

Georgia Court Rules Permit for Coal Plant Must Limit Carbon Dioxide Emissions

BY SANJAY RANCHOD

On June 30, 2008, in another signal of a trend of greater scrutiny of new coal-fired power plants, a Georgia state court held that the air permit for a proposed coal plant must set limits on carbon dioxide ("CO₂") emissions. The ruling represents the first time a judge has applied the U.S. Supreme Court's recent landmark decision on regulation of greenhouse gas emissions to an industrial source, although state regulators have been giving increased scrutiny to proposed plants. The decision in *Friends of the Chattahoochee v. Couch*, No. 2008CV146398 (Fulton County Superior Court), may be a harbinger of things to come in similar cases.

Background

Long Leaf Energy Associates, LLC, sought a Prevention of Significant Deterioration ("PSD") permit for the construction and operation of a 1,200 megawatt proposed coal-fired power plant in southwest Georgia. The proposed facility, which would be the state's first new coal plant in more than two decades, would emit up to 9 million tons of carbon dioxide, the main greenhouse gas responsible for global warming. A PSD permit is required under the Clean Air Act and analogous Georgia law to specify the amount of air pollution that may be released by a plant.¹ The state Environmental Protection Division issued the permit to Longleaf Energy Associates, LLC without

any limits on carbon dioxide emissions from the plant.

Two environmental groups, Friends of the Chattahoochee and the Sierra Club, had participated in the administrative proceedings, and challenged the final permit arguing *inter alia* that *Massachusetts v. EPA*, 549 U.S. 497 (2007) (EPA must regulate tailpipe greenhouse gas emissions under the Clean Air Act if it finds greenhouse gases cause or contribute to global warming) required the permit to regulate carbon dioxide emissions. The superior court in Fulton County vacated the final decision of the administrative law judge ("ALJ"), invalidated the permit, and sent the matter back to the state agency.² The developers of the proposed plant have indicated they will appeal the ruling.

The Opinion

The *Chattahoochee* decision is the first court decision on a permit to link control of carbon dioxide emissions to issuance of the permit. Judge Thelma Wyatt Cummings Moore concluded that, under *Massachusetts v. EPA*, carbon dioxide is a pollutant "subject to regulation" under the Clean Air Act. As a result, even though EPA has not established a National Ambient Air Quality Standard ("NAAQS") or other separate, general numerical limitation for carbon dioxide, federal law requires the proposed plant's PSD permit to cover

all pollutants that are “subject to regulation” under the Clean Air Act, including carbon dioxide.

The court then determined that because it would be a “major emitting facility” as defined by the Clean Air Act, the proposed plant must incorporate the “best available [pollution] control technology” (“**BACT**”)³ for carbon dioxide emissions. Because the agency had not performed any evaluation of technologies that would control carbon dioxide emissions from the plant and the permit contained no carbon dioxide emission limitations based on a BACT analysis, the court invalidated the permit.

The court also accepted other arguments made by the environmental groups, finding that the NAAQS for fine particulate matter (PM 2.5) could be exceeded as a result of construction and operation of the proposed plant and that the BACT analyses were deficient by failing to include analysis of integrated gasification combined cycle (“**IGCC**”) technology, an alternative fuel combustion technique. In addition, the court determined that the ALJ had committed reversible error by applying the incorrect standard of review.

Key Implications

While the strictly legal impact of the *Chattahoochee* decision will be limited because it is a Georgia state trial court ruling that generally will not have precedential value in other states, the decision does have the following ramifications:

- Environmental organizations and other advocates will utilize the ruling in

challenges to the dozens of other proposed coal plants nationwide that are subject to litigation, arguing that the judge’s reasoning is persuasive.⁴

- Regulators in other states may be encouraged to attempt to include limits on carbon dioxide emissions in permits for industrial sources.
- Air permits for other proposed coal-fired power plants in Georgia must set limits on carbon dioxide emissions unless the decision is reversed on appeal.

The *Chattahoochee* decision is one of the first court rulings to squarely address the regulation of greenhouse gas emissions in PSD permits. A larger principle underlying the decision, however, has been underscored recently in the federal courts: the government must consider greenhouse gas emissions and the means and/or benefits of reducing them when acting in a regulatory capacity. For example, in *Center for Biological Diversity v. National Highway Transportation Safety Administration*, 508 F.3d 508, 531-36 (9th Cir. 2007), the Ninth Circuit held that a federal agency acted unlawfully by failing to assess the benefits of reducing carbon dioxide emissions when setting fuel economy standards for light trucks. In light of this ruling, requiring evaluation of ways to reduce carbon dioxide emissions from a proposed coal plant in the PSD permitting process is less novel than it might appear at first blush.

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¹ In order to obtain a PSD permit, an applicant must apply the "best available control technology" for each "new source review" pollutant that it has the potential to emit in significant amounts and affirmatively demonstrate that the new facility will not cause or contribute to air pollution in violation of a National Ambient Air Quality Standard in any area.

² Under Georgia law, the final decision of an administrative law judge on such a matter may be appealed to the state's superior court (a trial-level court) through a petition for judicial review.

³ BACT is an emissions limitation that is based on the maximum degree of control that can be achieved at a major stationary source. It is a case-by-case decision that considers energy, environmental, and economic impact.

⁴ In the most-watched case, EPA's Environmental Appeals Board (EAB) is considering whether the PSD permit for a new waste coal-fired electric generating unit in Utah should have included a BACT limit for carbon dioxide emissions. See *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, EAB.