

SEEKING PLANT PERMITS UNDER THE CLEAN AIR ACT

by PAUL SEALS

Congress is not likely to pass major climate change legislation to regulate greenhouse gas emissions until 2009, with implementing regulations not effective until 2011 or 2012. In the interim, developers will continue to pursue energy-intensive projects. Lawyers for them — or their opponents — face a serious quandary of how to proceed during this period of uncertainty. The climate change battle is fierce, and the road is difficult for all participants. Attorneys must consider a variety of strategies in navigating this environment.

The climate change battle has crystallized around the resurgence of coal projects. The Energy Information Administration, a statistical agency of the U.S. Department of Energy, has identified proposals for more than 150 new coal plants since 2000. Power producers have returned to coal as a preferred fuel for new power plants, supplanting natural gas. However, coal combustion produces more than twice the amount of carbon dioxide, a greenhouse gas, while generating the same amount of electricity. These proposals, and the resulting increase in CO₂ emissions, have coalesced and solidified opposition across the country.

Opponents worry that the CO₂ emissions from these plants, when they become operational, will thwart any future regulations designed to constrain CO₂ emissions. Public interest groups have united in a national campaign

to challenge new coal plants. For example, the Sierra Club has developed an environmental law program to assist impacted communities and their lawyers with technical and legal resources. The campaign appears effective: In February, the Department of Energy reported the delay or cancellation of more than 50 of the proposed projects.

Lawyers must be prepared to address climate change legal issues today in the absence of a defined regulatory program. Ground zero is Clean Air Act (CAA) permit proceedings. A CAA permit is a prerequisite for the initiation of project construction. Delays caused by an extended administrative process followed by appeals not only increase project costs but may impact project feasibility and viability.

The significance of the CAA permit proceeding was reinforced in



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the April 2007 U.S. Supreme Court decision *Massachusetts v. EPA*, which ruled that CO₂ is an “air pollutant” under the CAA. The ruling related to motor vehicle emissions. Lawyers for some project opponents want to extend the ruling to the permitting of stationary sources such as

power plants and refineries, which would require CAA permits to include controls on CO₂ emissions. But in cases involving new coal plants in Utah and Illinois, the Environmental Protection Agency argues in documents filed before the EPA's environmental appeals board that CO₂ is only subject to regulation if the EPA has established regulations that require actual controls on emissions. The courts or Congress likely will need to settle the issue.

Lawyers on all sides of permitting fights must be vigilant for state developments. According to news reports, the Kansas secretary of health and environment in October 2007 rejected the application of Sunflower Electric Power Corp. for a new coal plant based on a finding that the CO₂ emissions would contribute to global warming. He relied on a September 2007 opinion of the Kansas attorney general that said state law authorizes the secretary to address air contaminants that substantially endanger public health and welfare. A similar interpretation of state law may be available in other states.

Plan Smart

In this atmosphere of uncertainty, lawyers for project developers and opponents should evaluate the strengths and weaknesses of their cases. Based on regulations and case law, project approval may be likely but only at a dear price to both sides. Lawyers should explore with their clients the potential for project modifications or settlement conditions, focusing on the following areas:

- *Think small.* Would reduction in the project's size and capacity to emit greenhouse gases be feasible? Until lawyers can determine the full impact of future carbon constraints, a smaller project may pose less risk for all parties.

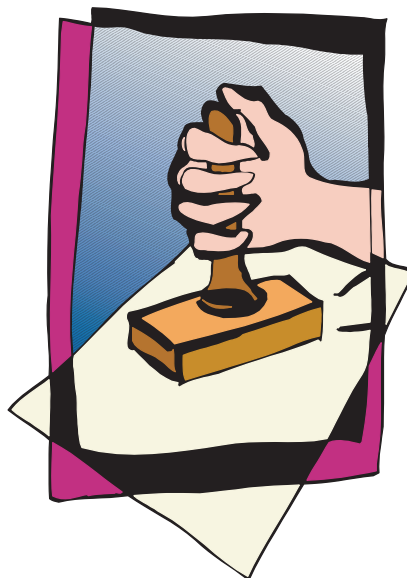
- *Plan ahead.* Should clients consider combustion technology alternatives? New plans could incorporate different combustion technology and project design, which may be more susceptible to the future retrofit of carbon capture. In February, Tenaska Inc. proposed a coal plant near Sweetwater, which would incorporate technology for the capture of CO₂ emissions for potential use in underground injection projects for the enhanced recovery of oil and gas.

- *Focus on fuel.* Are alternative fuels an option? Different coal or lignite sources may impact emissions and other contaminants of concern. Switching to natural gas may expedite bringing new generating capacity on line and reduce CO₂ emissions.

- *Make a deal.* Will the client consider CO₂ offsets? A company that wanted to build a new coal plant could close older plants or make a donation of land or funds to environmental preservation.

- *Go green.* Is investment in renewable energy sources, such as wind and solar, available to offset CO₂ emissions? An agreement to increase the percentage of power from renewable sources may be available if a utility is involved in a fossil fuel project.

Not all projects may be susceptible to these modifications or potential settlement conditions. Developers may choose to delay or cancel projects due to the regulatory



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uncertainty of climate change and escalating costs. A limited number of projects, perceived to be needed and worth the risks of delays, cost increases, and future carbon constraints will proceed. Fasten your seat belts, it's going to be a bumpy ride. ■■■

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