

Environmental E-news

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EPA Appeal Board Remands Michigan PSD Permit for Consideration of CO2 Limits

Sending yet another strong indication of the Obama administration's intent to reduce and further regulate greenhouse gas emissions from power plants and other sources, on February 18, 2009, the Environmental Protection Agency's Environmental Appeal Board ("EAB") granted in part, the Sierra Club's petition for review of a PSD permit issued by the Michigan Department of Environmental Quality to Northern Michigan University for a coal and wood burning cogeneration boiler unit in Marquette. In doing so, the EAB remanded the permit back to MDEQ to reconsider SO₂, CO₂ and NO₂ limits.

Ignoring former EPA Administrator Stephen Johnson's 2008 memo clarifying EPA's position on the regulation of CO₂ emissions, the EAB directed the MDEQ to "be guided by its recent decision in *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB Nov. 13, 2008), 14 E.A.D. _____. This decision comes just one day after newly appointed EPA Administrator Lisa Jackson granted a petition by the Sierra Club to reconsider the Johnson interpretive memo. Interestingly, in her February 17, 2009 announcement, Jackson did not withdraw the Bush administration memo, but rather, indicated that EPA would review the memo to "ensure that it is consistent with the Obama Administration's climate change strategy and interpretation of the Clean Air Act."

Former EPA Administrator Stephen Johnson issued the December 18, 2008 interpretive memo in response to the EAB's decision in *In re Deseret Power Electric Cooperative*. In the Deseret decision, the EAB granted an appeal of a PSD permit issued by EPA Region 8 to the Deseret Power Electric Cooperative for a new waste-coal-fired electric generating power plant in Utah. At issue in the appeal was whether there was sufficient articulation of EPA's interpretation of the phrase "subject to regulation" as used in 40 C.F.R. 52.21(b) (50) and the Clean Air Act, so as to restrict Region 8's ability to subject the power plant's CO₂ emissions to Best Available Control Technology ("BACT") limits as a "regulated NSR pollutant." EPA's position was that the Clean Air Act was ambiguous and therefore subject to reasonable interpretation by the Agency. Citing "historical interpretations," the EPA's position was that "subject to regulation" applied only to pollutants regulated by emission limits and not simply monitoring and reporting requirements. While agreeing that the phrase "subject to regulation" is ambiguous, the EAB determined that there was not adequate support for EPA's interpretation to preclude EPA from subjecting CO₂ emissions to BACT limits and remanded the permit back to EPA to reconsider whether to impose CO₂ BACT limits and to "develop an adequate record for its decision." EPA Administrator Johnson's December 18, 2008 memo did just

that, setting forth in detail EPA's interpretation that CO2 emissions were not emissions "subject to regulation" under the Clean Air Act and therefore, not subject to BACT limits.

In a February 22, 2009 article in the Detroit Free Press by Associated Press reporter John Flesher, the MDEQ indicated it would await further guidance from the Obama administration before regulating CO2 and other greenhouse gases.

If you would like more information about the foregoing, please contact the author of this E-News bulletin as indicated below, or your Butzel Long attorney, or any member of Butzel Long's Environmental, Energy and Land Use Practice Group.

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