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State Court Invalidates Power Plant's Air Permit for Lack of Carbon Dioxide Emission Limitations

Sierra Club scores significant win; appeal is expected

On June 30, 2008, a Georgia Superior Court judge ruled in *Friends of the Chattahoochee Inc., et al. v. Georgia Department of Natural Resources,* that a Clean Air Act construction and operating permit must include limitations on carbon dioxide emissions. The permit, issued in May 2007 by the Georgia Department of Natural Resources, involves a 1,200-megawatt coal-fired power plant proposed for Early County by a partnership of LS Power Group of East Brunswick, N.J., and Houston-based Dynegy Inc. (DYN), an independent power generator.

The decision by Georgia Superior Court Judge Thelma Wyatt Cummings Moore invalidated the power plant's permit and required the Georgia Department of Natural Resources to draft a new permit that proposes carbon dioxide emission limitations based upon a review of Best Available Control Technology (BACT). Representatives from Dynegy and LS Power have been quoted as saying that they will immediately appeal Judge Moore's decision to the state appellate court.

In halting construction of what would be Georgia's first new coal-fired power plant in more than two decades, Judge Moore ruled in favor of the plaintiffs' claim that carbon dioxide is currently subject to regulation under the Clean Air Act, and that a permit cannot be issued for the power plant without carbon dioxide limitations based on a BACT analysis. The case was brought by the Sierra Club and a local environmental group, Friends of the Chattahoochee.

Judge Moore based her decision on *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), in which the U.S. Supreme Court ruled that the most common greenhouse gas emission, carbon dioxide, is an air pollutant within the plain meaning of the Clean Air Act. EPA may release in the coming weeks a formal response to the Supreme Court's decision in *Massachusetts v. EPA.*

This decision by the Georgia Superior Court has potential ramifications in another case brought by the Sierra Club currently pending before EPA's Environmental Appeals Board (EAB) in Washington D.C. In that case, the Sierra Club is challenging a permit issued by EPA Region 8 to Deseret Power Electric Cooperative for a new coal-fired generating unit at the company's power plant near Bonanza, Utah. At

issue is whether EPA should have considered carbon dioxide before issuing the permit.

During oral arguments on May 29, 2008, in the *Deseret Power* case, EPA argued that carbon dioxide is not regulated under the Clean Air Act and therefore, EPA is not required to consider carbon dioxide before issuing Clean Air Act operating permits. The EAB judges expressed concern in oral arguments that a decision in favor of the Sierra Club could potentially trigger carbon dioxide permit limits for all new major stationary sources and for such existing facilities that are proposing major modifications.

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