

United States Court of Appeals  
For the Eighth Circuit

---

No. 18-2705

---

Casey Voigt; Julie Voigt

*Plaintiffs - Appellants*

v.

Coyote Creek Mining Company, LLC, a North Dakota Corporation

*Defendant - Appellee*

-----

State of North Dakota; Lignite Energy Council

*Amici on Behalf of Appellee(s)*

---

Appeal from United States District Court  
for the District of North Dakota - Bismarck

---

Submitted: October 17, 2019

Filed: November 20, 2020

---

Before LOKEN, SHEPHERD, and STRAS, Circuit Judges.

---

SHEPHERD, Circuit Judge.

Casey and Julie Voigt, the owners of a large ranch in rural North Dakota, filed suit against Coyote Creek Mining Company, LLC (CCMC), alleging CCMC failed to

obtain the proper construction permit under the Clean Air Act (CAA), 42 U.S.C. § 7401, et seq., and failed to implement the requisite dust control plan for the Coyote Creek Mine, which is adjacent to the Voigts' ranch. CCMC moved for summary judgment on the Voigts' claims and the Voigts moved for partial summary judgment on issues of liability. The district court<sup>1</sup> granted summary judgment in favor of CCMC, concluding the federal regulations imposing permitting and dust control requirements do not apply to CCMC's operations. The Voigts appeal, arguing the district court erroneously determined the regulations are ambiguous and improperly relied on the North Dakota Department of Health (NDDOH) permitting decision to reach its conclusion. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

## I.

Pursuant to the CAA, the Environmental Protection Agency (EPA) established National Ambient Air Quality Standards (NAAQS), which are designed to improve air quality by placing limits on six specific air pollutants, including, as relevant here, particulate matter. 42 U.S.C. §§ 7408-09; see also Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 308 (2014). Particulate matter is the air pollutant most commonly associated with mining operations. Areas of the country where the air quality meets the NAAQS are called attainment areas, while areas that do not meet these standards are known as non-attainment areas. 42 U.S.C. § 7407(d). North Dakota is an attainment area. As part of its plan to achieve and maintain the NAAQS, the EPA created New Source Performance Standards (NSPS), which impose emission standards on new major sources of air pollution, including newly constructed facilities, and on modifications to existing facilities that would increase emissions. See Sierra Club v. Otter Tail Power Co., 615 F.3d 1008, 1011 (8th Cir. 2010). However, because the NSPS are aimed at helping achieve and maintain the NAAQS,

---

<sup>1</sup>The Honorable Charles S. Miller, Jr., United States Magistrate Judge for the District of North Dakota, now retired, to whom the case was referred for final disposition by consent of the parties pursuant to 28 U.S.C. § 636(c).

they do not prevent air quality degradation in attainment areas, like North Dakota, where the air quality is already below NAAQS-imposed limits. See Alaska Dep't of Env'tl. Conservation v. EPA, 540 U.S. 461, 470-71 (2004). Recognizing that this gap existed, Congress amended the CAA to include prevention of significant deterioration of air quality (PSD) provisions, which apply to attainment areas and impose permitting requirements on the construction of "major emitting facilities." 42 U.S.C. §§ 7475, 7479(1). A major emitting facility may not be constructed until a major source permit is obtained, which requires compliance with various regulations, including the planned use of best available control technology for each pollutant emitted by the facility. 42 U.S.C. § 7475(a)(4); see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 846 (1984).

There are two ways for a source to be considered a major emitting facility. See 42 U.S.C. § 7479(1). First, a source constitutes a major emitting facility if it is a stationary source that is included on the list of specified industrial facilities that have a potential to emit (PTE) 100 tons per year (tpy) of any air pollutant. Id. Second, any other stationary source that has a PTE of at least 250 tpy of any air pollutant constitutes a major emitting facility. Id. Surface coal mines are not included on the list of specified industrial facilities subject to the 100 tpy threshold. See id. Therefore, the only way for a surface coal mine to be considered a major emitting facility, and thus to fall within the PSD provisions and require a construction permit, is if it has a PTE of at least 250 tpy of any air pollutant.

As a general matter, when calculating whether a source's PTE air pollutants satisfies the threshold so as to constitute a major emitting facility, the source's fugitive emissions are excluded. Fugitive emissions are "those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening." 40 C.F.R. § 51.166(b)(20). For mining operations, fugitive emissions generally take the form of coal dust. Although fugitive emissions are generally excluded, the EPA has promulgated a list of categories of sources for which fugitive emissions must be counted. See id. §§ 51.166(b)(1)(iii), 52.21(b)(1)(iii). Surface coal

mines are not included on that list. Therefore, although most surface coal mines have the PTE more than 250 tpy of dust, see Natural Resources Def. Council, Inc. v. EPA, 937 F.2d 641, 643 (D.C. Cir. 1991), those emissions consist almost entirely of fugitive emissions and, thus, the surface coal mines do not, by themselves, constitute major emitting facilities. The EPA has provided, however, that fugitive emissions must be counted when calculating the PTE air pollutants for a coal processing plant. See 40 C.F.R. §§ 51.166(b)(1)(iii)(aa), 52.21(b)(1)(iii)(aa). Therefore, a coal processing plant that has a PTE more than 250 tpy of any air pollutant, the calculation of which includes fugitive emissions, is considered a major emitting facility. Moreover, where the coal processing plant meets this threshold and is a part of a mining operation that also consists of a surface coal mine, the entire mining operation is considered a major emitting facility. Accordingly, the PSD provisions and construction permit requirement would apply to the entire mining operation, including the surface coal mine.

Further, in addition to the PSD provisions' permitting requirements, generally applicable NSPS have been established for coal processing plants that process more than 200 tons of coal per day. These regulations are contained in Subpart Y—Standards of Performance for Coal Preparation and Processing Plants, 40 C.F.R. pt. 60. Among the Subpart Y requirements, an open storage coal pile in a coal processing plant must have a fugitive dust control plan. 40 C.F.R. § 60.254(c). The parties agree that CCMC's coal processing plant is subject to Subpart Y; however, they dispute which portions of CCMC's operations constitute a part of the coal processing plant. This is of critical importance because what portions of the operation are part of the coal processing plant dictates which portions are subject to Subpart Y NSPS and are included in calculating the major source PTE air pollutants threshold. In short, those parts of the mining operation that are considered within the coal processing plant are subject to permitting and dust control requirements simply because the regulations distinguish between coal processing plants and surface coal mines.

This framework and these regulations are carried out through a cooperative relationship between the EPA and individual states. The CAA delegates to states the primary responsibility for carrying out its purposes, which states accomplish by enacting a State Implementation Plan (SIP), which details how a state plans to comply with the provisions of the CAA. See 42 U.S.C. § 7410. A state's SIP is subject to EPA approval. North Dakota has an EPA-approved SIP, which includes administration of PSD provisions. The practical effect of this set-up is that North Dakota, through the NDDOH, is the permitting authority for new facilities that require a major source construction permit under the CAA. In addition to the CAA requirements, North Dakota has adopted regulations that impose their own requirements on new facilities that do not qualify as major sources under the CAA, including mandating that these facilities obtain a minor source permit prior to construction. See N.D. Admin. Code § 33.1-15-14-03. Both the major and minor source permitting decisions are handled by the NDDOH.

CCMC mines lignite at the Coyote Creek Mine. Lignite is a low-grade coal, which is typically consumed near the mine based on the economics of lignite transportation. Coyote Creek Mine consists of two major components: the mine face itself and the coal processing facility. The mine face is connected to the coal processing facility by a private hauling road, which covers the several mile distance between the two locations. After coal is mined, trucks transport it across the haul road to the coal processing facility, where it is unloaded onto an open storage coal pile at the coal processing facility. The coal pile covers an area of roughly 8 acres and can store approximately 180,000 tons of raw, unprocessed coal and abuts a retaining wall that separates the coal pile from the crushing equipment within the coal processing facility. Near the top of the retaining wall is an apron feeder, which is where the coal is fed into the crushing equipment. The apron feeder is located a significant distance off the ground, but is rarely visible because it is typically covered by the top of the coal pile. Coal is usually drawn into the apron feeder with the assistance of gravity, but in the circumstances where the apron feeder is visible because the coal pile is not high enough to cover it, CCMC uses bulldozers to push the coal directly into the

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.