Major Source Determination/Clean Air Act: Federal Appellate Addresses Whether State Agency's Interpretation Entitled to Deference

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The United States Court of Appeals, Eight Circuit ("Eight Circuit") addressed in a November 22nd Opinion whether a lignite coal mine obtained the correct Clean air Act ("CAA") permit. See *Voigt v. Coyote Creek Mining Company, LLC*, 329 F.Supp.3d 735.

The Opinion was authored by Judge Bobby E. Shepherd who formerly served as a United States Magistrate (Western District-Arkansas).

Coyote Creek Mining Company, LLC ("CCMC") obtained a CAA minor source permit ("MSP") from the North Dakota Department of Health ("NDDOH"). The MSP authorized the construction and operation of Coyote Creek Mine and its adjacent processing plant. This was due to the NDDOH classifying the mine as a minor source of air pollutants based on its interpretation of the relevant United States Environmental Protection Agency ("EPA") regulations and North Dakota's EPA-approved State Implementation Plan ("SIP").

Whether to classify the mine as a major emitting facility was a significant issue. Major emitting facilities must obtain a MSP. This requires the applicant to undergo a Prevention of Significant Deterioration ("PSD") New Source Review.

Casey and Julie Voigt ("Voigts"), filed suit against CCMC arguing that the company should not have been granted a MSP. The Voigts' primary contention was that the NDDOH erroneously excluded from its consideration an open storage pile of approximately 140,000 tons of coal. The pile was located adjacent to the processing plant's apron feeder that fed into the plant's crushing equipment.

The NDDOH determined that the open pile was not part of the processing plant. Therefore, the pile's fugitive emissions were not considered in determining whether to issue a minor or major source permit to CCMC.

The Voigts' argued that the pile was part of the processing plant. Therefore they contended that construction and operation of the mine and plant required a major source permit. Further, this was argued to mandate a fugitive dust control plan for the coal.

The Eighth Circuit noted that both the Voigts and CCMC provided "plausible conflicting interpretations of the [applicable] regulation, underscoring the ambiguity that exists." The Voigts contended that because

the EPA's guidelines made explicit reference to open storage piles, then it "clearly demonstrates [that it] broadly applies to open storage piles, regardless of their location before or after the coal crushing equipment."

CCMC countered by arguing that the EPA guidelines "unambiguously dictate that the regulation apply only to open storage piles" occurring past the plant's first hopper. CCMC also argued that because the processing plant began at the apron feeder, the open storage pile did not fall within the guidelines and was correctly excluded.

The Eighth Circuit found both interpretations plausible. As a result, it agreed with the United States District Court's determination that applicable EPA guidance was ambiguous. The court wrote that:

The regulations simply do not provide an unambiguous answer to the inquiry here: whether a coal pile that is adjacent to the coal processing equipment, and is used for both storage and loading coal into the coal processing equipment, is "in" the coal processing plant itself. Indeed, as the district court noted, both parties provide plausible conflicting interpretations of the regulations, underscoring the ambiguity that exists. While the regulations clearly contemplate the inclusion of coal piles that are within coal processing plants, they do not provide unambiguous direction as to when exactly a coal pile is "in" a coal processing plant so as to be considered an affected facility subject to [relevant requirements].

Having determined that the regulation and its guidance was ambiguous, the Eighth Circuit then held that the permitting decision of the NDDOH was entitled to deference in its interpretation and application of the regulations.

The Voigts argued in response:

1. NDDOH was simply a state agency interpreting federal law and therefore not entitled to deference; and
2. Granting any deference to the agency's decision would undermine "the uniform applicability and consistency of the EPA regulations

The Eighth Circuit rejected this argument. It emphasized that the CAA relies on a system of cooperative federalism between the EPA and state agencies in order to achieve its goals. Specifically, the court pointed to the EPA's express delegation of authority to North Dakota to implement New Source Performance Standards ("NSPS") rules and to issue preconstruction permits in accordance with the state's EPA-approved State Implementation Plan ("SIP"). The court stated:

"Because implementation of the CAA hinges on a system of cooperative federalism and North Dakota has an EPA-approved SIP, North Dakota is the primary party enforcing the CAA for the State."

And further commented that:

"As the primary body responsible for issuing permits based upon the CAA standards, North Dakota is in the best position to decide whether a given facility falls within or satisfies the CAA standards, and that decision is entitled to deference."

Finally, the Eighth Circuit held that giving deference to the NDDOH's permitting decision would not undercut the EPA's non-delegable authority to make legal determinations in the interest of national NSPS uniformity. The court noted that making factual determinations about the applicability of the NSPS to a permit application was part of the express delegation from the EPA to North Dakota, even when it was sometimes necessarily intertwined with legal issues. In the event that any state agency were to make a decision that was unreasonable, arbitrary, or capricious, then such decisions could be challenged and corrected for the sake of national consistency.

The Voigts, on December 4, 2020, petitioned for both an en banc rehearing and, alternatively, a rehearing by panel. On December 8 the court granted the petition to a rehearing before the panel, and declared the

petition for en banc rehearing as moot. Case was reopened on the same date and submitted on the briefs to the original panel.

A copy of the Opinion can be downloaded here.