

August 26, 2010

Sierra Club Challenges RUS Lien Accommodation Regulation

The Sierra Club has broadened its campaign against approvals granted by the Rural Utilities Service (RUS) related to new coal plants involving electric cooperatives. Having previously challenged specific RUS approvals, the Sierra Club recently filed suit challenging the overall validity of the RUS regulation on which such approvals are based. Approvals, including lien accommodations, granted by RUS pursuant to loan agreements are excluded from environmental review under this regulation. This facial challenge to RUS's regulation has implications for all RUS borrowers.

As previously reported, the Sierra Club is engaged in an aggressive campaign to stop the construction of new coal plants. In a lawsuit filed more than two years ago, the Sierra Club challenged specific RUS approvals related to Sunflower Electric Power Corporation's expansion of its coal-fired Holcomb plant in Kansas. The Sierra Club alleged that such approvals were invalid because they were granted in the absence of any environmental review under the National Environmental Policy Act (NEPA). Even though the expansion will be financed with private funds, the Sierra Club sued to rescind the approvals. *Sierra Club v. USDA*, Docket No. 1:07-cv-01860-EGS (D.D.C. filed Oct. 16, 2007).

RUS's position is that such approvals do not require NEPA review. This interpretation is set forth in 7 C.F.R. § 1794.3, promulgated by RUS, which provides in pertinent part: "Approvals provided by RUS pursuant to loan contracts and security instruments, including approvals of lien accommodations, are not actions" under NEPA.

In a lawsuit filed June 15, 2010, the Sierra Club, joined by a local environmental group, filed suit against RUS, the Secretary of Agriculture, and the Administrator of RUS, challenging the validity of 7 C.F.R. § 1794.3. The plaintiffs also challenge a lien accommodation and other unidentified approvals granted by RUS to East Kentucky Power Cooperative related to a proposed coal-fired plant. The lawsuit was filed in the United States District Court for the District of Columbia (Docket No. 1:10-cv-01010).

In support of their facial challenge, the plaintiffs allege that in promulgating § 1794.3, RUS exceeded its authority under NEPA, acted arbitrarily and capriciously, and violated the Administrative Procedure Act. The plaintiffs seek an order from the court declaring that § 1794.3 is "invalid facially." RUS filed an answer on August 24, 2010, denying the essential allegations of the complaint.



If you have any questions regarding this Legal Alert, please feel free to contact the attorneys listed below or the Sutherland attorneys with whom you regularly work.

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