

Supreme Court Rejects Issuance of 2010 Sunflower Electric Permit

The Supreme Court today, in a unanimous decision, reversed the issuance of a 2010 permit by the Kansas Department of Health and Environment to Sunflower Electric for the construction of a new coal-fired power plant, Holcomb 2, at the site of Sunflower's existing plant, Holcomb 1, in southwestern Kansas. The case will be remanded to the KDHE.

Judicial review was sought by Sierra Club, who the Court determined had legal standing to bring the challenge. The environmental group satisfied multi-level standing requirements: (1) statutory requirements under the Kansas Air Quality Act and the Kansas Judicial Review Act and (2) common-law or traditional requirements for associations. The justices said Sierra Club satisfied traditional standing requirements, in part, by establishing that the construction threatens some of the group's members—such as those living near the Holcomb 2 site and vulnerable to the increased health risk substantiated in the record—with imminent injury.

After determining that Sierra Club had standing to challenge the KDHE's issuance of a permit for construction of Holcomb 2, the Court then reviewed the decision making and determined that the KDHE erred in its interpretation and application of the federal Clean Air Act and the Kansas Air Quality Act by failing to apply the regulations of the federal Environmental Protection Agency regarding new 1-hour emission limits for nitrogen dioxide and sulfur dioxide. These EPA regulations became effective before the Holcomb 2 permit had been issued, and the Court held that federal and state laws and regulations require the KDHE to apply these national air ambient quality standards upon the date they become effective. The new 1-hour limits must be applied on remand.

In another issue, the justices recognized that, after the Holcomb 2 permit had been issued, the EPA enacted a new regulation on hazardous air pollutants, which establishes national limits for mercury, acid gases, and other toxic emissions from coal- and oil-fired power plants of more than 25 megawatts. Holcomb 2 falls into this category. As undisputed by the parties, this EPA regulation is retroactive and must also be applied on remand.

Part of the permit process involves the consideration of modern technologies for reducing emissions. The Court considered arguments raising concerns about the KDHE's consideration, or lack thereof, of such technologies. Sierra Club argued that the Holcomb 2 permit failed to adequately reflect the best available control technology. The Court questioned whether this issue has become moot based on its other rulings in the case. But because the parties did not discuss in their briefs whether this issue would become moot if the Court were to find error on another issue, the Court considered the merits but indicated that on remand, “the parties should be given an opportunity to present their positions regarding the scope of proceedings on remand and whether there must be a new determination on the best available control technology.” And the Court directed that “the scope of the proceedings on remand must be determined by the KDHE.” Ultimately, the Court upheld the KDHE's decisions concerning various types of modern control technologies. In a related argument—whether the Holcomb 2 permit's emission limits for nitrogen oxides and particulate matter are too high compared to the limits in a Georgia power plant's permit—the Court determined that the KDHE's conclusions regarding Holcomb 2's emission levels and its “decision to set limits that will be achievable over the life of the plant” were not unreasonable, arbitrary, or capricious and were supported by substantial evidence.

Finally, the Court rejected multiple arguments in which Sierra Club contended that the KDHE engaged in an unlawful procedure or failed to follow prescribed procedures in the process of approving and issuing the Holcomb 2 permit.

The case will now be remanded to the KDHE for further proceedings.

Supreme Court Of Kansas