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EPA Appeals Board Issues a Precedent-Setting Decision on Requirements for CO₂ Emission Limits in Clean Air Act Permits

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In a decision that injects substantial uncertainty into Clean Air Act ("CAA") permits pending before the Environmental Protection Agency ("EPA") and state agencies across the country, the Environmental Appeals Board ("EAB") yesterday remanded to EPA a Prevention of Significant Deterioration ("PSD") permit for a proposed waste-coal-fired electric generating unit to reconsider whether to require an analysis of Best Available Control Technology ("BACT") for carbon dioxide ("CO₂") emissions.¹ The EAB held in *In re Deseret Power Electric Cooperative* that EPA has the discretion to interpret the CAA to require BACT analyses for CO₂ as part of the PSD permitting process and is not, as the agency argued, constrained from doing so by historical agency interpretation. However, the EAB did not rule that EPA must require such BACT analyses, instead remanding the issue to EPA to reconsider whether to require CO₂ BACT in light of the agency's discretion to interpret what constitutes a pollutant "subject to regulation" under the Act. The EAB acknowledged that its decision will "have implications far beyond this individual permitting proceeding" and encouraged EPA to address the issue in a nationwide rulemaking.

The case involves a PSD permit that EPA Region 8 issued to the Deseret Power Electric Cooperative ("Deseret Power") for construction of a new waste-coal-fired electric generating unit at its existing Bonanza Power Plant, located near Bonanza, Utah. The CAA requires EPA to issue PSD permits for any new "major emitting facility" ² proposed in any area classified as in "attainment" of the national ambient air quality standards ("NAAQS"), ³ or any existing facility that is undergoing a "major modification" in such an area. ⁴ The CAA prohibits the issuance of a PSD permit unless it includes BACT controls on "each pollutant subject to regulation" under the Act (not just the designated NAAQS). ⁵ The Sierra Club challenged Deseret Power's PSD permit on grounds that EPA failed to require a BACT emissions limit for emissions of CO₂, which Sierra Club contended is "subject to regulation" under the CAA.

The Board Sidestepped the Issue of Whether CO₂ Is "Subject to Regulation" Under the Clean Air Act

The EAB did not decide the issue of whether CO₂ is "subject to regulation" under the PSD provisions of the CAA, instead remanding the issue to EPA for further consideration. In doing so, the EAB rejected the Sierra Club's argument that EPA was statutorily required to impose BACT for CO₂ as part of every PSD permitting decision. However, the EAB also found the agency's argument that it was prohibited from interpreting the CAA to require BACT limits for CO₂ because of the agency's historic interpretation of the statute to be "clearly erroneous." ⁶

The Board found the statutory language of the CAA is not so unequivocal as to prohibit the EPA from using its regulatory authority to interpret the meaning of "subject to regulation." ⁷ However, EPA did not, according to the EAB, adequately support its position that the phrase "subject to regulation" describes only those pollutants that "are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." ⁸ The Board concluded that the agency did not provide "sufficiently clear and consistent articulations of an Agency interpretation to constrain the authority the Region acknowledges it would otherwise have under the terms of the statute." ⁹

The EAB's decision remanding the permit to EPA is not subject to appeal. If EPA decides to regulate CO₂ under the PSD provisions as part of the Deseret Power permit, the permit decision could be appealed to the EAB and then to the appropriate federal appeals court. It is more likely, however, that EPA will decide the issue as part of a larger rulemaking.

The Final Determination Will Fall to the Obama Administration

The Board's decision places the issue of whether CO₂ is a pollutant that must be incorporated into PSD permitting decisions squarely into the hands of EPA. In its decision, the Board stated that on remand EPA should address whether a nationwide rulemaking may be required. In light of the change in administrations, it is likely that Deseret Power's permit – along with others around the country – will be put on hold until an Obama Administration decides how to address the issue.

It is unclear how the decision might immediately affect pending PSD permit applications. Because the EAB has not ruled one way or the other regarding whether CO₂ is a pollutant "subject to regulation" under the Clean Air Act, it remains uncertain whether a CO₂ BACT analysis should be required for PSD sources. State permitting agencies will have to decide how to proceed in light of this continuing uncertainty. The EPA's decision on this issue ultimately will affect both facilities currently subject to the PSD program as well as those that are not currently subject to the PSD program. Because the statute defines a "major emitting facility" as both designated categories of sources as well as "any other source that has the potential to emit 250 tons per year or more of any air pollutant," an EPA conclusion that CO₂ is a "regulated pollutant" would sweep into the PSD program a huge number of small industrial and commercial facilities. Although the EPA is constrained by the statutory language, the agency will have to address this issue as part of any broader rulemaking.

The issue of whether CO₂ BACT emissions limits must be imposed under

the PSD program is separate from the agency's ongoing rulemaking regarding whether to make an "endangerment" finding for CO₂, which would necessitate regulation of CO₂ under other parts of the CAA. The EPA may decide, however, to address all of these issues as part of one larger rulemaking.

1 *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (Nov. 13, 2008) ("*In re Deseret Power*").

2 The CAA defines a "major emitting facility" as a designated group of sources, including power plants, that emit, or have the potential to emit, 100 tons per year or more of any air pollutant, as well as any other source that has the potential to emit 250 tons per year or more of any air pollutant. 42 U.S.C. § 7479(1).

3 *Id.* § 7407(d)(1) (designation of attainment, nonattainment, and unclassifiable areas). The EPA also must issue permits for areas that are designated as "unclassifiable" for attainment of the NAAQS, which means that there is inadequate data to determine whether the area is attaining the NAAQS. *Id.* § 7407(d)(1)(A).

4 *Id.* § 7475; see also 40 C.F.R. § 52.21(a)(2).

5 42 U.S.C. § 7475(a)(4). BACT controls are based on site-specific determinations that result "in the selection of an emission limitation that represents application of control technology or control methods appropriate for the particular facility." *In re Cardinal FG Co.*, 112 E.A.D. 153, 161 (EAB 2005).

6 *In re Deseret Power* at 9.

7 *Id.* at 26.

8 *Id.* at 25-26.

9 *Id.* at 37.

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