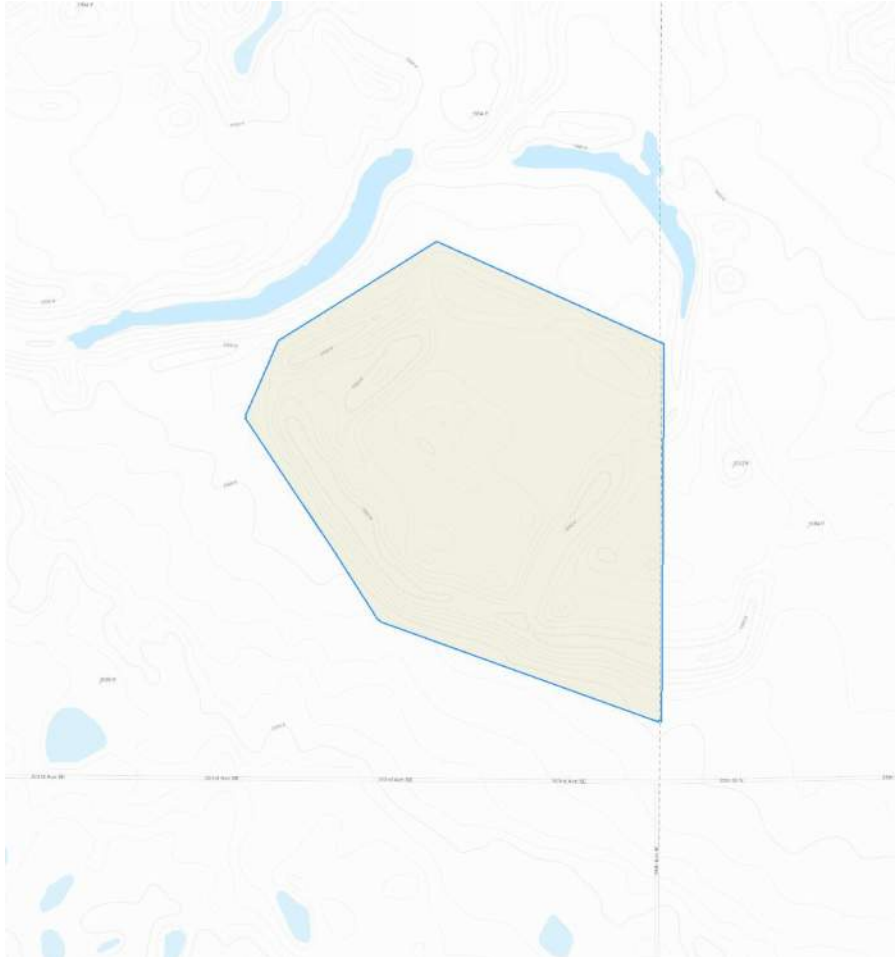
- [Restored habitat](#)

### 1.4.6.1.3 CHANGE IN VEHICLE TRAFFIC



#### ANTICIPATED MAGNITUDE

This is a temporary effect and will cease once the project is complete.

#### STRESSOR LOCATION



#### LEGEND

-  Project footprint
-  Stressor location

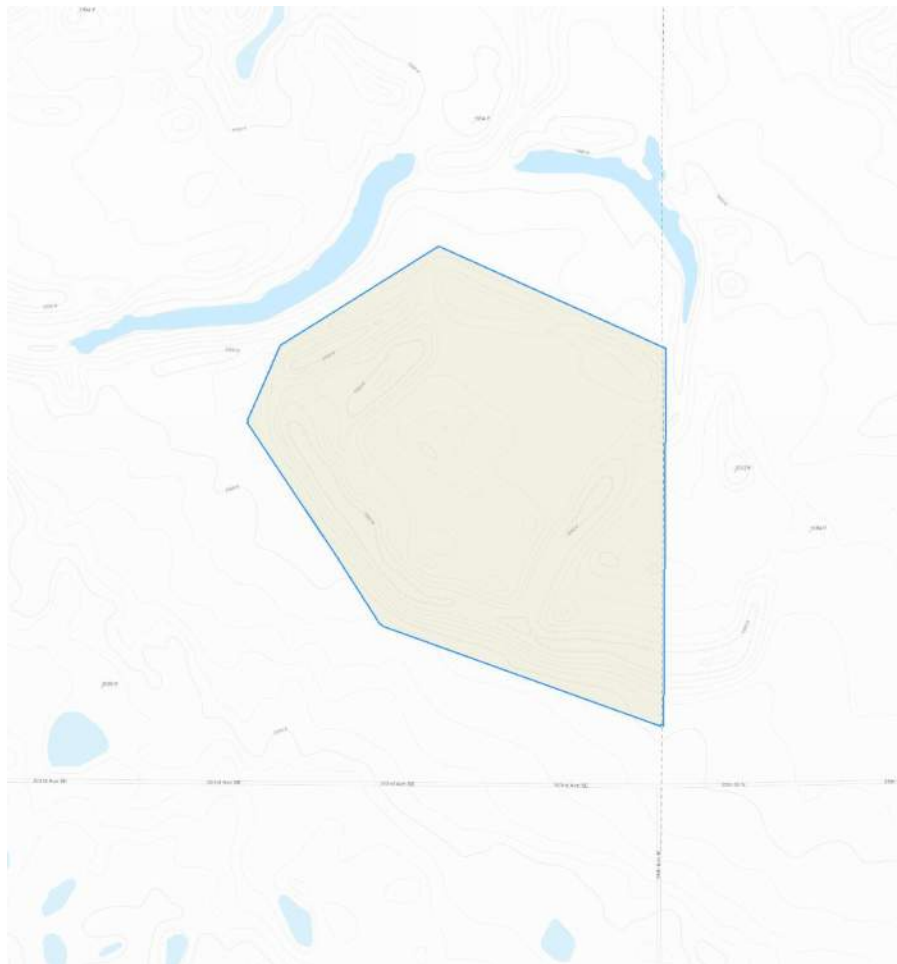
**CONSERVATION MEASURES**

*No conservation measures for this stressor*



**STRUCTURES AND ACTIVITIES**

- [Reclamation of an abandoned coal mine](#)

**1.5 ACTION AREA**



**LEGEND**

-  Project footprint
-  Stressor location

## **1.6 CONSERVATION MEASURES**

### **1.6.1 SOIL RECLAMATION**

#### **DESCRIPTION**

All available soil material will be segregated and respread once the spoil material has been graded.

#### **STRESSORS**

- [Change in soil disturbance](#)

## **1.7 PRIOR CONSULTATION HISTORY**

All project completed by the ND Public Service Commission Abandoned Mine Lands Division have been conducted with consultation with the USFWS.

## **1.8 OTHER AGENCY PARTNERS AND INTERESTED PARTIES**

The Office of Surface Mining is the federal agency overseeing this project.

## **1.9 OTHER REPORTS AND HELPFUL INFORMATION**

#### **RELEVANT DOCUMENTATION**

- [Inspection18Oct2022](#)

## 2 SPECIES EFFECTS ANALYSIS

*This section describes, species by species, the effects of the proposed action on listed, proposed, and candidate species, and the habitat on which they depend. In this document, effects are broken down as direct interactions (something happening directly to the species) or indirect interactions (something happening to the environment on which a species depends that could then result in effects to the species).*

*These interactions encompass effects that occur both during project construction and those which could be ongoing after the project is finished. All effects, however, should be considered, including effects from direct and indirect interactions and cumulative effects.*

### 2.1 MONARCH BUTTERFLY

*This species has been excluded from analysis in this environmental review document.*

#### RELEVANT DOCUMENTATION

- [Inspection18Oct2022](#)

#### JUSTIFICATION FOR EXCLUSION

The action area consists of orphan spoil, pits, and associated surface irregularities that formed when a dragline excavated coal. The orphan spoil material appears to consist of glacial till that is clearly capable of supporting vegetation. Herbaceous and woody species are generally well established on the orphan spoil except in areas ponding deep water. Smooth brome grass is the dominant grass species established on the orphan spoil.

### 2.2 WESTERN REGAL FRITILLARY

*This species has been excluded from analysis in this environmental review document.*

#### RELEVANT DOCUMENTATION

- [Inspection18Oct2022](#)

#### JUSTIFICATION FOR EXCLUSION

The action area consists of orphan spoil, pits, and associated surface irregularities that formed when a dragline excavated coal. The orphan spoil material appears to consist of glacial till that is clearly capable of supporting vegetation. Herbaceous and woody species are generally well established on the orphan spoil except in areas ponding deep water. Smooth brome grass is the dominant grass species established on the orphan spoil.



### **3 CRITICAL HABITAT EFFECTS ANALYSIS**

*No critical habitats intersect with the project action area.*

# 4 SUMMARY DISCUSSION AND CONCLUSION

## 4.1 SUMMARY DISCUSSION

Reclamation activities at the Buechler/Velva Phase 3 site will not jeopardize or adversely affect any proposed, threatened, or endangered species or proposed or designated critical habitat. No federal threatened, endangered, or proposed species were observed within or adjacent to the Buechler/Velva Phase 3 site, and there are no proposed or designated critical habitats in or adjacent to the area. USFWS Information for Planning and Consultation (IPaC) identifies five threatened or endangered species, one candidate species, and designated piping plover critical habitat in Ward County ND.

## 4.2 CONCLUSION

The Buechler/Velva Phase 3 operations will not affect the continued existence of any threatened, endangered, or proposed species or result in the destruction or adverse modification of proposed or designated critical habitats.

You have indicated that your project falls under or receives funding through the following special project authorities:

- BIPARTISAN INFRASTRUCTURE LAW (BIL) (OTHER)



# United States Department of the Interior



FISH AND WILDLIFE SERVICE  
North Dakota Ecological Services Field Office  
3425 Miriam Avenue  
Bismarck, ND 58501-7926  
Phone: (701) 250-4481 Fax: (701) 355-8513

In Reply Refer To:

10/02/2024 16:08:31 UTC

Project Code: 2025-0000866

Project Name: 2025 Buechler/Velva Phase 3 AML Project

Subject: List of threatened and endangered species that may occur in your proposed project location or may be affected by your proposed project

To Whom It May Concern:

## **Section 7 of the Endangered Species Act**

The enclosed species list identifies threatened, endangered, proposed and candidate species, as well as proposed and final designated critical habitat, that may occur within the boundary of your proposed project and/or may be affected by your proposed project. The species list fulfills the requirements of the U.S. Fish and Wildlife Service (Service) under section 7(c) of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*).

New information based on updated surveys, changes in the abundance and distribution of species, changed habitat conditions, or other factors could change this list. Please feel free to contact us if you need more current information or assistance regarding the potential impacts to federally proposed, listed, and candidate species and federally designated and proposed critical habitat. Please note that under 50 CFR 402.12(e) of the regulations implementing section 7 of the Act, the accuracy of this species list should be verified after 90 days. This verification can be completed formally or informally as desired. The Service recommends that verification be completed by visiting the IPaC website at regular intervals during project planning and implementation for updates to species lists and information. An updated list may be requested through the IPaC system by completing the same process used to receive the enclosed list.

The Act requires that actions authorized, funded, or carried out by Federal agencies not jeopardize federally threatened or endangered species or adversely modify designated critical habitat. To fulfill this mandate, Federal agencies (or their designated non-federal representative) must consult with the Service *if they determine their project and associated actions "may affect" listed species or critical habitat*. If Federal agencies or their non-federal representatives determine their project and associated actions will have "no effect" on listed species, their habitats, or designated critical habitat, consultation is not required. However, if a "no effect" is determined, we recommend that you maintain a written record in support of your conclusion.

## **Bald and Golden Eagle Protection Act and Migratory Bird Treaty Act**

Additionally, while not all are listed as threatened or endangered, eagles and migratory birds

have protections under the Bald and Golden Eagle Protection Act (BGEPA) and the Migratory Bird Treaty Act (MBTA). The BGEPA prohibits take which is defined as, “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb” (50 CFR 22.3). Disturb is defined in regulations as, “to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, 1) injury to an eagle, 2) decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.”. The MBTA makes it unlawful without a waiver to pursue, hunt, take, capture, kill, or sell birds listed as migratory birds, including eagles. The statute does not discriminate between live or dead birds and also grants full protection to any bird parts including feathers, eggs, and nests.

### **Service Property Interests**

As part of the National Wildlife Refuge System, the Service administers fee title Refuge and Waterfowl Production Areas, as well as wetland and grassland easements, throughout North Dakota. For exact locations of Service interest lands, please contact the appropriate Wetland Management Districts (WMD) for guidance regarding FWS easements.

Northwest ND WMD Complex: Kyle Flanery, (701) 768-2548

Eastern ND WMD Complex: Dave Azure, (701) 285-3341

Central ND WMD Complex (also covers south and west): Todd Luke, (701) 442-5474

Attachment(s):

- Official Species List
- USFWS National Wildlife Refuges and Fish Hatcheries
- Wetlands

## **OFFICIAL SPECIES LIST**

This list is provided pursuant to Section 7 of the Endangered Species Act, and fulfills the requirement for Federal agencies to "request of the Secretary of the Interior information whether any species which is listed or proposed to be listed may be present in the area of a proposed action".

This species list is provided by:

### **North Dakota Ecological Services Field Office**

3425 Miriam Avenue

Bismarck, ND 58501-7926

(701) 250-4481

## PROJECT SUMMARY

Project Code: 2025-0000866

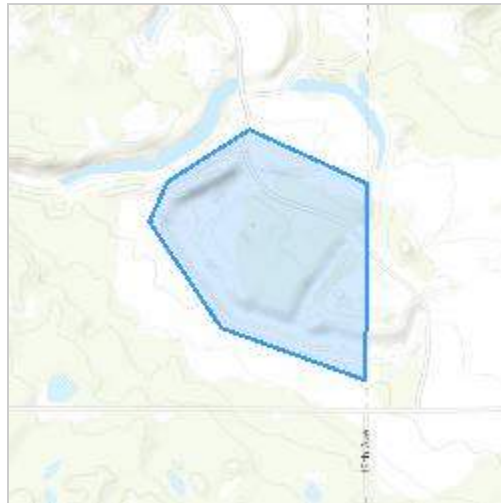
Project Name: 2025 Buechler/Velva Phase 3 AML Project

Project Type: Restoration / Enhancement - Agricultural

Project Description: The 2025 Buechler/Velva Phase 3 AML Project involves back sloping and backfilling approximately 2,950 feet of steep highwalls which are 30 to 45 feet high at an abandoned surface coal mine located ten miles southwest of Velva ND. On-site mine spoil will be used to reduce the steepness of the highwalls. Affected areas will be reseeded with locally adapted grass species native to western North Dakota. Erosion and sedimentation will be controlled. The total area affected is about 90 acres.

Project Location:

The approximate location of the project can be viewed in Google Maps: <https://www.google.com/maps/@47.92435985,-100.97470736789924,14z>



Counties: McHenry and Ward counties, North Dakota

## ENDANGERED SPECIES ACT SPECIES

There is a total of 7 threatened, endangered, or candidate species on this species list.

Species on this list should be considered in an effects analysis for your project and could include species that exist in another geographic area. For example, certain fish may appear on the species list because a project could affect downstream species.

IPaC does not display listed species or critical habitats under the sole jurisdiction of NOAA Fisheries<sup>1</sup>, as USFWS does not have the authority to speak on behalf of NOAA and the Department of Commerce.

See the "Critical habitats" section below for those critical habitats that lie wholly or partially within your project area under this office's jurisdiction. Please contact the designated FWS office if you have questions.

- 
1. [NOAA Fisheries](#), also known as the National Marine Fisheries Service (NMFS), is an office of the National Oceanic and Atmospheric Administration within the Department of Commerce.

**MAMMALS**

NAME	STATUS
Northern Long-eared Bat <i>Myotis septentrionalis</i> No critical habitat has been designated for this species. Species profile: <a href="https://ecos.fws.gov/ecp/species/9045">https://ecos.fws.gov/ecp/species/9045</a>	Endangered

**BIRDS**

NAME	STATUS
Piping Plover <i>Charadrius melodus</i> Population: [Atlantic Coast and Northern Great Plains populations] - Wherever found, except those areas where listed as endangered. There is <b>final</b> critical habitat for this species. Your location does not overlap the critical habitat. Species profile: <a href="https://ecos.fws.gov/ecp/species/6039">https://ecos.fws.gov/ecp/species/6039</a>	Threatened
Rufa Red Knot <i>Calidris canutus rufa</i> There is <b>proposed</b> critical habitat for this species. Your location does not overlap the critical habitat. Species profile: <a href="https://ecos.fws.gov/ecp/species/1864">https://ecos.fws.gov/ecp/species/1864</a>	Threatened
Whooping Crane <i>Grus americana</i> Population: Wherever found, except where listed as an experimental population There is <b>final</b> critical habitat for this species. Your location does not overlap the critical habitat. Species profile: <a href="https://ecos.fws.gov/ecp/species/758">https://ecos.fws.gov/ecp/species/758</a>	Endangered

**INSECTS**

NAME	STATUS
Dakota Skipper <i>Hesperia dacotae</i> There is <b>final</b> critical habitat for this species. Your location does not overlap the critical habitat. Species profile: <a href="https://ecos.fws.gov/ecp/species/1028">https://ecos.fws.gov/ecp/species/1028</a>	Threatened
Monarch Butterfly <i>Danaus plexippus</i> No critical habitat has been designated for this species. Species profile: <a href="https://ecos.fws.gov/ecp/species/9743">https://ecos.fws.gov/ecp/species/9743</a>	Candidate
Western Regal Fritillary <i>Argynnis idalia occidentalis</i> No critical habitat has been designated for this species. Species profile: <a href="https://ecos.fws.gov/ecp/species/12017">https://ecos.fws.gov/ecp/species/12017</a>	Proposed Threatened

**CRITICAL HABITATS**

THERE ARE NO CRITICAL HABITATS WITHIN YOUR PROJECT AREA UNDER THIS OFFICE'S JURISDICTION.

YOU ARE STILL REQUIRED TO DETERMINE IF YOUR PROJECT(S) MAY HAVE EFFECTS ON ALL ABOVE LISTED SPECIES.

## USFWS NATIONAL WILDLIFE REFUGE LANDS AND FISH HATCHERIES

Any activity proposed on lands managed by the [National Wildlife Refuge](#) system must undergo a 'Compatibility Determination' conducted by the Refuge. Please contact the individual Refuges to discuss any questions or concerns.

THERE ARE NO REFUGE LANDS OR FISH HATCHERIES WITHIN YOUR PROJECT AREA.

## WETLANDS

Impacts to [NWI wetlands](#) and other aquatic habitats may be subject to regulation under Section 404 of the Clean Water Act, or other State/Federal statutes.

For more information please contact the Regulatory Program of the local [U.S. Army Corps of Engineers District](#).

Please note that the NWI data being shown may be out of date. We are currently working to update our NWI data set. We recommend you verify these results with a site visit to determine the actual extent of wetlands on site.

### FRESHWATER POND

- PUBF<sub>x</sub>

## **IPAC USER CONTACT INFORMATION**

Agency: State of North Dakota  
Name: Michael Howe  
Address: 600 E. Blvd Ave - Dept 408  
City: Bismarck  
State: ND  
Zip: 58505  
Email: mthowe@nd.gov  
Phone: 7013284188

## **LEAD AGENCY CONTACT INFORMATION**

Lead Agency: Office of Surface Mining Reclamation and Enforcement  
Name: Michael Howe  
Email: mthowe@nd.gov  
Phone: 7013284188

You have indicated that your project falls under or receives funding through the following special project authorities:

- BIPARTISAN INFRASTRUCTURE LAW (BIL) (OTHER)

**The Buechler/Velva Phase 3 operations will not affect the continued existence of any threatened, endangered, or proposed species or result in the destruction or adverse modification of proposed or designated critical habitats [NDAC 69-05.2-10-03(6)(d)].**

Reclamation activities at the Buechler/Velva Phase 3 site will not jeopardize or adversely affect any proposed, threatened, or endangered species or proposed or designated critical habitat. No federal threatened, endangered, or proposed species were observed within or adjacent to the Buechler/Velva Phase 3 site, and there are no proposed or designated critical habitats in or adjacent to the area. USFWS Information for Planning and Consultation (IPaC) identifies five threatened or endangered species, one candidate species, and designated piping plover critical habitat in Ward County ND. The **northern long-eared bat, piping plover, red knot, and Dakota skipper** are listed threatened; the **whooping crane** is listed endangered; and the **monarch butterfly** is a candidate species for listing in Ward County.

The Buechler/Velva Phase 3 area does not contain suitable **whooping crane** stopover habitat and it is not within the whooping crane breeding or wintering ranges. It is conceivable that whooping cranes could fly over the area and that they could utilize the upland native grassland and cropland sites at the abandoned mine, but this is unlikely given the absence of suitable wetland habitat in the area and anthropogenic activities in the area. Therefore, the Commission believes that the proposed reclamation activities in the Buechler/Velva Phase 3 area will have **“no effect”** to the continued existence of the whooping crane.

There is no suitable habitat for the **piping plover** within or adjacent to the Buechler/Velva Phase 3 area, which is generally characterized as sparsely vegetated shorelines usually associated with alkaline wetlands and sandbars and shorelines associated with major river systems. The Missouri River and Lake Sakakawea, designated piping plover critical habitat, is located at least 17 miles from the reclamation area. The balance of the designated critical habitat is located north and east of the Missouri River. Reclamation activities may create sparsely vegetated habitat, but such habitats have only been used when the species' natural shoreline habitat is adversely affected by high water. There is limited wetland acreage with sparsely vegetated shorelines in or adjacent to the area and the Commission believes that the proposed reclamation activities will have **“no effect”** to the continued existence of the piping plover.

The **northern long-eared bat** is a medium-sized bat that is not common in North Dakota. Its historic range includes essentially all of North Dakota and it has been documented in the Little Missouri Badlands, Missouri River Valley, and the Turtle Mountains. There is no known hibernacula in North Dakota, according to the federal register final rule listing. This species spends its winters in caves and underground mines called hibernacula. During the summer, it roosts singly or in colonies underneath bark, in cavities, or crevices of both live and dead trees. This species was listed as threatened because of its decline due to a disease termed White-Nose Syndrome (WNS). If this disease had not emerged, it is unlikely the northern long-eared bat would be listed. The northern long-eared bat has been up-listed to endangered status which would remove its species specific 4(d) rule. USFWS IPaC indicates that this species is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. There is no proposed or listed designated critical habitat for the northern long-eared bat in North Dakota.

The Buechler/Velva Phase 3 area contains a very limited amount of woodland acreage which consists of primarily isolated patches of tall cottonwoods. The reclamation area does contain farmstead shelterbelts but does include trees that could potentially provide suitable habitat for the northern long-eared bat. There are no known wintertime hibernacula present within or adjacent to the reclamation area. The Commission will not impact the trees during the maternity period from June 1 through July 31.

The northern long-eared bat is rare in North Dakota according to Dr. Erin Gillam, Professor of Biological Science, NDSU. In December 2021, Ms. Gillam prepared a report entitled *Distribution and Roosting Ecology of the Federally Threatened Northern Long-Eared Bat, Myotis septentrionalis, and the Little Brown Bat, Myotis lucifugus, in North Dakota*. The report concludes that the northern long-eared bat is not common in North Dakota and recommends that the range of the species be modified to only include badlands habitats of extreme western North Dakota. Therefore, it is highly unlikely that reclamation will have any effect on the northern long-eared bat and the Commission believes that the proposed reclamation activities will have “**no effect**” on the continued existence of the northern long-eared bat.

**Rufa red knot** is a robin-sized shorebird that migrates from south to north every spring and repeats the trip in reverse every fall from far-flung sites throughout the Western Hemisphere. This species is one of the longest-distance migrants in the animal kingdom. Rufa red knots begin their life cycle in the Arctic tundra and undertake their first migration on their own. Migration and wintering habitats include both high-energy ocean or bay front areas as well as tidal flats in more sheltered bays and lagoons. Available information suggests that rufa red knots use inland saline lakes as stopover habitat in the Northern Great Plains. The species range map includes portions of central North Dakota. In July of 2021, the USFWS has proposed to designate critical habitat for the rufa red knot in areas outside of North Dakota. The Buechler/Velva Phase 3 area does not contain habitat for the rufa red knot and the Commission believes that the proposed reclamation activities will have “**no effect**” on the continued existence of rufa red knot species.

The **Dakota skipper** is a small butterfly that requires high-quality mixed or tallgrass prairie. Two habitat types have been identified as suitable for this species. Suitable habitat consists of a moist lowland bluestem prairie habitat type with wood lily, harebell, and smooth camas and a relatively dry upland prairie habitat type found on ridges and hillsides dominated with bluestem grasses, needlegrasses, and desirable native forbs such as purple coneflower. Ward County was added to the list of counties in North Dakota where this species is believed to exist.

The Buechler/Velva Phase 3 reclamation and adjacent areas do not contain any moist lowland bluestem prairie habitat and the dry upland sites are generally in reduced ecological condition according to an inspection conducted by Mr. Guy Welch of the ND PSC Reclamation division. The inspection report provided an assessment of the forb component in areas of potentially suitable habitat according to the USFWS 2022 Dakota Skipper North Dakota Survey Protocol and is attached. The report determined that the native grassland at the Buechler/Velva Phase 3 Site and adjacent areas provided no suitable habitat for the Dakota skipper. The 2022 Dakota Skipper Survey Protocol provides information to decide how, where, and when surveys may be warranted and clarifies that Type B habitat in North Dakota typically contains an association of little bluestem, big bluestem, needlegrasses, and western wheatgrass that is often invaded by Kentucky bluegrass. The updated survey protocol includes a species range map for North Dakota and a determination flow chart, Appendix C. The Commission believes that the proposed reclamation activities will have “**no effect**” on the continued existence of the Dakota skipper.

On December 15, 2020, the US Fish and Wildlife Service found that adding the monarch butterfly to the list of threatened and endangered species is warranted but precluded by work on higher-priority listing actions. This decision made the monarch butterfly a candidate for listing under the Endangered Species Act (ESA). The monarch butterfly is not listed or proposed for listing, so it is currently not provided protection by the ESA.



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE Mountain-Prairie Region

IN REPLY REFER TO:  
PSC-Abandoned Mines Lands  
Buechler/Velva Phase 3

North Dakota Ecological Services  
3425 Miriam Avenue  
Bismarck, North Dakota 58501

October 22, 2024

Mr. Jonathan Emmer  
Director, Abandoned Mine Lands Division  
Public Service Commission  
600 East Boulevard Avenue, Department 408  
Bismarck, North Dakota 58505-0480

Dear Mr. Emmer:

Thank you for your letter of October 8, 2024, requesting comments on Public Service Commission's proposed 2025 Buechler/Velva Phase 3 Abandoned Mines Lands project located in McHenry County, North Dakota. The U.S. Fish and Wildlife Service (USFWS) has the following comments.

You requested U.S. Fish and Wildlife Service (Service) concurrence with your "No Effect" determinations for the endangered Northern Long-eared Bat (*Myotis septentrionalis*) and Whooping crane (*Grus americana*); the threatened Piping plover (*Charadrius melodus*), Red Knot (*Calidris canutus rufa*) and Dakota skipper (*Hesperia dacotae*). There is no requirement under the implementing regulations of the ESA (50 CFR Part 402) for action agencies to receive USFWS concurrence with "No Effect" determinations or candidate species. Accordingly, we recommend the federal action agency retain the documentation for these resources in the decisional record for this federal action.

Thank you for the opportunity to comment on this project proposal. If changes are made in the project plans or operating criteria, or if additional information, including new species listings, becomes available, the Service should be informed so that the project impacts can be reconsidered. If you have any additional questions or comments, please contact Jerry Reinisch at (701) 425-2133 or via email at [jerry\\_reinisch@fws.gov](mailto:jerry_reinisch@fws.gov), or contact me at (701) 355-8512 or [luke\\_toso@fws.gov](mailto:luke_toso@fws.gov).

Sincerely,

LUKE  
TOSO

Luke Toso  
ND Ecological Services Supervisor

Digitally signed  
by LUKE TOSO  
Date: 2024.10.24  
08:09:44 -05'00'



# Public Service Commission

## State of North Dakota

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### COMMISSIONERS

Randy Christmann  
Sheri Haugen-Hoffart  
Julie Fedorchak

September 18, 2023

600 East Boulevard, Dept. 408  
Bismarck, North Dakota 58505-0480  
Web: [www.psc.nd.gov](http://www.psc.nd.gov)  
E-mail: [ndpsc@nd.gov](mailto:ndpsc@nd.gov)  
Phone: 701-328-2400  
ND Toll Free: 1-877-245-6685  
Fax: 701-328-2410  
TDD: 800-366-6888 or 711

Mr. Benjamin N. Soiseth  
US Army Corps of Engineer  
3319 University Drive  
Bismarck, North Dakota 58504

Re: Abandoned Surface Coal Mine, Velva ND, E ½ Section 1, T151N, R81W

Dear Mr. Soiseth,

I am an engineer working at the ND Public Service Commission, Abandoned Mine Lands Division. The Abandoned Mine Lands program was created when President Carter signed the Surface Mine Control and Reclamation Act of 1977. This law created the Department of Interior's Office of Surface Mining which oversees our program. Our mission is to eliminate hazards associated with abandoned coal mines in ND. Prior to construction activity on our restorative projects, we are required to complete an Environmental Assessment and obtain concurrence letters from the US Fish and Wildlife Service, the ND Department of Environmental Quality, the State Historical Society of North Dakota, and the ND Parks and Recreation Department.

We would like to reclaim an abandoned coal mine, southwest of Velva ND, by backfilling the dangerous highwall with the adjacent spoil piles and regrading the area. We believe the site would be considered a non-jurisdictional water defined under CFR Title 33, Chapter II, Part 328.3 (b)(7). The existing waterfilled depression was created by coal mining, and there were no water features on the landscape prior to mining. I have included a location map, a USGS Quad map, a 1952 aerial photo that shows the site as native pasture, a 1961 photo that shows mining in progress, and a 2022 NAIP aerial photo that shows the site at different scales. The proposed work area required to reclaim the final pit is identified on all maps.

Please let us know the requirements of the US Army Corps of Engineers to proceed with our proposed restorative project. Please call or email if you want to discuss this or want any additional information. Any guidance on this or assistance is greatly appreciated.

Sincerely,

Michael T. Howe  
Environmental Engineer  
Abandoned Mine Lands Division  
701-425-4649  
[mthowe@nd.gov](mailto:mthowe@nd.gov)

Enclosures



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, OMAHA DISTRICT  
NORTH DAKOTA REGULATORY OFFICE  
3319 UNIVERSITY DRIVE  
BISMARCK, ND 58504

February 2, 2024

**SUBJECT: NWO-2023-01451-BIS – Ward County Reclaim Abandoned Surface Coal Mine Southwest of Velva, North Dakota – Approved Jurisdictional Determination**

North Dakota Public Service Commission  
Abandoned Mine Lands Division  
Attn: Mr. Michael Howe  
Environmental Engineer  
600 East Boulevard, Dept. 408  
Bismarck, North Dakota 58505-0408

Dear Mr. Howe:

This letter is in response to your request received on September 18, 2023 submitted on your behalf by North Dakota Public Service Commission, Abandoned Mine Lands Division for an approved jurisdictional determination for the Abandoned Surface Coal Mine. The site is located in Section 1 of Township 151 North, Range 81 West, 10 miles Southwest of Velva, Ward County, North Dakota. Your request has been assigned the Corps Regulatory File Number referenced above. Please reference this file number on any correspondence to us or to other interested parties when referencing this project or concerning this request.

The U.S. Army Corps of Engineers (Corps) regulates the discharge of dredged and fill material into waters of the United States under Section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344) and structures or work in, over, and under navigable waters of the United States under Section 10 of the Rivers and Harbors Act (RHA) (33 U.S.C. 403). The implementing regulations for these Acts are published in the Code of Federal Regulations at 33 CFR parts 330-332.

Based on our evaluation of the information provided and other available information, we have determined the following resources are non-jurisdictional: OW1 and OW2. The attached approved jurisdictional determination provides rationale for why these aquatic resources do not meet the definition of waters of the United States. Based on this determination, a Department of the Army permit is not required for the discharge of dredged or fill material into this aquatic resources. This determination does not eliminate requirements to obtain any other applicable federal, state, tribal, or local permits.

Attached to this letter is the approved jurisdictional determination for your project site. This jurisdictional determination is valid for a 5-year period from the date of this letter, until **February 2, 2029**, unless new information warrants revision of the determination

before the expiration date. If you object to this determination, you may request an administrative appeal under Corps regulations at 33 CFR part 331. Enclosed you will find a *Notification of Administrative Appeal Options and Process and Request for Appeal* (NAO-RFA) form. If you request to appeal this determination, you must submit a completed NAO-RFA form to the address listed on the form.

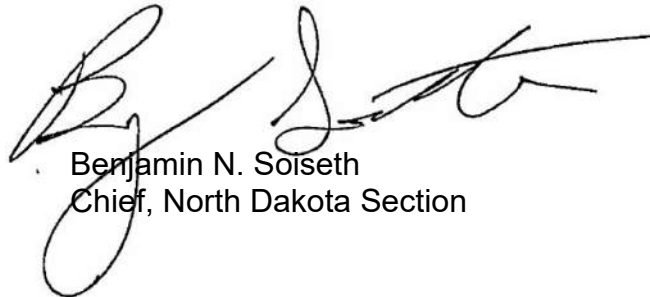
For an NAO-RFA to be accepted by the Corps, the Corps must determine that it is completed, that it meets the criteria for appeal under 33 CFR 331.5, and that it has been received by the Division Office within 60 days of the date of the NAO-RFA. Should you decide to submit an NAO-RFA form, it must be received at the Division Office by **April 2, 2024**. It is not necessary to submit an NAO-RFA form to the Division Office if you do not object to the determination in this letter.

In the event that you disagree with this approved jurisdictional determination, and you have **new information** not considered in the original determination, you may request reconsideration of this determination by contacting this office prior to initiating an appeal. To request this reconsideration based upon new information, you must submit the new information to this office so that it is received within 60 days of the date of the NAO-RFA.

The Corps' Omaha District, Regulatory Branch is committed to providing quality and timely service to our customers. In an effort to improve customer service, please take a moment to complete our Customer Service Survey found on our website at <https://regulatory.ops.usace.army.mil/customer-service-survey/>. If you do not have Internet access, you may call and request a paper copy of the survey that you can complete and return by mail. Additionally, further information regarding the Omaha District Regulatory Program can be obtained by visiting our website at <https://www.nwo.usace.army.mil/Missions/Regulatory-Program/>.

If you have any questions concerning this jurisdictional determination, please contact Benjamin Soiseth at the above address, by phone at 701-255-0015, ext. 2001, or by email at Benjamin.N.Soiseth@usace.army.mil and reference file number **NWO-2023-01451-BIS**.

Sincerely,



Benjamin N. Soiseth  
Chief, North Dakota Section

Enclosures

## NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Mr. Micheal Howe, ND Public Service Commission, Abandoned Mine Lands	File Number: NWO-2023-01451-BIS	Date: February 2, 2024
Attached is:		See Section below
<input type="checkbox"/>	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A
<input type="checkbox"/>	PROFFERED PERMIT (Standard Permit or Letter of permission)	B
<input type="checkbox"/>	PERMIT DENIAL WITHOUT PREJUDICE	C
<input type="checkbox"/>	PERMIT DENIAL WITH PREJUDICE	D
<input checked="" type="checkbox"/>	APPROVED JURISDICTIONAL DETERMINATION	E
<input type="checkbox"/>	PRELIMINARY JURISDICTIONAL DETERMINATION	F

### SECTION I

The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/appeals/> or Corps regulations at 33 CFR Part 331.

**A: INITIAL PROFFERED PERMIT:** You may accept or object to the permit

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **OBJECT:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

**B: PROFFERED PERMIT:** You may accept or appeal the permit

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **APPEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

**C. PERMIT DENIAL WITHOUT PREJUDICE: Not appealable**

You received a permit denial without prejudice because a required Federal, state, and/or local authorization and/or certification has been denied for activities which also require a Department of the Army permit before final action has been taken on the Army permit application. The permit denial without prejudice is not appealable. There is no prejudice to the right of the applicant to reinstate processing of the Army permit application if subsequent approval is received from the appropriate Federal, state, and/or local agency on a previously denied authorization and/or certification.

**D: PERMIT DENIAL WITH PREJUDICE: You may appeal the permit denial**

You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

**E: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information for reconsideration**

- **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice means that you accept the approved JD in its entirety and waive all rights to appeal the approved JD.
- **APPEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.
- **RECONSIDERATION:** You may request that the district engineer reconsider the approved JD by submitting new information or data to the district engineer within 60 days of the date of this notice. The district will determine whether the information submitted qualifies as new information or data that justifies reconsideration of the approved JD. A reconsideration request does not initiate the appeal process. You may submit a request for appeal to the division engineer to preserve your appeal rights while the district is determining whether the submitted information qualifies for a reconsideration.

**F: PRELIMINARY JURISDICTIONAL DETERMINATION: Not appealable**

You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also, you may provide new information for further consideration by the Corps to reevaluate the JD.

**POINT OF CONTACT FOR QUESTIONS OR INFORMATION:**

If you have questions regarding this decision you may contact:

US Army Corps of Engineers,  
North Dakota Regulatory Office  
Attn: Benjamin Soiseth, Section Chief  
3319 University Drive  
Bismarck, ND 58504  
Telephone (701) 255-0015, ext. 2001  
CENWO-OD-RND@usace.army.mil

If you have questions regarding the appeal process, or to submit your request for appeal, you may contact:

US Army Corps of Engineers,  
Northwestern Division  
Attn: Regulatory Appeals Review Officer  
P.O. Box 2870  
Portland, OR 97208-2870

**SECTION II – REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT**

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. Use additional pages as necessary. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15-day notice of any site investigation and will have the opportunity to participate in all site investigations.

_____ Signature of appellant or agent.	Date:
Email address of appellant and/or agent:	Telephone number:



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, NWO DISTRICT  
3319 UNIVERSITY DRIVE  
BISMARCK, NORTH DAKOTA 58504

NWO-OD-RND

February 2, 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023),<sup>1</sup> [NWO-2023-01451-BIS, Ward County Reclaim Abandoned Surface Coal Mine Southwest of Velva, North Dakota.](#)<sup>2</sup>

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.<sup>3</sup> AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.<sup>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in this state due to litigation.

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<sup>1</sup> While the Supreme Court's decision in *Sackett* had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

<sup>2</sup> When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

## CENWO-OD-RND

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NWO-2023-01451-BIS](#)

### 1. SUMMARY OF CONCLUSIONS.

a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).

i. [OW1, non-jurisdictional, intrastate lake/pond](#)

ii. [OW2, non-jurisdictional, intrastate lake/pond](#)

### 2. REFERENCES.

a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).

b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).

c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)

d. *Sackett v. EPA*, 598 U.S. \_\_\_, 143 S. Ct. 1322 (2023)

e. 2008 Rapanos Guidance

f. 30 December 2022 Memo, U.S. EPA & U.S. Army Corps of Engineers, "Waters that Qualify as "Traditional Navigable Waters" Under Section (a)(1) of the Agencies' Regulations"

3. REVIEW AREA. [Review area is approximately 10 acres near Velva, Ward County, North Dakota in Section 1, Township 151 North, Range 81 West; Latitude 47.92359° North, Longitude -100.97436° West; Boundary map for review area is attached.](#)

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [N/A.](#) <sup>6</sup>

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS [N/A](#)

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<sup>6</sup> This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

## CENWO-OD-RND

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NWO-2023-01451-BIS](#)

6. SECTION 10 JURISDICTIONAL WATERS<sup>7</sup>: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10. [N/A](#) <sup>8</sup>
  
7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the pre-2015 regulatory regime. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.
  - a. TNWs (a)(1): [N/a](#)
  - b. Interstate Waters (a)(2): [N/A](#)
  - c. Other Waters (a)(3): [N/A](#)
  - d. Impoundments (a)(4): [N/A](#)
  - e. Tributaries (a)(5): [N/A](#)
  - f. The territorial seas (a)(6): [N/A](#)
  - g. Adjacent wetlands (a)(7): [N/A](#)
  
8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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<sup>7</sup> 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

<sup>8</sup> This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

## CENWO-OD-RND

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NWO-2023-01451-BIS](#)

- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).<sup>9</sup> Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water. [N/A](#)
- b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance. [N/A](#)
- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. [N/A](#)
- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. [N/A](#)
- e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic resource or feature, and how it was determined to be an “isolated water” in accordance with *SWANCC*. [OW1 and OW2 are approximately 10 acres as measured in Google Earth Pro. OW1 and OW2 are water filled excavated pits created during coal mining in the early 1960s. The mining area has been abandoned and the water filled excavated area remain based on 2022 NAIP Aerial Imagery and Google Earth Pro imagery from multiple years. OW1 and OW2 are located within an abandoned coal mine cut and are surrounded by spoil piles. OW1 and OW2 do not possess a continuous surface connection to a TNW or to an RPW. There are no inlets or outlets connection to a TNW or to an RPW. Based on elevation, rainfall, flood risk, and topographic data accessed from the resources listed below in Section 9, it was determined that water enters this feature via precipitation, surface runoff, and snow melt. OW1 and OW2 are surrounded by private property and is part of an abandoned coal mine to be reclaimed. These features do not possess a viable nexus to interstate or foreign commerce, as these waters do not possess the characteristics of a TNW nor is there a continuous surface connection to a TNW. The use, degradation, or destruction of OW1 and OW2 would not affect interstate or foreign commerce and are not used by](#)

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<sup>9</sup> 51 FR 41217, November 13, 1986.

## CENWO-OD-RND

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NWO-2023-01451-BIS](#)

interstate or foreign travelers for recreational or other purposes, do not support fish or shellfish that could be taken and sold in interstate or foreign commerce, and are not used for industrial purposes by industries in interstate commerce.

- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court's decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). N/A
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
- a. Office evaluation conducted on January 5, 2024.
  - b. North Dakota Department of Water Resources Aerial Imagery Dated 1952, 1961, and 2022 NAIP Aerial Imagery. Submitted by State of North Dakota, Public Service Commission on September 20, 2023.
  - c. Google Earth Pro, 2010 to 2022; Accessed January 9, 2024
  - d. USFWS National Wetlands Inventory Wetlands Mapper <https://fwsprimary.wim.usgs.gov/wetlands/apps/wetlands-mapper/>; Accessed January 9, 2024
  - e. USGS Advanced Map Viewer <https://apps.nationalmap.gov/viewer/>; Accessed January 9, 2024
  - f. NDDWR/FEMA North Dakota Risk Assessment Map Service <https://ndram.dwr.nd.gov/>; Assessed January 5, 2024
10. OTHER SUPPORTING INFORMATION. N/A
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

2022 NAIP Aerial Imagery

ND Dept. of Water Resources

PROPOSED  
WORK AREA

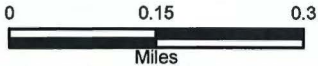
• OW2

• OW1

**Buechler/Velva Phase 3 AML Site  
Proposed Work Area**

E 1/2 Section 1, T151N, R81W  
10 Miles Southwest of Velva ND  
Ward County  
ND PSC AML Division  
September 8, 2023

N





# Public Service Commission

Sheri Haugen-Hoffart

Randy Christmann

Julie Fedorchak

600 East Boulevard Ave  
Dept. 408  
Bismarck, ND 58505-0480  
701-328-2400  
ndpsc@nd.gov

October 29, 2024

Mr. Jeff Fleischman, Chief  
Denver Field Division Office of Surface Mining  
P.O. Box 11018  
Casper, WY 82602-5004

Dear Mr. Fleischman:

This letter is submitted under 30 CFR 874.12 as the required eligibility determination for land included in the 2025 Buecher Velva Phase 3 AML Project.

## **Eligibility Determination - 30 CFR 874.12**

The requirements of this section of the Abandoned Mine Reclamation Program set forth the following criteria for eligibility for reclamation activities (paraphrased):

- a. Was the real property subjected to coal mining and related processes?
- b. Did the coal mining processes on the real property occur before August 3, 1977, and was said real property left or abandoned in an unreclaimed or inadequately reclaimed condition? and;
- c. Is there continuing responsibility for reclamation by the operator, permittee or agent of the permittee under the statutes of the State of North Dakota or the government of the United States?

Based upon available historical information, I find that the described real properties were mined for coal; that the coal mining activity occurred before August 3, 1977; and, that the property has been left in an abandoned and unreclaimed state. I further find that there is no continuing responsibility for reclamation by the operator, permittee, or agent of the permittee under statutes of the State of North Dakota or the government of the United States.

Based on these findings, it is my opinion that the described real properties meet the eligibility requirements of 30 CFR 874.12 for abandoned mine reclamation.

Sincerely,

A handwritten signature in blue ink, appearing to read "Brian Johnson".

Brian Johnson  
Special Assistant Attorney General  
North Dakota Public Service Commission