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Ref: 8P-AR

Mr. Terry O'Clair, Director
Division of Air Quality
North Dakota Department of Health
918 East Divide Avenue
Bismarck, North Dakota 58501

Re: Coyote Station Title V Permit to Operate EPA 45-day Review Period

Dear Mr. O'Clair:

On October 2, 2018, the North Dakota Department of Health (NDDH) transmitted a letter to the U.S. Environmental Protection Agency requesting the EPA's position on whether a coal-fired power plant (Coyote Station) and a lignite coal mine operated by Coyote Creek Mining Co. (CCMC) should be considered under "common control" for Clean Air Act (CAA) permitting purposes. The EPA understands this request to address whether these two entities should be considered part of the same "major source" for the operating permit program under title V of the CAA and/or part of the same "stationary source" for the New Source Review (NSR) preconstruction permit programs under title I of the CAA.[1] The EPA commonly refers to these types of questions as "source determinations." Given that North Dakota's title V and NSR programs have been approved by the EPA, the 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. The EPA hopes that the following information is helpful to the NDDH as it makes its final permitting decision.

BACKGROUND

In an April 11, 2013 source determination, the NDDH previously determined that Coyote Station and CCMC should be considered two separate sources for permitting purposes, and in so doing concluded that the two entities "do not appear to be under common control." During the public comment period for the renewal of Coyote Station's title V permit, commenters challenged aspects of this prior determination[2] (including aspects related to control) and asserted that Coyote Station and CCMC should be considered a single stationary source.[3] Both Coyote Station (through its majority owner, Otter Tail Power Company) and CCMC submitted comments in response, asserting that the two entities were not under common control, in part based on an analysis of "control"

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[1] Under the federal and state rules governing these permitting programs, entities may be considered part of the same "major source" or "stationary source" if they (1) belong to the same major industrial grouping (2-digit Standard Industrial Classification (SIC) code); (2) are located on one or more contiguous or adjacent properties; and (3) are under the control of the same person (or persons under common control). *See* 42 U.S.C. § 7661(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). NDDH's permitting regulations generally mirror EPA's regulations in relevant part. *See* NDAC 33-15-14-06.1.q (title V regulations); *id.* 33-15-15-01.2 (incorporating by reference EPA's relevant NSR regulations).

[2] The public commenters' current challenges to the 2013 source determination appear to stem in part from 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 a contract between Coyote Station and CCMC.

[3] As a consequence, in the context of the current title V renewal permit action, the commenters assert that Coyote Station's current title V permit is deficient because it does not include conditions related to CCMC's operations.

under the framework recommended by the EPA in its April 30, 2018 Meadowbrook Letter.[4] In the NDDH's October 2, 2018 letter to the EPA, the state concluded—also based on the principles outlined in EPA's Meadowbrook Letter—that "it 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 support, the NDDH provided one example stating that, "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." The NDDH requested the EPA's position on this matter as part of the EPA's review of the Coyote Station title V renewal permit.

DISCUSSION

In the Meadowbrook Letter, the EPA recommended that permitting authorities assessing questions of "control" or "common control"[5] 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 explained that this inquiry asks, in relevant part, "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.

Based on the NDDH's statements reproduced above, it appears that the NDDH has undertaken an analysis based on the principles recommended in the Meadowbrook Letter and concluded that Coyote Station does not have the power to dictate relevant decisions at CCMC's mine. Based on the record currently before the EPA, however, it is unclear what facts the NDDH has considered in arriving at this conclusion, particularly given the issues and information raised in public comments.[6] In light of this, the EPA encourages the state to develop more fully its permit record considering all relevant facts and to provide a more thorough explanation of the reasoning behind its determination.

A potentially relevant aspect of Coyote Station and CCMC's operations that the EPA urges the NDDH to consider is the Lignite Sales Agreement between the two entities. 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.*, Lignite Sales Agreement 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

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[4] Letter from William L. Wehrum, Assistant Administrator, Office of Air and Radiation, EPA, 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").

[5] For further discussion regarding EPA's suggested approach for evaluating whether the "control" exerted by one entity over another results in the two entities themselves being considered "persons under common control" under the relevant regulatory text, see the recent Letter from Anna Marie Wood, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards, EPA, to Ms. Gail Good, Director, Bureau of Air Management, Wisconsin Department of Natural Resources (October 16, 2018), available at https://www.epa.gov/sites/production/files/2018-10/documents/ameresco_jcl_letter.pdf. In sum, the fact that two entities may each have some level of control over a particular *activity* (or a small portion of otherwise separate operations) does not mean that the *entities* themselves are "persons under common control." *See id.* at 5–6. On the other hand, "[W]here 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' in certain situations." *Id.* at 6.

[6] 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.

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. In other words, the NDDH should take account of these contract provisions in order to ascertain whether they provide Coyote Station the relevant type and extent of "control" over CCMC's operations, such that both entities' activities are either under the control of "the same person" or under the control of "persons under common control." Given that the NDDH is the title V permitting authority for Coyote Station and CCMC, the NDDH has the ultimate responsibility to make this determination based on the specific facts before it.

If you have any questions or need further clarification, please contact Patrick Wauters, of my staff, at (303) 312-6114 or wauters.patrick@epa.gov.

Sincerely,

11/14/2018

X Monica Mathews-Morales

Signed by: MONICA MATHEWS-MORALES

Monica Mathews-Morales
Director, Air Program
Office of Partnerships and Regulatory Assistance

cc: Jim Semerad, ND DAQ
Craig D. Thorstenson, ND DAQ