Coal-Fired Power Plant/Mine/Common Control: Federal Appellate Court Addresses Challenge to Title V Permit Renewal

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") addressed in an August 31st Opinion a challenge to the renewal of a Title V Clean Air Act operating permit for a coal-fired electric generating plant. See *Voigt v. U.S. Environmental Protection Agency,* 2022 WL 3905812.

The appeal sought a review of the United States Environmental Protection Agency ("EPA") Administrator's denial of a petition that objected to the issuance of the Title V permit renewal.

The Opinion describes a lignite coal-fired power plant (i.e., Coyote Station) that is located in Mercer County, North Dakota. Coyote Station receives all of its coal from the nearby Coyote Creek Mine ("Mine"). Large parts of the Coyote Creek Mine are stated to be located on property leased to Coyote Creek Mining Company by the Voigts.

The Voigts own a large ranch.

Coyote Station is stated to be the Mine's sole customer. The Mine transports coal to Coyote Station via a conveyor belt that runs between the two facilities. It is located approximately five miles from the Voigts' home and one mile from their ranch.

Coyote Station applied to renew its Title V operating permit. This was the first time it had sought to renew its permit since the Mine became operational and initiated fulfilling Coyote Station's coal needs.

The North Dakota Department of Health ("NDDOH") issued a draft Title V permit for public comment in 2018. The Voigts submitted comments arguing that the draft permit was not compliant because the Mine and its emissions were excluded from the Title V permit. They asserted that the Mine and Coyote Station should be considered a single source for purposes of the Title V permit.

If that was the case, this would result in the imposition of specific emission limits on the Mine that would otherwise not be required. The Voigts argued the Mine and Coyote Station are facilities under common control. This was based on their belief that Coyote Station exerts complete control over the Mine through the terms of their Lignite Sales Agreement. Cited was Coyote Station's complete physical control over the conveyor belt running between the two facilities.

The determination that operations in the vicinity of each other should be aggregated for Clean Air Act permitting purposes is an issue that periodically arises. This can be a critical determination since sources falling within the scope of the phrase "located on adjacent properties" (or similar phraseology) can be

"aggregated" for purposes of determining whether a Clean Air Act Title V permit or New Source Review determination is applicable to a particular source. The regulating community and permitting authorities sometimes experience uncertainty regarding the meaning of terms such as "adjacent" in the Clean Air Act context.

NDDOH sent the proposed Title V permit to EPA pursuant to the Clean Air Act review process. See 42 U.S.C. § 7661d(a). The state agency asked for EPA's position on whether the Mine and Coyote Station were single sources for Title V permitting purposes. EPA recommended that NDDOH further develop the record regarding the issue of common control.

The Voigts subsequently filed a petition with EPA objecting to the issuance of the proposed permit citing the common control issue. NDDOH reevaluated its permitting decision but confirmed its determination that the two facilities were separate sources.

The Voigts submitted another petition asking that EPA object to the permit and reasserted their position that the two facilities constitute a single source. They are stated to have repeated verbatim the argument regarding common control from their previous petition. A single sentence included in the background section of their second petition stated:

This stationary source determination cherry-picked parts of the [Lignite Sales Agreement] and ignored almost all of the provisions cited by the Voigts herein.

The EPA Administrator denied both of the Voigts' petitions.

The first petition was denied as moot due to NDDOH's withdrawal of the proposed permit. The 2020 petition was denied because of EPA's conclusion that the Voigts failed to meet their burden of demonstrating that Coyote Station and the Mine were a single source.

EPA's determination was based on its view that source determinations:

. . . require highly fact-specific analyses, and the EPA does not substitute its judgment for that of the permitting authority.

EPA further stated that a lack of any definition of or particular framework for evaluating common control meant the most pertinent source of information was the decision of the NDDOH. This decision was represented in a memorandum titled "Stationary Source Determination" which NDDOH developed to address the issue. Because the Voigts did not attempt to rebut the reasoning in the NDDOH memorandum, they were deemed to have failed to demonstrate that the state agency's justification was unreasonable or that the decision was contrary to the Clean Air Act.

EPA therefore concluded that the Voigts failed to carry their burden. However, it also stated that its decision should not be read as reflecting agreement with the NDDOH's reasoning.

The Voigts appealed to the Eighth Circuit.

The Eighth Circuit states that the Voigts' contentions are largely premised on the proper interpretation of the Clean Air Act term "demonstrates." This is due to EPA's conclusion that the Voigts failed to:

. . . engage with the facts that [the NDDOH] deemed to be most relevant, the [Voigts] . . . failed to demonstrate that [the NDDOH's] justification was unreasonable, or that its ultimate decision was contrary to the CAA.

The Eighth Circuit applied the two-step Chevron framework to this language and concludes:

- The word "demonstrate" is an ambiguous term
- EPA is empowered to interpret definitively, so long as it does so reasonably, the term "demonstrate"

The Eighth Circuit concludes that EPA's interpretation that the term "demonstrates" in § 7661d(b)(2) imposes upon the Voigts the obligation to discuss the specific points in the NDDOH permit to which they

object is entitled to deference. The state agency interpretation is deemed by the court to be both reasonable and persuasive.

The Voigts argument regarding lack of a notice and comment period after issuance by NDDOH of the Stationary Source Determination memorandum is also rejected.

A copy of the Opinion can be downloaded here.