

Recent EPA Objections To Title V Permits

Law360, New York (January 25, 2010) -- On Dec. 15, 2009, the U.S. Environmental Protection Agency objected, in part, to two Clean Air Act (“the Act”) Title V permits for new electricity generating capacity.

The EPA found each state agency had not adequately considered alternatives to the proposed source during the Best Available Control Technology (“BACT”) analysis required by the Prevention of Significant Deterioration (“PSD”) program under the Act.

In one, the EPA found the state agency had not adequately considered Integrated Gasification Combined Cycle (“IGCC”) technology as an alternative to a proposed pulverized coal-fired station.

In the second, the EPA found that although the proposed source was an IGCC unit, the agency had not adequately considered natural gas as an alternative.

From a regulatory perspective the objections are not necessarily fatal to either project. The objections serve as another demonstration of the challenges facing the permitting of fossil-fuel fired electric generating projects and the need to stay abreast of the EPA’s positions as they evolve through objections to Title V operating permits and PSD appeal decisions.

The EPA also made notable determinations regarding the applicability of the PSD program to carbon dioxide (“CO₂”) and fine particulate matter (“PM_{2.5}”).

John W. Turk Jr. Plant

The EPA objected to a Title V permit issued by the Arkansas Department of Environmental Quality (“ADEQ”) to Southwestern Electric Power Co. for a new 600 MW ultra-supercritical pulverized coal-fired plant planned for Hempstead County, Ark. In re: American Electric Power Service Corporation, et al., Pet. No. VI-2008-01 (Dec. 15, 2009).

IGCC

The EPA found ADEQ failed to adequately justify excluding IGCC from its BACT analysis. ADEQ had adopted the reasoning EPA Region VIII had used in its review of the Deseret Power Electric Cooperative Bonanza plant that requiring consideration of IGCC as an alternative control technology for a coal-fired boiler would improperly “redefine the source” due to fundamental equipment and process differences.

Although the EPA acknowledged that state agencies administering EPA-approved PSD programs (like ADEQ) exercise independent discretion, EPA found ADEQ’s analysis to be insufficient under Desert Rock Energy Company

LLC, PSD Appeal No. 08-03 et al., (EAB, Sep. 24, 2009). In Desert Rock, the Environmental Appeals Board rejected reasoning similar to that used by ADEQ.

According to the EPA, ADEQ “failed to follow the analytical framework for evaluating the ‘redefining the source’ issue” outlined in Prairie State Generating Company LLC, PSD Appeal No. 05-05 (Aug. 24, 2006) and did not address, in its responses to public comments, instances of other state permitting agencies requiring consideration of IGCC as BACT.

ADEQ may still exclude IGCC, but EPA found it must consider record evidence of “the applicant’s objective and purpose” to assess whether IGCC “redefines the source,” among other considerations.

CO2 Limits Not Required

The EPA also determined that CO2 is not currently subject to regulation under PSD.

ADEQ issued the Turk permit eight days before the Environmental Appeals Board’s decision in Deseret Power Electric Cooperative, PSD Appeal No. 07-03 (EAB, Nov. 13, 2008) where it rejected the argument that the EPA had a long-held, binding interpretation that only those pollutants subject to actual emission limitations were “subject to regulation” under PSD.

In response to Deseret Power, former EPA Administrator Stephen Johnson issued a memo requiring regulatory emission limits for a pollutant to be “subject to regulation,” thereby excluding CO2 from PSD regulation. Memo from Stephen L. Johnson, EPA Administrator to Regional Administrators (Dec. 18, 2008).

Although the EPA is reconsidering this decision, the agency did not stay its effectiveness in the interim, and so the EPA upheld ADEQ’s finding that CO2 BACT limits are not now required under PSD.

Cash Creek Station

The EPA also objected to a Title V permit issued by the Kentucky Division for Air Quality (“KDAQ”) for a new 770 MW IGCC plant at the Cash Creek Station in Owensboro, Ky. In re: Cash Creek Generation LLC, Pet. Nos. IV-2008-1 and IV-2008-2 (Dec. 15, 2009).

This is the first time the EPA has objected to a source permitted to build an IGCC.

IGCC

The EPA found KDAQ failed to explain why it excluded natural gas as an alternative primary fuel in its BACT analysis.

An IGCC unit converts coal to produce “syngas” as its primary operating fuel, which is then combusted in a combined cycle gas plant. The IGCC unit thus could also use natural gas as a backup fuel and during startup, and the permit contained BACT limits for natural gas-fired operation.

KDAQ had not, however, considered natural gas as the primary fuel source, and the EPA found that KDAQ had failed to explain adequately its decision, noting the Clean Air Act directs consideration of alternative processes and fuels in a BACT analysis.

As with the Turk decision, the EPA’s Cash Creek decision is further evidence that EPA is directing permitting authorities to consider alternative technologies/fuels in a BACT review or document fully why the alternatives

would fundamentally “redefine” the source. See Desert Rock Energy Company LLC and Northern Michigan, PSD Appeal No. 08-02 (EAB, Feb. 18, 2009) (need to justify use of coal when proposed source could use wood or natural gas).

PM10 As Surrogate for PM2.5

The EPA also found that KDAQ failed to justify its use of PM10 as a “surrogate” for addressing PM2.5 emissions.

KDAQ had followed an EPA 1997 policy that allowed the use of PM10 as a surrogate for PM2.5 for purposes of establishing emissions limits (EPA Memo, “Interim Implementation for the New Source Review Requirements for PM2.5”), but the EPA cited differences in health effects between PM10 and PM2.5, its current view of the scope and purpose of the 1997 policy, and judicial decisions on using surrogate emission standards as the basis for requiring further analysis by KDAQ.

The EPA acknowledged that it had previously declined to object to a Title V permit for a coal-fired plant that had not included a BACT limit for PM2.5 emissions, East Kentucky Power Cooperative, Petition No. IV -2006-4 (Aug. 30, 2007), but the EPA reasoned that its current view reflected “an evolving understanding of the technical and legal issues associated with the use of the PM10 Surrogate Policy.”

This decision builds upon the EPA’s decision to rescind its own permit issued to Desert Rock Generating, in part, based on a need to reconsider its policy on the use of PM10 as a surrogate for PM2.5. Desert Rock Energy Company, PSD Appeal Nos. 08-03, et al.(Sep. 24, 2009).

Conclusion

The EPA broadly construes its power to object to Title V permits to include the underlying BACT analysis and emissions limitations.

For this reason, advocacy groups routinely petition the EPA to object to Title V permits for new or modified major stationary sources that are subject to the PSD (or nonattainment new source review) permitting requirements.

Despite the seeming independence of states with EPA-approved programs, the agency’s recent Title V objections demonstrate that the EPA still holds the final “say” over the end-result of the state permitting process.

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