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Mixing Zone (Water)/New Source Review (Air): New York Appellate Court Addresses Challenge to Permits for Reactivation of Power Plant

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The New York Supreme Court (Appellate Division) addressed in a July 20th opinion challenges to the New York Department of Environmental Conservation ("DEC") issuance of certain permits to a natural gas electric generating station ("station"). See *Riverkeeper, Inc. v. New York State Dept. of Environmental Conservation*, 2017 WL 3080228.

The Court reviewed the appeal of the lower court judgment dismissing Riverkeeper, Inc.'s ("Riverkeeper") application for declaratory judgment that challenged certain permits associated with the reactivation of the station.

The operation of the station requires both a State Pollutant Discharge Elimination System ("SPDES") permit (because of the discharge of warmer water) and a Title V air permit (because of the emission of certain hazardous air pollutants.) The station was forced offline due to a storm-driven flood and scheduled for demolition.

In June 2014 the station was subsequently sold to Danskammer Energy, LLC ("DE").

The New York Public Service Commission subsequently authorized it to resume operations. The ownership change and passage of time resulted in two applications to DEC. The station applied for updated SPDES and Title V permits. The permits were granted to DE after technical review and comments.

Riverkeeper commenced proceedings asking for declaratory relief and other relief in regards to the SPDES and Title V permits. The lower court dismissed the action and Riverkeeper appealed.

The appellate court addressed whether DEC was required to hold a public adjudicatory hearing prior to issuing the permits. The standard for whether a public hearing must be held is a determination that the issues were "substantive and significant."

The Court determined that the failure to hold a hearing was not arbitrary and capricious. This decision was based on the fact that the SPDES permit was largely identical to the prior one. The prior permit had been issued after "extensive administrative proceedings and an adjudicatory hearing." Further, the effect of any modifications to the new permit were stated to likely reduce the environmental impact. It also noted that the primary objection to the Title V permit was the fact that the station would be reactivated.

As to the merits of the challenge, the Court first addressed the contention that:

. . .the discharge of warm water from the station will cause surface water temperature near the discharge point to occasionally exceed the regulatory maximum of 90 degrees Fahrenheit and threaten marine life.

This concern was rejected. The EPA Water Quality Standards Handbook was cited as authorizing such discharge. (nothing inherently improper in allowing for ambient temperature above criteria in small area near outfalls).

The Court noted that New York had adopted the previously referenced EPA mixing zone provision. A DEC report was referenced that addressed the thermal issues and the Court concluded that the agency had a rational basis for determining the mixing zone for the station was compliant.

Riverkeeper also argued that issuance of the Title V required a “new source review.” DEC had disagreed arguing:

The reissuance, recertification or extension of any permit for previously approved activities which will be continued on the same site without material change.

A prior federal EPA decision addressing an idled Entergy Monroe, Louisiana facility was discussed. Riverkeeper cited it for the proposition that reactivation of a permanently shutdown facility should be treated as operation of a new source for purposes of new source review.

The Court cited the Entergy decision in stating that permanency was dependent on the intention of the owner or operator at the time of shutdown and was based on various facts and circumstances (time shutdown, owner statements, cost/time to reactivate the facility, etc.).

The Court concluded there was no intent to permanently shut down the station citing:

- Storm damage beyond owner’s control
- Resumed operation after standard repairs two years later
- Maintained and renewed permits
- Decision to sell plant to be demolished reversed once financial and regulatory changes made station operation viable

As a result, it was held new source review was not required.

Finally, the Court agreed that the permit renewals did not trigger a State Environmental Quality Review Act “significant effect upon the environment.” It noted that the station’s impacts were not new and that the modified permit would be mitigated by the elimination of coal as a fuel source. DEC was stated to have undertaken the required identification of “relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination.”

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