



DC Circ. Nixes EPA's Biomass Carbon Emissions Exemption

By Sean McLernon

Law360, New York (July 12, 2013, 6:46 PM ET) -- The D.C. Circuit on Friday struck down a U.S. Environmental Protection Agency rule temporarily exempting biomass-burning facilities from carbon dioxide emission limits in a 2-1 decision, granting a victory to environmental groups demanding a consistent federal greenhouse gas regulation policy.

Describing the EPA measure as arbitrary and capricious, the majority said that the government failed to explain why it is treating biogenic sources differently from other greenhouse gas emissions and vacated the deferral rule that gave biomass power plants a reprieve from carbon dioxide pollution standards.

The agency had argued that the one-step-at-a-time doctrine allows it to take a gradual approach toward achieving the Clean Air Act's mandate, saying it needed three years to complete a scientific study examining "the unique nature and characteristics of these emissions sources."

Despite any possible scientific uncertainty, the appeals court said that the EPA needed to present an interpretation of the CAA that would allow the agency to set apart biomass emissions in order to take a piecemeal approach to regulating greenhouse gases.

"We simply have no idea what EPA believes constitutes 'full compliance' with the statute," Judge David S. Tatel wrote for the majority. "In other words, the deferral rule is one step towards ... what? Without a clear answer to that question, EPA has no basis for invoking the one-step-at-a-time doctrine."

The Center for Biological Diversity, Conservation Law Foundation and Natural Resources Council of Maine Inc. lodged the suit against the agency in April 2011, arguing that the EPA had no authority to exempt biomass power plants from its greenhouse gas emissions rule before examining the consequences of increased carbon dioxide.

Although the exemption period expires in July 2014, biomass-burning facilities that have received deferments from the agency will not have to file for new permits, leaving them forever free of the CO2 emission regulations, according to the groups.

The EPA maintained that its incomplete record on the effects of CO2 emissions justifies the biomass plants' exception, as the agency has no data it can use to set the limits for the facilities. Without that support, the agency would be susceptible to legal attacks from the power plants, the agency said.

The agency also attempted to use the administrative necessity doctrine to justify the exemption, arguing that requiring permits for biomass-burning plants would go against the program's goals because biogenic carbon dioxide sources may have a negligible impact on the net carbon cycle.

The appeals court said the EPA failed to properly consider a proposed "middle ground" option instead, which would have instead required biogenic sources to secure permits only if they make no attempt to take into account net carbon cycle effects.

"Given EPA's obligation to adopt the narrowest exemption possible, it should have explained why it rejected an option that would have reduced emissions from sources the deferral rule permanently exempts," the decision says.

The majority of the D.C. Circuit panel said Friday's decision does not prevent the EPA from permanently exempting biogenic sources from the greenhouse gas standards following the completion of its scientific research, but said the temporary ban cannot stand.

Judge Brett M. Kavanaugh wrote a concurring opinion claiming that the EPA's power should be restricted even further, claiming that the agency has no authority to distinguish biogenic carbon emissions from other forms of carbon pollution.

Coming down in favor of the EPA, Judge Karen LeCraft Henderson wrote in her dissent that the one-step-at-a-time doctrine was applied properly in the deferral rule.

"While the CAA requires EPA to regulate CO2, it does not foreclose, as one step toward full compliance, EPA's deferring regulation of a unique type of CO2 in order to study whether EPA can — and should — treat it differently," the dissent says.

Center For Biological Diversity attorney Kevin Bundy described the decision as a victory for both science and the law.

"The D.C. Circuit once again confirmed EPA's responsibility to follow the Clean Air Act as it's written in addressing climate pollution," Bundy said. "As the court noted, the atmosphere can't tell the difference between carbon pollution from burning trees and carbon pollution from burning coal."

A spokeswoman for the EPA declined to comment on the case other than to say that the agency is reviewing the decision and will review the decision to determine any next steps.

Judges Karen LeCraft Henderson, David S. Tatel and Brett M. Kavanaugh sat on the panel for the D.C. Circuit.

The environmental groups are represented by Ann Brewster Weeks and Jonathan Frederick Lewis of the Clean Air Task Force and Kevin Patrick Bundy, Brendan Ridgely Cummings and Vera P. Pardee of the Center for Biological Diversity.

Industry intervenors are represented by Roger R. Martella Jr., Lisa E. Jones and Timothy Kenly Webster of Sidley Austin LLP, Shannon S. Broome and Charles H. Knauss of Katten Muchin Rosenman LLP and Norman W. Fichthorn and Allison D. Wood of Hunton & Williams LLP.

The case is Center for Biological Diversity et al. v. U.S. Environmental Protection Agency et al., case number 11-1101, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Additional reporting by Erica Teichert. Editing by Katherine Rautenberg.