EAB Remands *Deseret Power* Case:

EPA Directed to Consider Nationwide Implications of BACT for Greenhouse Gas Emissions

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On November 13, 2008, EPA's Environmental Appeals Board (EAB) issued a much anticipated decision in the arena of greenhouse gas regulation. The question posed by *In Re Deseret Power Electric Cooperative,* EAB PSD Appeal No. 07-03, is whether current Clean Air Act (CAA) "best available control technology" (BACT) regulations can be used to force power plants to control carbon dioxide (CO2) emissions. The EAB answered this question with a resounding "maybe," and threw the ball back into EPA's court.

In this case and others filed in administrative and judicial forums across the county, environmental activists have sought to use existing CAA BACT requirements as a sword to address greenhouse gases and global warming. In June 2008, a Georgia court voided a CAA permit and halted the construction of a coal-fired power plant for failure to address BACT for CO2 emissions. *Friends of the Chattahoochee, Inc. v. Couch*, No. 2008CV146398 (June 30, 2008). While that decision is on appeal, a similar permit challenge is pending in North Carolina. CO2 BACT arguments have been the basis of permit challenges, and in some instances permit denials, in forums across the country, including notable cases in Kansas, Illinois, Texas and New Mexico.

In its remand decision in *Deseret Power*, the EAB rejected EPA's rationale for not applying BACT to CO2 emissions, but also stated that ambiguity in the CAA BACT provisions make this question an appropriate subject for interpretation by the Agency charged with enforcing the CAA. The EAB also strongly suggested that this question should be addressed by rulemaking or legislation, rather than on the limited factual record in an individual permit proceeding. EAB required that EPA expressly consider whether an action of "nationwide scope" is required to support its decision on BACT applicability to CO2 emissions.

The *Deseret Power* remand and the plethora of BACT CO2 cases challenging coal-fired power plants across the country follow on the 2007 Supreme Court decision in *Massachusetts v. EPA* holding that EPA has the authority to regulate greenhouse gas emissions as a pollutant under the CAA, but *only if* it finds that such emissions endanger health or the environment. EPA has not yet made an *endangerment finding*, and, in fact, punted on this issue. In July 2008, EPA published an Advance Notice of Proposed Rulemaking detailing the difficult questions raised by the prospect of regulating greenhouse gas emissions under the CAA. With its remand in *Deseret*, the EAB has effectively assured that the question of whether greenhouse gas emissions will be regulated under the CAA will not be decided by the current Administration – and perhaps not before a new Congress has had an opportunity to weigh in. A significant portion of the debate in Congress on climate change regulation has involved the question of whether the CAA is an appropriate vehicle for regulating greenhouse gases.

The significance of the Sierra Club's argument in the *Deseret Power* case is that it circumvents the requirement for an EPA endangerment finding. Unlike the mobile source provisions in CAA Section 202(a)(1) which were at issue in *Massachusetts*, the BACT provisions in Sections 165 and 169 of the CAA do not require an endangerment finding. Rather, EPA is obligated to impose BACT requirements for pollutants which are *subject to regulation* under the CAA. The dispute in *Deseret Power*, as in the other BACT CO2 cases winding through the courts, turns on the meaning of the statutory phrase "pollutant subject to regulation under this Act" and whether CO2 falls within the meaning of that phrase under current regulations. USEPA Region 8 argued this phrase is ambiguous, and thus the EAB should defer to EPA's historic interpretation that a pollutant is subject to regulation only if it is subject to

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requirements to actually *control emissions*. Lacking that regulatory predicate, EPA argued CO2 is not subject to BACT requirements.

Sierra Club argued that the term "regulation" is plainly broader than "actual control of emissions." As evidence of regulatory requirements that apply to CO2, Sierra Club pointed to Section 821 of the CAA, which directs EPA to issue regulations for monitoring and reporting of CO2 emissions at power plants as a part of the CAA Acid Rain program, and EPA regulations promulgated under that provision.

The EAB cut the baby in two. It held that the phrase was "not so clear or unequivocal as to preclude Agency interpretation" or to compel EPA to include BACT requirements for CO2 in an air pollution control permit. But it also held that EPA is not, as it contended, constrained by historic agency interpretation of the phrase "subject to regulation" from imposing CO2 BACT in a PSD permit. Thus the rationale for EPA's decision was simply not supported in the administrative permitting record. In reaching this conclusion, the EAB decision is pointedly at odds with the Georgia Superior Court's decision in *Friends of the Chattahoochee*, which held that the phrase "subject to regulation," had a "plain meaning" that included CO2 monitoring and reporting requirements.

The EBA also rejected EPA's alternative argument that the CO2 monitoring and reporting requirements promulgated pursuant to Section 821 of the 1990 Amendments were not actually promulgated *under* the CAA. EAB found this argument to be at odds with EPA's own past statements regarding the relationship between Section 821 and the CAA.

The EAB remanded the case back to EPA to consider anew whether CO2 is a "pollutant *subject to regulation* under the CAA," and, thereby, determine whether CO2 BACT is required in its permitting decisions. By remanding this question back to EPA with instructions to consider the nationwide implications of its decision, EAB signaled the broad policy questions raised by regulating CO2 under the existing CAA structure. In the first instance, any EPA decision on remand in this case will have repercussions for the BACT CO2 cases pending in administrative and judicial forums nationwide. It may dictate the viability of not only coal-fired power plant projects, but also many other new and modified facilities. Therefore, a broader record – possibly in the form of a rulemaking — is surely warranted. EPA might take such an opportunity to reprise and investigate further the points it made in the ANPR regarding the difficulties EPA, the states and regulated entities would encounter if greenhouse gas emissions were regulated like other pollutants under existing CAA definitions, significance thresholds, and programs.

How EPA will respond to this remand, and indeed whether EPA will have an opportunity to respond, will be influenced, and perhaps dictated, by the whirlwind of public debate and activity beyond EPA's doorstep. EAB's admonishment that EPA must consider the nationwide implications of this decision comes at a changing of the guard at EPA, as well as in Congress and the White House. Indeed, EPA's interpretation of the existing CAA may soon be moot in the wake of amendments to the CAA or new legislative or administrative regimes for regulating greenhouse gas emissions and incentivizing clean energy technologies. On its face, the EAB opinion simply orders EPA to reconsider its statutory interpretation in light of a broader record, including additional information contributed in a reopened public comment period. But the broader context suggests that EPA's reconsideration is likely to be superseded by other events. President-elect Obama has stated unequivocally that climate change is one of his priorities. Moreover, his spokespersons have signaled that if Congress fails to act on climate change legislation within 18 months after the new Congress is seated, the Obama Administration is willing to go forward with CAA regulation of greenhouse gases. If nothing else, the EPA docket for reconsideration in *Deseret Power* will provide the new administration with another vehicle to drive Congress to enact a comprehensive national climate change policy.

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