

February 18, 2009

EPA Reconsideration of Carbon Dioxide in Air Quality Permits

On February 17, 2009, EPA Administrator Lisa Jackson issued a response to the Sierra Club's Petition for Reconsideration of the December 18, 2008 memorandum issued by Ms. Jackson's predecessor, Stephen Johnson ("the Johnson memorandum"), regarding reviewing carbon dioxide in air quality Prevention of Significant Deterioration ("PSD") permits. This action is of interest to those seeking PSD permits, as well as those concerned about carbon dioxide regulation generally.

The Johnson memorandum was issued in response to the Environmental Appeals Board's decision ("the Deseret decision"), to remand a PSD permit back to EPA for it to provide a rationale for its position that it presently is not required to consider the climate changing effects of carbon dioxide in PSD permits. The Deseret decision held that the federal Clean Air Act did not mandate that EPA consider carbon dioxide impacts on global warming as part of an air quality permit review, but that EPA had failed to provide an adequate basis for its decision not to consider carbon dioxide. The Johnson memorandum was EPA's response in which it maintained and explained the rationale for not considering carbon dioxide.

Administrator Jackson's response was to grant the petition, promise to issue a notice of proposed rulemaking, and accept public comments on the issue. Her response, however, denied the Sierra Club's related request that she immediately stay the effectiveness of the Johnson memorandum.

Ms. Jackson pointedly noted, however, that the states are not bound by the Johnson memorandum and should not assume that it "is the final word on the appropriate interpretation of Clean Air Act requirements." So, for now, EPA will not require that affected sources address carbon dioxide in their PSD applications.

If EPA ultimately declares that carbon dioxide is a regulated pollutant, subject to the Clean Air Act permitting requirements, there could be a large number of nontraditional sources including schools, shopping centers and office buildings that might be required to obtain permits. Congress is also considering legislation regarding global warming that could eliminate the need for EPA to act on the Johnson memorandum. Persons potentially affected by these issues should closely track the actions of EPA and Congress.

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