

**EPA Environmental Appeals Board Decision in
Deseret Electric Power Cooperative: Issues and Implications**

On November 13, 2008, the U.S. Environmental Protection Agency's Environmental Appeals Board (EAB) issued its decision in the closely-watched *Deseret Electric Power Cooperative* case, PSD Appeal No. 07-03. Although the Board was expected to resolve the question of whether major stationary sources seeking a Clean Air Act (CAA) Prevention of Significant Deterioration (PSD) permit are subject to Best Available Control Technology (BACT) emission limitations for their carbon dioxide emissions, the Board, in the phrase of more than one observer, "punted" on the issue and remanded the matter back to EPA Region 8 for further consideration. The continuing uncertainty on this question has serious implications not just for large coal-burning electric power stations and other large industrial sources but for a myriad of small sources across the economy as well.

Issues and decision

Under the PSD provisions of the CAA, a "major emitting facility" must obtain a PSD permit setting forth BACT emission limitations for each "air pollutant subject to regulation under this chapter." See CAA § 165(a)(4). The central issue in the case was whether carbon dioxide is currently "subject to regulation" within the meaning of this provision. The permit issuer – EPA Region 8 – held that carbon dioxide is not currently subject to regulation and therefore issued the permit without carbon dioxide BACT requirements.

The Sierra Club appealed to the EAB, contending that carbon dioxide is currently subject to regulation by virtue of section 821 of the public law known as the CAA Amendments of 1990 and 1993 regulations issued by EPA thereunder. Section 821 and the implementing regulations require electric utility sources to monitor and report carbon dioxide emissions. According to the Sierra Club and a number of supporting state and environmental interest group amici, these requirements facially meet the definition of "regulation" within the meaning of CAA § 165(a)(4).

Region 8, supported by the permit applicant and a number of industry and interest group amici, maintained that the term "subject to regulation" does not include monitoring and reporting requirements and only includes regulations imposing emission controls. They also maintained that section 821 is not part of the CAA and that, therefore, even if the section 821 monitoring and reporting requirements are "regulations," they do not constitute regulations "under this chapter."

The Board rejected Region 8's contention that its section 821 regulations are not regulations "under" the CAA, finding that EPA's rationales on this point contradicted past EPA statements regarding the relationship between section 821 and the CAA. The Board's holding, therefore, turned on whether the section 821 monitoring and reporting requirements made carbon dioxide "subject to regulation" within the meaning of CAA § 165(a)(4) – and here is where the Board punted.

On the one hand, it ruled that the Sierra Club was wrong in its argument that the section 821 monitoring and reporting requirements necessarily are regulations under CAA § 165(a)(4), finding that the phrase “subject to regulation” is ambiguous and open to interpretation on this point. On the other hand, however, it declined to rule on Region 8’s contention that the Region’s interpretation of the term “subject to regulation” as encompassing only actual emission limitations was reasonable and entitled to deference and should be upheld. Instead, the Board took a very narrow interpretation of the issue before it based on Region 8’s statement, in a response to a comment in its permitting decision, that the Region did not have authority to impose carbon dioxide BACT limitations because of long-standing EPA policy that “subject to regulation” means subject to an emissions limitation. The Board thus framed the issue for decision as whether Region 8 had correctly determined that “an authoritative historical Agency interpretation” required Region 8 to refuse to include a carbon dioxide BACT condition.

With the issue framed in this manner, the Board decided that Region 8 had erred in its rationale for refusing to apply carbon dioxide BACT because, in the Board’s view, Region 8 had not shown that there was such a long-standing Agency interpretation. The Board further found that the phrase “subject to regulation” was ambiguous and that EPA has discretion to interpret the phrase as either including – or not including – the section 821 monitoring and reporting requirements. It remanded the case to Region 8 to apply its discretion unconstrained by the Region’s view as to prior EPA policy or, presumably, to develop new evidence of such past policy if the Region wishes to continue to press the point.

Legal implications

The Board’s narrow interpretation of the issue before it resulted in the Board leaving unresolved the central issue of whether carbon dioxide emissions currently are subject to regulation under the CAA within the meaning of CAA § 165(a)(4) and therefore whether CAA permitting agencies must include BACT for carbon dioxide in PSD permits. The Board decided only three things: that Region 8 had not shown that the section 821 monitoring and reporting provisions are not requirements adopted under the CAA; that the CAA § 165(a)(4) phrase “subject to regulation” could be interpreted either as including or not including such monitoring and reporting requirements; and that the correct interpretation of that phrase is not dictated by EPA past policy, or at least the record of that policy relied on by Region 8. However, there are other rationales for interpreting “subject to regulation” as not including monitoring and reporting; indeed, on brief and at oral argument, Region 8 did not even rely primarily on the argument that past EPA policy dictated Region 8’s decision. Region 8, instead, argued that its interpretation of subject to regulation was reasonable statutory construction that was *supported* (not *dictated*) by past policy and by the use of other tools of statutory construction. But the Board chose not to address this argument and similar arguments by Deseret and supporting amici and therefore these arguments all remain open under the decision.

In the authors’ view, the Board completely missed the main reason why “subject to regulation” in the context of CAA § 165(a)(4) must mean subject to an actual emission control requirement. Under the CAA, EPA first makes an endangerment finding, then regulates, not the

other way around. This obvious point was confirmed in *Massachusetts v. EPA*, 549 U.S. 487 (2007), where the Court, having found that greenhouse gases (GHGs) are CAA “air pollutants,” did not direct EPA to regulate but instead remanded the case for EPA to either make or not make the predicate endangerment finding. Obviously, the Administrator has made no such finding as to carbon dioxide; the matter is under consideration by EPA. As the Sierra Club would have it, however, by enacting section 821, Congress authorized extensive regulation of carbon dioxide under the PSD program in advance of any endangerment finding, and did so simply by requiring electric utilities to monitor and report their carbon dioxide emissions and without any explicit indication in statutory text or legislative history that it intended such a momentous regulatory result. The Sierra Club’s contention contradicts both the basic structure of the CAA and common sense. The Board should have rejected it out of hand.

The *Deseret* decision addressed this point only indirectly, by noting that the BACT provisions of the PSD program, unlike other CAA programs, do not include endangerment finding language. But that is exactly why “subject to regulation” means subject to an emission control requirement under another CAA program and not subject to monitoring and reporting requirements. The PSD program is not a CAA outlier where Congress authorized EPA to require reductions of emissions (particularly emissions as ubiquitous as carbon dioxide) that have not been found to endanger public health or welfare. To the contrary, the PSD program fits comfortably within the overall CAA structure by requiring BACT limitations only for those pollutants which are subject to emission controls under other CAA programs and for which, therefore, an endangerment finding has been made.

In any event, the Board’s decision to narrowly interpret the issue before it limits at least the legal effect of its holding. Region 8 is free on remand to continue to refuse to require carbon dioxide BACT in PSD permitting based on any rationale other than the two limited rationales rejected by the Board. Other PSD permitting agencies are free to do the same; indeed, EPA regions do not normally process PSD permits. That task is primarily performed by state permitting agencies; Region 8 processed the permit in *Deseret* only because the project was located in Indian Country. In essence, the *Deseret* case came and went without bringing clarity to one of the central issues now facing the PSD program at this time.

Practical implications

First, the “subject to regulation” issue presented in the *Deseret* case may be short-lived. As noted, on remand of *Massachusetts v. EPA*, EPA must consider whether to make a finding that emissions of GHGs, including carbon dioxide, from new motor vehicles cause or contribute to air pollution that “may reasonably be anticipated to endanger public health or welfare” – the so-called “endangerment finding.” If it makes such a finding, it must regulate such emissions. On July 31, 2008, EPA issued an Advance Notice of Proposed Rulemaking seeking comment on the issue and on whether it should make a similar endangerment finding and regulate GHG emissions under other CAA programs affecting other sources. By the November 28 comment deadline it had received a massive number of comments. President-elect Obama’s transition team personnel and environmental position nominees have stated their belief

that EPA should make an endangerment finding and proceed with GHG regulation under one or more CAA programs. Assuming that happens, carbon dioxide will definitely be subject to regulation under the CAA and carbon dioxide BACT will be required to be included in PSD permits. The Board seemed to be well aware of this potential outcome, and stated several times in the decision that the issues involved might more appropriately be decided in a national proceeding rather than an individual permit proceeding.

Second, unless and until EPA actually does regulate GHGs on remand of *Massachusetts*, considerable uncertainty will remain in the PSD program as to how to treat carbon dioxide emissions. A number of coal-fueled electric generating stations have already completed the PSD process without undertaking carbon dioxide BACT analyses, and the “subject to regulation” language will be litigated before other permitting agencies and different appellate bodies. Most state PSD permit decisions are not subject to review by the EAB but instead may be appealed to state courts which are not bound by EAB decisions. One pending appeal involves the Longleaf coal-fueled electric generating station in Georgia. A state trial court, reversing a state agency issuance of a PSD permit without carbon dioxide limitations, ruled that PSD permits must include BACT for carbon dioxide. The matter is now before the Georgia Court of Appeals. We may see other state PSD permit and state court decisions on the issue in the future.

Third, parties just beginning the PSD permit process may decide to undertake BACT analyses for their carbon dioxide emissions, even while preserving the legal argument that no such analyses are required. These applicants may conclude that it is preferable to conduct the analysis rather than risking the delay that will ensue if they go through the permit process without such an analysis and their regulator, and/or a court, then concludes that the analysis should have been conducted.

At least for large coal plants, the issues raised by a carbon dioxide BACT analysis are generally clear. The applicant will argue that carbon dioxide reduction controls are not economically feasible and therefore the only possible BACT is improved plant efficiency. But they may also argue that the plant has already been designed to attain the maximum economically feasible efficiency, and hence the BACT limitation should not exceed the unit’s planned carbon dioxide emission levels. Environmental parties will argue that the applicant should consider further efficiency and carbon capture controls, and should consider redesigning the unit to be an integrated gasification combined cycle unit (IGCC). The issue of whether IGCC is BACT for a conventional coal plant has already been debated in a number of PSD proceedings and before EPA.

Fourth, perhaps the most troubling aspect of the entire debate about applying carbon dioxide BACT in the PSD process is that, although the debate has so far been limited to large coal-fueled electric generating stations and other large industrial facilities, many other types of facilities are affected, because any combustion source emits carbon dioxide. This is a particular concern for a wide variety of facility modifications.

The elephant in the room

Although the *Deseret* case concerned carbon dioxide BACT limits, the issues raised have major implications for a more fundamental question: whether a source emitting more carbon dioxide than the CAA § 169(1) thresholds is a “major” source solely by reasons of its carbon dioxide emissions and therefore subject to PSD permitting. This is a critical issue because, as EPA noted in its Advance Notice of Proposed Rulemaking in response to *Massachusetts v. EPA*, a very large number of sources across the economy emit more carbon dioxide than the CAA § 169(1) thresholds, even though they emit little or no other pollutants.

Under CAA § 165(a), a “major emitting facility” must obtain a PSD permit, and under CAA § 169(1), a “major emitting facility” is one that emits more than a defined amount of “air pollutants.” Unlike CAA § 165(a)(4), which provides for BACT for air pollutants that are “subject to regulation,” CAA § 169(1)’s definition of “major emitting facility” is not so limited. Nevertheless, throughout the entire thirty-year history of the PSD program, EPA has consistently required PSD permits only for sources emitting above the threshold level of *regulated* air pollutants, not any air pollutants. *See, e.g.*, 67 Fed. Reg. 80,186 (December 31, 2002) (applying PSD requirements to any “regulated NSR pollutant”).

The Board in *Deseret* was apparently troubled by the linguistic difference between CAA § 165(a)(4) and § 169(1). After oral argument, it asked for briefs addressing whether, given the Supreme Court ruling in *Massachusetts* that GHGs are air pollutants, a facility emitting more carbon dioxide than the § 169(1) thresholds is automatically a “major emitting facility” regardless of whether carbon dioxide is regulated under the statute. Both Region 8 and the Sierra Club told the Board that it did not have to consider the issue because *Deseret*’s facility emitted other pollutants in amounts greater than the CAA § 169(1) thresholds and thus was subject to the PSD program regardless of how much carbon dioxide it emitted. In the view of the parties, the Board could therefore resolve the “subject to regulation” issue for BACT purposes without addressing how the Board’s decision might affect the issue of PSD applicability to carbon dioxide-emitting sources. The Board’s decision thus did not address the applicability issue.

Nevertheless, the applicability and BACT issues cannot be separated. If the EAB or other permitting agency were to rule definitively that carbon dioxide is “subject to regulation” for purposes of determining BACT because of section 821 or another requirement, then there would not seem to be any basis to argue that carbon dioxide is not also a “regulated NSR pollutant” for purposes of determining PSD applicability. In that event, sources that are “major” only because their carbon dioxide emissions exceed the CAA § 169(1) thresholds would become subject to the PSD program. As the authors have detailed elsewhere,¹ the consequences of such a result would be enormous because it would bring an extraordinarily large number of new

¹ Potential Regulation of Greenhouse Gas Emissions under Title I of the Clean Air Act: An Evaluation of EPA’s Legal Analysis in Regulating Greenhouse Gas Emissions under the Clean Air Act, Advance Notice of Proposed Rulemaking, November 28, 2008, submitted in OAR-2008-0318.

sources into the PSD program. It would threaten to overwhelm the entire PSD permit program, and could seriously impede a wide variety of construction activities. In sum, resolution of the “subject to regulation” issue is not just about coal plant emissions – at stake is whether the PSD program will be applied to numerous small sources across the economy because of their carbon dioxide emissions.

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