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IN THE COURTS

Georgia State Court Rejects Air Permit for Failing to Regulate CO₂.

Sparking additional controversy over the regulation of carbon dioxide (CO₂)—the primary greenhouse gas (GHG) linked to global warming—the Fulton County Superior Court in Georgia recently overturned the issuance of a prevention of significant deterioration (“PSD”) air permit for a proposed new 1,200 megawatt coal-fired power plant because state regulators had failed to include any permit limitations for CO₂ emissions. In its decision, *Friends of the Chattahoochee, Inc. v. Couch*, No. 2008CV146398 (June 30, 2008), the Superior Court held that the federal Clean Air Act required the Georgia Department of Natural Resources (“GDNR”) to perform a “best available control technology” (or “BACT”) analysis and to include limits for all emissions that could be regulated, including the estimated 8-9 million tons per year of CO₂ that would be emitted by the proposed Longleaf plant. The court’s ruling stopped construction of what would have been the first coal-fired power plant to be built in Georgia in over twenty years. But the decision, if upheld on appeal, could have much broader implications for businesses in Georgia and, possibly, outside of the state as well.

The Court’s Ruling

There are several key facets to the Superior Court’s ruling. First, the court relied on the April 2007 decision—*Massachusetts v. EPA*, 549 U.S. 497—in which the U.S. Supreme Court held that CO₂ falls within the broad definition of “air pollutant” under the federal Clean Air Act and that the U.S. Environmental Protection Agency (“EPA”) has authority under the Act to regulate CO₂ emissions from new motor vehicles. Second, the court found that the Supreme Court’s ruling that CO₂ is an air pollutant applies equally to “major emitting” stationary sources—such as the proposed Longleaf plant. And finally the court found that, as a major emitting facility, the proposed Longleaf plant must comply with the Clean Air Act’s BACT provisions, which require “an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under the Act” emitted from the proposed Longleaf plant. Citing other statutory provisions that impose requirements to monitor CO₂ emissions, the Superior Court rejected the argument advanced by GDNR and the proponent of the Longleaf plant that CO₂ is not an air pollutant “subject to regulation” under the Clean Air Act because the Act does not control or limit CO₂ emissions. According to the court, the “BACT statute is plainly broader” and encompasses “all pollutants that are ‘subject to regulation’ under the Act, whether or not they are independently subject to NAAQS [National Ambient Air Quality Standards] or other general limits.” As a result, the court concluded that a “permit cannot issue for [the] Longleaf [plant] without CO₂ emission limitations based on a BACT analysis” and remanded the matter to GDNR for further proceedings consistent with the court’s findings.

Significance of the Court’s Ruling

On its face, the court’s ruling means that the Longleaf plant cannot be built as proposed unless it employs BACT to control CO₂ emissions. The ruling, however, is not limited to coal-fired power plants and will likely have broad implications outside of the energy industry. Under the court’s ruling, the regulation of CO₂ emissions certainly would apply to any air permit application filed by any major emitting source in Georgia and could, in theory, apply to what would otherwise be considered small air emission sources as well. In addition, proponents of the court’s ruling will undoubtedly try to use it to persuade courts in other states to issue similar rulings in cases challenging air permits that fail to include any CO₂ limitations.

Equally significant is the court’s reliance on the Supreme Court’s Massachusetts decision to find that CO₂ is a

pollutant “subject to regulation” under the Clean Air Act. The Supreme Court did not state that the Clean Air Act requires EPA to regulate CO2 emissions. Rather, the Court held that EPA has the “authority” to regulate CO2 and remanded the matter to EPA to determine whether CO2 and other GHGs emitted from new motor vehicles cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. The so called “endangerment determination” is a prerequisite to regulating such air emissions under the Act. EPA, however, has not yet determined whether CO2 emissions endanger public health or welfare.

It is debatable whether the Clean Air Act is the appropriate vehicle to regulate CO2—an odorless, colorless gas essential to the respiratory process of every human and animal and plant species. Over the year, Congress has floated numerous legislative proposals to address CO2 and other GHG emissions, outside of the Clean Air Act. And in its Advance Notice of Proposed Rulemaking on Greenhouse Gas Regulation (“ANPR”) issued last month, EPA, itself, questions whether the current federal Clean Air Act is properly suited to regulate CO2 emissions. See <http://www.epa.gov/climatechange/anpr.html>. In particular, EPA stated that “PSD permits have not been required to contain BACT emissions limit for GHGs because GHGs (and CO2 in particular) have not been subject to any [Clean Air Act] provisions or EPA regulations issued under the Act that require actual control of emissions.” ANPR, at 165. Historically, EPA has interpreted the phrase “subject to regulation” under the Clean Air Act to describe air pollutants subject to statutory provisions or regulations that require actual control of emissions of that pollutant. As such, EPA has concluded, “[i]n the absence of statutory or regulatory requirements to control GHGs under the Act, a stationary source need not consider those emissions when determining its major source status.” *Id.* The Superior Court has by-passed the normal regulatory process, the current legislative debate in Congress and EPA’s long-standing interpretation of the Clean Air Act when it found that CO2 is a pollutant “subject to regulation” under the Act.

As a final matter, it is questionable whether state agencies should undertake the daunting task of deciding, on a case-by-case basis, what BACT is for various CO2 emission sources—a process that could result in varying standards from state to state. Unlike other air pollutants, such as nitrogen oxides and sulfur dioxide, there presently is no control technology that can be slapped on to a smoke stack to remove CO2. Controlling CO2 is much more technologically complicated, which is one of the reasons why regulating CO2 emissions is not an easy endeavor and has been the subject of considerable debate.

The Superior Court’s decision underscores the need for comprehensive, national legislation to address climate change and GHG emissions. Although numerous federal bills on climate change have been introduced, it is unlikely that Congress will pass any comprehensive climate change legislation this term.

For the moment, the Superior Court’s decision remains the latest word on the regulation of CO2 from stationary sources. The Georgia Court of Appeals has agreed to hear the case, and a decision from the appellate court is expected early next year. We predict that the Superior Court’s decision will be overturned on appeal.

Project Greenstorm™ is Duval & Stachenfeld’s multi-practice group approach to assist clients in addressing and taking advantage of the corporate sustainability challenges and opportunities resulting from global warming initiatives. For assistance in climate change related matters please contact:

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