

EPA Required to Consider BACT for CO₂ Emissions

On November 13, 2008, EPA's Environmental Appeals Board (EAB) decided to require EPA to consider whether Best Available Control Technology (BACT) for CO₂ emissions should be included in a Prevention of Significant Deterioration (PSD) permit issued for the construction of a new coal-fired power plant in Utah (*In re: Deseret Power Electric Cooperative*, PSD Appeal No. 07-03). The appeal to the EAB was filed by the Sierra Club.

The EAB's decision appears to be contrary to EPA's position that greenhouse gas (GHG) emissions, including CO₂, should not be regulated under the Clean Air Act (CAA). In April 2007, the US Supreme Court, in *Massachusetts vs. EPA*, found that EPA had the authority to regulate GHG emissions as a pollutant under the CAA, but only if EPA finds that the emissions endanger health or the environment through an *endangerment finding*. In July 2008, instead of making an *endangerment finding*, EPA issued the Advanced Notice of Proposed Rulemaking (ANPR), which concludes that Congress should be addressing the control of GHG emissions through new legislation, not the EPA. EPA Administrator Stephen Johnson stated in the preface of the ANPR that the CAA is "ill-suited" for regulation of GHG emissions, and regulating GHG emissions through the CAA would result in a "very complicated, time-consuming, and likely, convoluted set of regulations". The ANPR details the significant challenges EPA would face if GHG were regulated under the CAA.

The EAB's decision did not require EPA to *impose* BACT for CO₂, nor did it state whether the CAA should include regulations for GHG emissions, but it does require EPA to *consider* whether CO₂ is a pollutant subject to regulation under the CAA, and hence whether CO₂ BACT is required in permitting decisions. The EAB also instructed EPA to consider the nationwide implications of their decision. The implications could be huge, considering that even small combustion units can emit CO₂ above the major source level.