Environmental & Safety Report

EPA Denies Review of Permit for California Utility Containing Greenhouse Gas Limits

On November 18, 2010, the Environmental Appeals Board of the U.S. Environmental Protection Agency issued an order denying review of the first ever Clean Air Act pre-construction permit containing greenhouse gas ("GHG") emissions limits. See In re Russell City Energy Center, LLC, PSD Permit # 15487 (PSD Appeal ## 10-1, 10-2, 10-3, 10-4, and 10-5). The permit is for a natural gas fired utility known as the Russell City Energy Center located in Hayward, California.

The permit for the facility was issued by the Bay Area Air Quality Management District ("BAAQMD") last February. The permit requires energy efficiency measures as the primary controls for limiting GHG emissions from the new plant. The permit also contains specific limits on carbon dioxide and other GHG emissions. The GHG emissions limits were put in place before controls for GHG emissions were required by the EPA.

The permit was challenged primarily based on non-GHG related provisions. One of the claims of one of the Petitioners, however, was that BAAQMD had failed to consider GHGs as regulated pollutants. The Environmental Appeals Board stated that the Petitioner’s “have not met their burden of demonstrating that review is warranted on any of the grounds presented.” Opinion at Page 2. With respect to the claims concerning greenhouse gases, the Environmental Appeals Board stated:

Importantly, even though CARE [one of the Petitioners] quotes from BAAQMD’s responses to comments, CARE does not address the responses in any real way or explain why they are clearly erroneous. In particular, CARE fails to explain why this issue is not “moot because the facility would satisfy all PSD requirements for greenhouse gases even if they were legally applicable at this time,” as BAAQMD contended. . . . Thus, CARE has failed to demonstrate why BAAQMD's response to comments on this issue is clearly erroneous or otherwise warrants review.

Opinion at Page 133.

The Environmental Appeals Board decision comes on the heels of recent guidance from the U.S. EPA to state and local agencies on addressing GHG issues in the context of PSD and Title V permitting. The guidance, which the Environmental Appeals Board cites in its Opinion, explains how state and local agencies (like BAAQMD) should evaluate best available control technology ("BACT") for GHGs under the EPA’s “tailoring” rule which becomes
effective as of January 2, 2011. See here. Because the permit for the Russell City Energy Center facility was issued before January 2, 2011, the tailoring rule did not apply.

The GHG emissions limits in the Russell City Energy Center permit demonstrate the magnitude of GHG emissions from burning fossil fuels (even natural gas). The permit contains an annual CO2e (carbon dioxide equivalent) limit in metric tons of 1,928,182 CO2e. The permit also contains individual hourly, daily, and annual limits for CO2, methane (CH4), and nitrous oxide (N2O).

For further information contact your Seyfarth Shaw LLP attorney or any member of the Firm’s Environmental, Safety and Toxic Tort Group.