



Court Vacates EPA's Biomass Greenhouse Gas Deferral Rule

Derailed or Temporarily Deferred?

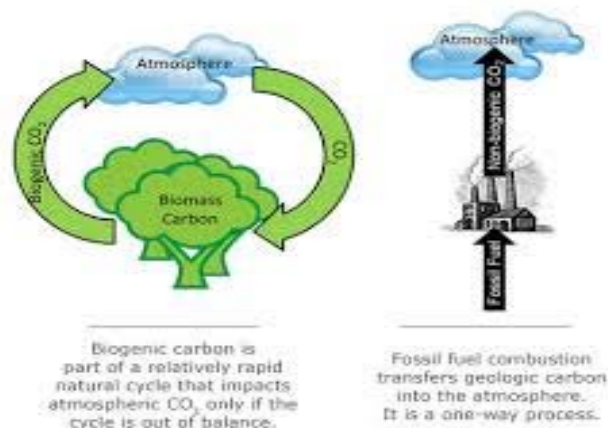
Implications of *Center for Biological Diversity v. EPA*, No. 11-1101 (D.C. Cir., July 12, 2013).

National Clean Water Law Seminar
National Association of Clean Water Agencies
November 20, 2013
San Antonio, Texas

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Biogenic CO2 Emissions - Overview

- When EPA began regulating GHG emissions from stationary sources under the CAA as part of promulgating the “Timing” and “Tailoring” Rules in 2010, it highlighted a regulatory quandary of *biogenic* CO2 emissions vis-à-vis the long-term carbon cycle impacts.



- Examples of biogenic CO2 include emissions from combusting landfill methane, woody biomass or municipal, biologically-derived solid waste (e.g. biosolids, biogas).

Biomass Deferral Rule

- In July 2011, EPA issued what is known as the “Deferral” Rule, which postponed regulation of biogenic sources of carbon dioxide under the CAA for a 3 year period (expiring July 2014) to allow for further consideration on if, and how, EPA should regulate such biogenic emissions.
 - *See* Deferral for CO2 Emissions From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs. 76 Fed. Reg. 43490 (July 20, 2011).
- The Deferral Rule effectively excepted qualifying biogenic emissions from any requirements under the PSD/NSR and Title V permit programs (e.g., eligible project developers of biomass feedstock projects would not have to pursue BACT controls).
- Because biogenic CO2 pathways may be preferable to longcycle carbon alternatives, EPA promulgated the deferral rule to undertake scientific analysis evaluating the potential advantages.

Defending the Deferral

- EPA offered three** legal doctrines to justify the rule:
 - De Minimis
 - “[w]hen the burdens of regulation yield a gain of trivial or no value.”
 - One-Step-At-a-Time
 - Allows an agency to proceed in a “piecemeal fashion.”
 - Administrative Necessity
 - Enables agency to “avoid implementing a statute by showing that attainment of the statutory objectives is impossible.”

- ** A fourth doctrine was introduced in litigation - the “absurd results” rule - which allows an agency to reject the interpretation of a statute that would produce an absurd result.

DC Circuit Legal Challenge

- The Deferral Rule was challenged by the Center for Biological Diversity (CBD), *et al*, before the U.S. Court of Appeals for the District of Columbia Circuit on the grounds that the exemption for biogenic CO₂ was arbitrary and capricious.
 - CBD's challenge largely focused on the EPA rule and that the carbon cycle of woody biomass feedstocks is *not* neutral.
- On May 21, 2012, NACWA filed an *amicus curiae* brief in the proceeding supporting EPA's deferral and explaining why biogenic emissions from biosolids combustion are short cycle carbon and occur regardless of POTW management option.
- NACWA's brief also explained the unnecessary burden to POTWs if the rule were vacated and potentially forced to comply with PSD/NSR and Title V programs.

DC Circuit Vacates Deferral Rule

- On July 12, 2013, the DC Circuit rejected all legal justifications proposed by EPA, holding:
 - The de minimus doctrine applied to permanent exemptions only;
 - EPA did not explain how the rule would achieve the stated policy objectives;
 - EPA did not explain how narrower alternative approaches to addressing biogenic emissions would not work;
 - The absurd results doctrine was not raised in the rulemaking and must be ignored.
- After denying en banc rehearing, the DC Circuit was to issue its legal mandate to EPA November 17th, but delayed issuance to await SCOTUS review of the Tailoring Rule, which could have wide-ranging implications.

How Will EPA Respond?

Options (assuming SCOTUS doesn't upset the Tailoring Rule):

- Promulgate rulemaking or guidance on treatment of biogenic emissions as part of BACT;
- Promulgate new rulemaking for permanent exemption
 - Will likely take 3-5 years; and
- Promulgate new rulemaking for another temporary exemption with better reasoning based on more solid legal footing (see NACWA amicus brief for explanation of such footing).

What Should Concerned POTWs Do in the Interim?

- Examples of the type of biosolids managements projects affected are new and some existing (2011) sewage sludge incinerator projects/upgrades, as well as biosolids-to-energy projects (e.g. gasification and digestion).
 - If POTW is outsourcing biosolids management to 3rd party, emissions permitting may only affect that party. However, unclear whether total POTW methane emissions would affect calculations.
- The ruling could mean (after the mandate is issued) that facilities permitted since July 2011 that emit at least 100,000 tons per year of carbon dioxide will have to jump through additional permitting hoops.
- Those facilities may also trigger Prevention of Significant Deterioration (PSD) requirements under the Clean Air Act, compelling them to take steps to rein in not only greenhouse gas emissions but other covered pollutants they emit in significant quantities, like nitrogen oxides and carbon monoxide.

Speculation

NEW AND EXPANDED FACILITIES – If the court upholds the Tailoring Rule, the CO₂ emission level triggers may only make biogenic emissions an issue for the larger new or modified facilities.

- For those facilities, we think EPA will choose to address biogenic emissions through its consideration of what constitutes BACT.
- Unclear whether anthropogenic and biogenic emissions would be calculated for triggering purposes, though.

FACILITIES ALREADY PERMITTED - In the early 2000s, when EPA vacated the mercury control rule, EPA sent a letter to all coal-fired power plants that had been permitted prior to vacation telling the facilities that each needed to be re-permitted. Whether EPA will do something similar here is unknown, but if they do we believe there are defenses.

Wild Speculation

- Backed by additional scientific study, EPA may do nothing until late 2014, at which time it could pursue a permanent exemption or detailed set of BACT guidance for measuring and addressing biogenic emissions.
 - A robust lifecycle analysis of biosolids management may play a key role in determining how EPA regulates CO2 emissions from POTWs.

Putting it All in Context: GHG Performance Standards for Existing Power Plants 111(d)

- President's Climate Action Plan
- EPA recently issued a proposed regulation governing new power plants
- By June 2014, EPA to propose 111(d) guidelines for existing power plants



Questions or Comments?

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