



DC Circ. Told EPA's CO2 Emissions Exemption Was Premature

By Erica Teichert

Law360, Washington (April 08, 2013, 3:36 PM ET) -- Environmental groups urged a D.C. Circuit panel on Monday to nix a U.S. Environmental Protection Agency rule exempting biomass-burning facilities from carbon dioxide emission limits under the Clean Air Act, saying the agency is ignoring congressional mandates to regulate the pollutant.

According to the Center for Biological Diversity, Conservation Law Foundation and Natural Resources Defense Counsel of Maine Inc., the EPA gave biomass power plants a permanent reprieve from carbon dioxide emission regulations before examining the consequences of increased CO2.

"Without vacature of this exemption rule, our members don't have a way to ensure these pollutants are regulated," said Ann Brewster Weeks, counsel for the conservation groups. "They lose that, not only during the exemption period, but permanently for these facilities."

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 groups allege that biomass-burning plants will create more greenhouse gas pollution than their natural gas-burning counterparts.

"We have no objection to EPA studying the pollution," Weeks said. "We have an objection to them creating a blanket exception while they do that study."

But 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, EPA counsel Perry M. Rosen said.

"We're not asking you to uphold based on flimsy science," Rosen told the panel. "Everyone agrees the science is unclear."

Rosen noted that it's tricky to gauge biomass-burning plants' pollution effects, as they may emit more carbon dioxide while reducing more harmful greenhouse gases like methane. If the biomass, such as corn stalks or wood waste, wasn't used in to fuel power plants, Rosen said they would still emit carbon dioxide as they decomposed.

However, Judge Brett M. Kavanaugh said the Clean Air Act doesn't provide the EPA discretion to create such exceptions from its plain-text requirements, which could overrule the deference the courts apply to agency actions.

"It seems to me EPA doesn't like the policy in one instance and says it can make ad hoc exceptions," Judge Kavanaugh said. "You don't get to rewrite the statute. If you had a gap, I'd be with you."

According to Rosen, the statute does provide some discretion for first-time standards, like it's working to set in this case.

EPA assured the court that it is working diligently to set the carbon dioxide emission standards by the July 2014 exemption expiration.

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 by Kevin Patrick Bundy, Brendan Ridgely Cummings and Vera P. Pardee of the Center for Biological Diversity.

Industry intervenors are represented by Lisa Elizabeth Jones, Roger R. Martella Jr. and Timothy Kenly Webster of Sidley Austin 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.

--Editing by Rebecca Flanagan.