

Major Environmental Decision May Also Expand Right to Appeal In Other State Permitting Cases

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A party challenging a state agency's decision to issue a permit for a project may be allowed a second appeal of right, the Michigan Court of Appeals said in *Natural Resources Defense Council v Department of Environmental Quality*, issued March 21, 2013. The decision is important because it may set precedent for many types of state permitting appeals. It also specifically addresses MDEQ's discretion to determine the best available control technology (BACT) in its Prevention of Significant Deterioration (PSD) air emissions permitting program, which may help industrial sources defend MDEQ permit decisions against third party appeals.

In this case, the Sierra Club and the Natural Resources Defense Council challenged MDEQ's decision to issue a permit allowing the City of Holland to install a new coal-fired boiler at one of its power plants. MDEQ did not hold a contested case hearing before issuing the permit. The appeal to the circuit court was the first time the permit was formally challenged.

Two Bites At The Appellate Apple

In Michigan, parties typically have the right to one appeal, with any higher level of appellate review left to the discretion of the courts. The Court of Appeals, however, recognized a right to a second appeal following certain state agency decisions to issue a permit, unless the agency decision follows a quasi-judicial proceeding like a contested case hearing.

The Court of Appeals was careful to analyze this second appeal by right only in the context of MDEQ's PSD permit program. However, numerous state agencies issue permits without holding a contested case hearing. Parties who are disappointed in the first-level appeal to the circuit court are likely to rely on this case to argue for the right to a second appeal to the Court of Appeals. Individuals and business should take into consideration the extra time that may be involved in appeals when planning time-sensitive projects that require permitting and are likely to face opposition.

First-Time Consideration of State BACT Determination

The United States Environmental Protection Agency applies a "topdown" BACT analysis that generally selects the most stringent available control technology for an air permit. The Sierra Club and Natural Resources Defense Council argued in this lawsuit that MDEQ had not properly applied topdown BACT.

The Court of Appeals held that the question on appeal is whether the MDEQ's permit decision is authorized by law - the courts are not entitled to evaluate the evidence supporting the agency decision. Applying this fairly deferential standard, the Court concluded that MDEQ did not violate state or federal air laws when its BACT analysis provided a "reasoned analysis of each type of fuel that" Holland could use without redefining the scope of its proposed facility. The Court further concluded that MDEQ was not obligated to follow EPA guidance on the BACT analysis.

This opinion could be helpful for industrial sources considering which control technology alternatives to propose in the permitting process. It may also prove helpful in defending MDEQ PSD permit decisions and BACT determinations against third party challenges.

Continued

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