

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN FOREST & PAPER)	
ASSOCIATION, INC. and)	
AMERICAN WOOD COUNCIL)	
)	
Petitioners)	
)	
v.)	No. 15-1485
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

MOTION TO HOLD CASE IN ABEYANCE

Petitioners American Forest & Paper Association, Inc. and American Wood Council hereby move this Court to hold this case in abeyance pending further developments in the challenged rule, for reasons set forth below. Undersigned counsel contacted counsel for Respondent U.S. Environmental Protection Agency (“EPA”) yesterday about Petitioners’ intent to file this motion, but EPA has not yet decided what position it will take on this motion.

Background

This proceeding involves a petition for review, pursuant to 42 U.S.C. § 7607(b) and Fed. R. App. P. 15(a), of the United States Environmental Protection Agency's issuance under the federal Clean Air Act of "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule," EPA Docket No. EPA-HQ-OAR-2013-0602, published at 80 Fed. Reg. 64,662 on October 23, 2015, commonly known as the "Clean Power Plan." American Forest & Paper Association, Inc. and American Wood Council ("AF&PA and AWC") have members that operate facilities and manage forest resources that will be affected by the challenged emission guidelines in a number of ways, but Petitioners filed this petition for review in particular to address provisions of the Clean Power Plan that describe how state plans under Clean Air Act section 111(d), 42 U.S.C. § 7411(d), should deal with potential generation of electricity through combustion of biomass-based fuels.

In the Federal Register preamble to the Clean Power Plan, EPA "recognizes that the use of some biomass-derived fuels can play a role in controlling increases of CO₂ [carbon dioxide] in the atmosphere" and describes a draft Science Advisory Board report that, among other things, concludes that emissions from burning some biomass-based fuels "will not inevitably result in

increased levels of CO₂ to the atmosphere, unlike CO₂ emissions from combustion of fossil fuels.” 80 Fed. Reg. 64,662, 64,885. Accordingly, the Clean Power Plan regulations indicate that states may include, in their state plans to control emissions of CO₂ from existing electric generating units, provisions that, in effect, treat electricity generation from combustion of certain biomass-based fuels (“qualified biomass”) as a form of CO₂ emissions control. *See* 40 C.F.R. § 60.5800(a)(4) and (d)(1), 80 Fed. Reg. at 64,950. The rule defines “qualified biomass” as simply: “a biomass feedstock that is demonstrated as a method to control increases of CO₂ levels in the atmosphere.” 40 C.F.R. § 60.5880, 80 Fed. Reg. at 64,960. The Clean Power Plan gives very little detail about what types of biomass-based fuels may be considered “qualified biomass” in state plans, however. *See* 80 Fed. Reg. at 64,950, 64,959-60.

Likewise, although the rule requires that state plans “specify how biogenic CO₂ emissions will be monitored and reported” for all qualified biomass feedstocks, and they must “identify specific [emission eligibility determinations, monitoring, and verification], tracking, and auditing approaches,” there is very little description in the rule itself of what that may entail for biomass. *See* 40 C.F.R. §§ 60.5800(a)(4) and (d)(1) and 60.5805, 80

Fed. Reg. at 64,950-51; § 60.5830, 80 Fed. Reg. at 64,952.

In the preamble to the Clean Power Plan, EPA indicates that the agency currently is in the process of refining its assessment of how emissions of CO₂ from biomass (“biogenic CO₂ emissions”) should be evaluated for potential contribution to or amelioration of the buildup of CO₂ in the atmosphere, and that “EPA’s work on assessing biogenic CO₂ emissions from stationary sources may...help inform state’s efforts to assess the role of different biogenic feedstocks in their plans....” *See* 80 Fed. Reg. at 64,885-86; *see also id.* at 64,900 col. 1. Also, EPA indicates that it plans to flesh out requirements for determining eligibility of, monitoring, and verifying emissions reductions associated with use of biomass fuels, in a still-ongoing rulemaking to produce a “model trading rule” and in what is currently “draft EM&V guidance.” *See id.* at 64,886 col. 2, 64,894, 64,899-64,900.

Interests of AF&PA and AWC

AF&PA and AWC members manufacture pulp and paper and wood products from forest biomass, and they also produce biomass byproducts and wastes in the process. Additionally, the members may own or lease forest lands, which lands may produce biomass used to produce electricity, and they may generate electricity themselves using biomass fuels. Thus, AF&PA and AWC

members will be affected by the way in which state plans address biomass fuels. The members therefore will be affected by the way EPA elaborates on and interprets the language of the Clean Power Plan related to when a state can take credit for power generation using “qualified biomass” and what requirements a state plan must include for assessing and verifying the eligible emission credits associated with use of biomass fuels.

The language of the Clean Power Plan itself, however, is brief and not very specific, and the preamble to the Clean Power Plan confirms that EPA is still developing technical information and guidance that will apply to and inform state and EPA action on state plans that incorporate credit for electricity generation using biomass fuels, as explained above. Additionally, AF&PA and AWC believe that aspects of the final rule may be worded unintentionally in a way that states might interpret incorrectly, while other provisions may be unnecessarily vague or ambiguous. AF&PA and AWC have already met with EPA representatives to try to clarify some of the language of the Clean Power Plan related to biomass.

Relief Requested

Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1), generally only permits the filing of a petition for judicial review of an EPA rule such as the Clean

Power Plan within 60 days of its publication. As a result, AF&PA and AWC were compelled to file a petition for review of the biomass-related aspects of the Clean Power Plan even though it is not yet clear whether, with further explication of what requirements EPA intends the Clean Power Plan to impose on state plans that include credit for use of biomass-based fuels, the Clean Power Plan will adversely affect AF&PA and AWC members in a way that demands judicial review.

Accordingly, it would promote judicial efficiency, avoid unnecessary litigation, and conserve judicial resources and the resources of EPA and Petitioners to hold this case in abeyance pending further discussions between EPA and Petitioners and further development of EPA guidance on implementation of the Clean Power Plan.¹

¹ AF&PA and AWC are aware that the National Association of Forest Owners and the Biogenic CO₂ Coalition also have filed petitions for review of biomass aspects of the Clean Power Plan (D.C. Cir. case nos. 15-1478 and 15-1479, respectively). AF&PA and AWC understand that those entities also either have filed, in case no. 15-1479 (ECF Document # 1591586), or plan to file, in case no. 15-1478, motions to have their petitions for review held in abeyance for similar reasons. AF&PA and AWC also understand that one or both of those entities have filed petitions for administrative reconsideration of biomass provisions of the Clean Power Plan, pursuant to Clean Air Act section 307(d)(7)(b), 42 U.S.C. § 7607(d)(7)(b). The pendency of such a petition for reconsideration is further justification for holding the instant petition for review in abeyance.

(...continued)

AF&PA and AWC therefore respectfully request that the Court hold Case No. 15-1485 in abeyance while the parties have additional discussions aimed at clarifying the application of biomass provisions of the Clean Power Plan and pending EPA's development of additional guidance, referenced above, to states on how state plans can include credit for electricity generation using biomass-based energy. AF&PA and AWC suggest that the Court require EPA to file status reports at least once every 120 days and require that the parties notify the Court within 30 days after any party has concluded that abeyance is no longer warranted, based on the discussions between the parties or other developments.

This motion is made without prejudice. Petitioners AF&PA and AWC would retain the right to file a motion to reactivate this case in the future.

Dated: January 5, 2016

Respectfully submitted,

/s/ Russell S. Frye
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(...continued)

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Unopposed Motion To Hold Case in Abeyance to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. A copy of the foregoing document was served by placing it in the U.S. mail, first class, postage prepaid, this 5th day of January, 2016, upon the following persons:

Eric Hostetler
U.S. Department of Justice
Environmental Defense Section
Environment & Natural Resources Division
P.O. Box 23986
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/s/ Russell S. Frye