

KDHE Grants Unprecedented Stay of Final Air Permit for Proposed Coal-fired Facility

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In an order issued on July 20, 2011, the Kansas Department of Health and Environment (KDHE) granted a stay of the 18-month construction period provided for in the final air permit issued to an 895-megawatt coal-fired facility proposed by Sunflower Electric Power Corp. to be built in Holcomb, Kansas. The stay, which is unprecedented in Kansas, provides Sunflower with more time to begin constructing its facility without making a request for an extension of time that would open its permit to the inclusion of greenhouse gas (GHG) emission limits identified in the GHG tailoring rule published by U.S. EPA on June 3, 2010.

The final permit approving construction of the Sunflower facility was issued in December 2010, just prior to when U.S. EPA's GHG tailoring rule took effect on January 1, 2011. Permits issued in *final* form prior to the effective date of the GHG tailoring rule do not need to include any GHG permit limits, and accordingly, Sunflower's final permit does not have any such limits. Approximately one month after Sunflower's final permit had been issued, the Sierra Club sought judicial review of the air permit in the Kansas Court of Appeals. The request for review, among other things, significantly criticizes the facility's potential GHG emissions. The review was ultimately transferred to the Kansas Supreme Court.

In relation to this suit, on June 1, 2011, Sunflower requested a stay of the 18-month construction period, which applies to the construction of major stationary sources subject to Prevention of Significant Deterioration (PSD) permitting under the Clean Air Act (CAA). Without the stay, and in order to avoid permit expiration, which would require that Sunflower begin the permitting process anew before beginning construction on its facility, Sunflower would be required to request an extension of the 18-month construction period. This request would reopen the permit for review (the permit would no longer be *final*), subjecting it to the inclusion of GHG emission limits. In requesting the stay, Sunflower argued that if the permit were ultimately modified because of the ongoing judicial review, any construction completed on the facility during the review could, despite considerable capital expended, be rendered meaningless, and that any lenders were either likely to refuse financing or increase the cost of financing necessary for the project because the ongoing permit review significantly increased project risk.

In granting the stay, KDHE ultimately found, among other things, that the stay poses no threat to the public health, safety, or welfare, that it would stop construction of the facility temporarily, which would essentially be favorable to the Sierra Club's position, and that it prevents Sunflower from incurring considerable capital expense and entering into lending contracts with risky obligations. Environmental groups, on the other hand, argue that the stay is just a

creative way for Sunflower to both stall construction and avoid having to meet any GHG limits. Environmental groups also express concern that this “unprecedented” stay will be used as a tactic by other coal-fired facilities in similar circumstances to avoid having to meet any GHG emissions limits. There is no indication at this point, however, that any environmental groups will formally challenge the stay.

Opening briefs in the underlying judicial review of Sunflower’s final permit were filed on August 5, 2011. If the Sierra Club is successful in obtaining review of the permit, and the permit is sent back to KDHE, the Sierra Club has indicated that it will then seek to have GHG limits considered for inclusion in the permit. Opening briefs for KDHE and Sunflower, who is intervening on behalf of KDHE, are due on September 12.

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