BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the matter of:	)	
	)	
Renewal of Title V Operating Permit No. T5-F84011	)	
	)	
Proposed by the North Dakota Department of Health for Issuance to Montana-Dakota Utilities, Co. North Western Public Service Company Northern Municipal Power Agency (Minnkota Power Cooperative, Inc.), and Otter Tail Power Company for operation of the Coyote Station	)	Permit No. T5-F84011

PETITION TO OBJECT TO NORTH DAKOTA DEPARTMENT OF HEALTH'S PROPOSED RENEWAL OF TITLE V OPERATING PERMIT FOR COYOTE STATION

This Petition is submitted by counsel for Casey Voigt and Julie Voigt, husband and wife, who live in Mercer County, North Dakota. The Voigts' house is located within Section 31 of Township 143N, Range 88W, next to Coyote Creek in the Coyote Creek Valley. The Voigts are cattle ranchers, and they have lived at this home for over forty years. The Voigts' home is approximately five miles from Coyote Station. Part of the Voigts' ranch—leased land—is approximately one mile from Coyote Station. Coyote Station is directly visible from the Voigts' property.

Pursuant to 42 U.S.C. § 7661d(b)(2) and 40 C.F.R. § 70.8(d), Casey Voigt and Julie Voigt ("the Voigts" or "Petitioners") hereby respectfully petition the Administrator of the U.S. Environmental Protection Agency ("EPA") to object to the North Dakota Department of Health's ("NDDH") proposed Renewal #4 of Title V Operating Permit No. T5-F84011 ("Permit") to Coyote Station. NDDH has proposed renewal and issuance of this Permit to Montana-Dakota Utilities, Co., North Western Public Service Company, Northern Municipal Power Agency (Minnkota Power Cooperative, Inc.), and Otter Tail Power Company ("Permittees"). Coyote Station is located in Sec. 10, S½ of S½ of Sec. 3 and W½ of Sec. 11, T143N, R88W, Mercer County, North Dakota. As explained in detail below, EPA must object to the renewal of the Permit because it does not include standards applicable to the newly constructed coal processing facility and coal mine immediately contiguous with and adjacent to Coyote Station, even though Coyote Station exerts complete contractual control (and sometimes, physical control) over these new facilities, these new facilities exist solely to supply Coyote Station, and some of these facilities are located on Coyote Station's real property. Also explained below, EPA must object to the renewal of the Permit because it is not supported by a Best Available Control Technology ("BACT") determination and BACT limits for Coyote Station, the coal processing facility, or the mine, even though Coyote Station's own documents show that emissions from the newly constructed coal

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mine and coal processing plant exceed the significance thresholds contained in 40 C.F.R. § 52.21(b)(23).

I. Procedural and Factual Background

Coyote Station is an approximately 427 MW mine-mouth lignite coal-fired power plant located in Mercer County, North Dakota. The Station is owned jointly by four partners: Otter Tail Power Company ("OTPCO"), Northern Municipal Power Agency, Montana Dakota Utilities Company, and NorthWestern Energy.[1] OTPCO is the operator of Coyote Station. As a mine-mouth power plant, Coyote Station is associated with a coal mine. In 2012, Coyote Station began working closely with North American Coal Corporation (a subsidiary of NACCO Industries, Inc.) to build a new mine for Coyote Station. The new mine was built in 2015 and is called "Coyote Creek Mine." The new mine is owned by Coyote Creek Mining Company, LLC ("CCMC"), which is a wholly owned subsidiary of North American Coal Corporation.

The procedural background for this Petition begins on February 13, 2013, when CCMC and Coyote Station submitted a joint request for a "determination from the NDDH that the proposed mine is a separate 'stationary source' from the Coyote Station."[2] In that letter, CCMC correctly explained that:

> Under Federal and North Dakota PSD regulations, a "stationary source" is defined as "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant."[3] "Building, structure, facility or installation" is defined as "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)…"[4]

In other words, three components are necessary: if this three-part test is met, then a facility is a single source and must be combined for purposes of Title V[5] permitting and PSD permitting.[6] The rest of the February 13, 2013 letter reviewed each of these three elements—common control, adjacency, and industrial grouping—and applied what CCMC presented as facts to request a determination from NDDH that the mine and the Station were separate facilities.

CCMC claimed in its February 13, 2013 letter that:

> The [proposed] mining operations proper are located on property owned or maintained through leases and at present are over three miles from and not

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[1] *See* https://www.otpco.com/about-us/how-we-generate-electricity/coal-fired-plants/coyote-station/ (last accessed January 15, 2019).

[2] Exhibit C, Single/Separate Source Request Letter (Feb. 13, 2013), at PG002. Please note that Exhibit C is a collection of ten attachments that the Voigts filed with their comments to NDDH on the Permit. Those documents are all bates numbered. All bates numbered footnote citations in this Petition will refer to the bates numbers with Exhibit C.

[3] *Id.* (citing 40 C.F.R. § 52.21(b)(5)).

[4] *Id.* (citing 40 C.F.R. § 52.21(b)(6)).

[5] 40 C.F.R. § 70.2.

[6] 40 C.F.R. § 52.21(b)(5).

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> contiguous or adjacent to Coyote Station's property as illustrated in Attachment 1. CCMC is currently evaluating different options for delivering the lignite from the mining operations proper to the Coyote Station…The lignite will likely be conveyed by belt conveyor across the property/permit boundary between the CCM and the Coyote Station with transfer of ownership of the lignite occurring during the conveyance.[7]

Attachment 1 to the February 13, 2013 letter shows CCMC and Coyote Station as two separate sources separated by several miles.[8]

NDDH concluded in a document entitled "Stationary Source Determination" dated April 11, 2013, that "[t]he CCM and the Coyote Station will be located on property which is over three miles apart with the property between the two sources not controlled by either party. It is determined that the two sources are not located on contiguous or adjacent properties."[9] NDDH's determination concluded:

> [t]he Coyote Creek Mine and the Coyote Station do not appear to be under common control and it is unclear if the two sources should be considered under the same SIC code. However, the two sources are not located on contiguous or adjacent properties. Since the two sources are not located on contiguous or adjacent properties, the sources are considered separate sources for purposes of determining whether the sources are subject to the requirements of the above programs."[10]

NDDH conducted this entire process without public notice or comment, even though NDDH expressly stated in its April 11, 2013 that it was making a "Stationary Source Determination" that affected the "Title V Operating Program" for Coyote Station.[11] NDDH never notified the public that it had received a separate source submittal request regarding Coyote Station. Nor did NDDH ever notify the public that it had actually made a final decision on this separate source determination.

On September 9, 2014, CCMC submitted a formal permit application to NDDH requesting a minor source permit to construct its Coyote Creek Mine.[12] The application only mentioned the stationary source determination in passing, once, on the first page.[13] Remarkably, however, the application described, in detail, a facility that was very different than what Coyote Station and CCMC had described in their original separate source request. Most importantly, that application included a large coal processing facility directly adjacent and physically connected to Coyote Station.[14] CCMC's air permit application also included maps and diagrams describing a private haulroad directly connecting the mine mouth to this coal processing facility, and a conveyor belt

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[7] *Id.* at PG009-010.
[8] *Id.* at PG012.
[9] *Id.* at PG016.
[10] PG018.
[11] PG015.
[12] PG019-PG046.
[13] PG022.
[14] *Id.* at PG023-024, PG045; *see also* PG058-065.

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connecting the processing facility to the Station. None of these facilities were mentioned in the February 13, 2013 letter from CCMC and Coyote Station to NDDH. Thus, while the map attached to the February 13, 2013 letter showed "CCMC's" facilities at least three miles away from Coyote Station (and made no mention of a large coal processing facility), the map attached to the September 9, 2014 application depicted Coyote Station as directly contiguous with and adjacent to "CCMC's" facilities, and indeed, the processing facility is located on land owned by Coyote Station as explained below.[15] For ease of readability, Petitioners will refer to the coal processing facility as "CCMC's facilities," but this is not a concession that there is a difference between designating them as CCMC's facilities versus Coyote Station's facilities.

The basic operation of the coal processing facility is as follows: CCMC haul trucks load coal at the mine pit and then drive on the private haul road to the coal processing facility where they unload their coal onto an approximately eight-acre open coal storage pile.[16] A large bulldozer shapes and maintains the coal pile and pushes coal from the pile into the crushing system. The coal first is processed/crushed to a size of 8" by a primary crusher (a feeder-breaker). Then, the coal is immediately processed by a secondary crusher to a size of 3", after which it falls onto a conveyor belt (CCMC and Coyote Station jointly own the conveyor belt in a detailed and carefully orchestrated arrangement described below).[17] The conveyor belt carries the processed coal over a fence that is in-between the coal processing plant and the rest of Coyote Station's facilities. The coal on this conveyor belt is then deposited at Coyote Station's coal barn.

Coyote Station's environmental manager (Mark Thoma) described the travel of this coal from the coal processing facility to Coyote Station's boilers as follows in sworn deposition testimony:

> Th[e] conveyor [carrying coal from the processing facility] travels to the Coyote Station live storage building. From that point the coal can either be stored in the live storage building. However, at some point that coal would be transferred out of there, out of the live storage building up to the transfer house, which is left and just a bit up from the live storage building.
>
> ...
>
> the transfer house is where the coal is reduced and sized from approximately 3 inches to three-quarter inches at which point the coal is conveyed into the Coyote Station. In the main boiler of the Coyote Station coal would then feed into bins which ultimately feed into the boiler ... the coal conveying at Coyote Station is subject to [NSPS] Subpart Y.[18]

A Google Earth satellite image showing these facilities is attached hereto at PG066. In that photograph, the coal processing facility with its eight-acre storage pile is clearly visible on the southwest corner of Coyote Station, as is the conveyor belt described by Mr. Thoma that directly

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[15] Compare PG012 with PG044-045; *see also* PG058-065.
[16] PG022-024.
[17] PG023.
[18] Exhibit I, Thoma Deposition, at pp. 55-57, attached hereto.

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connects this coal processing facility to Coyote Station's live storage building. This photograph was taken on May 2, 2016, which is shortly after the coal processing facility was constructed.

Importantly, Mr. Thoma's above statement shows that coal is crushed and reduced in size first at the coal processing facility (i.e., first to 8" and then to 3"). CCMC claimed those crushers as its own on its application for its permit to construct[19] and NDDH included them on CCMC's final permit to construct.[20] But then, Mr. Thoma explains that the coal is crushed again (to .75") by Coyote Station on the opposite side of the fence. Coyote Station claims these crushing operations as its own for air permitting purposes.[21] In other words, both CCMC and Coyote Station are conducting operations for the identical purpose of processing coal for the same facility (Coyote Station) on opposite sides of a chain-link fence, yet the two parties claim that these activities should be covered by separate air permits (with the fence demarcating the permit boundary). All of these processes on both sides of the fence by both CCMC and Coyote Station are regulated by the same NSPS (Subpart Y) as coal processing operations and equipment. 40 C.F.R. § 60.250 *et seq.*

Further, Coyote Station's owners own the land upon which the coal processing facility is located. As discussed later in this Petition, this is relevant to the adjacency and contiguousness of Coyote Station's and CCMC's facilities. Specifically, Coyote Creek Mine's only interest in this land is through an easement, which Coyote Station's partners (i.e., the Permittees) gave to Coyote Creek Mine for $1.00. Under North Dakota law, "[t]he major distinction between a lease and an easement or license is that a lease confers exclusive use and possession of the property against the world, including the landowner, whereas an easement or license merely grants a right or permission to nonexclusive use of the land for a specific, limited purpose." *Riverwood Commercial Park, LLC v. Standard Oil Co.*, Inc., 2005 ND 118, ¶ 11, 698 N.W.2d 478. A copy of the easement is attached hereto at PG058-065. This easement (like all North Dakota easements) retained ownership of the coal processing facility property in Coyote Station, is non-exclusive, and allowed Coyote Station to retain all rights to use the property concurrent with CCMC.

On December 10, 2014, while CCMC's application for its minor source permit to construct was still pending, Coyote Station submitted a "Notice of Planned Construction of New Conveyor" to NDDH.[22] The conveyor described in this letter is the conveyor that Mr. Thoma explained in his above statement connects CCMC's coal processing equipment with Coyote Station's coal barn. In other words, Coyote Station submitted this "Notice of Planned Construction of New Conveyor" to NDDH pursuant to Coyote Station's Title V permit, even though part of the conveyor is on mine property. CCMC and Coyote Station then later executed the following deal, which CCMC described in a deposition in sworn testimony:

> A. [The agreement] provided for the sale of the entire conveyor on the Coyote Station side of the fence, meaning structure, foundation, steel, supports, trusses, motors, motor control building. It provided also for that they [i.e., Coyote Station's

[19] PG023, PG038, PG040.
[20] Exhibit J, at p. 1 (listing primary and secondary crushers as emission units).
[21] Exhibit I, Thoma Deposition, at pp. 55-57, attached hereto (indicating that coal is crushed by Coyote Station at the transfer house after Coyote Station conveys it from its live storage building); *see also* Exhibit A, at p. 3 of Draft Title V Permit (listing coal transfer house and coal distribution buildings as emission units).
[22] PG057.

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partners] would own the entire conveyor belt, meaning the rubber portion of the conveyor on our side of the fence.

Q. And did it then provide that CCMC would own all parts of the conveyor on its side of the fence other than the belt?

A. Yeah. Yes.[23]

In other words, Coyote Station currently owns the "structure, foundation, steel support, trusses, motors, [and] motor control building" on its side of the chain-link fence, and CCMC owns these same conveyor belt facilities on CCMC's side of the chain-link fence. As for the actual *belt* of the conveyor itself, it rotates in a circle (like any conveyor) over and around the structure, foundation, and supports for the conveyor (including those owned by CCMC). The very nature of the belt as a moving transportation device means that CCMC and Coyote Station could not separate its ownership based upon its location. Under the agreement, Coyote Station owns the 100% of the belt. Again, this belt that is 100% owned by Coyote Station crosses over into what CCMC claims is "CCMC's" coal processing facility, and in fact, that belt goes directly *into* the coal processing facility.[24]

Regardless of the fact that CCMC's application for its minor source permit to construct contained materially different information than what it submitted to NDDH in its separate source request, on January 7, 2015, NDDH granted CCMC a minor source permit to construct.[25] The permit to construct made no mention of Coyote Station at all. Further, NDDH issued the final permit to construct to CCMC without ever providing the public with notice or seeking public comment. NDDH staff explained in an email that "[t]he Permit to Construct for the Coyote Creek Mine was not subject to the public participation procedures."[26] The entire process—beginning with the separate stationary source request and ending with issuance of CCMC's final permit to construct to CCMC—was conducted outside of public purview.

On September 28, 2017, the Permittees filed a Renewal Application for Coyote Station's Title V Permit with NDDH.[27] On June 12, 2018, NDDH prepared a draft permit based upon Coyote Station's Renewal Application and solicited public comment on the draft Permit.[28] On July 21, 2018, the Voigts timely filed public comments with NDDH in response to NDDH's request for comments on this Permit.[29] Attached to those comments, the Voigts included ten exhibits, which are combined for purposes of this Petition as Exhibit C. On July 24, 2018, NDDH e-mailed EPA staff to request that EPA suspend its review of the permit because the Petitioners' comments may result in changes to the draft permit and the need to start over with the Permit.[30] On October 2,

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[23] Exhibit G, Deposition Transcript of Coyote Creek Mining Company, pp. 30-31.
[24] PG044-45, PG066.
[25] Exhibit J, CCMC Permit to Construct dated 1/7/2015, attached hereto.
[26] Exhibit H, Email from NDDH dated July 20, 2015, attached hereto.
[27] *See* Exhibit A, Draft Title V Permit, Statement of Basis, and cover letter (cover letter references September 28, 2017 application date), attached hereto.
[28] *Id.*
[29] Exhibit B, Voigt Comments to NDDH on Coyote Station Permit, attached hereto.
[30] Exhibit D, attached hereto.

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2018, NDDH apparently changed course and sent a letter to EPA with the subject "Coyote Station Title V Permit to Operate EPA 45-day Review Period."[31] With that letter, NDDH transmitted the draft Permit to EPA for review (the Permit and statement of basis for the permit were enclosed).[32]

Based on the October 2, 2018 date, EPA's 45-day review period was open until November 16, 2018. *See* 42 U.S.C. § 7661d(b)(1). However, NDDH's letter to EPA requested that EPA "review and provide comments regarding the draft permit no later than November 17, 2018." *Id.* p. 2. On November 14, 2018, EPA responded by letter.[33] EPA did not object to the permit, but instead stated that EPA "urges the NDDH to consider" the issues raised by the Petitioners, that NDDH had not developed a sufficient record for EPA to review and therefore stated "[b]ased on the record currently before the EPA, however, it is unclear what facts the NDDH has considered.[34] The undersigned spoke via telephone with Patrick Wauters (EPA Region 8 Staff), who indicated that EPA does not intend to conduct further review of this permit and does not anticipate a further 45-day EPA review period.[35]

To date, EPA has not objected to the Permit. NDDH also has not issued a final version of the Permit to Coyote Station and the Permittees or issued a response to the Petitioners' comments.

This Title V Petition is timely submitted. EPA's 45-day review period closed on November 16, 2018. Petitioners are required to file this Petition with the Administrator within 60 days of the close of this 45-day review period, which is on January 15, 2019. *See* 42 U.S.C. § 7661d(b)(2) ("If the Administrator does not object in writing to the issuance of a permit pursuant to paragraph (1), any person may petition the Administrator within 60 days after the expiration of the 45-day review period specified in paragraph (1) to take such action."). This Petition is based on objections raised with reasonable specificity during the public comment period on the Permit.[36]

II. Argument

Under Federal and North Dakota PSD regulations, a "stationary source" is defined as "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant."[37]

> Building, structure, facility, or installation means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same first two digit code)

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[31] Exhibit E, attached hereto.
[32] *Id.* at p. 2.
[33] Exhibit F, attached hereto.
[34] *Id.* at p. 2.
[35] *See* Exhibit G, Declaration of JJ England, attached hereto, at paragraph 1.
[36] *See* Exhibits B and C, attached hereto (containing the Voigts' comments to NDDH on the Permit, along with ten combined exhibits filed with those comments).
[37] 40 C.F.R. § 52.21(b)(5).

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as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement.[38]

The definition of "stationary source" is nearly identical under the Title V program.[39] Here, Coyote Station and the Coyote Creek Mine are one stationary source for PSD and Title V purposes. Because the Permit does not include standards applicable to the newly constructed coal processing facility and coal mine, as well as updated BACT limits supported by BACT determinations for Coyote Station, the processing plant, and the mine, EPA must object to the issuance of this Permit.

a. Coyote Station and Coyote Creek Mine are adjacent and contiguous.

As already described in this Petition, Coyote Station and Coyote Creek Mine are adjacent and directly contiguous to one another. This is readily shown on satellite,[40] on CCMC's application for its permit to construct,[41] and through OTPCO staff's statements.[42] NDDH's determination that the facilities are not adjacent or contiguous is wrong. Coyote Station and Coyote Creek Mine are physically connected by a conveyor belt that connects CCMC's coal processing facility with Coyote Station. The base and foundation of the conveyor belt is owned by CCMC on CCMC's side of the fence[43] and by Coyote Station on Coyote Station's side of the fence.[44] The actual conveyor belt itself is owned by Coyote Station across the entire length of the conveyor belt (including the portion that receives coal from the secondary crusher).[45] Further, both Coyote Station and CCMC control the belt,[46] and when Coyote Station starts and stops the belt without first notifying the coal processing operator, this automatically starts and stops the primary and secondary crushers at "CCMC's" processing facility.[47] Further, Coyote Station owns the property upon which "CCMC's" coal processing facility is located.[48] The remainder of the Coyote Creek Mine (including the haul road that connects the mine face to the processing plant) is one contiguous stretch of property.[49] Therefore, the first element for Coyote Station and CCMC to be a single "facility or installation" is met because the two facilities are both "contiguous" and "adjacent."[50]

b. Coyote Station exerts both contractual and physical control over Coyote Creek Mine.

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[38] 40 C.F.R. § 52.21(b)(6).
[39] 40 C.F.R. § 70.2.
[40] PG066.
[41] PG044-PG045.
[42] Exhibit I, Thoma Deposition, at pp. 55-57, attached hereto.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] PG081-87, Deposition excerpt of coal processing facility operator Dewayne Lounsberry.
[47] *Id.* at PG087 ("if they shut the belt down, it will shut my crushers down").
[48] PG058-065 (easement indicating that Coyote Station's partners, i.e., the Permittees, own the land upon which the coal processing facility is located, and that CCMC operates that facility only under a non-exclusive easement); *see also* discussion *supra* at p. 5.
[49] *See* PG044.
[50] 40 C.F.R. § 52.21(b)(6)); 40 C.F.R. § 70.2.

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The second element, that the facilities must be "under the control of the same person (or persons under common control)" is also met here. Coyote Station has a twenty-five-year Lignite Sales Agreement ("LSA") with CCMC. Pursuant to the LSA, Coyote Station exerts complete control over Coyote Creek Mine. The LSA between Coyote Station and CCMC is available in its entirety (with pricing terms removed) to the public through filings with the SEC.[51] For ease of reading, the Petitioners filed an excerpt of that agreement with NDDH as an attachment to their comments.[52] The Agreement requires CCMC to submit an "annual mining plan" to Coyote Station every year.[53] This plan must include detailed information, including:

> maps showing mine progression, location of infrastructure, and capital projects locations … mining operations schedules … labor requirements … a reclamation plan … and a permitting and bonding schedule … an estimated capital budget containing detailed, itemized estimates of all capital expenditures … including any proposed acquisition of Capital Assets by [CCMC] … estimated employee headcounts … an estimated Monthly cash flow statement … a projection of the next four Years of operations in such detail as directed by [Coyote Station].[54]

Coyote Station then must give its "approval or disapproval" of this annual mining plan.[55] If Coyote Station "disapproves" and CCMC and Coyote Station are "unable to resolve their differences," then "[CCMC] shall adopt such changes to the annual mining plan as requested by [Coyote Station], and shall submit a revised mining plan."[56] (emphasis added). In other words, Coyote Station has the absolute right under this contract to disapprove CCMC's mine plans and to force CCMC to change its mine plans. The Agreement also prohibits CCMC from making any "material modification of or material deviation from the approved Annual Mining Plan … without written approval of [Coyote Station]."[57]

The LSA also requires Coyote Station to approve all capital expenditures at CCMC. The LSA says that "[CCMC] shall not make any capital expenditures unless they are generally reflected in the budget approved by buyer as part of an Annual Mining Plan or unless otherwise approved by [Coyote Station]."[58] Capital expenditures, of course, would include all equipment that emits air pollution as well as all air pollution control equipment.

The LSA is a minimum twenty-five year contract, with additional options for extensions. It does not expire until December 31, 2040 (and even then, the LSA remains in place until the mine itself is reclaimed during the LSA's "Post-Production Period").[59] The LSA is also what is

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[51] The entirety of the LSA is available at the SEC's website at the following link: https://www.sec.gov/Archives/edgar/data/789933/000078993313000013/ncexh105820121 0k.htm. A complete copy of this LSA is also attached hereto as Exhibit L.
[52] PG067-073.
[53] PG069-070.
[54] *Id.*
[55] PG070-071.
[56] PG071.
[57] PG072.
[58] Exhibit L, LSA Section 2.1(d), at p. 20.
[59] *Id.*, at Section 2.1(e).

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commonly referred to as a "requirements" contract. The LSA states that "the Buyer [i.e., Coyote Station] hereby agrees to purchase and accept exclusively from Seller [i.e., CCMC]."[60] (emphasis added).

Coyote Station filed a response to the Voigts' comments on the Permit with NDDH.[61] That response helps explain why Coyote Station required such substantial and direct control over CCMC. Specifically, the LSA is not just a requirements contract. It is also a "cost plus" contract, which means that, through the LSA, Coyote Station has guaranteed CCMC a profit over its costs.[62] In Coyote Station's response to the Voigts' comments, Coyote Station explained that it therefore needed "oversight" of the mine.[63] That word, however, puts the reality too mildly. The LSA's plain language goes beyond oversight and gives Coyote Station's owners direct authority to approve and deny all capital expenditures at CCMC and sets in place mandatory processes for Coyote Station's owners to review all capital expenditures during the agreement's minimum twenty-five year term.

CCMC also explained to NDDH that Coyote Station has contractually agreed to pay (reimburse) CCMC's owners for any fines arising from environmental violations at CCMC's mine.[64] This is not limited to any specific type of violation, and would included reimbursement for fines arising from the violation of air quality laws. This arrangement is highly unusual and is indicative of a single source because Coyote Station pays the penalties for environmental violations at both facilities. It was also not possible to provide this specific piece of information to NDDH in the Voigts' original comment letter because CCMC provided this information to NDDH in its response to the Voigts' comments (i.e., the source of this information is dated after the Voigts' initial comments on the Permit to NDDH).

In April of 2018, EPA issued updated guidance regarding "the assessment of 'control' for title V and NSR permitting purposes…" [65] In that guidance, EPA explained that such assessment "…focuses 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."[66] EPA also explained that the "'source' for NSR permitting purposes should comport with the 'common sense notion of a plant.'"[67] Most importantly, the April 2018 guidance explained that

> For purposes of source determinations, EPA considers 'control' to be best understood to encompass the power or authority to dictate the outcome of decisions

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[60] *Id.* at Section 2.3 ("Purchase and Sale of Lignite").
[61] Exhibit E (letter from NDDH to EPA regarding 45-day review period, with attachments), at pp. 6-16 of combined document.
[62] Exhibit E (letter from NDDH to EPA regarding 45-day review period, with attachments), at p. 4 of "Coyote Creek Mining Company's Response to Separate Source Determination Comments on Draft Permit T5-F84011."
[63] Exhibit E (letter from NDDH to EPA regarding 45-day review period, with attachments), at p. 5 of OTPCO's "Response to Comments of Casey and Julie Voigt on Draft Permit T5-F84011."
[64] Exhibit E (letter from NDDH to EPA regarding 45-day review period, with attachments), at p. 5 of "Coyote Creek Mining Company's Response to Separate Source Determination Comments on Draft Permit T5-F84011."
[65] Letter from William Wehrum, U.S.EPA,to Patrick McDonnell, Pennsylvania Dep't of Envtl. Prot. regarding aggregation of emissions from a biogas processing facility and a landfill, dated Apr. 30,2018 and Attachment, available at https://www.epa.gov/sites/production/files/2018-05/documents/meadowbrook_2018.pdf.
[66] *Id.*
[67] *Id.* at 3. (citing 45 Fed. Reg. 52676, 52694 (Aug. 7, 1980) and *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. I 979)).

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> of another entity. This concept includes only the power to dictate a particular outcome and does not include the mere ability to influence. Thus, control exists when one entity has the power or authority to restrict another entity's choices and effectively dictate a specific outcome, such that the controlled entity lacks autonomy to choose a different course of action. This power and authority could be exercised through various mechanisms, including … contractual obligations (e.g., where a contract gives one entity the authority to direct specific activities of another entity) … Thus, control can be established: (I) when one entity has the power to command the actions of another entity (e.g., Entity A expressly directs Entity B to "do X"); or (2) when one entity's actions effectively dictate the actions of another entity (e.g.. Entity A's actions force Entity B to do X. and Entity B cannot do anything other than X). … While distinguishing control from the ability to merely influence will necessarily be a fact-specific inquiry, the key difference is that 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. Ultimately, the focus is not on how control is established (through ownership, contract, or otherwise), but on whether control is established-that is, whether one entity can expressly or effectively force another entity to take a specific course of action, which the other entity cannot avoid through its own independent decision-making.[68]

Here, the LSA "removes the autonomy" of CCMC. The LSA gives Coyote Station "the authority to direct specific activities" of CCMC. Coyote Station must approve the mine's capital expenditures *and* operating plans. This necessarily includes equipment that emits air pollution, air pollution control equipment, and operating plans that impact air quality. The bottom line is that Coyote Station has complete control over the mine through the LSA.

Further, regarding the coal processing facility specifically, Coyote Station does not just exert contractual control—it also exerts actual physical operational control over this facility. In a deposition, one of CCMC's coal processing facility operators explained that he radios to Coyote Station at the start of every shift to determine the Station's coal needs and then he bases his coal crushing activities on what the Station radios back to him.[69] The coal processing facility operators also radio back and forth between the Station (and the Station radios to the coal processing facility operator) when starting up or shutting down the conveyor belts or coal processing plant.[70] This is because the conveyor belt connects—and therefore affects—workers at both the power plant and the processing facility. In fact, the Coyote Station control operator "starts and stops the belt,"[71] which also simultaneously starts and stops the crushers at "CCMC's" processing facility.[72]

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[68] *Id.* at 6-7 (emphasis added).
[69] Deposition of Dewayne Lounsberry, at PG080-082.
[70] *Id.*
[71] *Id.* at PG082.
[72] *Id.*

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c. CCMC falls under Coyote Station's industrial grouping because it provides 100% of its coal to Coyote Station and is therefore a support facility.

The third and final element to establish that Coyote Station and CCMC are a single source is that the two facilities must "belong to the same industrial grouping … Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same first two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement."[73] Whether two facilities share the same SIC code is a factual question that must be made on a "case -by-case basis."[74]

If one facility is a support facility for a primary facility and they have different SIC codes, a question commonly arises as to whether the support facility is actually part of the primary facility such that the primary facility's SIC code should apply to the support facility. EPA addressed and answered this question long ago in the preamble to EPA's early PSD regulations (which, in turn, provides the origin for this same rule that exists today under the PSD and Title V programs):

> Each source is to be classified according to its primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered. Thus, one source classification encompasses both primary and support facilities, even when the latter includes units with a different two-digit SIC code. Support facilities are typically those which convey, store or otherwise assist in the production of the principal product. Where a single unit is used to support two otherwise distinct sets of activities, the unit is to be included within the source which relies most heavily on its support.[75]

This rule has been in place since 1980 and reflects the principle that if two facilities will be aggregated, the aggregation must reflect the "common sense notion of a plant."[76] The support facility test has been consistently applied by EPA for nearly four decades.[77]

In NDDH's April 11, 2013 single source determination, NDDH recognized that CCMC might be a support facility of Coyote Station, but chose not to make a determination on this question. NDDH explained:

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[73] 40 C.F.R. 52.21(b)(6); *see also* 40 C.F.R. 70.2 (same requirement for Title V program, except referencing 1987 manual).

[74] Letter from William Wehrum, U.S.EPA,to Patrick McDonnell, Pennsylvania Dep't of Envtl. Prot. regarding aggregation of emissions from a biogas processing facility and a landfill, dated Apr. 30,2018 and Attachment, at pp. 2, 8, *available at* https://www.epa.gov/sites/production/files/2018-05/documents/meadowbrook_2018.pdf.

[75] 45 Fed.Reg.52676, 52695 (emphasis added).

[76] William Wehrum, U.S.EPA,to Patrick McDonnell, Pennsylvania Dep't of Envtl. Prot. regarding aggregation of emissions from a biogas processing facility and a landfill, dated Apr. 30,2018 and Attachment, available at https://www.epa.gov/sites/production/files/2018-05/documents/meadowbrook_2018.pdf; 45 Fed. Reg. 52676, 52694 (Aug. 7, 1980); *see also Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. I 979)).

[77] *See, e.g.*, https://www.epa.gov/sites/production/files/2015-08/documents/dodguid.pdf (nuanced application of support facility test to military facilities in 1996); https://www.epa.gov/sites/production/files/2015-07/documents/single.pdf (2010 application of test); https://www.epa.gov/sites/production/files/2015-08/documents/ps2011.pdf (2011 application of test).

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> CCM is a coal mine in SIC major group 12 while Coyote Station is under SIC major group 49. However, an August 1996 EPA memorandum available at http//www.epa.gov/ttnlcaaalt5/memoranda/dodguid.pdf has established that support activities must be aggregated with the associated primary activity regardless of dissimilar SIC codes. The August 1996 memorandum discusses 50 percent support test to be used as presumptive test to determine whether one facility supports the other. Although this document is intended for determinations at military facilities, the language relating to support facilities can be applied to nonmilitary facilities. The above-referenced August 1996 memorandum states that "a support facility usually would be aggregated with the primary activity to which it contributes 50 percent or more of its output." The document adds a footnote stating "However while the 50 percent support test is the presumptive test for these programs it may not be the most appropriate test in certain situations. Support facility relationships should always be established in light of the particular circumstances of the sources being evaluated."
>
> If greater than 50 percent of the coal mined at CCM will be supplied to the Coyote Station, then CCM may be presumed to be a support facility for Coyote Station and the facilities would be considered classified under the same SIC code or purposes of the PSD and Title V rules.
>
> ...
>
> Given the uncertainties regarding the amount of coal to ultimately be supplied from CCM to the Coyote Station, the Department is unable to determine at this time if the two sources should be considered to be under the same SIC code.[78]

Because CCMC is now operational, it is a simple matter to determine that CCMC provides well in excess of 50% of its coal output to Coyote Station. In fact, it provides 100% of its coal to this power plant pursuant to the LSA (which again, requires Coyote Station "to purchase and accept [lignite coal] exclusively from [CCMC]."[79] Both CCMC and Coyote Station responded to the Voigts' comments to NDDH, and neither Coyote Station[80] nor CCMC[81] dispute that CCMC sells coal only to Coyote Station, that Coyote Station purchases coal only from CCMC, that CCMC partially processes 100% of Coyote Station's coal, and that CCMC's facilities are physically connected to CCMC's facilities.

The fact that CCMC sells 100% of its coal to Coyote Station, apart from being apparent from the physical connection between the two facilities, is also readily apparent from other publicly available documents. First, the North Dakota Public Service Commission in its Findings of Fact, Conclusions of Law, and Order Granting CCMC its surface coal mine permit stated in Finding of Fact No. 1 that "[t]he Commission issued Surface Coal Mining Permit NACC-1302 to allow CCMC to conduct surface coal mining and reclamation operations at Coyote Creek Mine, a

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[78] PG018.
[79] Exhibit L, LSA, at Section 2.3 ("Sale and Purchase of Lignite") of LSA.
[80] Exhibit E, at pp. 6-16.
[81] Exhibit E, at pp. 17-27.

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new mine that will supply lignite coal to the Coyote Power Station beginning in May 2016."[82] Thus, the North Dakota Public Service Commission has made an explicit factual finding that the purpose of the Coyote Creek Mine is to supply coal to Coyote Station. This is also confirmed by Coyote Station's application for this permit, which explains that "[a]fter coal is removed from [CCMC's] pit, it will be hauled to the Coyote Power Generation Station."[83]

Likewise, CCMC's application for its air quality permit to construct explains that it will deliver all of its coal to the coal processing facility (the same coal processing facility described in detail above that is connected by Coyote Station's conveyor belt directly to Coyote Station):

> CCMC is proposing to construct a surface lignite coal mine with an expected annual production of approximately 2.5 million tons of lignite coal for sale with the capability to process up to 3.2 million tons of lignite coal. The primary mining operations are proposed to occur in a 13-square mile area located 3 to 4 miles southwest of Coyote Station and west-southwest of Dakota Westmoreland's existing Beulah Mine ... The mined lignite will then be transported by CCMC to CCMC's coal processing facility west of Coyote Station where it will be further prepared for sale.[84]

A review of Coyote Station's Annual Emission Inventory Summaries confirms that Coyote Station uses approximately 2.5 million tons per year of coal per year – the same amount of coal that CCMC estimated in the above quote. According to these summaries, attached hereto as Exhibit 10, Coyote Station used the following amounts of coal from 2014-2017:

2014: 2,248,483 tons
2015: 1,659,351 tons[85]
2016: 2,011,974 tons
2017: 2,154,856 tons

OTPCO also has an online fact sheet for Coyote Station. That fact sheet says that Coyote Station uses "about 7,000 tons of lignite coal" per day.[86] This is equivalent to 2.55 million tons of lignite coal per year. The LSA dictates that CCMC's "Life-of-Mine Plan shall assume [Coyote Station's] life-of-mine lignite requirements shall be equal to 2,500,00 Tons per year unless [Coyote Station] notified [CCMC] to use a different assumption."[87] Finally, CCMC's mine permit

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[82] PSC Findings of Fact, Conclusions of Law, and Order on Surface Mining Permit NACC-1302, *available at* https://psc.nd.gov/database/documents/13-0850/125-020.pdf, at p. 2 (emphasis added).
[83] PG086.
[84] PG023.
[85] A serious fire occurred in December, 2014, reducing operations significantly at Coyote Station at 2015. *See* https://bismarcktribune.com/bakken/coyote-station-aims-to-be-partially-generating-power-bychristmas/article_e3a16ffc-80b1-11e4-8fd4-d772922800fb.html ("It will be months before the plant, owned by a consortium of utility companies and operated by Otter Tail Power of Minnesota, can run at full capacity."). This is likely the explanation for reduced coal usage in 2015.
[86] *See* fact sheet, *available at* https://www.otpco.com/media/2087/coyote-station-fact-sheet_final.pdf (last accessed January 15, 2019).
[87] PG068.

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application to the North Dakota Public Service Commission indicates that CCMC plans to sell 2.5 million tons of coal per year – the same amount of coal that is used by Coyote Station.[88]

Taking all of this information together, the sole purpose of the Coyote Creek Mine is to provide coal for Coyote Station, and Coyote Station's sole source of coal is Coyote Creek Mine. Therefore, CCMC is a "support facility" of Coyote Station and it shares the same SIC code as Coyote Station. It is part of the "same industrial grouping."[89]

Further, not only does CCMC produce coal solely for Coyote Station (and likewise Coyote Station purchases all of its required coal from CCMC), but CCMC also partially processes the coal for Coyote Station (as previously discussed, CCMC crushes the coal at "CCMC's" processing facility, but then Coyote Station finishes the crushing/processing on its side of the fence). Therefore, the purpose of CCMC is not just to produce lignite – it is also to partially crush the lignite and to transfer 100% of the Station's coal via the conveyor belt for Coyote Station's primary purpose, which is electricity production.

Returning to the support facility test, "[e]ach source is to be classified according to its primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered. Thus, one source classification encompasses both primary and support facilities, even when the latter includes units with a different two-digit SIC code. Support facilities are typically those which convey, store or otherwise assist in the production of the principal product. Where a single unit is used to support two otherwise distinct sets of activities, the unit is to be included within the source which relies most heavily on its support.[90]

Here, Coyote Creek Mine and its coal processing facility exist for the sole purpose of providing, processing, and storing Coyote Station's lignite coal so that Coyote Station can complete its "primary activity," which is to generate electricity. CCMC "convey[s]"[91] all of its coal feedstock directly to Coyote Station via the conveyor belt. CCMC also "stores"[92] nearly all of Coyote Station's coal on the approximately 180,000 ton, eight acre coal stockpile that exists at "CCMC's" coal crushing facility[93] directly adjacent to Coyote Station. CCMC goes well beyond just "assist[ing] in the production of the principal product" of electricity at Coyote Station as would be sufficient under the support facility test. Indeed, CCMC's activities are required for Coyote Station to fulfill its primary purpose of electricity production. CCMC provides 100% of the Station's lignite coal, partially processes 100% of Coyote Statin's coal, and stores most of the coal for the Station immediately adjacent to Coyote Station. To recap, CCMC does all of this under a cost plus requirements contract that gives Coyote Station complete control over all major decisions at the mine, Coyote Station has agreed to pay any fines for violation of environmental laws that

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[88] Exhibit K, Section 3.1.1.4 to Coyote Creek Mining Company's Application for Surface Coal Mining Permit, attached hereto.

[89] 40 C.F.R. § 52.21(b)(6)).

[90] 45 Fed.Reg.52676, 52695 (emphasis added).

[91] *Id.*

[92] *Id.*

[93] The LSA states that the "Mine and any Plant stockpiles ordinarily will not be less than 200,000 Tons." Section 2.8 ("Stockpile inventories") of LSA, available at https://www.sec.gov/Archives/edgar/data/789933/000078993313000013/ncexh10582012l0k.htm.

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might result from CCMC's operations (and Coyote Station's direction of those operations), the coal processing facility is on Coyote Station's real property, and Coyote Station has the ability to start and stop the coal crushing equipment that is on CCMC's side of the fence.

NDDH noted it was "unable to determine" in its April 11, 2013 single source determination whether or not the mine and the Station should be considered under the same SIC code due to "uncertainties regarding the amount of coal to ultimately be supplied from CCM."[94] The information is now conclusive—CCMC is a support facility of Coyote Station, the sole purpose of CCMC is to serve as a support facility for Coyote Station, and these facilities therefore fall under the same SIC code under the support facility test. For the foregoing reasons, CCMC and Coyote Station are a single stationary source and must be permitted as such under the PSD and Title V programs.

d. Coyote Station's Title V Permit does not include all enforceable emission limitations applicable to the source.

The primary purpose of a Title V permit is to include all enforceable emission limitations applicable to the source within the permit.[95] A Title V permit that does not fulfill this role is unlawful because it does not comply with Title V of the Clean Air Act (e.g., 42 U.S.C. § 7661c), and EPA has a mandatory duty to object to such a permit. Here, Coyote Station's draft Title V Permit does not include all enforceable emission limitations applicable to this source.

First, the Permit does not list emission standards that apply to Coyote Creek Mine's mining area, the newly constructed haul road, and the coal processing facility. Inclusion of these sources is necessary because as explained above, Coyote Station, the mine area, the haul road, and the processing area are all a single source/facility. For example, this draft Title V permit does not include NSPS Subpart Y standards applicable to the coal processing plant.

Second, the construction of the Coyote Creek Mine resulted in new emissions exceeding PSD significance thresholds. The Station, including the CCMC mine, haul road, and coal processing plant, were therefore required to undergo PSD review, including a determination of best available control technology. Because NDDH has not required Coyote Station, including the mine, haul road, and processing plant to complete a BACT determination prior to completion of this new construction (which resulted in significant emissions), this Title V Permit does not include all necessary enforceable emission limitations.

As to whether the newly constructed coal mine and coal processing plant cause Coyote Station to exceed PSD significance thresholds, OTPCO itself estimated that a haul road for a 4.5 mile round trip would result in 410.02 tpy of PM_{30}, 100.76 tpy of PM_{10} and 10.08 tpy of $PM_{2.5}$ for a road of this length. A copy of these estimates, obtained through a subpoena to Coyote Station's environmental manager, is enclosed at PG049-056. Note that the actual road length is the haul road from Coyote Creek Mine to the coal processing facility is approximately 5 miles in length (10 miles round trip), so these estimates substantially underestimate PTE for the actual haul road. OTPCO also estimated 17.01 tpy of PM_{10} from bulldozing the coal pile and 6.05 tpy of PM_{10} for

[94] PG018.
[95] 42 U.S.C. § 7661c.

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wind erosion of the coal pile. PM_{30} emissions for these activities, of course, would exceed the amounts of PM_{10} and $PM_{2.5}$.

The applicable PSD significance thresholds are 25 tpy for PM, 15 tpy for PM_{10}, and 10 tpy for direct $PM_{2.5}$.[96] The construction of CCMC's new facilities exceeds these amounts, triggering new source review for Coyote Station and CCMC because both facilities are a single source and these new emissions and PTE resulted from new construction.[97]

The Voigts live and work in very close proximity to Coyote Creek Mine and Coyote Station (and at times within the mine's footprint). They are significantly harmed by air emissions from these facilities. For example, the Voigts have had dust from the mine cake their entire home and yard in thick layers of dust. These following photographs are examples of the dust from the mine on the Voigts' property:

[96] 40 C.F.R. § 52.21(b)(23)(i).
[97] 42 U.S.C. 7475; 40 C.F.R. § 52.21.

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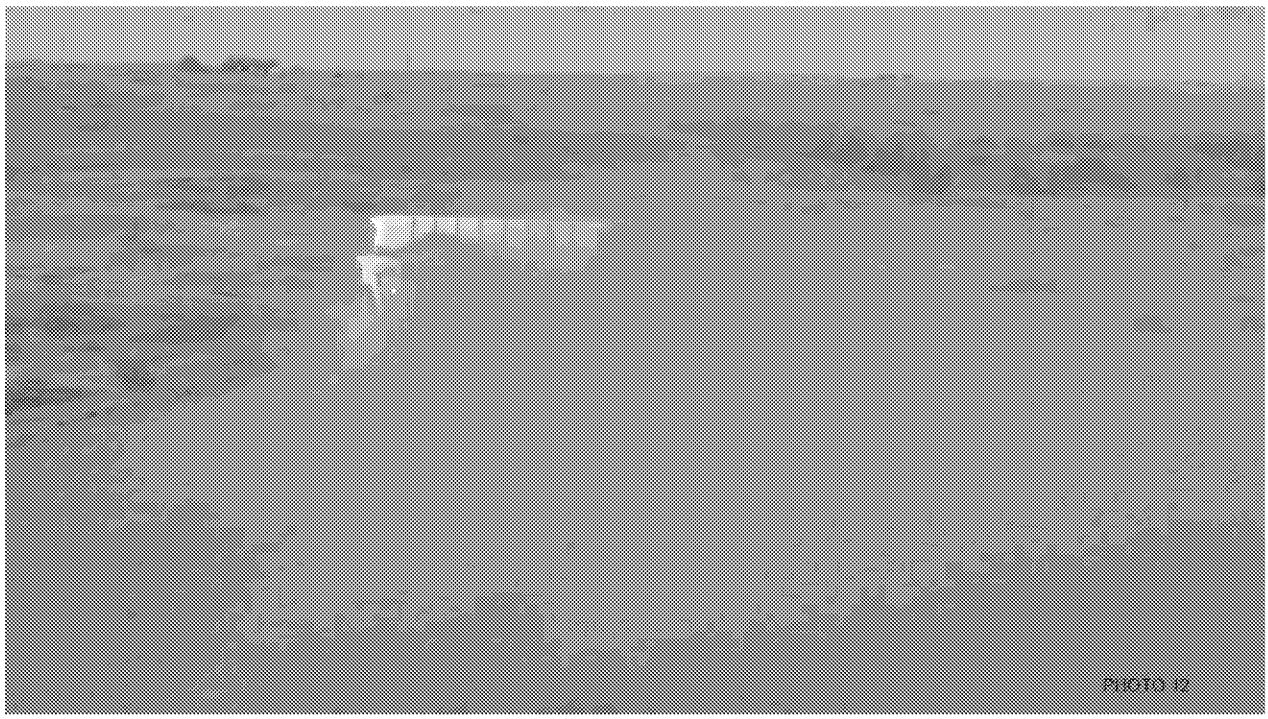

Julie Voigt has explained in sworn testimony that the dust is so severe that there is "dirt on the grass that cattle are eating" and there is "dirt in the water tanks for the horses [which I] got to clean out every day now, which in the past I didn't."[98]

This dust has also blown onto their fields across their ranch, making it more difficult to work and causing the Voigts to worry about the health of their family and cattle. Because T5-F84011 does not include new BACT limits based upon PSD review, including limits for mining operations such as draglining and hauling coal to the newly constructed coal processing plant, as well as more stringent limits for the Station and the coal processing facility, the Voigts must deal with air pollution and dust that they believe far exceeds BACT limits. BACT limits should include, for example, paved roads, fully enclosed coal processing (including coal piles and truck-unloading operations), automatic dust suppression, and dry-fining[99] at the Station. At the bare minimum,

[98] Exhibit M, Julie Voigt Deposition, at pp. 31-32, attached hereto.

[99] Originally, the Voigts provided the following link in support of their comments to NDDH on the permit: https://greatriverenergy.com/wp-content/uploads/2015/11/FINAL-2016-Dryfining-brochure-B-reduced.pdf. It appears that this link may have been removed after the Voigts filed their comments. A general description of the

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NDDH at least needs to complete a BACT determination process to consider whether these options are feasible. To date, NDDH has not completed a BACT determination for Coyote Station and CCMC, even though the newly constructed CCMC coal mine, haul road, and processing facility have significant emissions. Instead, NDDH has completely excluded these facilities from Coyote Station's permit and attempted to put these facilities onto a different permit (one just for CCMC) without even soliciting public comment on that permit. The lack of these BACT limits and NDDH's failure to undertake a BACT determination process for this Permit has significantly harmed the Voigts, both substantively and procedurally.

Because T5-F84011 does not include enforceable BACT limits, is not supported by BACT determinations for Coyote Station (including the processing plant, haul road, and mine), and further because T5-F84011 excludes CCMC's facilities and emission standards applicable to these facilities (e.g., NSPS Subpart Y and fugitive dust control requirements), the Voigts are adversely harmed by the issuance of this Permit. The Permit is not in compliance with the law, including 42 U.S.C. § 7661c. The Voigts recognize that they bear the burden of demonstrating that the Title V Permit is deficient. The Voigts have met their burden. The Voigts therefore respectfully petition the Administrator of the EPA to object to the issuance of this Permit.

Respectfully submitted via EPA's Central Data Exchange this 15th day of January, 2019.

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process is contained here: https://www.businesswire.com/news/home/20100603006212/en/DryFining%E2%84%A2-Coal-Enhancement-Technology-Dedicated-Great-River.

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LIST OF EXHIBITS

Exhibit A	Draft Renewal 4 Title V Permit for Coyote Station and Statement of Basis (with cover letter).
Exhibit B	Voigts' Comments to NDDH on Coyote Station Title V Permit
Exhibit C	All Exhibits to Voigts' Comments to NDDH on Coyote Station Title V Permit
Exhibit D	Email from NDDH to EPA dated July 24, 2018
Exhibit E	NDDH to EPA Letter re Coyote Station Title V Permit to Operate EPA 45-day Review Period
Exhibit F	EPA to NDDH Letter re Coyote Station Title V Permit to Operate EPA 45-day Review Period
Exhibit G	CCMC Deposition Transcript Excerpt
Exhibit H	NDDH Email about lack of public comment period for CCMC Air Pollution Control Permit to Construct
Exhibit I	Mark Thoma Deposition Transcript Excerpt [Redacted]
Exhibit J	Final Air Pollution Control Permit to Construct for CCMC issued by NDDH
Exhibit K	Section 3.1.1.4 of CCMC application for Surface Coal Mine Permit (CCMC Coal Production Schedule)
Exhibit L	Complete Lignite Sales Agreement
Exhibit M	Julie Voigt Deposition Excerpt
Exhibit N	Declaration of JJ England dated January 15, 2019

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