

News: Legal Updates

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Current Air Permitting Issues: CO₂, PM_{2.5}, Coal Gasification

MORE INFORMATION

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Amid all of the current focus on *future* emissions regulation, two recent actions address the requirements for permits now. These actions -- a significant EPA letter and a noteworthy Georgia court case -- concerned the treatment of carbon dioxide (CO₂), fine particulate matter (PM_{2.5}), and Integrated Gasification Combined Cycle (IGCC) technology.

Sunflower

On July 1, 2009, EPA Region VII sent a letter to the Kansas Department of Health and Environment concerning the proposed Sunflower Electric Power Corporation coal-fired power plant. The Sunflower plant was previously proposed as two 700 MW units. After an initial permit denial, Sunflower reached an agreement with state officials for permitting one 895 MW unit. EPA's letter stated that the design changes and public input must be considered before any final permit.

EPA encouraged consideration of IGCC technology as the best available current technology (BACT). Additionally, the letter recommended the direct evaluation of PM_{2.5} rather than using PM₁₀ as a surrogate. Currently, EPA does not have rules requiring such actions, so the letter's statements were merely recommendations. Nevertheless, some news reports indicate that Sunflower will likely follow the recommendations to avoid future litigation.

Longleaf

On July 7, 2009, the Georgia Court of Appeals handed down its decision in *Longleaf Energy Associates, LLC v. Friends of the Chattahoochee, Inc. et al.*, reversing the lower court on several points. As a bit of background Longleaf Energy Associates, LLC sought a permit for the construction of a pulverized coal-fired electric power plant in rural Early County, Georgia. The permitting was required by CAA regulations, as incorporated through Georgia's State Implementation Plan (SIP) for the prevention of significant deterioration (PSD) program under new source review (NSR). In Georgia the PSD program is administered by the state's Environmental Protection Division (EPD) of the Georgia Department of Natural Resources. After 30 months of consideration and review, the EPD issued a permit to Longleaf.

Environmental groups challenged the permit and invoked the right to a review by an ALJ. After a 21-day evidentiary hearing, the ALJ affirmed the issuance of the permit. Challengers then appealed to the Fulton County Superior Court which found error in the ALJ's decision. The EPD and Longleaf then appealed to the Georgia Court of Appeals.

The Superior Court, relying on CAA regulations and the recent U.S.

Supreme Court decision *Massachusetts v. EPA*, decided that CO₂ must be regulated in the EPD permit. The Georgia Court of Appeals disagreed. It found that *Massachusetts v. EPA* authorized regulation of CO₂, but that such regulation is still in the regulatory process and was not applicable to the permit in question. Additionally, the Court of Appeals rejected the argument that procedural monitoring and reporting of CO₂ means that the gas is "subject to regulation," which would in turn define CO₂ as a pollutant subject to PSD regulation.

Environmental groups argued that IGCC technology should be considered in the BACT analysis of the planned pulverized coal-fired power plant. While the Superior Court was persuaded by this argument, the Court of Appeals looked to other court and administrative decisions holding that (1) BACT analysis need not consider technology that would redefine the design of the facility; and (2) IGCC technology would redefine the design of this pulverized coal-fired power plant. As such, the BACT analysis for Longleaf need not consider IGCC technology.

The PSD permit requires consideration of PM_{2.5} and PM₁₀. The Court of Appeals traces the regulation of particulate matter back to 1997 when modeling for PM_{2.5} was technologically unfeasible and PM₁₀ modeling was accepted as a surrogate. Regulation issued in April 2007 implemented a rule for PM_{2.5}, but the Court of Appeals notes that the regulation did not apply to NSR. Thus, Longleaf's use of PM₁₀ modeling as a surrogate for PM_{2.5} modeling is acceptable.

Finally, the Court of Appeals agreed with the Superior Court on one important point -- the ALJ failed to apply a de novo standard of review. The ALJ's decision expresses deference to the agency decision in question. Statute, however, calls for de novo review and independent determination. So, despite the several points decided by the Court of Appeals in favor of Longleaf, the case was remanded to the ALJ to reconsider the evidence under the correct standard of review.

Attorneys in McGuireWoods' environmental, energy and climate change groups regularly represent clients in the energy and manufacturing sectors on environmental and greenhouse gas matters. We would be pleased to assist clients in considering these recent developments as well as positioning for possible future emissions regulation. Please contact the authors for more information.

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