



November 20, 2008

***In re Deseret Electric Power Cooperative:*  
Environmental Appeals Board Declines to Decide Important  
Issue Concerning Greenhouse Gas Regulations**

On November 14, 2008, the U.S. Environmental Protection Agency's (EPA) Environmental Appeals Board (EAB) addressed an issue central to the current debate over greenhouse gas regulation: whether the Clean Air Act (CAA) requires permits for new air pollution sources to address emissions of carbon dioxide (CO<sub>2</sub>). The case, *In re Deseret Power Electric Cooperative*, concerns the validity of an EPA-issued permit for the construction and operation of a new waste coal-fired electric generating unit at Deseret's existing Bonanza Power Plant in Utah. The issue before the EAB, however, has significance far beyond coal-fired power plants.

**The Issue: Are CO<sub>2</sub> Emissions Currently Regulated  
Under the CAA?**

Under the CAA, all major emitting facilities that lie within areas of the country that are currently in compliance with national air quality standards (also known as "attainment areas") must obtain a prevention of significant deterioration (PSD) permit prior to construction and operation. Among other requirements, PSD permits must utilize the best available control technology and contain emission limitations for each "pollutant subject to regulation under the [Clean Air] Act" that the proposed facility will emit in significant amounts.

In the U.S. Supreme Court's landmark 2007 decision, *Massachusetts v. EPA*, the Court held that CO<sub>2</sub> fits within the definition of "pollutant" under the CAA. Importantly, the Supreme Court did not rule that EPA *must* regulate CO<sub>2</sub> under the CAA. In the *Deseret* case, the EAB was asked by the Sierra Club to take the next step and hold that CO<sub>2</sub> is a pollutant that is currently "subject to regulation under the Act."

This seemingly straightforward question carries significant implications for the regulated community. Consider, for example,

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that if CO<sub>2</sub> were “subject to regulation under the Act,” large stationary sources such as coal-fired power plants would not be the only facilities that would be subject to a CO<sub>2</sub> emission limitation. Indeed, by law, any facility that emits more than 250 tons per year of CO<sub>2</sub> and lies in an “attainment area” would be required to obtain a PSD permit and to use the “best available control technology” for reducing CO<sub>2</sub> emissions. This would include thousands of facilities—hospitals, office buildings, warehouses, apartment buildings—that have never before been subject to PSD permitting.

### The *Deseret* Decision

The parties presented the EAB with two opposing interpretations of the phrase “subject to regulation under the Act.” The Sierra Club claimed that the plain meaning of the phrase encompasses *any* regulation under the CAA that refers to CO<sub>2</sub>, including those that require only the monitoring and reporting of CO<sub>2</sub> emissions. EPA maintained that the agency’s historical interpretation limits the scope of the phrase to those pollutants subject to a regulation that requires the *actual control of emissions*. The distinction is determinative, as there are not currently any statutory or regulatory provisions that require the control of CO<sub>2</sub> emissions.

The EAB was not persuaded by either party’s arguments. First, the EAB held that the phrase “subject to regulation” is not clear or unequivocal, as Sierra Club had claimed. The EAB found no evidence of Congressional intent that would require EPA to impose an emission limitation for a pollutant, like CO<sub>2</sub>, that is subject only to monitoring and reporting requirements. The EAB therefore rejected Sierra Club’s argument that the plain language of the CAA requires EPA to regulate CO<sub>2</sub> emissions in PSD permits.

At the same time, the EAB held that EPA’s stated rationale for not addressing CO<sub>2</sub> in the permit was not supported by the administrative record. The EAB, however, did not rule out the possibility that, on remand, the agency could develop an administrative record that would support an interpretation of “subject to regulation under the Act” that does not include CO<sub>2</sub>.

With no convincing support in the statute or the administrative record for either party’s proffered interpretation of “subject to regulation under the Act,” the EAB remanded the permit to EPA “to reconsider whether or not to impose” an emission limitation for CO<sub>2</sub> in the permit. In punting the issue back to the agency, the EAB noted that, in its view, an individual permitting proceeding might not be the most appropriate forum to resolve this “issue of national scope,” and suggested that the agency should consider addressing the issue through rulemaking.

### The Implications of the *Deseret* Decision

By disposing of the issue of CO<sub>2</sub> regulation on purely procedural grounds, the EAB’s decision has effectively deferred resolution of this important issue until the new administration has an opportunity to set its policy on greenhouse gas regulation—either through new legislation or rulemaking. Rather than deciding whether CO<sub>2</sub> emissions are currently regulated, the EAB has remanded the matter to EPA and



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required the agency to revisit the Bush Administration's position that the CAA, as it currently exists, is not the appropriate vehicle for implementing greenhouse gas reductions.

Although EPA and/or Deseret can, and likely will, appeal the EAB's decision, the ruling nevertheless will stall the final approval of the many pending EPA-issued PSD permits for new coal-fired power plants. It is unclear, however, whether the EAB's decision will have any effect on pending applications for state-issued PSD permits. Many states, including Georgia, Texas, and Virginia, operate their own PSD permitting programs independent of EPA, and therefore they are not bound by the EAB's decision nor are they subject to the procedural requirements that resulted in the remand of the Deseret permit. State permitting authorities therefore still maintain considerable discretion in processing PSD permits in the face of claims that such permits must address CO<sub>2</sub> emissions.

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