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An 11th Hour Bush EPA Response to the Deseret Power Decision and Environmentalists' Reaction

On Dec. 18, 2008, just a month before the new administration takes the reins at EPA, Administrator Stephen Johnson, a Bush appointee, responded to the recent *Deseret Power* decision by issuing a well-crafted interpretive rule determining that CO2 is not currently a "pollutant subject to regulation" under the Clean Air Act (CAA).

EPA contends its interpretive rule is consistent with prior EPA interpretation, and that immediate EPA action was required to avoid a calamitous breakdown in CAA permitting for new and modified emission sources following the Environmental Appeals Board's (EAB) November 2008 *Deseret Power* decision (*In re Deseret Power Electric Cooperative*, EAB PSD Appeal No. 07-03 (Nov.13. 2008)).

While Johnson's action was a surprise to many, it was a great relief to many project developers whose pending permit applications were cast in doubt by the *Deseret Power* decision. But before the ink could dry, outraged environmental groups led by the Sierra Club and the Natural Resources Defense Council, fired back on Dec. 30, 2008 with a Petition for Reconsideration under Section 307(d) of the CAA, threatening the prospect of an appeal of the new rule to the D.C. Circuit Court of Appeals.

Environmental activists have filed CAA permit appeals in administrative and judicial forums across the county, seeking to use existing CAA BACT requirements as a sword to force coal-fired power plants and other large CO2-emitting plants to address greenhouse gases and global warming. The Bush administration has resisted this effort on a case-by-case basis. In the *Deseret Power* case, the EAB

for the first time, rejected the environmentalists' argument that the CAA *on its face* requires EPA regulate CO2 emissions, saying the CAA is ambiguous and EPA interpretation would be controlling.

But it also rejected EPA's explanation of its historic interpretation and its policy reasons for not applying Best Available Control Technology (BACT) requirements to CO2 emissions. The EAB remanded the permit proceeding back to EPA to provide a better record for its decision. The EAB also strongly suggested that EPA consider the question of CO2 regulation in an action of "nationwide scope." Arguably, Johnson's interpretive rule is just such an action.

In his lengthy Dec. 18 memorandum constituting the interpretive rule, the EPA administrator laid out the argument for *not* regulating CO2 under the existing CAA New Source Review program. The Johnson Memo reiterates the statutory construction arguments made in EPA's *Deseret Power* briefs, and points to CAA regulatory and legislative history, as well as EPA permitting precedent in support of its conclusion that a pollutant is "subject to regulation under the Act" only if it is subject to regulations that require *actual control* of emissions.

But Johnson also details EPA's policy concerns and some very practical administrative concerns. Among them are the prospect of requiring case-by-case BACT decisions on CO2 emission reduction technologies before EPA has articulated CO2 "major source" and "significance" thresholds, has established something akin to a "National Ambient Air Quality Standard" for CO2, and has reviewed the availability and cost of CO2 control technologies in the context of a full rulemaking record. Johnson also vigorously defends EPA's authority and need to obtain information and study a pollutant before rushing to control it under the CAA's New Source Review program.

Reaction to the Johnson Memo was fast and furious. Sierra Club immediately denounced it as "cynical," "ham-handed" and "illegal," and contended that the Obama administration would undo the Johnson Interpretive Rule with "the flick of a pen." Senator Boxer called for the Justice Department to intervene to require EPA to withdraw what she characterized as a "blatantly illegal" memo.

Then, on Dec. 30, 2008, seventeen environmental groups filed a Petition for Reconsideration with EPA, arguing that EPA's action in issuing the Johnson Memo as an interpretive rule was illegal without notice and comment because the memo: (1) was actually a substantive rule; and/or (2) changed EPA's interpretation, rather than re-stated it, as Johnson contended. The petition is brought under Section 307(d) which by its own terms doesn't apply to interpretive rules. But the environmentalists' first claim, that the Johnson Memo is substantive rulemaking and not an interpretive rule, could open the door to Section 307(d) judicial review.

The case law precedent on interpretive rules relied on by both Johnson and the environmentalist groups is the same, holding that no notice and comment is required for an interpretive rule unless an agency is changing its interpretation. The question presented is whether EPA has changed its interpretation. In *Deseret Power*, the EAB "questioned" but expressly stated that it didn't "decide" whether the combination of EPA memos and rulemakings cited in the *Deseret Power* briefs constituted "an authoritative 'interpretive rule' meeting the characteristics for which a notice and comment rulemaking would be required . . . if the Agency were to change the interpretation."

The Bush EPA could act quickly to deny the petition, stating the petition is improper because the memo did not constitute a Section 307(d) substantive rule, and it is wrong on the merits because the memo did not change, but rather expressly stated, EPA's existing interpretation. An EPA denial of a proper petition for reconsideration under Section 307(d) is appealable directly to the Circuit Court of Appeals.

Such an appeal doesn't automatically stay the effect of the challenged rule, but either EPA or the Appellate Court could issue a discretionary stay up to three months in duration. If the Bush EPA denies the petition quickly, it will presumably also deny any stay at the same time. Under this scenario, the environmentalists will surely appeal and push the Appellate Court for a stay of the effect of the Johnson Memo in the interim.

Alternatively, the Bush EPA could simply wait and let the new administration respond to the petition. If that occurs, the Obama EPA will be under considerable pressure from environmental groups to stay the effect of the Johnson Memo to try to stop any pending permit actions from proceeding while EPA "reconsiders" its interpretation. But Obama will also be under pressure from the other side -- including state and EPA regional permit writers and new energy project proponents -- whose permits could be placed back in limbo if the interpretive rule is withdrawn. They argue that, according to *Deseret Power*, EPA has no legal basis for withholding a PSD permit for failure to address CO2 emission absent a definitive EPA interpretation.

The Obama EPA's easiest course could be to open a docket for reconsideration -- with full notice and comment -- without staying the effect of the memo. As the Administrative Procedure Act has long been interpreted as allowing agencies to issue *initial interpretive rules* without public notice and comment, but requiring public notice and comment when an agency makes a significant change to an established interpretation, *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997), this approach would be unquestionably legal and would qualm concerns about precipitous action.

By proceeding in an orderly fashion to review the question of how to best regulate greenhouse gases, the Obama EPA might avoid an appeal from either side, thus keeping the ball in its court to maintain the threat of regulating CO2 under the CAA to pressure Congress to enact comprehensive climate change legislation.

McGuireWoods LLP is a full service law firm with specialty practices in Clean Air Act and climate change matters. For further information on the Johnson Memo, *Deseret Power* case, Clean Air Act, climate change, or greenhouse gas regulation, please contact one of the McGuireWoods attorneys listed below.

Please join us Friday, Jan. 16, 2009, at noon (ET) for a complimentary McGuireWoods teleconference panel discussion of the legal and political issues surrounding regulation of CO2 under the Clean Air Act, including the significance of the Johnson Memo, the environmentalists' challenge, and the prospects for CO2 regulation in the Obama administration. Advanced registration for the teleconference is now available. More details will be provided shortly.

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