

INSIGHTS

First Texas GHG Permit Upheld by EPA's Environmental Appeals Board

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On March 14, 2014, the Environmental Appeals Board (EAB) within EPA issued an order denying review of the first petition for review of a Texas greenhouse gas (GHG) prevention of significant deterioration (PSD) permit. Sierra Club filed this petition in December 2013, challenging the GHG PSD permit issued by EPA Region 6 to La Paloma Energy Center, LLC (La Paloma or LPEC). La Paloma is a merchant power provider with plans to construct a new combined cycle natural gas-fired power plant in Texas and was represented by Bracewell attorneys Rich Alonso, Tim Wilkins and Sandra Snyder.

Although this case raised issues of first impression, the Board issued this decision to uphold the permit a mere 98 days after Sierra Club filed its petition for review. This is the quickest timeframe the EAB has acted on a substantive challenge to a PSD permit in recent history.

The La Paloma Decision

Sierra Club's petition raised two questions:

1. whether EPA may issue a permit that set different GHG emission limits for each turbine option proposed in the permit application, and
2. whether the applicant should have considered solar preheat in order to reduce the project's overall GHG emissions as a control device to a natural gas-fired power plant.

The first issue concerned La Paloma's decision to propose three potential turbine options in its permit application. Sierra Club alleged that EPA should have determined the appropriate emission limit for each proposed turbine model using the five-step Best Available Control Technology (BACT) analysis and then ranked the turbine models against each other, before imposing the most stringent limit of the three options for all of the proposed models. This suggestion was disregarded by the Board, who concluded that there was no law or EPA policy that required EPA to undertake this step. The Board also did not find fault with the applicant

proposing various turbine options in its permit application and found comfort that the turbines that are not installed must be deleted from the permit at a later time. Therefore, the Board determined that Sierra Club failed to show that EPA erred or abused its discretion in temporarily setting a different GHG emission limit for each turbine option in the permit.

With regard to the second issue, the Board concluded that while EPA's response to Sierra's comment could have been more robust, "the business purposes and site-specific constraints described in the administrative record support the Region's conclusion that use of supplemental solar power would constitute redesign of the source under the circumstances of this case." Notably, the Board did not establish a bright line concluding that solar power generation would always redesign the source if the application did not propose including solar. Rather, the Board cautioned that "permitting authorities must consider the specific circumstances of the situation presented and explain their decisions in the record." Here, there was insufficient acreage at the proposed site to install solar and relocating the project "would be inconsistent with LPEC's basic business purpose." Therefore, Sierra Club failed to show that EPA erred or abused its discretion in concluding that solar was not a potential control technology for this project.

Perhaps anticipating that this decision would raise questions about the need to analyze solar in future BACT analyses, the Board clarified that permitting authorities are not required to "perform a full and detailed analysis of all potential solar power options every time a commenter suggests that solar power be considered at a facility." However, the Board cautioned that "[a]t a minimum, . . . the permitting authority should provide a reasoned response to comments that are fairly raised."

Conclusion

As the La Paloma case shows, the validity of a permit is ultimately determined based on the strength of the administrative record. Therefore, clients that need to obtain a GHG PSD permit should work closely with counsel to ensure their permit records are fully developed to minimize the risks associated with a permit appeal, which can adversely impact the project's ability to secure financing and meet construction deadlines.

Note: Bracewell has assisted with the GHG permitting process in Region 6 on fifteen applications to date with eight of those projects having received final PSD GHG permits. In addition, Bracewell has worked with various clients on strategies for ensuring that GHG permitting is not triggered, allowing certain projects to avoid costly and time-consuming PSD review for GHGs. We have also assisted companies navigate GHG permitting requirements in various states, such as California, Illinois and New Jersey, and under the Outer Continental Shelf permitting program.