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PSD/Clean Air Act: Federal Appellate Court Addresses Biomass/BACT/Greenhouse Gas Emissions

Arkansas Environmental, Energy, and Water Law Blog

10/03/2016

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The Ninth Circuit Court of Appeals (“Court”) addressed the Environmental Protection Agency’s (“EPA”) process for evaluating Best Available Control Technologies (“BACT”) for greenhouse gas emissions associated with Clean Air Act (“CAA”) Prevention of Significant Deterioration (“PSD”) facility permits. See *Helping Hand Tools v. U.S. Environmental Protection Agency*, 2016 WL 4578364.

The Court noted that this was its first opportunity to address EPA’s doctrine of “redefining the source.”

Sierra Pacific Industries, Inc. (“Sierra Pacific”), a lumber manufacturer, submitted a CAA PSD application to EPA for authorization to construct a new biomass fuel burning unit at its Anderson, California facility. The purpose of the unit was to produce electricity to heat lumber dry kilns. Sierra Pacific’s own wood waste would be the primary source of fuel for the unit.

Congress did not provide specific procedures in the PSD related provisions of the CAA for how EPA should evaluate BACT for pollutants. The federal agency therefore developed years ago its own five-step “top-down” approach for determining BACT.

Step 1 requires the applicant to list all available control technologies, regardless of feasibility, for that particular unit. The applicant in Step 2 eliminates all of the infeasible control technologies previously listed in Step 1. Step 3 requires ranking the remaining options according to effectiveness. Step 4 requires that the applicant rank those options according to the energy, environmental, and economic impacts. In Step 5, the most effective option that is not eliminated in Step 4 is chosen as BACT.

EPA approved Sierra Pacific's PSD permit application in 2014. It utilized the top-down approach to determine BACT for the facility.

Helping Hand Tools ("Helping Hand") and the Center for Biological Diversity ("Center") filed petitions for review of the EPA's decision. They argued that the EPA should have considered solar power and a greater natural gas mix in the BACT analysis.

The Court first held that the failure to consider solar power as an option in the BACT analysis was not an error. To do so was deemed a redefinition of the source. The Court stated, "A control alternative redefines the source if it requires a complete redesign of the facility."

Because Sierra Pacific's application expressly stated that the burning of biomass fuel was a main component of the unit design, the EPA was not at fault in failing to consider a solar power alternative. Solar power was deemed a significant alteration of the construction of the unit and failed to function in accordance with the proposed method of emission release.

The Court also considered the contention that a greater natural gas mix should have been considered. It held that when the proposed fuel source is co-located with the facility, the EPA does not have to consider fuel options that are not readily available in the BACT analysis. Because Sierra Pacific's entire application centered on using its own wood waste as fuel, the Court ruled that this detail was "an inherent design" of the unit and the consideration of alternate fuel sources would have impermissibly redefined the source.

The Court upheld the EPA's BACT analysis and denied the petitions for review.

[A copy of the opinion can be downloaded here.](#)