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Recommended Citation

Michael B. Gerrard, *Coal-Fired Powerplants Dominate Climate Change Litigation*, 242(61) N.Y.L.J., SEPTEMBER 25, 2009 (2009).

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New York Law Journal



WWW.NYLJ.COM

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VOLUME 242—NO.61

FRIDAY, SEPTEMBER 25, 2009

ENVIRONMENTAL LAW

Expert Analysis

Coal-Fired Power Plants Dominate Climate Change Litigation

Litigation aiming to reduce emissions of greenhouse gases (GHGs) is coming to be dominated by battles over coal-fired power plants. Ten of the last 20 judicial or administrative decisions or case filings in matters aiming to reduce GHGs have concerned such plants.¹ A concerted effort by the environmental community to fight the use of coal is behind much of this litigation. According to the Energy Information Administration, the combustion of coal is the largest source of GHG emissions in the United States; motor vehicles are a not-very-close second.

The Sierra Club has a Web site that tracks all the proposed coal-fired power plants in the United States.² It shows there are 100 such proposals today, of which 56 are active. My own litigation tracking has identified air-related legal proceedings involving 42 separate facilities.³

In these 42 facilities, 28 have been involved in current or recent appeals of or requests to review permitting decisions. Of these appeals, the great bulk were initiated by environmental groups. There have been numerous claims brought in these appeals, but the most common have involved either best available control technology or maximum available control technology analysis for one or more pollutants, or consideration of carbon dioxide emission limitations. In these cases, the courts and appeals boards have generally deferred to the findings of the agency, where the agency has considered the issue; but where the agency has failed to consider and develop a record on the contested issue, there have been frequent remands and reversals.

In addition to the air-related cases, there is a great deal of activity on two kinds of issues that concern water impacts—mountaintop removal as part of coal mining, which often involves widespread filling of streams; and coal ash



By
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disposal, which has led to several large spills of ash into waterways.

This column discusses the most recent legal developments concerning coal plants, including those on the regulatory and legislative fronts.

Air Pollution Litigation

On Sept. 21, 2009, the U.S. Court of Appeals for the Second Circuit issued its long-awaited decision in *State of Connecticut v. American Electric Power Co.*, a public nuisance suit brought against six electric power corporations that operate fossil-fuel-fired power plants in 20 states. The

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suit sought an injunction requiring the plants to reduce their GHG emissions.

The U.S. District Court for the Southern District of New York dismissed the suit in 2005 on the grounds that it presented a non-justiciable political question, 406 F.Supp.2d 265 (SDNY 2005). The Second Circuit this week reversed, finding that the questions raised are justiciable, that plaintiffs (including certain non-governmental landowners) have standing, that the federal common law of nuisance applies to the claims, and that regulatory and judicial developments have not displaced the common law.

The Fourth Circuit issued a decision on Aug. 12, 2009, in *Mirant Potomac River LLC v. EPA*.⁴ The court found that a power plant in Virginia may not use emissions trading to meet

its obligations under a state implementation plan approved by the U.S. Environmental Protection Agency (EPA) as part of the Clean Air Interstate Rule (CAIR). While CAIR allows emissions trading, Virginia state law does not allow such trading in state nonattainment areas such as the one where the plant was located.

Also in the same state, a state court last month invalidated one of the permits for a coal-fired power plant that Dominion Resources has been building for more than a year.⁵ The permit had a maximum achievable control technology definition that included an escape hatch clause saying that if federal limits on mercury emissions are not achievable on a consistent basis, then testing and evaluation shall be conducted to determine an appropriate adjusted maximum annual emissions limit. The court rejected this clause, holding that the Clean Air Act allows no such adjustment.

On Aug. 11, 2009, a proposed consent decree was filed in federal court in Ohio settling a lawsuit brought by the Department of Justice (DOJ) against Ohio Edison.⁶ The decree requires the subject plant to reduce greenhouse gas emissions by 1.3 million tons per year. According to DOJ, the plant will be the largest coal-fired power plant in the United States to repower with renewable biomass fuels, and the first such plant at which greenhouse gas emissions will be reduced under a Clean Air Act consent decree.

Good news for the coal-fired power plant industry came in July in a case called *Longleaf Energy Associates LLC v. Friends of the Chattahoochee*. The Georgia Court of Appeals reversed a lower court ruling that had vacated a state permit for the construction of a 1,200-watt coal-fired power plant because it did not limit carbon dioxide emissions.⁷ The appellate court found that no regulations controlling such emissions have been promulgated under the Clean Air Act or the Georgia Air Quality Act. EPA is developing such regulations, but they are not yet final.

Other plants are struggling. On Sept. 11, 2009, Otter Tail Power Company pulled out of a proposed project called Big Stone II in South Dakota, citing "the broad economic downturn

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coupled with a high level of uncertainty associated with proposed federal climate legislation and existing federal environmental regulation.” Two days earlier, the staff of the Michigan Public Service Commission handed in negative reviews of two proposed coal plants near Rogers City and Bay City, Michigan, finding that the need for them had not been established.

On July 13, 2009, EPA granted portions of a petition filed by the Center for Biological Diversity, the Sierra Club and others challenging a Clean Air Act operating permit issued by the Kentucky Division for Air Quality to the Tennessee Valley Authority for the Paradise Fossil Fuel electric generating facility. EPA found that the permit failed to require pollution controls and monitoring for nitrous oxide, a GHG.⁸

One notable pending appeal is in a case called *State of North Carolina ex rel. Cooper v. Tennessee Valley Authority*. North Carolina said that several TVA plants in Alabama, Kentucky and Tennessee were polluting its air and thus causing a nuisance under the common law of those three states. TVA moved to dismiss the nuisance claims, arguing (among other things) that North Carolina could not use the other states’ common law to sue over pollution that crossed state lines into North Carolina. The U.S. District Court denied the motion and allowed the case to proceed.⁹ The case raises novel issues concerning the cross-border application of the common law of nuisance, and it is being appealed to the Fourth Circuit, with amici lining up on both sides.

The coal industry received a favorable ruling on Sept. 16, 2009, when a federal court ruled that Pennsylvania law preempts Blaine Township from barring mining activities within its borders.¹⁰

Regulatory Activity

All this litigation is against a backdrop of intense activity in EPA and Congress. Spurred by the U.S. Supreme Court’s landmark 2007 decision in *Massachusetts v. EPA*,¹¹ the agency seems to be on the verge of issuing an endangerment finding under the Clean Air Act, which will set in motion a series of regulatory actions to require permits for GHGs. Also forthcoming is a proposed rule defining what kinds of stationary sources will be subject to GHG permitting requirements. There is a large open question about whether these permits will be required of small sources, but large coal plants are major sources under anyone’s definition.

Additionally, on Sept. 9 EPA sent to the Office of Management and Budget (OMB) a proposal to reverse the policy issued by then-EPA Administrator Stephen Johnson in the waning days of the Bush administration that new and modified sources are not subject to EPA’s rules under the prevention of significant deterioration program of the Clean Air Act. OMB is also reviewing a proposed rule from EPA on the reporting of GHG emissions, as required by a 2007 appropriations bill.

Attorneys for several industry groups have indicated that they plan to launch litigation challenging most or all of these new regulations once they become final.

Every coal plant generates considerable quantities of ash. This ash is not heavily regulated, and much of it is stored in impoundments near the plants that generated it. In December 2008 such an impoundment at the Tennessee Valley Authority’s Kingston Fossil Plant in Roane County, Tennessee, suffered a catastrophic failure, flooding more than 300 acres of land, filling large areas of two rivers, and killing many fish. As a result of this and other incidents, EPA is developing regulations to govern the management of coal combustion materials.

As a related matter, on Sept. 14, 2009, the Environmental Integrity Project, Defenders of Wildlife and the Sierra Club sent a 60-day notice of intent to sue EPA alleging that it has failed to conduct a review of the effluent limitation guidelines for water discharges from coal plants, as required by the Clean Water Act. The notice focused on the discharge of toxic metals.¹² The next day, EPA announced that it did indeed plan to revise these

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discharge standards (though not as quickly as the environmental groups were demanding).

EPA is also taking a new look at “mountaintop removal,” a method of surface coal mining that often involves the deposit of large quantities of overburden in streams. The compatibility of this practice with the Clean Water Act has been the subject of extensive litigation. On Sept. 11, 2009, EPA announced that it had identified 79 proposed projects in Appalachian states that it will review closely in conjunction with the U.S. Army Corps of Engineers.¹³

The one pending regulation that the coal industry generally favors would govern carbon capture and sequestration (CCS), the technology now being developed to capture carbon dioxide emissions before they are emitted from smokestacks, and to store the gas permanently in geologic repositories. These regulations will primarily fall under the underground injection control program of the Safe Drinking Water Act. EPA published a notice and request for comments on July 25, 2008, and on Aug. 24, 2009, EPA announced it was opening a new 45-day public comment period to allow review of newly released data.

Congressional Activity

On June 26, 2009, the U.S. House of Representatives, by a 219-212 vote, passed

the American Clean Energy and Security Act of 2009 (also known as the Waxman-Markey bill).¹⁴ It would comprehensively regulate GHGs through a cap-and-trade program and other regulatory measures. The bill is now being considered by several committees of the Senate, led by the Committee on Environment and Public Works.

The Obama administration has been hoping to secure final passage of the legislation before the Conference of the Parties to the United Nations Framework Convention on Climate Change to be held in Copenhagen in December 2009, but there is widespread uncertainty over whether this goal will be met, especially since Congress is now focusing on health care legislation.

In the final negotiations leading up to the House vote, amendments were adopted that soften the air emissions performance standards applicable to coal plants, and greatly expand the availability of offsets as a way to avoid or postpone emissions reductions. Many environmentalists were outraged at these amendments and want the Senate to remove them. On the other hand, that would make it even harder for the bill’s supporters to get the votes of the swing Democratic senators from coal states. These senators are likely to press for even more generous financial support for CCS; for delays in the time when coal plants would be required to have CCS; for exemptions for coal mine and landfill methane projects from technology standards, and their eligibility for carbon offsets; and for other provisions to ease the bill’s impact on the coal industry.

1. The author maintains a Web site that tracks climate change litigation. The site also has information on how to receive periodic updates. www.climatecasechart.com.

2. <http://www.sierraclub.org/environmentallaw/coal/plantlist.asp>.

3. Bradford McCormick of Columbia Law School’s Center for Climate Change Law undertook this numerical analysis.

4. No. 08-1277.

5. *Appalachian Voices v. State Air Pollution Control Board*, Case No. CL08-3530 (Circuit Court, City of Richmond), letter ruling, Aug. 10, 2009 (Spencer, J.).

6. *United States v. Ohio Edison Co.*, Civil Action No. 2:99-cv-1181 (S.D. Ohio).

7. Index No. A09A0387 (Ga. Court of Appeals, 1st Div.), July 7, 2009.

8. http://www.eenews.net/public/25/12098/features/documents/2009/08/11/document_gw_01.pdf.

9. 549 F.Supp.2d 725 (W.D. N.C. 2008), 593 F.Supp.2d 812 (W.D. N.C. 2009).

10. *Penn Ridge Coal v. Blaine Township*, W.D. Pa., 2:08-cv-1452 (Sept. 16, 2009).

11. 549 U.S. 497 (2007).

12. http://action.sierraclub.org/site/DocServer/FINAL_NOI_Steam_Electric_ELG_20090914.pdf?docID=2761.

13. <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/b746876025d4d9a38525762e0056be1b!OpenDocument>.

14. The bill as passed by the House, plus prior versions, the floor debates, committee markups, hearings, and other materials, including a database of its rulemakings and other mandates, can be found at the Climate Litigation Resource Center, <http://www.law.columbia.edu/centers/climatechange/legislation>.