BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	PETITION NOS. VIII-2019-1 & VIII-2020-8
COYOTE STATION POWER PLANT MERCER COUNTY, NORTH DAKOTA PERMIT NO. T5-F84011, RENEWAL NO. 4	)	ORDER RESPONDING TO PETITIONS REQUESTING OBJECTION TO THE ISSUANCE OF TITLE V OPERATING PERMIT
ISSUED BY THE NORTH DAKOTA DEPARTMENT OF ENVIRONMENTAL QUALITY	)	

ORDER DENYING PETITIONS FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received two petitions dated January 15, 2019, and July 23, 2020 (collectively the Petitions) from Casey Voigt and Julie Voigt (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petitions request that the EPA Administrator object to operating permit No. T5-F84011, Renewal No. 4 (the Permit) issued by the North Dakota Department of Environmental Quality (NDDEQ) to the Coyote Station Power Plant (Coyote Station or the power plant) in Mercer County, North Dakota. The Permit was issued pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and the North Dakota Administrative Code (N.D.A.C.) Chapter 33.1-15-14. *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petitions and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further below, the EPA denies the Petitions requesting that the EPA Administrator object to the Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 766la(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 C.F.R. part 70. The EPA granted full approval of North Dakota's title V operating permit program in 1999. 64 Fed. Reg. 32433 (June 17, 1999). This program, which became effective on August 16, 1999, is codified in N.D.A.C. sections 33.1-15-14-06, 33.1-15-23-04, and 33.1-15-21.

All major stationary sources of air pollution and certain other sources are required to apply for and operate in accordance with title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. CAA §§ 502(a), 503, 504(a), 42 U.S.C. §§ 7661a(a), 7661b, 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate testing, monitoring, recordkeeping, reporting, and other requirements to assure compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* CAA § 504(c), 42 U.S.C. § 7661c(c). One purpose of the title V program is to "enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." 57 Fed. Reg. at 32251. Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the source's emission units and for providing adequate testing, monitoring, recordkeeping, and reporting to assure compliance with such requirements.

B. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to their EPA-approved title V programs. Under CAA § 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations found at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of the EPA's 45-day review period, petition the Administrator to object to the permit. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

Each petition must identify the proposed permit on which the petition is based and identify the petition claims. 40 C.F.R. § 70.12(a). Any issue raised in the petition as grounds for an objection must be based on a claim that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements under part 70. 40 C.F.R. § 70.12(a)(2). Any arguments or claims the petitioner wishes the EPA to consider in support of each issue raised must generally be contained within the body of the petition.[1] *Id.*

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); *see also* 40 C.F.R. 70.12(a)(2)(v).

[1] If reference is made to an attached document, the body of the petition must provide a specific citation to the referenced information, along with a description of how that information supports the claim. In determining whether to object, the Administrator will not consider arguments, assertions, claims, or other information incorporated into the petition by reference. *Id*.

In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).[2] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.[3] The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator's part to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)).[4] When courts have reviewed the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g.*, *MacClarence*, 596 F.3d at 1130–31.[5] Certain aspects of the petitioner's demonstration burden are discussed below. A more detailed discussion can be found in the preamble to the EPA's proposed petitions rule. *See* 81 FR 57822, 57829–31 (August 24, 2016); *see also In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether a petitioner has provided the relevant analyses and citations to support its claims. For each claim, the petitioner must identify (1) the specific grounds for an objection, citing to a specific permit term or condition where applicable; (2) the applicable requirement as defined in 40 C.F.R. § 70.2, or requirement under part 70, that is not met; and (3) an explanation of how the term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under part 70. 40 C.F.R. § 70.12(a)(2)(i)–(iii). If a petitioner does not identify these elements, the EPA is left to work out the basis for the petitioner's objection, contrary to Congress's express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("[T]he Administrator's requirement that [a title V petitioner] support his allegations with

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[2] *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (*NYPIRG*).

[3] *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *cf. NYPIRG*, 321 F.3d at 333 n.11.

[4] *See also Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word 'shall' . . . plainly mandates an objection *whenever* a petitioner demonstrates noncompliance." (emphasis added)).

[5] *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

legal reasoning, evidence, and references is reasonable and persuasive.").[6] Relatedly, the EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard. *See, e.g.*, *In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (January 15, 2013).[7] Also, the failure to address a key element of a particular issue presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the permit. *See, e.g., In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).[8]

Another factor the EPA examines is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. Petitioners are required to address the permitting authority's final decision and final reasoning (including the state's response to comments) where these documents were available during the timeframe for filing the petition. 40 C.F.R. § 70.12(a)(2)(vi); *see MacClarence*, 596 F.3d at 1132–33.[9] Specifically, the petition must identify where the permitting authority responded to the public comment and explain how the permitting authority's response is inadequate to address (or does not address) the issue raised in the public comment. *Id*.

The information that the EPA considers in making a determination whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. 40 C.F.R. § 70.13. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis'); any comments the permitting authority received during the public participation process on the draft permit; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; and all materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2). *Id.* If a final permit and a statement of basis for the final permit are available during the agency's

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[6] *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (September 21, 2011) (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring); *In the Matter of Portland Generating Station*, Order on Petition at 7 (June 20, 2007) (*Portland Generating Station Order*).

[7] *See also Portland Generating Station Order* at 7 ("[C]onclusory statements alone are insufficient to establish the applicability of [an applicable requirement]."); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (April 20, 2007); *Georgia Power Plants Order* at 9–13; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (March 15, 2005).

[8] *See also In the Matter of Hu Honua Bioenergy*, Order on Petition No. IX-2011-1 at 19–20 (February 7, 2014); *Georgia Power Plants Order* at 10.

[9] *See also, e.g.*, *Finger Lakes Zero Waste Coalition v. EPA*, 734 Fed. App'x *11, *15 (2d Cir. 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 14, 2012) (denying a title V petition issue where petitioners did not respond to the state's explanation in response to comments or explain why the state erred or why the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying a title V petition issue where petitioners did not acknowledge or reply to the state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (January 8, 2007) (*Georgia Power Plants Order*) (denying a title V petition issue where petitioners did not address a potential defense that the state had pointed out in the response to comments).

review of a petition on a proposed permit, those documents may also be considered when making a determination whether to grant or deny the petition. *Id*.

III. PERMIT HISTORY BACKGROUND

A. The Coyote Station Power Plant

The Coyote Station power plant is operated by Otter Tail Power Company and jointly owned by Montana-Dakota Utilities Company, Northwestern Public Service Company, Northern Municipal Power Agency (Minnkota Power Cooperative, Inc.), and Otter Tail Power Company. Coyote Station generates electricity from the combustion of lignite coal in a single Babcock and Wilcox cyclone-fired boiler.

Coyote Station receives its coal from a nearby surface coal mine operated by the Coyote Creek Mining Company, LLC (CCMC), a wholly owned subsidiary of the North American Coal Corporation. After mining, lignite coal is transported via truck over a haul road to a storage pile and coal crushing equipment operated by the mine. The crushed coal is then transported by a conveyor belt that runs between the mine and the Coyote Station power plant; this conveyor belt is jointly owned by the mine and power plant. Coal received by the power plant is further stored, processed, and eventually burned as fuel. The relationship between the mine and power plant is further governed by the terms of a contract termed the Lignite Sales Agreement (LSA),[10] as discussed further below.

B. Permitting History

To date, NDDEQ and its predecessor, the ND Department of Health, NDDH, have treated the power plant and associated mine as separate sources for permitting purposes. *See infra* Section IV.B. of this order. The permitting action at issue involves the renewal of the title V permit for the Coyote Station power plant which solely authorizes the operation of the power plant. However, because both Coyote Station and the CCMC mine are implicated by the Petitions, this section briefly addresses the permitting history of both the power plant and the mine.

Coyote Station began operation in 1981 and has operated under a title V permit since 1998, which was last renewed, and modified, in 2013. Construction of the CCMC mine was authorized and the mine began operation in 2015 under minor source Permit No. PTC15001.[11]

Coyote Station's current renewal permit—Permit No. T5-F84011, Renewal No. 4—is the first permit action for the power plant since the mine's construction. Based on a permit application dated September 28, 2017, NDDH published notice of a draft title V permit for the power plant on June 12, 2018. The draft permit was subject to a public comment period that ran from June

[10] Lignite Sales Agreement between Coyote Creek Mining Co., LLC and Otter Tail Power Co., Northern Municipal Power Agency, Montana-Dakota Utilities Co., and Northwestern Corp. (October 10, 2012) (2020 Petition Ex. L), available at https://www.sec.gov/Archives/edgar/data/1466593/000118811213000505/ex10-j.htm. Due to complications associated with the pagination of Exhibit L, the EPA's Order refers to individual sections and paragraphs of the LSA, as opposed to the page numbers provided by the Petitioners.

[11] Considered alone, the mine is a minor source for both NSR and title V purposes and does not have a title V permit.

22, 2018, until July 21, 2018; on July 21, 2018, the Petitioners submitted public comments. Operators of both the power plant and the mine separately submitted comments reacting to those of the Petitioners. On October 2, 2018, NDDH transmitted a proposed title V permit to the EPA (the 2018 Proposed Permit), along with a letter requesting the EPA's input on the state's position that the power plant and mine should be considered separate sources. The EPA responded by letter to the state's inquiry on November 14, 2018 (discussed in Section IV.B. of this order). On January 15, 2019, the Petitioners filed a petition asking the EPA to object to the issuance of the October 2018 proposed permit (the 2019 Petition).

By letter dated March 11, 2019, NDDH withdrew the 2018 Proposed Permit in order to complete its permit record and address any applicable public comments. On April 6, 2020, NDDEQ transmitted another proposed permit to the EPA (the 2020 Proposed Permit), accompanied by its written response to public comments (RTC) and a memorandum explaining the state's decision to treat the power plant and mine as separate sources. The EPA did not object to the 2020 Proposed Permit, and NDDEQ issued a final renewal permit to the power plant on May 27, 2020 (the Final Permit). The Petitioners filed a second petition asking the EPA to object to the issuance of the 2020 Proposed Permit on July 23, 2020 (the 2020 Petition).

C. Timeliness of Petitions

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. CAA § 505(b)(2). The EPA's 45-day review period of the 2018 Proposed Permit expired on November 16, 2018. Thus, any petition seeking the EPA's objection to the 2018 Proposed Permit was due on or before January 15, 2019. The 2019 Petition (challenging the 2018 Proposed Permit) was dated and received on January 15, 2019, and, therefore, was timely filed. However, the 2018 Proposed Permit upon which this first petition was based was subsequently withdrawn in March 2019. Moreover, in April 2020, NDDEQ provided an updated version of the proposed permit for the EPA's review, and in July 2020, the Petitioners filed a second, updated petition asking the EPA to object to the 2020 Proposed Permit (which alleges essentially the same claims as the 2019 Petition). Accordingly, the 2019 Petition is denied as moot.[12]

The EPA's 45-day review period of the April 2020 proposed permit expired on May 24, 2020. Thus, any petition seeking the EPA's objection to the April 2020 version of the permit was due on or before July 24, 2020. The 2020 Petition requesting that the EPA object to this version of the permit was dated and received on July 23, 2020, and, therefore, was timely filed. The EPA's determination presented in Section V of this order below relates to the 2020 Petition.[13]

[12] *See, e.g.*, *In the Matter of South Louisiana Methanol, LP*, Order on Petition Nos. VI-2016-24 & VI-2017-14 at 7–8 (May 29, 2018).

[13] Given the similarities between the two Petitions, the EPA's response to the 2020 Petition effectively resolves all claims raised in the 2019 Petition as well.

IV. SOURCE DETERMINATION BACKGROUND

A. Overview of the EPA's Source Determination Framework

Under the federal rules governing both the title V operating permit program and New Source Review (NSR) preconstruction permitting program, pollutant-emitting activities are considered part of the same "major source" or "stationary source" if they: (1) are located on one or more contiguous or adjacent properties; (2) are under the control of the same person (or persons under common control); and (3) belong to the same industrial grouping (2-digit "Major Group" Standard Industrial Classification (SIC) code). *See* CAA § 501(2) (title V statutory definition); 40 CFR §§ 70.2 and 71.2 (title V regulations); *id*. §§ 52.21(b)(5) and (6), 51.165(a)(1)(i) and (ii), and 51.166(b)(5) and (6) (NSR regulations). NDDEQ's permitting regulations generally mirror the EPA's regulations in relevant part. *See* NDAC 33.1-15-14-06.1.q (title V regulations); *id*. 33.1-15-15-01.2 (incorporating by reference EPA's relevant NSR regulations).[14] Determining which activities should be considered part of a single source is often referred to as a "source determination." The second criteria—often referred to by the shorthand "common control"—is most relevant to the 2020 Proposed Permit and the 2020 Petition.

The CAA and both the EPA and NDDEQ's Title V and NSR regulations do not define "control" or "common control" in the context of source determinations. Acknowledging that "[c]ontrol can be a difficult factual determination, involving the power of one business entity to affect the construction decisions or pollution control decisions of another business entity," the EPA has long recognized that common control determinations should be made on a case-by-case basis. 45 Fed. Reg. 59874, 59878 (September 11, 1980). The EPA has provided guidance concerning the agency's interpretations of the relevant regulatory text and its policies concerning how questions of common control should be approached. These interpretations and policies are not binding on states administering EPA-approved permitting programs—such as North Dakota, 64 Fed. Reg. 32433 (June 17, 1999)—but they may be instructive. A short summary of these interpretations and policies follows.

Prior to 2018, the EPA's historical positions related to common control were contained in multiple guidance memoranda and source-specific advisory letters. However, in the April 2018 *Meadowbrook Letter*,[15] the EPA reevaluated these past positions and articulated a revised framework for assessing common control.[16] In the *Meadowbrook Letter*, the EPA explained that

[14] The relevant North Dakota regulations were previously codified in Chapter 33, instead of Chapter 33.1, but were not changed by the recodification or the associated shift in North Dakota's administration of the operating permit program from NDDH to NDDEQ in any way pertinent to this Order.

[15] Letter from William L. Wehrum, Assistant Administrator, EPA Office of Air and Radiation, to the Honorable Patrick McDonnell, Secretary, Pennsylvania Department of Environmental Protection (April 30, 2018), available at https://www.epa.gov/sites/production/files/2018-05/documents/meadowbrook_2018.pdf ("*Meadowbrook Letter*").

[16] In the *Meadowbrook Letter* and subsequent letters that followed, the EPA signaled a shift away from certain prior policies related to common control, replacing these policies with a new, narrower interpretation of "control." *See Meadowbrook Letter* at 3–11. The EPA no longer follows the previously-employed "multi-factor" approach for evaluating common control, and has explicitly rejected other considerations that informed the agency's prior decisionmaking. For example, in the *Meadowbrook Letter*, the EPA took the position that dependency relationships should not be presumed to result in common control. *Id*. at 10. Similarly, the EPA reiterated that questions concerning whether one entity is a "support facility" for another entity are directly accommodated in the "industrial

assessments of control should focus on "the power or authority of one entity to dictate decisions of the other that could affect the applicability of, or compliance with, relevant air pollution regulatory requirements." *Meadowbrook Letter* at 6. The EPA noted that control may be established by common ownership or managerial authority, contractual obligations, or other arrangements. *Id*.

The EPA distinguished the ability to explicitly or implicitly dictate decisions (sufficient for control) from the ability to merely influence decisions (not sufficient for control). Specifically, the "EPA interprets 'control' to exist at the point where one entity's influence over another entity effectively removes the autonomy of the controlled entity to decide whether or how to pursue a particular course of action." *Id*. at 7.

Additionally, in the *Meadowbrook Letter*, the EPA noted its intent to focus on "whether the control exerted by one entity would determine whether a permitting requirement applies or does not apply to the other entity, or whether the control exerted by one entity would determine whether the other entity complies or does not comply with an existing permitting requirement." *Id*. at 8. The EPA provided some examples of potentially relevant considerations, including "the power to direct the construction or modification of equipment that will result in emissions of air pollution; the manner in which such emission units operate; the installation or operation of pollution control equipment; and monitoring, testing, recordkeeping, and reporting obligations." *Id*. at 9–10.

Subsequent source-specific letters further clarify the EPA's approach to common control. In the October 2018 *Ameresco Letter*,[17] the EPA provided guidance for evaluating whether multiple entities should be considered "persons under common control" based on the scope of activities that are subject to joint "control."[18] The EPA explained that "where one entity . . . exerts enough control over a substantial portion of the other's relevant operations," permitting authorities could consider these entities to be "persons under common control." Ameresco Letter at 6. On the other hand, "where the overlap of control is limited to only a small portion of otherwise separate operations, EPA does not believe such entities should themselves be considered 'persons under common control' simply by virtue of this limited nexus." *Id*. In the latter case—where multiple entities exert some level of control over a relatively limited aspect of their respective operations—the EPA considers it reasonable for permitting authorities to allocate that shared activity to only one of the sources for permitting purposes. *Id*. at 8.

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grouping" prong of the source determination framework, not the "common control" prong. *Id*. In the July 2019 *Ocean County Landfill Letter*, the EPA indicated that it would no longer employ a rebuttable presumption of common control in cases where one entity co-locates on another entity's property. Letter from Anne L. Idsal, Assistant Administrator, EPA Office of Air and Radiation, to the Honorable Catherine McCabe, Commissioner, New Jersey Department of Environmental Protection, (July 12, 2019) (*Ocean County Landfill Letter*), available at *https://www.epa.gov/sites/production/files/2019-08/documents/ocean_county_landfill2019.pdf*.

[17] Letter from Anna Marie Wood, Director, Air Quality Policy Division, EPA Office of Air Quality Planning and Standards, to Gail Good, Director, Bureau of Air Management, Wisconsin Department of Natural Resources (October 16, 2018) (*Ameresco Letter*), *available at https://www.epa.gov/sites/production/files/2018-10/documents/ameresco_jcl_letter.pdf*.

[18] Determining whether two entities are "persons under common control" is important, because if so, *all* the pollutant-emitting activities controlled by *either* entity would be "under the control of . . . persons under common control" and could therefore be considered part of the same source (provided the other two source determination criteria are met). *See Ameresco Letter* at 5–6.

In the July 2019 *Jaques Letter*,[19] the EPA further clarified its view that control can be established by the ability to dictate higher-level decisions impacting compliance or applicability of air permitting requirements. *Jaques Letter* at 4. That is, the EPA does not consider day-to-day operational control necessary to establish common control. *Id*.

The EPA has provided recommendations for permitting authorities that choose to implement these new positions. In both the July 2019 *Ocean County Landfill Letter* and the February 2020 *Eastman Letter*,[20] the EPA explained:

> [A]s a general matter, the guidance contained in EPA's recent documents concerning common control was intended to assist with future source determinations and was not intended to prompt permitting authorities to revisit prior permitting decisions. EPA does not believe it would be appropriate in most circumstances for permitting authorities to re-evaluate prior source determinations based solely on the change in EPA policy on which the [incoming source determination request] relies, especially where, as is the case with the [incoming] request, relevant facts have not changed.

Ocean County Landfill Letter at 2; *Eastman Letter* at 2–3. Relatedly, in the *Eastman Letter*, the EPA further adopted the position first articulated in related guidance[21] concerning the "contiguous or adjacent" prong of the source determination inquiry:

> [T]here may be circumstances where it could be appropriate (and not unduly burdensome) for a permitting authority to re-evaluate a prior source determination, such as where relevant facts change that impact whether the three criteria are met. If a permitting authority does revisit a prior source determination (e.g., based on changed facts), EPA recommends that such a re-evaluation apply prospectively to future permitting actions and not retroactively to permitting actions that have been completed. Therefore, in most circumstances, EPA does not think it would be appropriate to revisit or revise previously-issued final permit actions that were based on a reasonable application of regulatory requirements and then-existing policies to a given set of facts.

Eastman Letter at 3 (quoting Adjacent Guidance Memorandum at 9–10).

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[19] Letter from Carl Daly, Acting Director, Air and Radiation Division, EPA Region 8, to Danny Powers, Air Quality Program Manager, Southern Ute Indian Tribe (July 23, 2019) (*Jaques Letter*), available at *https://www.epa.gov/sites/production/files/2019-10/documents/jaques2019.pdf*.

[20] Letter from Christina Fernandez, Director, Air and Radiation Division, EPA Region III, to Brett A. Sago, Director, HSE Legal Services, Eastman Chemical Company (February 12, 2020) (*Eastman Letter*), available at *https://www.epa.gov/sites/production/files/2020-02/documents/eastman_response.pdf*.

[21] Memorandum from Anne L. Idsal, Acting Assistant Administrator, EPA Office of Air and Radiation, to EPA Regional Administrators, Interpreting "Adjacent" for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas (November 26, 2019) (Adjacent Guidance Memorandum), available at *https://www.epa.gov/sites/production/files/2019-11/documents/adjacent_guidance.pdf*.

B. History of Source Determinations for Coyote Station and the CCMC Mine

Prior to the mine's construction, CCMC requested that NDDH determine whether the mine should be considered part of the same stationary source as the existing Coyote Station power plant. In a memorandum dated April 11, 2013,[22] NDDH determined that the two facilities are to be considered separate sources for purposes of NSR, title V, and CAA section 112 air toxics purposes. This determination was based on NDDH's conclusion that the mine and power plant are not located on contiguous or adjacent properties (the mine and power plant were planned to be located on properties over three miles apart, with the property between them not controlled by either party). April 2013 Source Determination at 1, 3. Following further analysis, NDDH additionally noted that the mine and power plant "do not appear to be under common control and it is unclear if the two sources should be considered under the same SIC code." *Id*. at 3. Following the above-described source determination, NDDH issued a minor NSR permit to the mine on January 7, 2015. Issuance of this minor NSR permit did not include public notice or the opportunity for the public to comment.[23]

When NDDH released the draft title V renewal permit for the power plant in 2018, the Petitioners submitted comments challenging the state's decision to treat the power plant and mine as separate sources. *See* 2020 Petition Ex. B. The Petitioners' public comments largely mirror the arguments presented in the Petitions, which are discussed more fully below. In sum, the public comments contended that the power plant and mine should be considered a single source because (1) they are located on contiguous or adjacent properties, (2) they are under the common control of Coyote Station, and (3) they should be assigned the same SIC code. *See id*.[24]

Following NDDH's receipt of these public comments—as well as comments from the operators of both the power plant and the mine responding to the Petitioners' comments—NDDH transmitted to the EPA a letter dated October 2, 2018[25] addressing whether the operations are under common control. In this letter, NDDH cited the EPA's revised guidance contained in the *Meadowbrook Letter*, and stated:

> [I]t is apparent to the Department that the CCMC mine and the Coyote Station are not under "common control" as the owners of the Coyote Station do not have authority to dictate decisions that could affect the applicability of, or compliance with, relevant air pollution regulatory requirements for the CCMC mine. For example, the CCMC mine is subject to a fugitive dust control plan and it is the sole responsibility of CCMC to demonstrate compliance with the plan.

[22] Memorandum from Craig D. Thorstenson, NDDH, to File of Coyote Creek Mining, LLC, Re: Stationary Source Determination (April 11, 2013) (April 2013 Source Determination) (included within 2020 Petition Ex. C).
[23] Email from Craig D. Thorstenson, NDDH, to Becky Osborn, Baumstark Braaten Law Partners (July 20, 2015) (2020 Petition Ex. H).
[24] These public comments were based in part on new information concerning the relationship between the two entities that NDDH did not previously consider during its 2013 Source Determination, including information related to the location of CCMC's coal processing equipment and the terms of the LSA between Coyote Station and CCMC.
[25] Letter from Craig D. Thorstenson, NDDH, to Patrick Wauters, EPA Region 8 (October 2, 2018) (October 2018 Source Determination Request Letter) (included within 2020 Petition Ex. E).

October 2018 Source Determination Request Letter at 2. NDDH did not provide further analysis, but instead "request[ed] EPA's position as to whether the CCMC mine and the Coyote Station are to be considered under 'common control' for air quality permitting purposes" as part of the EPA's review of the Coyote Station title V renewal permit *Id*.

The EPA responded by letter dated November 14, 2018.[26] The EPA first noted that "Given that North Dakota's title V and NSR programs have been approved by the EPA, NDDH has primary responsibility to make this determination based on its EPA-approved rules, and this letter does not constitute a source determination by the EPA regarding Coyote Station or CCMC." November 2018 EPA Letter at 1. In responding to the state's request for input, the EPA urged the state to consider the relevance of certain terms within the LSA that governs the interactions between the two companies. Specifically, the EPA noted:

> Public commenters identified certain contract terms that provide Coyote Station the authority to disapprove and potentially modify activities related to CCMC's annual mine plans and capital expenditures. *See, e.g.*, [LSA] Sections 5.2.1, 5.2.2, 5.2.3, 5.2.4, and Sections referencing Section 5, including Section 18 (October 10, 2012). Both Coyote Station and CCMC acknowledge Coyote Station's oversight of CCMC's mine plans and capital expenditures based on these contract terms, but assert that "[t]he provisions of these plans do not include any decisions with respect to permitting or environmental compliance" and assert that Coyote Station cannot "affect[] the applicability of air pollution regulatory requirements to CCMC or its compliance with them." Otter Tail Comments at 5; CCMC Comments at 4. In evaluating these statements, the EPA recommends that the NDDH consider whether Coyote Station's authority to disapprove or modify CCMC's mine plans could cause new air pollution regulatory requirements to become applicable to CCMC. The EPA also recommends that the NDDH consider whether Coyote Station's authority to disapprove CCMC's capital expenditures could cause CCMC to not comply with existing permitting obligations.

Id. at 2-3. The EPA also addressed the example provided in NDDH's October 2018 letter, noting:

> The one example provided by NDDH indicates that CCMC is solely responsible for compliance with certain fugitive dust control plan requirements. However, the fact that CCMC is responsible for compliance with these requirements does not speak to what the EPA would consider the more important issue: whether Coyote Station can dictate whether CCMC complies with these requirements or others.

Id. at 2 n.6.

NDDEQ provided its final RTC, along with an updated Stationary Source Determination memorandum, in a document dated April 2, 2020. 2020 Petition Ex. R. First, in its RTC, the NDDEQ noted that it had previously determined that the sources were separate in 2013, and that it had issued a preconstruction permit to the mine in 2015 based on this prior determination.

[26] Letter from Monica Mathews-Morales, EPA Region 8, to Terry O'Clair, NDDH (November 14, 2018) (November 2018 EPA Letter) (2020 Petition Ex. F).

NDDEQ goes on to say: "EPA has recently addressed whether such previous preconstruction permitting decisions should be reviewed in the context of Title V permitting. The Department agrees with and adopts EPA's reasoning articulated in *In the Matter of PacificCorp Energy Hunter Power Plant, Emery County, Utah*, Order on Pet. No. VIII-2016-4 (October 16, 2017)," (*Hunter Order*) wherein the EPA indicated that "the title V permitting process is not the appropriate forum to review the preconstruction permitting decisions." RTC at 1 (quoting Hunter Order at 8). ND concluded, "Thus, the Voigts' comments are not relevant here and the Department will not consider them." *Id*.

The EPA notes that the U.S. Court of Appeals for the Tenth Circuit issued an opinion on July 2, 2020, vacating the Hunter Order. *Sierra Club v. EPA*, 964 F.3d 882 (10th Cir. 2020). The Tenth Circuit denied petitions for rehearing on October 16, 2020. However, the ultimate disposition of that case is not directly relevant to this Order, as judicial review of this Order is not within the Tenth Circuit's jurisdiction.

In any case, the EPA does not agree that the reasoning set forth in the *Hunter Order* is relevant to the state's obligation to respond to significant comments asserting that Coyote Station and the CCMC mine should be considered a single source. *See* 40 C.F.R. § 70.8(a)(1). In *Hunter*, the EPA expressed the position that a "duly obtained" preconstruction permit that had been subject to public comment and an opportunity for judicial review established "applicable requirements" that could be incorporated into a title V permit without further review. *Hunter Order* at 10, 17–18. However, the circumstances underlying the *Hunter Order*—and a number of additional EPA petition orders in other jurisdictions that succeeded *Hunter*—were materially different than those in North Dakota's permit actions at issue here.

First, no public notice or opportunity to comment was provided on the minor NSR permit issued to the CCMC mine in 2015, and so the public was not able contest its issuance through the traditional avenues for challenging title I permits (judicial review through the state court system). *See Hunter Order* at 11 n.21 ("This interpretation applies to the facts of this Claim, where a permitting authority issued a source-specific title I preconstruction permit subject to public notice and comment and for which judicial review was available. The EPA is not considering at this time whether other circumstances may warrant a different approach."); *id*. at 16–19 (repeatedly noting the importance of notice and comment and an opportunity for judicial review). The current Coyote Station title V renewal permit was the first opportunity for the public to comment regarding whether the mine and power plant should be considered a single source (outside of the enforcement context). The EPA does not consider it appropriate to rely on the reasoning expressed in the *Hunter Order* in this situation, where no notice was provided of the underlying NSR permit action.

Second, the EPA's logic expressed in the *Hunter Order* does not naturally extend to decisions like source determinations that may evolve as factual circumstances change. Although the EPA has indicated that permitting authorities need not revisit prior permitting decisions based solely on changes in EPA policy, the agency has also explained that changes in relevant facts could warrant the reevaluation of source determinations in the context of subsequent permitting actions. *See, e.g.*, *Eastman Letter* at 2–4; Adjacent Guidance at 9–10. Here, as the Petitioners note, additional facts concerning the final location of the mine's coal processing operations

provide a basis to revisit the state's prior conclusion that the two operations would not be located on contiguous or adjacent properties, and the availability of the LSA has provided more information potentially relevant to an assessment of common control. Thus, it would not be appropriate to rely on the clearly outdated 2013 determination in the present permitting action.

Relatedly, the fact that NDDH apparently relied on this 2013 Source Determination in issuing the mine's 2015 minor NSR permit does not automatically excuse the state from considering related issues in the power plant's current title V renewal permit. Although the same three source determination criteria are included in North Dakota's (and the EPA's) NSR and title V regulations, determining the proper scope of a "stationary source" prior to a source's initial construction (or modification) for NSR purposes is a legally distinct inquiry from subsequently determining the scope of a "major source" when issuing (or modifying or renewing) a source's title V permit. Although the EPA would generally expect these two inquiries to align, there could be circumstances—such as where the operative regulations differ between the two permitting programs, or where the relevant facts change—under which these inquiries might appropriately be evaluated separately. Given the change in relevant facts here, the comments concerning whether Coyote Station and the CCMC mine should be considered a "major source" for title V permitting purposes were clearly relevant to Coyote Station's title V renewal permit.

Notwithstanding NDDEQ's position concerning the public comments, the state nonetheless explained in its RTC that "even if the [petitioners'] comments were relevant," the state "recently re-evaluated and confirmed its 2013 single source determination" based on the availability of additional information concerning the actual construction and operation of the mine and an evolution of ND's reasoning. RTC at 1. NDDEQ attached to its RTC a memorandum with this updated stationary source determination.[27]

In its updated April 2020 Source Determination, NDDEQ affirmed its conclusion that Coyote Station and the CCMC mine are not under common control and should be considered separate sources.[28] The state added additional analysis of the relationship between Coyote Station and the CCMC mine to that provided in its October 2018 letter to the EPA. NDDEQ described the relevant regulatory framework and recited portions of EPA's *Meadowbrook Letter* guidance. NDDEQ acknowledged that it is not bound to follow EPA's guidance, the state nonetheless decided to "complete[] this source determination following the guidance on common control (i.e., the power or authority to dictate decisions) and on who has the control over decisions that affect the applicability of, or compliance with, relevant air pollution regulatory requirements." April 2020 Source Determination at 2 (citing *Meadowbrook Letter* at 6–11). NDDEQ based its analysis on certain provisions of the LSA as well as its own observations of the sources.

First, NDDEQ briefly addressed whether Coyote Station has the ability to dictate decisions that could affect the applicability of new requirements at the mine. NDDEQ outlined various

[27] Memorandum from Craig Thorstenson and David Stroh, NDDEQ, to Files of Otter Tail Power Company – Coyote Station and Coyote Creek Mining, LLC – Coyote Creek Mine, Re: Stationary Source Determination (April 2, 2020) ("April 2020 Source Determination") (included within 2020 Petition Ex. R).

[28] Given that all three source determination criteria must be met in order to consider multiple operations as a single source, and given NDDEQ's conclusion that the power plant and mine were not under common control, the state declined to evaluate the other two criteria. April 2020 Source Determination at 4.

regulatory requirements to which the mine is subject, and specifically noted that the mine's air permits restrict the amount of coal that can be mined to 3.2 million tons annually. The state explained that any modifications to this annual production capacity must be approved by NDDEQ. *See id*. at 2–3. The state therefore concluded: "Considering the enforceable restrictions in place relating to operation of the [CCMC mine], [Coyote Station] does not exert control over decisions which directly affect the 'applicability of' air pollution requirements.'" *Id*. at 3.

Second, NDDEQ explored the potential for control over decisions that could affect compliance with existing regulatory requirements. ND quoted LSA ¶ 21, and interpreted this provision as "establish[ing] that [the CCMC mine] and [Coyote Station] are separate and have the independent responsibility to comply with all obligations and responsibilities and that neither entity would be liable for the acts and deeds of the other entity." *Id*.

Third, NDDEQ stated that LSA ¶ 21 is consistent with its experience with both facilities, including various types of compliance reports. The state noted that it "has not observed either [Coyote Station] or [CCMC] dictating decisions that affect the applicability of, or compliance with, relevant air pollution regulatory requirements of the other entity. The Department has not observed either facility even involving the other in air related activities." *Id*.

Fourth, NDDEQ addressed LSA ¶ 12.3(a), which covers "Periodic Inspections." According to NDDEQ, this provision "specifically states that the inspections are not for the purpose of controlling the operations of the mine." *Id*. at 4. NDDEQ concluded: "Controlling the operations of the mine, including the 'pollutant-emitting activities' is therefore the responsibility of [CCMC]." *Id*.

NDDEQ concluded by stating:

> Based on a complete review including the guidance provided by EPA in the Meadowbrook Letter and the information contained in the LSA (including sections 12 and 21), . . . the Department has determined that Otter Tail Power Company - Coyote Station does not exercise power or authority over [the CCMC mine] which could affect applicability of, or compliance with, relevant air pollution regulatory requirements. Therefore, it is determined that the facilities are not under "common control"; accordingly. Coyote Station and [CCMC] Mine shall continue to be considered separate sources with regard to all air quality regulations.

Id.

After the issuance of the Final Permit, NDDEQ transmitted a follow-up letter to the EPA on September 29, 2020, providing supplemental information regarding the state's April 2020 RTC and source determination.[29] NDDEQ stated that in the course of considering its source determination, it reviewed the entire LSA—including the provisions identified in the EPA's November 14, 2019 letter—but "only specifically addressed the provisions of the LSA that it concluded were relevant." Specifically, NDDEQ characterized the LSA sections that the EPA

[29] Letter from James L. Semerad, Director, NDDEQ Division of Air Quality, to Greg Sopkin, Regional Administrator, EPA Region 8 (September 29, 2020).

had identified as "potentially relevant" as being "irrelevant" in NDDEQ's view to assessing whether one entity has the power or authority to dictate the outcome of decisions of another entity related to pollutant emitting activities. Additionally, NDDEQ briefly noted its concurrence with the responses provided by Otter Tail Power Company and CCMC that more directly responded to the issues raised in public comments relating to the same LSA provisions identified in the EPA's November 2019 letter.

V. DETERMINATION ON CLAIM RAISED BY THE PETITIONERS

A. Petitioners' Claim

The Petitioners disagree with NDDEQ's conclusions and assert that Coyote Station and the CCMC mine should be considered a single source for title V purposes. July 2020 Petition at 2 (citing 40 C.F.R. § 70.2). Based on this assertion, the Petitioners claim that the Coyote Station title V permit is deficient because it does not include requirements purportedly applicable to the nearby CCMC coal mine and coal processing facility, including requirements under NSPS Subpart Y and fugitive dust control requirements. *Id*. at 1, 10, 18, 24 (citing CAA § 504). Additionally, because the Petitioners assert that the power plant and mine should have been considered a single source for NSR purposes when the mine was constructed, and because the newly constructed mine allegedly exceeded the PSD significance thresholds contained in 40 C.F.R. § 52.21(b)(23), the Petitioners also claim that the Permit is deficient because it does not include updated limitations supported by Best Available Control Technology determinations for the mine, the mine's coal processing plant, and the power plant. *Id*. at 1–2, 10, 18–19, 23–24.

To support their overarching claim that the power plant and mine should be considered a single source, the Petitioners address each of the three prongs of the source determination analysis required by the EPA's title V and PSD regulations. First, the Petitioners assert that the CCMC mine and Coyote Station are located on contiguous or adjacent properties. *Id*. at 10. Specifically, the Petitioners claim that the two facilities are physically connected by a co-owned conveyor belt, that Coyote Station owns the property upon which CCMC's coal processing facility is located, and that the remainder of the mine is located on one contiguous stretch of property. *Id*.

Second, the Petitioners assert that the mine and power plant are under the control of the same person (or persons under common control). *Id*. The Petitioners claim that Coyote Station exerts "complete contractual control" over the mine by virtue of a 25-year contract, the LSA. *Id*. at 1; *see id*. at 11–13. The Petitioners first address LSA provisions related to the preparation of an annual mining plan. CCMC must prepare an annual mining plan, which includes multiple elements. Coyote Station must then approve or disapprove the mining plan; if Coyote Station disapproves the plan and the two parties are unable to resolve their differences, then CCMC is required to "adopt such changes to the annual mining plan as requested" by Coyote Station. *Id*. at 11 (quoting LSA ¶ 5.2.3(c)). CCMC is prohibited from materially deviating from the annual mine plan. *Id*. The Petitioners also address an LSA provision that requires Coyote Station to approve all capital expenditures at CCMC. *Id*. (citing LSA ¶ 5.2.4(c)). The Petitioners assert that this provision would include all equipment that emits or controls air pollution. *Id*. at 11. The Petitioners argue that these two LSA provisions result in "control" under the guidance presented in the EPA's *Meadowbook Letter*. Specifically, the Petitioners claim that these LSA provisions

give Coyote Station "the authority to direct specific activities" of CCMC and "removes the autonomy" of CCMC. *Id*. at 13. The Petitioners further assert that Coyote Station's authority extends to equipment that emits air pollution, to air pollution control equipment, and to operating plans that impact air quality. *Id*.

The Petitioners also assert that Coyote Station is contractually obligated to reimburse CCMC for any fines arising from environmental violations at the mine, further indicating that they are a single source. *Id*. at 12.

In addition to contractual control, the Petitioners also claim that Coyote Station exerts "actual physical operational control" over the CCMC coal processing facility because both facilities coordinate operation of the jointly-owned conveyor belt that connects the CCMC coal processing facility with Coyote Station. *Id*. at 13. For example, among other things, the Petitioners allege that the Coyote Station control operator starts and stops the belt, which simultaneously starts and stops the coal crushing equipment at CCMC's processing facility. *Id*.

Third, the Petitioners assert that CCMC and Coyote Station should be assigned to the same major industrial grouping (2-digit SIC code). *Id*. at 14. The Petitioners assert that the mine exists for the sole purpose of providing, processing, and storing 100 percent of Coyote Station's coal and is therefore a "support facility" to the power plant that should be assigned the SIC code of the power plant. *See id*. at 14–18.

B. EPA's Response

For the following reasons, the EPA denies the Petitioners' request for an objection. The Petitioners have failed to demonstrate that the power plant and mine must be considered a single source, and, relatedly, that NDDEQ's decision to consider them separate sources in Coyote Station's title V renewal permit does not comply with the Act. Given that NDDEQ's decision is based on a determination that the two sources are not under common control, the EPA's response focuses on that issue alone.[30]

As explained in Section IV.A of this Order, source determinations—and particularly questions concerning common control—are inherently case-by-case decisions involving a highly fact-specific analysis by the relevant permitting authority. For these types of decisions, "the EPA generally will not substitute its judgment for that of" the relevant part 70 permitting authority. *In the Matter of Seneca Energy II, LLC*, Order on Petition No. II-2013-01 at 14 (December 9, 2016) (*Seneca Energy/ Seneca Meadows Landfill Order*). More specifically, in the context of addressing title V petitions related to common control, the EPA has explained:

> Because common control is often such a fact-specific inquiry involving a permitting authority's exercise of discretion, it is critical that a petitioner directly address the permitting authority's explanation of its common control analysis—not just the ultimate conclusion. In this case, that means the Petitioner must demonstrate that [the state] did not make its determination based on reasonable grounds supported

[30] *See supra* note 28.

> by the permit record—not merely that the Petitioner (or even the EPA) would have come to a different conclusion had it been the permitting authority instead.

Id. at 14–15 (footnotes omitted).

Here, the Petitioners advance a number of arguments in support of their opinion that the Coyote Station power plant and CCMC mine are under common control (in addition to the other two source determination criteria). Specifically, the Petitioners identify various contractual provisions—including those that the EPA identified in its November 2018 letter—and other operational arrangements that the Petitioners deem relevant to this inquiry.

However, the facts and arguments advanced by the Petitioners are insufficient to compel the outcome they seek. That is, the Petitioners have failed to demonstrate that the *only* proper outcome available to NDDEQ under its EPA-approved regulations—which, as explained above, do not define "common control" or prescribe a particular approach for evaluating common control—was a conclusion that the power plant and mine are under common control.

Given that NDDEQ is the permitting authority, it is NDDEQ's position that is most pertinent here. As discussed above, as an attachment to its RTC, NDDEQ provided a 4-page memorandum explaining the basis for its determination that Coyote Station and the CCMC mine are not under common control and should be considered separate sources. NDDEQ's rationale focused on different facts and analysis than those highlighted in the Petition; it appears the state determined these to be the most relevant facts and deemed those facts considered most relevant by the Petitioners to be irrelevant.[31]

The Petitioners' only discussion of the content of the state's source determination is the following statement contained in the "Background" section of the 2020 Petition: "This stationary source determination cherry-picked parts of the LSA and ignored almost all of the provisions cited by the Voigts herein." 2020 Petition at 9. Beyond this cursory dismissal, the Petitioners do not substantively address or attempt to rebut *any* of the lines of reasoning provided by NDDEQ. In neglecting to engage with the facts that NDDEQ deemed to be most relevant, the Petitioners have failed to demonstrate that NDDEQ's justification was unreasonable, or that its ultimate decision was contrary to the CAA.[32]

In summary, given that NDDEQ is the EPA-approved permitting authority, the issue before the EPA is not whether the Petitioners believe that Coyote Station and the CCMC mine are under common control. Rather, it is whether the Petitioners have *demonstrated* that it was unreasonable and incorrect for NDDEQ to conclude that these sources are not under common control. Given that NDDEQ has the discretion to determine, within reason, which facts are most relevant to determining common control, the Petitioners' exclusive focus on its own arguments—without any substantive engagement with NDDEQ's opposing analysis—does little to demonstrate that NDDEQ erred in concluding that the sources are not under common control. Accordingly, the Petitioners have failed to demonstrate that NDDEQ's decision to treat the mine and power plant

[31] *See supra* note 29 and accompanying text.
[32] *See supra* note 9 and accompanying text.

as separate sources in the Coyote Station title V renewal permit did not comply with the CAA. CAA § 505(b)(2).[33]

The EPA's determination that the Petitioners failed to meet their demonstration burden should not be read to reflect the EPA's agreement with any particular element of NDDEQ's reasoning. To the contrary—as is apparent from the EPA's November 2018 letter—the EPA would have considered different facts to be more relevant[34] and would have analyzed these facts differently than NDDEQ.

For example, although NDDEQ purports to rely on and apply the EPA's *Meadowbrook* framework for assessing common control, the EPA notes that NDDEQ's April 2020 Source Determination does not apply *Meadowbrook* in the manner intended by the EPA in a number of ways. First, it is not clear to the EPA how the current permit restrictions on the mine's annual production, and the requirement that NDDEQ approve any modifications to these permit restrictions, might relate to Coyote Station's ability to dictate activities impacting the applicability of new requirements at the mine. *See* April 2020 Source Determination at 2–3. The relevant inquiry under *Meadowbrook* would be whether Coyote Station can dictate that the mine take some course of action that would trigger the applicability of new requirements; this would necessarily be followed by a permit revision, approved by the permitting authority, to authorize and impose such newly-applicable requirements. Thus, the fact that the mine's current permit would have to be amended (with such amendment approved by NDDEQ) before any new requirements might become applicable is self-evident and says little about the more relevant inquiry under *Meadowbrook*: whether Coyote Station has the authority to set this process in motion.

Second, NDDEQ's discussion concerning the ability of either entity to affect compliance with existing requirements—based largely on NDDEQ's interpretation of contract provisions that allocate liability for environmental compliance—also does not precisely align with *Meadowbrook*. *See* April 2020 Source Determination at 3. As the EPA previously explained in its November 2018 letter, "the fact that CCMC is *responsible* for compliance with these requirements does not speak to what the EPA would consider the more important issue: whether Coyote Station can dictate *whether* CCMC complies with these requirements or others." November 2018 EPA Letter at 2 n.6 (emphasis added).

Third, NNDEQ's experiences with and observations of the power plant and the mine (such as the lack of any perceived exercise of control) may certainly be relevant to the state's inquiry. *See* April 2020 Source Determination at 3. However, it is worth clarifying that under the

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[33] *See Seneca Energy/ Seneca Meadows Landfill Order* at 16 ("Critically, the Petitioner did not append to the Petition, cite, or otherwise address the substance of the NYSDEC's five-page rationale explaining its determination that these facilities are not under common control. . . . Instead of grappling with the [state's] analysis, the Petitioner makes its own affirmative argument about why the facilities are under common control—analyzing the facts as if the Petitioner was the permitting authority rather than addressing the reasonableness of the state's analysis. This failure to address the state's reasoning constitutes an independent reason that the Petition has not met its demonstration burden."); *see also supra* note 9 and accompanying text.

[34] For example, the EPA does not agree that the LSA provisions identified in the EPA's November 2018 letter are "irrelevant" to common control, as NDDEQ suggested in its September 2020 supplemental letter. *See supra* note 29 and accompanying text.

Meadowbrook framework, the EPA views the *power or authority* to dictate relevant decisions as sufficient (e.g., as provided by a contract); the actual *exercise* of control is not necessarily required to establish control. *See Meadowbrook Letter* at 6.

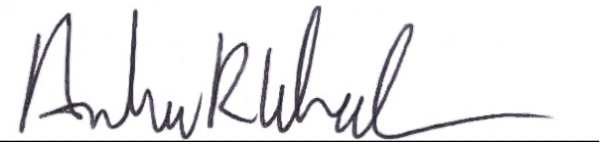
Fourth, NDDEQ's discussion of LSA ¶ 12.3(a) (concerning Coyote Station's apparent lack of authority to control the mine's operations via inspections) may also be relevant to the state's inquiry. *See* April 2020 Source Determination at 3–4. However, the EPA views the ability to dictate relevant higher-level decisions to be sufficient; the ability to control day-to-day operations is not necessarily required to establish control under the *Meadowbrook* framework. *Jaques Letter* at 4.

The EPA provides these illustrations primarily to clarify its own interpretations and policies that NDDEQ professed to adopt and apply. That discrepancies exist between the EPA's and NDDEQ's understanding of the EPA's policies does not impact the reasonableness of NDDEQ's decision *per se*, as NDDEQ is not legally required to follow EPA's guidance. NDDEQ was not obligated to give the same weight to the LSA provisions that the EPA (and the Petitioners) identified, nor to apply the EPA's analytical framework in the precise way the EPA (or the Petitioners) would have.[35] As the EPA-approved permitting authority responsible for both NSR and title V permitting of these facilities, it was NDDEQ's responsibility to determine whether Coyote Station and the CCMC mine were under common control based on its EPA-approved regulations, in light of the facts and analysis it deemed most relevant. Moreover, and more importantly to this Order, it was the Petitioners' responsibility to demonstrate that NDDEQ's decision—and its reasoning—did not comply with the CAA. It is not sufficient for the Petitioners to explain that they (or the EPA) might reasonably have concluded that the mine and the power plant are under common control. To meet their burden, the Petitioners needed to demonstrate that NDDEQ's April 2020 Source Determination, which the state prepared in response to the public comments raised by the Petitioners, was not based on reasonable grounds supported by the permit record. *MacClarence*, 596 F.3d at 1132–1133. Because the Petitioners have failed to do so, the 2020 Petition is denied.

VI. CONCLUSION

For the reasons set forth above and pursuant to CAA § 505(b)(2) and 40 C.F.R. § 70.8(d), I hereby deny the Petitions as described above.

Dated: January 15, 2021



Andrew R. Wheeler
Administrator

[35] *See Seneca Energy/ Seneca Meadows Landfill Order* at 17 ("The relevant question for this title V permit (which is a title V permit issued by [the state], not a PSD permit issued by the EPA) is whether the permitting authority's common control determination was reasonable, not whether [the state's] determination is identical to what the EPA would have determined if the agency itself had been the permitting authority.").