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Eighth Circuit Clean Air Act Opinion Brings "Deference" into Sharp Focus

Chevron, Auer, and Now Voight Deference?

On November 20, 2020, the Eighth Circuit Court of Appeals jumped headlong into the *Chevron,* and *Auer* deference realm. The issue: can a Clean Air Act permittee rely on a *state agency's* prevention of significant deterioration (PSD) determination? And should a Court "defer" to the state agency's determination to assist in the interpretation of an "ambiguous" environmental program requirement? *Voight v. Coyote Creek Mining Company* (No. 18-2705, 8th Circuit Court of Appeals).

See opinion **here.**

The dispute arose after the North Dakota Department of Health (NDDOH) issued a "minor source" clean air permit to Coyote Creek Mining Company (CCMC) related to its lignite coal mine and processing facility. The agency decided that the air emissions from the company's operations (primarily consisting of fugitive dust) did *not* exceed statutory minimums which would have categorized the operations as a "major source" of air pollution requiring extensive dust control measures at the site.

The opinion provides a valuable examination of the PSD program, the "cooperative relationship" established by Congress between EPA and state agencies with delegated Clean Air Act programs, and ultimately sides with the state agency's determination concluding:

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

. . .

> [G]iven the overarching framework of the CAA, including the cooperative relationship between the EPA and the states, we conclude the district court appropriately gave deference to the NDDOH permitting decision to resolve the regulations' ambiguity in favor of CCMC.

In a vigorous dissent, Circuit Judge Stras christens the majority opinion as a newly constructed *Voight* deference and grabs the other horn of this dilemma:

> Most Americans would be surprised to learn that state bureaucrats can play an even larger role than federal judges do in interpreting federal law. Yet by deferring to the North Dakota Department of Health's interpretation of a Clean Air Act regulation, the court's [majority] decision has just that effect.
>
> In my view, even if we must defer to a *federal* agency's interpretation of a federal *statute*, *see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984), and a *federal* agency's interpretation of a federal *regulation*, see *Auer v. Robbins*, 519 U.S. 452 (1997), **it defies basic constitutional principles to defer to a state agency's interpretation of federal law. For that reason, I respectfully dissent from today's unveiling of Voigt deference.** [Emphasis added.]

This post was drafted by John Watson, an attorney in the Denver, CO office of Spencer Fane LLP. For more information, visit www.spencerfane.com.