

Osaka District Court 2018, Heisei 30 (2018)(Gyo u) no. 184, the case claiming cancelation of the notice of finalization of an environmental assessment of two new coal-fired power plants

1. Summary of the proceedings

Japanese government has promoted the construction of new coal-fired power plants after the Fukushima nuclear accident in 2011, according to the shut down of all nuclear power plants nationwide. This administrative lawsuit concerns one of those promoted construction plan of two coal-fired power plants (hereinafter referred to as CFPPs) by Kobe Steel Co., Ltd. (hereinafter referred to as Kobelco). The two planned CFPPs is supposed to have capacity of 650,000 kW for each, meaning 1.3 million kW in total. The planned site is located in the central area of Kobe City, where once had of a blast furnace. The prospected annual CO2 emissions are 6.92 million tons (1/5000 of the world's total energy-related CO2 emissions). Two other CFPPs with capacity of 700,000 kW for each had already installed in the same Kobelco area in 2002, and currently in operation.

The environmental assessment procedure was started in September 2014, and the Minister of Economy, Trade and Industry (hereinafter referred to as METI) issued the notice of finalization on May 31, 2018. Construction started in October 2018 and new no.1 CFPP is supposed to start its operation in 2021, no.2 in 2022. All generated power will be sold to Kansai Electric Power Co., Inc. (hereinafter referred to as Kansai Electric Power Co.) for 30 years.

The plaintiffs (11 local residents) filed an administrative litigation to the to the Osaka District Court in November 2018, against the country (METI), seeking the cancellation of the final notice. This case is the first lawsuit in Japan on climate change grounds against large coal-fired power plants. **The court will deliver its decision on March 15, 2021.**

The same CFPPs are also targeted by 40 local residents that filed a civil lawsuit to the Kobe District Court against Kobelco and Kansai Electric Power Co., Inc., claiming infringement of their personal rights. Prior to these two proceedings, in December 2017, 486 residents filed a pollution arbitration to the Hyogo Prefectural Pollution Examination Board against Kobelco and Kansai Electric Power Co. in December 2017, which terminated in vain.

2. Issues in proceedings

(1) Requirements for proceedings

A. Disposability of the final notice

The "Final Notice" stipulated at Article 46-17II of the Electricity Business Act gives "a status to submit the construction plan and practice start the planned construction" of CFPPs. It therefore corresponds to the "permission disposition" which is an appeal targets as its

objective. The defendant contests its disposability, insisting the “Final Notice” sorely confirms the finalization process.

B. Standing

The Article 9 I of the Administrative Litigation Act of Japan limits the standings to "those who have legal interests in canceling the disposition" to seek cancellation of a disposition. In this case, the plaintiffs apparently have legal interests because CO₂ and PM_{2.5} emissions from CFPPs may affect their lives, health and living environment by climate change impacts and air pollution. Defendants contests the plaintiffs' standings, claiming that the environmental impact assessment system is supposed to protect the general public interest of environmental conservation, and the individual interests of neighboring residents are out of its scope.

(2) Issue of the merit: The conducted environmental impact assessment procedure lacks proper consideration for environmental conservation and has legal defects in the following points.

- A. Only the height of the chimneys was comparably examined in the environmental impact assessment procedure as an alternative. Natural gas-fired power whose emission of CO₂ corresponds to half of CFPPs was never argued.
- B. The investigation, prediction, and evaluation of the effects of PM_{2.5} emitted from the power plant were not conducted. The defendant insists that this was because those methods were yet fully established. Meanwhile the plaintiffs conducted the simulation, and the obtained result shows that the number of premature deaths due to PM_{2.5} emitted and secondarily generated from the new CFPPs will reach 52 per year, and about 2000 during the 30-year operation period.
- C. The conducted environmental impact assessment procedure does not investigate, predict, or evaluate the impact of CO₂, as it is only required to predict emissions. However, damage to human life, health and living environment due to extreme high temperature, extreme precipitation, and enormous typhoon due to climate change is already real and enormous in Japan nationwide, including the residence of the plaintiffs.

In addition, proper consideration for environmental conservation is yet given because the consistency with the nationwide emission prediction was not examined. The due annual emission of CO₂ from the CFPPs in total nationwide was predicted to be 220-230 million tons in order to achieve the national reduction target (26% reduction of GHG by 2030 compared to 2013), which is quite insufficient. The conducted procedure only included the new CFPPs' annual emission with no equipment of CCS, but basically it should have considered the emission of CO₂ from other CFPPs constructed in the same period as the

claimed CFPPs to investigate, predict and evaluate the consistency with the national reduction target.

Regarding this point, the defendant insists that they followed the "Director-General Meeting Summary" made on April 25, 2013. This summary regards all applications for new construction of CFPPs as "consistent with the national medium-term goal" only with the condition that they adapt the power generation efficiency regulation by the Energy Conservation Law, as well as participate in the voluntary efforts of the business operators to set the emission co-efficient of electricity sold in 2030 to about 0.37 kg-CO₂ / kWh. The defendant states that this summary is rational as a criterion for determining appropriate consideration for environmental conservation.

The plaintiffs insists that the summary by no means has any legality, only depending on the regulation measures of the power generation efficiency and the non-fossil power ratio of the electric power distributor, as well as the voluntary effort target of the electric power emission coefficient of the electric power company. It has no rationality as standards because it does not guarantee the achievement of the CO₂ emission target from CFPPs. The plaintiffs states that the summary allowed the conducted procedure to substantially skip the environmental impact assessment system.

(3) Illegality confirmation of lack in proper CO₂ emission regulations in the Ordinance of the Ministry of Thermal Power Technology Standards

The technical standards based on the Electricity Business Act only stipulate standards for air pollutants, which excludes CO₂. The Electricity Business Act aims not only to "ensure public safety" but also to "preserve the environment", which includes the conservation of the global environment. A proper regulation on CO₂ emission from thermal power plants is therefore needed in order to achieve a reduction in CO₂ emissions consistent with the Paris Agreement. The plaintiffs have the legal interests to seek the illegality confirmation of their omissions on the basis that METI has failed to exercise its regulative authority in a timely and appropriate manner.

3. Background of the proceedings

(1) In Japan, conduct of environmental impact assessment procedure is the only requirement to construct a large CFPP of 112,500 kW or more. No administrative approval is needed. In addition, Japanese environmental impact assessment procedure is carried out by the business operator and evaluated by the regulatory agency, and the assessment of thermal power plants is exceptionally regulated by a special provision stipulated in the Electricity Business Act. not an environmental impact assessment method but a feature of the Electricity Business Act. In

this case, the procedure is supposed to end with a notification that the METI does not approve the need to change the assessment (Electricity Business Act Article 46-17II Final Notice).

(2) In Japan, a policy of expanding high-efficiency CFPPs was adopted after the Great East Japan Earthquake and the Fukushima nuclear accident on March 11, 2011, and 35 new plans were proceeded. Among them, 20 plans of large-scale coal fired power plants took the same environmental impact assessment as this case. Seven of them are already in operation. Nine units are under construction, and four units are under assessment or completed the procedure.