



THE ADMINISTRATIVE WATCH

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U.S. EPA Board Decision May Open Door to CO₂ Regulation Under the Clean Air Act

On November 13, 2008, the Environmental Appeals Board (“EAB”) issued a decision requiring EPA Region 8 to reconsider whether a Prevention of Significant Deterioration (“PSD”) permit it issued for the construction of a new coal-fired power plant in Utah must include Best Available Control Technology (“BACT”) for CO₂ emissions. *In re: Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB 2008). (hereinafter “*Deseret Power*”) The EAB’s decision requires Region 8 to develop a full record for its decision regarding whether to require BACT controls for CO₂ in the PSD permit. The EAB’s decision in *Deseret Power* appears to run counter to the EPA’s position that greenhouse gases like CO₂ should be addressed under new national legislation and not the Clean Air Act.

The *Deseret Power* case marks the first EAB decision since the U.S. Supreme Court’s landmark holding in *Massachusetts v. EPA*, 549 U.S. 497 (2007) that found CO₂ to be an “air pollutant” under the Clean Air Act, in which the EAB required EPA to consider whether BACT for CO₂ must be included in a PSD permit for a stationary source. Since the 2007 *Massachusetts* decision, the EPA has maintained that it is not required under the Clean Air Act to consider BACT controls for greenhouse gases, because these pollutants are not regulated under the Clean Air Act. Environmental groups have challenged this position in several pending permit appeal cases around the country.

The EAB’s decision stopped short of actually requiring Region 8 to impose BACT in its reconsideration of the PSD permit. Although the EAB’s opinion generally agrees with the arguments made by the Sierra Club, the group that filed the permit appeal, the EAB declined to address the highly controversial issue of whether or not CO₂ is in fact regulated under the Clean Air Act. The EAB’s failure to address this pivotal issue suggests that the EAB intended to avoid issuing an opinion that would have national implications for the regulation of CO₂ emissions from all stationary sources.

The immediate impact of the *Deseret Power* case on stationary sources, including power plants and industrial operations is unclear. However, it is likely the EAB’s decision will be widely cited by those opposing PSD permits that lack BACT for CO₂. Industry should carefully monitor developments in the *Deseret Power* case, as well as other permit appeal cases for their potential implications for the regulation of CO₂ and other greenhouse gas emissions under the Clean Air Act.

BCCZ’s Environmental Health and Safety and Climate Change Groups actively track Clean Air Act and climate change legislative, regulatory, and policy developments at all levels of government, and advise clients as to the impacts of these developments. Our Climate Change Group will continue to closely monitor litigation developments. For more information regarding the case discussed above, please contact Michael H. Winek at (412) 394-6538 or mwinek@bccz.com or Seth A. Rice at (412) 394-5490 or srice@bccz.com.

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