Legal Opinion Letter

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IS CO_2 REGULATED UNDER FEDERAL LAW?: IMPLICATIONS OF GEORGIA COURT RULING

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On June 30, 2008, Judge Thelma Wyatt Cummings Moore of the Fulton County, Georgia Superior Court ruled in *Longleaf Energy Associates v. Friends of the Chattachoochee* that carbon dioxide (CO_2) is "subject to regulation" under the Clean Air Act (CAA). According to Judge Cummings, therefore, the new source Clean Air Act permit for the Longleaf Power Plant must contain an emission limit that reflects "best available control technology" for CO_2. This judicial ruling contradicts the position of the Environmental Protection Agency (EPA) and of every other state administrative agency that has addressed this issue. Moreover, the court's reasoning is remarkably thin. In fact, Judge Cummings appears to have adopted the proposed decision submitted by the environmental group petitioners with only minor edits.

Background on CO_2 and the Clean Air Act. Under the CAA's Prevention of Significant Deterioration (PSD) provisions, parties proposing to construct or to modify large sources must secure construction permits containing emissions limitations for air pollutants "subject to regulation" under the CAA. These emission limitations must reflect the "best available control technology" (BACT) for reducing emissions of those pollutants. Prior to the Supreme Court's ruling in *Massachusetts v. EPA* that CO_2 is an "air pollutant" under the CAA, no party had ever argued that CO_2 was "subject to regulation" under the Act. This is all the Court has now done, *i.e*. found that EPA has the authority to regulate but only after it makes the requisite endangerment finding.

Following the 2007 ruling by the Supreme Court, environmental advocacy groups argued for the first time that CO_2 was "subject to regulation" under the CAA because CO_2 emissions are required to be monitored and reported from certain power plants under section 821 of the Clean Air Act Amendments of 1990. According to this theory, any new or modified industrial, commercial or residential facility of whatever kind that emits as little as 100 tons of CO_2 a year needs a PSD permit – a costly and resource-intensive process. For context, consider that the furnace for a large apartment building, hospital, or church can emit 100 tons of CO_2 in a year.

Using the CO_2 BACT Argument in Permit Challenges. Armed with this new and novel argument, advocacy groups have challenged permits for coal-fired power plants and refineries all over the country. Generally, they have met with little success as state agencies and EPA have correctly explained that an air pollutant is not "subject to regulation" until EPA promulgates emission limits for the substance, as it has for all other pollutants regulated under the PSD program. These agencies have also pointed out that section 821 is not part of the CAA, so that the provision does not subject CO_2 to regulation under the Act. Finally, they have noted that if this argument were correct, residential apartment buildings, large office buildings, hotels, large retail facilities or any similarly-sized facility that burns natural gas for heating, could be required to secure CAA preconstruction and operating permits.

Where advocacy groups have made these arguments and lost (as they did before the Georgia DEP in this case), they have appealed to state administrative hearing boards or to the EPA's Environmental Appeals Board (EAB). Indeed, this issue is now pending before the EAB in a case involving a permit to construct the Deseret Power plant in Bonanza, Utah.

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What the Georgia Superior Court Said. In her June 30 decision, Judge Moore adopted in whole the environmental groups' proposed order and decision, finding the state agency's decision that CO_2 is not "subject to regulation" under the CAA to be "untenable." She avoided discussing the broader implications of this decision by "[p]utting aside the argument that any substance that falls within the statutory definition of 'air pollutant' may be 'subject to' regulation under the Act." Having side-stepped this issue, she concluded that because section 821 of the 1990 CAA Amendments mandates monitoring of CO_2 emissions, CO_2 is "subject to regulation" under the Act. She suggested that any other result would "effectively ignore[ ]" the "subject to regulation" language of EPA's PSD regulations.

Analysis of the Decision. The decision is remarkable for its cursory evaluation of an issue with enormous regional and national impact. The Georgia DEP and Longleaf are now seeking appeal of the ruling in the State Court of Appeals. They will likely be joined by government, community and business groups across Georgia that are concerned about the potentially severe economic impacts of the decision. The flaws in the decision include:

> No consideration of congressional intent – The court purports to divine congressional intent without any actual analysis of statutory language or legislative history. For example, the court makes no effort to analyze section 821 or its history, both of which show that Congress never intended to regulate CO_2 or to establish emission limits for CO_2. Furthermore, the court did not address the fact that section 821 is not part of the CAA, and therefore could not possibly result in CO_2 becoming "subject to regulation" under the Act.
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> No reference to EPA interpretation and practice – Incredibly, the court opines on and interprets federal law and regulations without any reference to EPA's interpretations and practice. Since the court analyzes *federal* law and regulations, it should have afforded deference to EPA's longstanding interpretation that CO_2 and other unregulated pollutants are not "subject to regulation" and do not require BACT controls.
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> No references to case law – The court cites to *Massachusetts v. EPA* for the proposition that CO_2 is an air pollutant, yet totally ignores the Court's explanation that EPA had not yet regulated CO_2 under the Clean Air Act, and could not do so until it made an endangerment finding. Nor does the court consider the relevant EAB or federal case law holding that unregulated pollutants, and CO_2 in particular, are not subject to PSD and BACT requirements.
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> No consideration of impacts – Perhaps most alarming is the court's failure to recognize or to discuss the profound implications of this decision for the people and economy of Georgia. Rather, the court adopts the advocacy group's uninformed and simplistic interpretation of *federal* law and regulation in a vacuum, without any evaluation or even recognition of the impacts of its decision.

Impact of the Decision. The *Longleaf* decision has generated much national attention since it is the first judicial ruling – state or federal – that directly addresses the argument that CO_2 is "subject to regulation" under the CAA. The same matter is now pending in other state courts as well as at the EAB. Even though the *Longleaf* decision is not legal precedent in other states or at the federal level, it has been and will be offered by environmental groups in administrative permit challenges across the country as authority supporting their position that BACT emission limits for CO_2 should be established in PSD permit proceedings.

If the case is not reversed on appeal, it could have a dramatic impact in Georgia, not just on major industrial facilities such as power plants or manufacturing facilities, but on smaller facilities as well. Indeed, under the court's ruling, any residential, commercial or other project that may emit more than 100 tons per year of CO2 could be required to obtain PSD and Title V operating permits under the Clean Air Act. The result will be a tremendous economic burden affecting almost every sector of society. For consumers this will mean higher prices for products and services and reduced electrical reliability. For Georgia itself, it will mean an exponential increase in permitting responsibilities for the Georgia DEP. The inevitable backlog of permitting decisions will disrupt environmental protection and stifle economic growth, further impacting prices for products and services.

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