

STATE OF NORTH CAROLINA
 COUNTY OF WATAUGA

IN THE OFFICE OF
 ADMINISTRATIVE HEARINGS
 08 EHR 0779 and 09 EHR 3175

APPALACHIAN VOICES,)
)
 Petitioner,)
)
 v.)
)
 NORTH CAROLINA DEPARTMENT OF)
 ENVIRONMENT AND NATURAL)
 RESOURCES, DIVISION OF AIR)
 QUALITY,)
)
 Respondent,)
)
 and)
)
 DUKE ENERGY CAROLINAS, LLC,)
)
 Respondent-Intervenor.)

APPALACHIAN VOICES’
 PROPOSED DECISION
 (Before the Environmental
 Management Commission)

Based upon careful consideration of the parties’ pleadings, oral arguments and memoranda of law and the entire record in this case, the undersigned hereby finds as follows:

FINDINGS OF UNDISPUTED MATERIAL FACT

01. The deadline for submitting written comments regarding the draft construction and operation permit was extended from October 31, 2007 to November 15, 2007. See Hearing Officer’s Report and Recommendations at 1 (available at <http://daq.state.nc.uu/permits/psd/cliffside.shtml>).

02. Petitioner’s written comments were received by DAQ before the November 15, 2007 deadline. Id., Appendix B at 6.

03. In its written comments, Petitioner specifically requested that Respondent consider, inter alia, the “collateral impacts” of mountaintop removal and other surface coal mining on the people, communities and the environment of the Appalachian coalfields when identifying and selecting BACT. See generally, Petitioner’s Memorandum in Support of Partial Summary Judgment, Exhibit 3 at 5–25.

04. Petitioner’s written comments incorporated into the administrative record, by reference, a study jointly prepared by the U.S. Environmental Protection Agency (“EPA”), the U.S. Fish and Wildlife Service, the U.S. Army Corps of Engineers, the U.S. Office of Surface Mining, Reclamation and Enforcement and the West Virginia Department of Environmental Protection, detailing and analyzing the significant environmental effects associated with surface mining in the steep terrain of Appalachia entitled “Mountaintop Mining/Valley Fills in Appalachia Final Programmatic Environmental Impact Statement” (PEIS). See Petitioner’s Memorandum in Support of Partial Summary Judgment, Exhibit 3, at 4, 7.

05. For Respondent’s consideration in selecting BACT, Petitioner’s written comments summarized, in part, the PEIS’s evaluation of the significant environmental and human impacts associated with surface mining in the Appalachian Mountains. Id. at 5–17.¹

06. In response to Petitioner’s request that Respondent consider the collateral impacts of surface coal mining when identifying and selecting BACT, Respondent’s hearing officer stated: “DAQ has no authority or regulation over coal mining procedures.” See Hearing Officer’s Report and Recommendations at 21.

07. In response to written and oral requests that Respondent consider the collateral impacts of mountaintop mining in Appalachia when identifying and selecting BACT, the hearing officer stated: “The issue of coal mining is outside the scope of a review under DAQ regulations.” Id. at 6.

**THE CLEAN AIR ACT: AMBIENT AIR QUALITY STANDARDS,
IMPLEMENTATION PLANS, NEW SOURCE REVIEW, PREVENTION OF
SIGNIFICANT DETERIORATION AND SELECTING THE BEST AVAILABLE
CONTROL TECHNOLOGY**

I. Permitting Major New Sources of Air Pollution Under the Federal Clean Air Act

A. *Establishing National Ambient Air Quality Standards*

08. Title I of the federal Clean Air Act (“CAA”), 42 U.S.C. §§ 7401–7671q, requires, inter alia, the United States Environmental Protection Agency (“EPA”) to develop national ambient air quality standards (“NAAQS”) for those pollutants that “cause or contribute to air pollution ...” 42 U.S.C. § 7408(a)(1)(A)–(B).

09. Once a NAAQS has been established for a pollutant, EPA designates areas of the country as attainment, nonattainment, or unclassifiable depending on whether the area meets the NAAQS for that pollutant. Id. § 7407(d)(1).

¹ The conclusion that surface coal mining in the mountains of Appalachia has significant impacts flows logically from the fact that EPA, et al., prepared a programmatic environmental impact statement pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370f, which requires, inter alia, federal agencies to prepare such statements for any “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C) (emphasis added).

B. State and Federal Implementation Plans for Achieving NAAQS

10. States bear the primary responsibility for assuring air quality within their borders by developing state implementation plans (“SIP”) detailing the manner in which the NAAQS will be achieved and maintained. 42 U.S.C. § 7407(a).

11. A SIP is not effective until approved by EPA, 42 U.S.C. § 7410, and SIPs may be approved in whole or in part. 42 U.S.C. § 7410(k)(3).

12. If a SIP – or portion thereof – is untimely or insufficient for achieving and maintaining NAAQS, EPA will develop a federal implementation plan (“FIP”) for the state. 42 U.S.C. § 7410(c)(1).

13. Where a FIP is in effect, EPA is the implementing authority unless it delegates those responsibilities to a state. 42 U.S.C. § 7410(c)(3).

14. States that have received EPA approval for their SIPs are commonly known as “SIP-approved” states, while those implementing FIPs are known as “delegated” states.

C. The Clean Air Act’s New Source Review Program

15. To address air pollution emitted by major new sources and major modifications of existing sources, the CAA requires the new facility to undergo new source review (“NSR”) before construction may commence. See 42 U.S.C. §§ 7470–7515.

16. NSR is divided into two programs depending on the NAAQS attainment status of the area affected by the new or modified source. Id.

17. In nonattainment areas, new and modified sources must obtain preconstruction permits designed to offset emission increases and to secure the lowest achievable emission rate. 42 U.S.C. §§ 7501–7514a.

18. In attainment areas, new and modified sources must comply with the prevention of significant deterioration (“PSD”) program, 42 U.S.C. §§ 7470–7492, by obtaining a preconstruction permit prescribing emissions limits – or permit conditions – representing the “best available control technology” (“BACT”). 42 U.S.C. § 7475.

19. North Carolina’s prevention of significant deterioration program is SIP-approved. See 40 C.F.R. § 52.1772.

20. Congress sought to achieve five objectives under the PSD permitting program:

A. “[T]o protect public health and welfare from any actual or potential adverse effect which in the Administrator’s judgment may reasonably be anticipate[d] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air, notwithstanding attainment and maintenance of all national ambient air quality standards.” 42 U.S.C. § 7470(1).

B. “[T]o preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value.” 42 U.S.C. § 7470(2).

C. “[T]o insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.” 42 U.S.C. § 7470(3).

D. “[T]o assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State.” 42 U.S.C. § 7470(4).

E. “[T]o assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.” 42 U.S.C. §§ 7470(5).

21. To achieve these goals, Congress prohibits the construction of new major emitting facilities in attainment areas unless, inter alia, “the proposed facility is subject to the best available control technology.” 42 U.S.C. § 7475(a)(4).

D. Identifying and Selecting the Best Available Control Technology

22. Congress defined “best available control technology” (“BACT”) as “an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment of innovative fuel combustion techniques for control of each such pollutant. ...” 42 U.S.C. § 7479(3).

23. EPA prepared a draft manual that provides guidance to permitting authorities for, inter alia, identifying and selecting BACT. See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, NEW SOURCE REVIEW WORKSHOP MANUAL (“NSRWM”) at B.1–75 (1990).

24. EPA’s NSRWM details a five-step, top-down process that permitting authorities should use or emulate in identifying and selecting BACT. See e.g. Knauf I, 8 E.A.D. 121, 134 n.25 (EAB 1999) (“A strict application of the methodology described in the NSR Manual is not mandatory, but we expect an analysis that is as sufficiently detailed as the model in the NSR Manual.”); see also, id. at 129 n.14 (“We would not reject a BACT determination simply because the permitting authority deviated from the Draft NSR Manual, but we would scrutinize such a determination carefully to ensure that all regulatory criteria were considered and applied appropriately.”); In re Three Mountain Power, LLC, 10 E.A.D. 39, 54 (EAB 2001) (“The Draft NSR Manual is not accorded the same weight as a binding Agency regulation ... Nevertheless, the [Environmental Appeals] Board requires an analysis that reflects a level of detail in the BACT analysis comparable to the methodology in the NSR Manual.”) (citation omitted).²

25. Briefly, EPA’s five-step process begins by identifying all control options with potential application to the source and pollutant under evaluation. Next, any options that are clearly demonstrated to be technically infeasible based on physical, chemical or engineering principles are eliminated. During the third step, the remaining control technologies are ranked according to their effectiveness. The fourth step is designed to ferret out the control technology having the least collateral environmental, economic and energy impacts. Finally, the most effective control option not eliminated in step 4 is proposed as BACT. See NSRWM at B.8–10.

26. Generally, after selecting BACT, the permitting authority specifies – as an enforceable permit condition – an emissions limitation for each source representing the “maximum degree of reduction achievable for each pollutant ...” Id. at B.2.

27. If, however, it is infeasible for the permitting authority to impose an enforceable emissions limitation representing BACT, the agency may require “the source to use design, alternative equipment, work practices or operational standards to reduce emissions of the pollutant to the maximum extent.” Id.

28. The BACT selection process allows the permitting authority to consider new information developed subsequent to the submission of a complete application in order to assure, inter alia, that “all considerations relating to economic, energy and environmental impacts have been addressed.” Id. at 55.

STANDARDS OF REVIEW

29. In cases challenging an ALJ’s decision “[q]uestions of law receive de novo review.” In re: Denial of NC Idea’s Refund of Sales and Use Tax, __ N.C. App. __ (2009), 675 S.E.2d 88, 94, 2009 N.C. App. LEXIS 423 (quoting In re Appeal of the Greens of Pine Glen Ltd. P’ship, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

² The Environmental Appeals Board is EPA’s final decision-maker on administrative appeals under all major environmental statutes administered by the EPA, including the Clean Air Act. The Board is normally composed of three-judge panels making decisions by majority vote.

30. Summary judgment is proper where the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c).

31. “The moving party has the burden of establishing the absence of any genuine issue of material fact, and the evidence presented should be viewed in the light most favorable to the nonmoving party.” Parish v. Hill, 350 N.C. 231, 236, 513 S.E.2d 547, 550 (1999) (citing Holley v. Burroughs Wellcome Co., 318 N.C. 352, 355–56, 348 S.E.2d 772, 774 (1986); see also, Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985)).

CONCLUSIONS OF LAW

32. The ALJ’s conclusion that – as a matter of law – Petitioner must support a motion for summary judgment with affidavits or other verified pleadings is contrary to law.

33. The ALJ’s conclusion that – as a matter of law – Respondent is not required to consider the collateral impacts of surface coal mining when selecting BACT for a coal-fired power plant is contrary to law.

34. The ALJ’s conclusion that – as a matter of law – Respondent is prohibited from requiring permittees to burn specific types of coal, or blends thereof, is contrary to law.

35. The ALJ’s conclusion that – as a matter of law – Respondent is not required to consider other sources of coal as alternatives to burning surface-mined Central Appalachian coal is contrary to law.

Dated this the ____ day of _____, 2010.

Commissioner,
North Carolina Environmental Management Commission

CERTIFICATE OF SERVICE

I hereby certify that copies of APPALACHIAN VOICES' PROPOSED DECISION (Before the Environmental Management Commission) has been served on the following counsel by hand delivery or by first-class USPS mail, postage pre-paid and by electronic mail on the following:

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Dated at Asheville, North Carolina this 13th day of November 2009.

/s/

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