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Judges Question EPA Authority to Defer Greenhouse Gas Permitting for Biomass

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By Andrew Childers

WASHINGTON, D.C.-- Federal appeals court judges during oral argument April 8 pressed the Environmental Protection Agency to explain where in the Clean Air Act it is given the authority to temporarily exempt large industrial sources burning biomass and some landfills from greenhouse gas permitting requirements (Center for Biological Diversity v. EPA, D.C. Cir., No. 11-1101, oral argument 4/8/13).

Judge Brett Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit warned EPA against “carve-outs that aren’t seemingly in the text.” Kavanaugh noted that the D.C. Circuit had previously upheld EPA’s application of prevention of significant deterioration and Title V operating permit requirements to greenhouse gas emissions.

“Now EPA doesn’t like the policy and is saying it can create an ad hoc exemption,” he said.

At issue is a 2011 rule that exempts until July 21, 2014, new and modified facilities that burn wood waste, as well as landfills with emissions from decomposing biomass, from requirements to obtain prevention of significant deterioration and Title V operating permits for their greenhouse gas emissions (76 Fed. Reg. 43,490; 129 ECR, 7/1/11).

EPA said it needs that time to study whether emissions from biomass, which would naturally decay and release its carbon dioxide, should be regulated or considered carbon neutral for the purposes of permitting.

A coalition of environmental groups, including the Center for Biological Diversity, Natural Resources Defense Council, and Clean Air Task Force, challenged the exemption rule as unlawful and unwarranted.

EPA Sees Authority for Deferral

Perry Rosen, the Justice Department attorney representing EPA, said the deferral is in part intended to give EPA a chance to determine how to measure emissions from biomass to account for their life-cycle greenhouse gas impact. EPA deferred the permitting requirement for sources burning biomass because some of those facilities could “serve to reduce the very pollutant that is being regulated,” Rosen said. Because biomass and landfills would eventually release their greenhouse gases anyway, EPA must decide whether those emissions should be treated differently than other fuel sources and whether permitting officials should consider carbon sequestration from biomass in the permitting process, he said.

Section 169(1) of the Clean Air Act requires “stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year

or more of any air pollutant” to obtain prevention of significant deterioration permits. Judge David Tatel asked whether the word “emit” could be read to include net greenhouse gas emissions and not just total emissions, but Kavanaugh was more skeptical.

Although the prevention of significant deterioration statute does not give EPA the explicit authority to consider life-cycle emissions, Rosen said other Clean Air Act provisions such as Title II, which regulates automobile emissions, allow EPA to consider the life-cycle impact of emissions when it evaluates biofuels.

Ann Weeks, a Clean Air Task Force attorney representing the environmental groups, said Congress explicitly gave EPA the authority to consider net emissions under the new source review requirements at Section 173 of the Clean Air Act, but did not include a similar provision for prevention of significant deterioration. EPA cannot categorically exclude sources burning biomass from the prevention of significant deterioration permitting process entirely, Weeks said. Instead, EPA could issue guidelines for how permitting officials should treat the fuel during the best available control technology

review, which determines what pollution controls are necessary.

EPA Relies on Court Doctrine

EPA invoked the administrative doctrine of “one step at a time” to defend the permitting deferral, arguing that the agency needs the additional time to study biomass emissions to determine whether and how they should be regulated in the permitting process. That doctrine, if upheld by the court, would allow the agency to deviate from the text of the Clean Air Act if implementing it as written would be impossible.

“All EPA is asking for is a reasonable period ... to get this right,” Rosen said.

EPA also applied the doctrine of one step at a time to defend its tailoring rule, which limits greenhouse gas permitting requirements to only the largest stationary sources, in a series of legal challenges to the agency’s greenhouse gas regulatory program (*Coalition for Responsible Regulation v. EPA*, D.C. Cir., No. 09-1322, 12/20/12; 57 ECR, 3/25/13)

Roger Martella, a partner at Sidley Austin LLP who represents the National Alliance of Forest Owners and other wood and biomass

industry groups that intervened on behalf of EPA, said the deferral is “indistinguishable from the tailoring,” except that it has a sunset provision built into it.

Environmental Groups Call Exemptions Permanent

Even though EPA has only deferred the permitting requirement until 2014, facilities burning biomass that received their prevention of significant deterioration and operating permits prior to that date will not be required to undergo a best available control technology review for their greenhouse gas emissions should the exemption expire, environmental groups said.

“EPA has created a blanket exemption from the Clean Air Act permitting and control requirements,” Weeks said, calling it “a permanent harm.”

The D.C. Circuit allowed EPA to deviate from the statutory permitting requirements when it upheld the tailoring rule, which limits greenhouse gas permitting to the largest industrial sources, as part of *Coalition for Responsible Regulation v. EPA*. Tatel asked Weeks why the court should not allow EPA similar deference with biomass emissions, particularly because the

uncertain nature of the science “doesn’t seem to be challenged by anybody.”

Unlike in the tailoring rule, EPA has not “met its heavy burden” to demonstrate that issuing greenhouse gas permits for industrial sources burning biomass would present any significant burdens or challenges for state regulators, Weeks said.

“We have no objection to EPA studying the question,” Weeks said. “We do object to EPA carving out a blanket exemption.”