KIRKLAND ALERT
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Environmental Appeals Board Remands Air Permit, Suggesting Nationwide Action, But Leaving CO_2 Requirements Unresolved

On November 13, 2008, in *In re Deseret Power Electric Cooperative*,[1] the Environmental Protection Agency's ("EPA") Environmental Appeals Board ("EAB") remanded a decision by EPA Region 8 (the "Region") issuing an air permit for a proposed waste-coal-fired electric generating unit for reconsideration of the Region's determination that it was not authorized to impose "best available control technology" ("BACT") emissions limits for carbon dioxide ("CO_2"). The Sierra Club (a party to the case), among other environmental groups, is hailing the decision as groundbreaking and of great precedential importance. According to the Sierra Club, "[t]he decision means that ***all new and proposed coal plants nationwide*** must go back and address their carbon dioxide emissions."[2] In addition, Senator Reid wrote to the Governor of Nevada, asserting that Nevada would be wise not to move forward with any power plant permits until CO_2 emissions are specifically addressed, especially for any plants with greater emissions than the one for which Deseret Power Electric Cooperative ("Deseret") was seeking approval.[3]

The central issue in the case was whether CO_2 is a pollutant "subject to regulation" under the Clean Air Act (the "Act" or "CAA"). The EAB's key holdings in *Deseret* are that:

- The term "subject to regulation under this Act" is ambiguous. The Sierra Club's position that the term had a plain meaning that required regulation of CO_2 in the BACT permitting decision of the Region must be rejected.

- The Region's view expressed in briefing before the EAB that the Region was constrained to interpret the term "subject to regulation under this Act" to mean "pollutants that are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant" is erroneous because such an interpretation was never clearly adopted by the EPA at any prior time. Hence, the Region's position that it can properly issue a permit for a power plant under the prevention of significant deterioration ("PSD") program without considering whether to impose BACT on its CO_2 emissions was erroneous. The Region possessed discretion as a policy matter to interpret the term "subject to regulation under this Act" that it wrongly believed it did not possess.

- On remand, the Region must reconsider whether CO_2 emissions are "subject to regulation under this Act" under a proper understanding of the scope of its discretion. Depending on the answer to that question, then, the Region must also decide whether to apply BACT emissions limits to CO_2.

Finally, the EAB suggested, but did not hold, that because this is a matter of nationwide importance, the Region and the EPA Administrator might be better advised to work together to address the question of CO_2 permitting in an action of nationwide scope, rather than through an individual permitting proceeding.

I. BACKGROUND

A. Regulatory Framework

The Act requires prior EPA approval, in the form of a PSD permit, to construct a new "major emitting facility" or "major modification" to an existing facility in designated areas.[4] Before issuing a PSD permit, the EPA must consider all public comments regarding the air quality impacts of a proposed facility, as well as alternatives thereto and control technology requirements.[5] Subject to certain other requirements, the Act prohibits the issuance of a PSD permit unless it includes BACT to control emissions of "each pollutant subject to regulation" under the Act.[6]

B. Procedural History

On November 1, 2004, Deseret submitted an application for a PSD permit to construct a new waste-coal-fired electric generating unit at its existing Bonanza Power Plant, located near Bonanza, Utah. The EPA was the permitting authority because the Plant is located within an Indian Reservation. The Sierra Club, among others, filed public comments opposing Deseret's application, arguing that the EPA had a legal obligation to regulate CO_2.

On August 30, 2007, the Region issued its decision to grant Deseret a PSD permit for the proposed facility. In its decision, the Region did not impose BACT emissions limits for CO_2. In response to the comments of Sierra Club and other commenters, the Region explained that the EPA did not have the authority at that time to impose emissions limits on CO_2. Functionally, the Region interpreted the term "subject to regulation under this Act" to mean that CO_2 emissions must actually be subject to regulatory ***restriction*** at the time a permitting decision is being made. On October 1, 2007, the Sierra Club appealed the permit to the EAB, arguing that the Region violated the Act by failing to require an emission limit for control of CO_2 and by failing to consider "alternatives" to the proposed facility.[7]

II. *DESERET*

A. Arguments of the Parties

The Sierra Club argued that the Region was required to include BACT emissions limits for CO_2 because CO_2 is an "air pollutant" that is "subject to regulation" under the Act. The Sierra Club pointed to the Supreme Court's April 2007 decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which held that CO_2 is an "air pollutant" within the meaning of the Act. CO_2 is "subject to regulation" under the Act, in the Sierra Club's view, because the EPA had promulgated regulations pursuant to the Act that require the monitoring and reporting of CO_2 emissions.[8]

The Region responded in briefing to the EAB that it could not impose such emissions limits because the EPA has historically interpreted the phrase "subject to regulation under this Act" to cover only pollutants that are subject to a statutory or regulatory provision that requires ***actual control*** of emissions of such pollutant. Because CO_2 is not subject to any emissions limits under the Act, the Region concluded that it did not have the authority to impose BACT emissions limits on CO_2 in a PSD permitting proceeding. The Region's decision seems eminently natural and sensible. Never before had any organ of the EPA ever suggested that "subject to regulation under this Act" could lawfully or logically be interpreted in any other way.

B. EAB Decision

The EAB held that the Region's decision was "clearly erroneous" and that it was not supported by evidence in the record. The EAB's characterization of the decision below as "clearly erroneous" as the basis for rejecting the Region's legal interpretation is curious, as no relevant finding of fact was in dispute. The EAB's decision is more readily treated as akin to a line of precedent in the D.C. Circuit tracing to *Prill v. NLRB*, 755 F.2d 941, 956-57 (D.C. Cir. 1985), and ultimately, all the way back to the Supreme Court's decision in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). Under the *Prill* line of cases, agencies that misperceive the expanse of their legal discretion under a statute have committed an error of law that requires a remand

for the agency to exercise its discretion under a properly formed view of the law. *Compare* EAB Decision slip op. at 19. Thus, in this case, given the Region's choice of arguments to the EAB, if the Region were incorrect that its interpretation of "subject to regulation under this Act" was a longstanding historical interpretation of the EPA as a whole, binding on the Region, then the Region's permitting decision would require remand.

In the course of its *Prill*-like analysis, the EAB first found that there is no evidence of a congressional intent to compel the EPA to apply BACT emissions limits to pollutants such as CO_2, which are subject only to monitoring and reporting requirements. Hence, the Sierra Club's aggressive position asserting such an argument had to go down to defeat. The EAB further concluded, however, that the term "subject to regulation" is not so clear and unequivocal as to preclude the EPA from exercising discretion as to how to classify the regulatory status of CO_2, which is subject to certain reporting requirements (though not emissions control) under the Act.

The EAB then went on to reject the Region's argument that its discretion was constrained by the EPA's historical interpretation because the Region had not identified any EPA documents expressly stating that "subject to regulation" means subject to actual control of emissions. Much of the decision is consumed with considering (and rejecting) various sources of authority that the Region pointed to for the purpose of demonstrating that the EPA had actually formulated a position on the proper construction of the central term: "subject to regulation under this Act."

Suggestive of potential vulnerabilities in the decision, one of the sources of authority the Region pointed to as establishing a clear historical position was a rulemaking in the "new source review" ("NSR")[9] area that concededly controlled the PSD program as well. In the relevant 2002 rulemaking, the EPA had issued agency-wide regulations defining the term "subject to regulation under this Act" by promulgating a regulation that defined the term "regulated NSR pollutant." Contemporaneously, the Agency also put out a list of pollutants regulated under NSR from which CO_2 was notably absent. The purpose of such an approach would appear to be to provide other EPA Regions and State permitting authorities with a "one-stop shopping" list that defined all NSR/PSD pollutants that could be regulated under the BACT process (and, under the canon *expression unius*,[10] to exclude from consideration by the permitting authorities any pollutants not so listed).

Nowhere did the EAB explain the purpose for such a coordinated release of a rulemaking along with a list of specific pollutants, if it was not to serve as such a "one-stop shopping" role. Instead, as it did at numerous junctures in its opinion, *see, e.g.*, EAB Decision slip op. at 35 & 43, EAB faulted the Region for citing to a source that did not ***specifically*** construe the term "subject to regulation under this Act" in light of a claim that CO_2 comported with that definition because it was a pollutant subject to mere reporting obligations. The EAB's decision here would seem to demand an uncharacteristic and extreme level of specificity that is out of place for an agency body adjudicating the propriety of action by another component within the same agency.

Moreover, the EAB's approach would seem to deny the Region any flexibility in the application of the NSR regulations to Deseret's facts and, indeed, to blur the distinction between interpreting the statute and applying regulations (that have already interpreted the statute) to a given set of facts. Indeed, as a general matter, the EAB's approach is almost to place the burden of proof on the Region to demonstrate that a highly specific past determination had been made in the context of a question of first impression for application of the relevant regulations. Nowhere did the EAB ask whether the Sierra Club's alternative interpretation of the Act made logical sense. Under the Sierra Club's analysis, BACT would appear to be required for pollutants that have not yet been identified (and thus not under any form of legal obligation under the Act) because such pollutants will, in the future, be "***subject to*** regulation under this Act." And the Sierra Club, after all, was the proponent of reversing the grant of a permit by the Region for the

Deseret plant, and normally would be the party saddled with carrying any burdens of proof on legal and factual issues in dispute.

The EAB remanded the proceeding back to the Region to reconsider its rationale for finding that it lacked the authority to impose BACT emissions limits on CO_2 and to supplement the factual record as necessary. The EAB also directed the Region to consider on remand whether this issue may be better addressed as part of a national proceeding on CO_2 regulation. Overall, the decision strains at various junctures to reach the conclusion that EPA as a whole had failed to adequately address the definition of "subject to regulation under this Act."[11] Essentially, the decision leaves the Region with three options: The Region could develop a stronger rationale on the record for not imposing BACT for CO_2. Alternatively, the Region could choose to impose a BACT limit for CO_2 in the permit. Finally, the Region could await action by EPA to commence a national rulemaking to establish whether CO_2 is a pollutant "subject to regulation" under this Act. The EAB's invitation to national regulations at the conclusion of the decision suggests that it was designed to present the incoming Administration with an opportunity to alter the legal and policy choices made by the current Administration in the area of climate change regulation.

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This decision could impact any clients seeking PSD permits in Class I areas or elsewhere. Next steps and the ability to contest this ruling are also dependent on the precise State in which new facilities are being or may be contemplated. The decision may result in significant delays in the permitting and development of new facilities, particularly if it becomes entangled in the question of how the new Administration should resolve the *Massachusetts v. EPA* remand. Should you have any questions or need any additional information, please feel free to contact us.

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1 13 E.A.D. __, PSD Appeal No. 07-03, PSD Permit No. PSD-OU-0002-04.00 (Nov. 13, 2008) ("*Deseret*").

2 *See* http://action.sierraclub.org/site/MessageViewer?em_id=78902.0 (emphasis added).

3 *See* Letter from Senator Harry Reid to Governor Jim Gibbons, at 1 (Nov. 25, 2008) ("The EAB's decision makes it overwhelmingly clear that the Nevada Division of Environmental Protection ("NDEP") cannot move forward with legal certainty in granting final air quality permits to any of the proposed coal-fired power plants currently being considered in Nevada, unless such permits consider the extremely high greenhouse gas emissions from those plants.").

4 *See* 42 U.S.C. §§ 7407, 7470-7492. Specifically, the requirement to obtain PSD permits applies in areas that either satisfy the EPA's national ambient air quality standards ("NAAQS") or have insufficient data to determine satisfaction of the NAAQS. The NAAQS establish maximum concentration ceilings for six types of pollutants (namely, sulfur oxides, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead), but not CO_2. *See* 40 C.F.R. §§ 50.4-50.12.

5 CAA § 165(a)(2), 42 U.S.C. § 7475(a)(2).

6 CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4).

7 The Sierra Club's argument concerning the failure to consider alternatives was rejected by the EAB on solid grounds. The Sierra Club tried to argue that the Region had a duty to *sua sponte* consider alternatives the Sierra Club had not requested be analyzed in the original proceeding before the Region, on the theory that the same issues were under consideration by EPA Region 9 in connection with a different plant in Nevada.

8 *See* 40 C.F.R. Pt. 75.

9 By contrast to the PSD program, the NSR program applies to areas that are in nonattainment. *See* CAA § 172(c)(5), 42 U.S.C. § 7502(c)(5); 40 C.F.R. § 51.160 *et seq*. *Compare* n.4, *supra*.

10 The EAB decision in effect imagines that there is a third category other than the obvious categories of a "regulated NSR pollutant" and a non-"regulated NSR pollutant." The concept is inherently binary, and EPA's logic in 2002 appeared inherently binary in deploying such a concept. Of course, if there is a something that must be regulated that is not on the "regulated NSR pollutant" list, then it cannot be a non-"regulated NSR pollutant," and would logically seem, automatically, to become instead a "regulated NSR pollutant." Adjudicators do not usually fail to appreciate the logical implications of agency positions, even if the agency does not specifically adopt such a logical implication in express terms. Such a failure is especially unusual where the adjudicators in question are housed ***inside***, rather than outside the agency in an Article III court. In short, EAB's searching review of the Region's analysis and the level of specificity the EAB demanded of the Region here is far from typical.

11 The decision also appears to have to strain to reach that result as a procedural matter. The argument presented by the Sierra Club was more limited than the issue on which the EAB chose to focus. The Sierra Club argued in comments to the Region (which defines the issues over which it can appeal) that if *Massachusetts v. EPA*, 549 U.S. 497 (2007), concluded that CO_2 had to be regulated under the Act, then the Region would likely have to set BACT for the Deseret plant. *See* EAB Decision slip op. at 15 (quoting Sierra Club as follows: "If the Supreme Court agrees that greenhouse gases, such as CO_2 ***must be regulated*** under the Clean Air Act, such a decision may also require the establishment of CO_2 emission limits in this permit....") (emphasis added). Of course, *Massachusetts v. EPA* did not decide that CO_2 regulation was mandatory. Accordingly, it is arguable that the point of law the EAB addressed was not even properly presented in the case.

Should you have any questions about the matters addressed in this Alert, please contact the following Kirkland & Ellis attorneys or the Kirkland & Ellis attorney you normally contact:

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