

Fulton County Superior Court Order

June 30, 2008

The final order, issued by the Superior Court Judge, cited six reasons why the Administrative Law Judge's order affirming the permit, must be reversed and remanded. Most of the attention has focused on the carbon dioxide issue, covered in two of the reasons for reversal, while four of the reasons, which involve the legal process errors of the Administrative Law Judge (ALJ), have been largely ignored.

Carbon Dioxide:

1. The Administrative Law Judge (ALJ) employed the incorrect standard of review. The ALJ erred by failing to make independent "de novo" findings and decisions. Instead, the ALJ afforded too much deference to findings made by the agency whose action was being reviewed, Georgia's Environmental Protection Division (EPD). Instead of making a truly independent determination, as is called for in by a de novo trial, the ALJ only asked whether or not EPD's determinations were reasonable, which is a much less stringent standard, inappropriate in this kind of case, and violative of controlling law. Because the ALJ applied the incorrect standard of review, her findings were not upheld on appeal.
2. There was no effort to analyze or limit CO₂ emissions. Language in the Clean Air Act mandates that there be an analysis of pollution control technology and an emissions limit must be set for 1) any pollutant, 2) regulated by the Act. Since *Mass v. EPA* decided that CO₂ is a "pollutant," we only had to establish that it is "regulated by the Act" to prove that an analysis of pollution controls needed to be done and that an emissions limit should be set. Because there are literally hundreds of regulations under the Act that address CO₂, the court only had to put two and two together to find that the permit was invalid as it did not contain the required analysis and did not contain an emissions limit for CO₂.
3. The ALJ ignored evidence that the planned facility would cause the area to violate national health based air quality standards for fine particulate matter. Despite evidence that air quality standards would be violated, the ALJ refused to hear or consider this evidence, satisfied by the facility's consideration of a similar pollutant, coarse particulate matter. Because the two pollutants should be considered independently, the ALJ failed by refusing to consider the evidence regarding fine particulates.
4. EPD and Energy Associates failed to consider pollution control technology that could greatly reduce CO₂ emissions as well as emissions of other pollutants. The specific technology or process that they failed to consider involves gasifying coal and burning the gas instead of the coal itself. The law requires that ALL pollution control

technology be considered and since this gasifying process was not part of the analysis, the permit did not comply with the law.

5. During the Administrative Hearing, the ALJ inappropriately dismissed claims that were brought forward by Petitioners. In dismissing these claims, the ALJ stated that because Petitioners did not provide a specific emissions limit to correct the defect that was the basis of their claims, she would not hear the claims at all. On appeal, the Judge ruled that an ALJ cannot hold Petitioners to hyper-specific pleading standards.
6. No professional engineers were involved with setting the emissions limits in the permit. Georgia law and the Georgia Board of Engineers requires that these types of analyses be performed by qualified, licensed, professionals. Because there was not a licensed professional engineer involved with setting the emission limits, the permit was invalid.

Thus, there were six different grounds on which the lower court's decisions were overturned.

EPD and Energy Associates have appealed all six rulings. Some of the grounds on which they base their challenge are simply not true, not reflected in the law, and are gross exaggerations of the truth.

For instance, Appellants argue that the judge's ruling on CO₂ will now require that "schools and hospitals" and other small businesses will be required to get a permit where they wouldn't have been required to do so before. This is exaggerated on many levels:

- The ruling only applies to PSD permits which are given to major new sources or major modifications. In order to be considered "major" a facility has to emit over 250 tons/year of a criteria pollutant. So, tiny businesses will likely not meet this threshold.
- There is a provision in the regulation that allows for states to exempt school, hospitals, and non-profit establishments:
 - "The source or modification would be a nonprofit health or nonprofit educational institution, or a major modification would occur at such an institution, and the governor of the state in which the source or modification would be located requests that it be exempt from those requirements"
- Many small businesses, such as bakeries, are already required to get permits from the air protection branch because of the amount of pollution coming from the site. This decision does not change that at all. And there have not been any problems with the longstanding requirement that bakeries and other businesses that release air pollution garner permits from EPD.