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EPA Clarifies Its Interpretation of the Clean Air Act As It Pertains to Greenhouse Gas Emissions

Neither the Clean Air Act (CAA) nor its implementing regulations require permits for new air pollution sources to address emissions of carbon dioxide (CO₂), according to a 19-page memorandum published by U.S. Environmental Protection Agency (EPA) Administrator Stephen L. Johnson on December 18, 2008.

The memorandum is a direct response to a recent decision by the EPA's Environmental Appeals Board (EAB), *In re Deseret Power Electric Cooperative*. In *Deseret*, the EAB was asked to determine whether the CAA requires Prevention of Significant Deterioration (PSD) permits for new coal-fired power plants to include an emission limitation for CO₂. EPA had argued that the agency's historical interpretation of the CAA prevented the agency from including an emission limitation for a pollutant, like CO₂, for which there are no regulations requiring the actual control of emissions. The EAB disagreed, and found insufficient evidence in the record to demonstrate that EPA had established such an interpretation of the CAA. As a result, the EAB remanded the matter back to the agency to reconsider the issue, and in doing so, effectively stalled final approval of many pending EPA-issued permits for new coal-fired power plants.

Administrator Johnson's December 18, 2008 memorandum fills the regulatory void perceived by the EAB in *Deseret* concerning EPA's interpretation of the CAA. As the memorandum explains, EPA relies on the language of the applicable regulations, the agency's past permitting practices, and important policy considerations to conclude that the CAA's PSD permitting requirements do not extend to pollutants that are not subject to any statute or regulation that requires the actual control of emissions of that pollutant. While CO₂ was no doubt the focus of the memorandum, this interpretation applies with equal force to other greenhouse gases. Although it is not a regulation, the memorandum will facilitate on-going review of permits for new or modified large sources of CO₂ emissions, such as coal-fired power plants, while preserving the next administration's flexibility to set its own policy on greenhouse gas regulation through new legislation or rulemaking.

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