Nos. 14-72553, 14-72602

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HELPING HAND TOOLS, ET AL.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents,

SIERRA PACIFIC INDUSTRIES, INC.,
Intervenor.

Petition for Review of a Final Decision of the Environmental Protection Agency, 79 Fed. Reg. 35,543 (June 23, 2014)

RESPONSE OF INTERVENOR SIERRA PACIFIC INDUSTRIES, INC. TO PETITION FOR REHEARING BY CENTER FOR BIOLOGICAL DIVERSITY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Sierra Pacific Industries, Inc. ("SPI") certifies that it has no parent companies and that no publicly held corporation owns ten percent or more of SPI.

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INTRODUCTION

In a case that involved complex issues "at the frontiers of science," the Court appropriately deferred to the United States Environmental Protection Agency's ("EPA's") judgment. Op. 24-25. The rehearing petition filed by the Center for Biological Diversity ("CBD") has identified no oversights or misapprehensions warranting rehearing. Instead, the petition makes contentions based on CBD's own misunderstanding of EPA's permitting decision and this Court's opinion. The petition should be denied.

ARGUMENT

I. The Court Correctly Applied The Law And Correctly Described CBD's Arguments

A. The Court Correctly Deferred to EPA's Conclusion that Quantitative Analysis of Different Biomass Fuels Was Not Possible, and CBD Makes No Contrary Argument

The Court correctly deferred to EPA's conclusion that it cannot, based on the current state of science, perform the quantitative analysis of different biomass fuel stocks that CBD would like. Op. 29 (citing *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983)). EPA explained that conducting such a quantitative assessment is an extraordinarily complex task. EPA Br. 98-99; PER132, PER634. Such an analysis would require consideration of a host of factors, including the type of biomass fuel, its growth and harvest characteristics, its location and related environmental conditions (to the extent they are even

identifiable), its decay rate, and its potential alternate fate (which is not always known with any degree of certainty). EPA Br. 18. To illustrate the challenge, the extensive comments of EPA's Science Advisory Board on EPA's 2011 Draft Accounting Framework for CO_2 Emissions for Biogenic Sources Study show that any such analysis is an immensely complicated undertaking. *See* RER1-81.

Nevertheless, CBD's petition opens with the conclusory claim that the Court erred by deferring to EPA's conclusion that a quantitative analysis of different biomass feedstocks is not currently possible. *See* Pet. 2, 4. None of the arguments that follow, however, attempts to show that the decision to defer to that conclusion was erroneous. Indeed, CBD actually *disclaims* ever having argued that EPA was equipped to perform such a quantitative analysis. *See* Pet. 5 ("The Center did not argue 'that EPA is equipped to proceed with a quantitative analysis of different biomass fuel stocks at Step 1' of the best available control technology ('BACT') analysis." (quoting Op. 26)). Accordingly, CBD has plainly not shown that rehearing is warranted on the question whether the Court incorrectly deferred to EPA's conclusion on this complex subject that is within the agency's scientific expertise.

B. CBD's Arguments About the Prevention of Significant Deterioration ("PSD") Permit's Fuel Restrictions Do Not Warrant Rehearing

As the Court recognized, "Sierra Pacific and EPA were particularly proactive in ensuring the appropriate fuel restrictions were written into the PSD permit." Op. 27-28. In the final PSD Permit, EPA prohibited SPI from burning timber harvested solely for the purpose of combustion, but permitted SPI to burn the "waste" biomass that is "readily available to the facility: mill residues, untreated wood debris from urban areas such as pallets and crates, agricultural crops and residues, forest residues, and non-merchantable forest biomass." Op. 29; *see* PER93-94. EPA noted that the waste fuels that SPI would burn were "the types of biomass fuels that are generally considered to have lower net atmospheric contributions when combusted." PER134.

CBD contends that EPA erred by permitting SPI to burn any type of biomass other than mill residue. Pet. 3-4. That is incorrect; the line EPA drew was not arbitrary and was supported by the record. As the Court noted, "[t]he only trees that can be burned in Sierra Pacific's facility . . . are those that would be removed from the forest anyway as part of Sierra Pacific's ongoing forest management and forest-thinning operations." Op. 29. Indeed, the biomass feedstocks that SPI is permitted to burn are all essentially waste that will decompose and give off emissions "anyway." *See* RER19 (noting that the "anyway" emissions for

agricultural and mill residues are within one to a few years); RER124 (explaining that forest residue "is often left on site after a harvesting operation and eventually will be burned or will decompose, releasing carbon into the atmosphere and into organic matter on the forest floor and soil"); RER124-25 (explaining that the "alternate fate of [non-merchantable forest] biomass would be loss to management-induced prescribed fire, wildfire, or decomposition"); RER104 ("Waste materials . . . can be sent to landfills where they decompose over many decades."); PER314 (SPI plans to use "urban wood residues diverted from landfills"). EPA reasonably concluded that the types of biomass that SPI is permitted to burn are generally considered to have "lower net atmospheric contributions when combusted" than the biomass that SPI was prohibited from burning, namely trees harvested solely for the purpose of combustion. *See* PER134. In contrast, "burning [a] live tree, which uses carbon dioxide for photosynthesis, removes a carbon dioxide absorbing source from the forest and also releases carbon dioxide emissions at the facility." Op. 11 n.8.

EPA's decision not to further prohibit SPI from using specific types of "waste" biomass is also fully consistent with the challenges posed when trying to compare different biomass stocks based on the current science. As this Court explained, it is relatively easy to compare the environmental effects of burning a dead tree that has fallen in the forest to the effects of burning a tree cut down for

that purpose. *See* Op. 11 n.8. Although combustion of either tree "emits carbon dioxide," burning the dead tree has "the benefit of removing a carbon dioxide emitting decomposing tree," whereas burning the live tree produces "the harm in removing a carbon dioxide absorbing [tree]." Op. 11 n.8. But "a comparison of different biomass fuel stocks" that are *both* waste, "such as comparing the effects of burning mill waste to the effects of burning a dead tree, is a much more technical endeavor." Op. 11 n.8. Because EPA, in its expertise, has concluded that the precise differences in net atmospheric contributions of these waste biomass feedstocks are too difficult to quantify at this time, it was reasonable for the agency to conclude that it would not attempt to determine whether one particular *type* of waste biomass should be preferred over another, and thus whether SPI's permit should draw distinctions between them. PER135. As EPA reasonably determined, the net effects of combustion of the general category of waste biomass are clearly less significant than the net effects of combustion of live trees that would otherwise have been absorbing CO_2. The agency thus properly ensured that SPI "cannot clear cut forests just to produce electricity for its lumber mills." Op. 29.

CBD's own comments on the permit, as evidenced in the administrative record, made the same general distinction. *See* PER232-34. CBD explained that combustion of trees that would otherwise have continued absorbing CO_2 "incur[s] carbon debt periods ranging from decades to centuries" because it results "in both

conversion of standing carbon stocks to atmospheric CO_2 and lost future sequestration." PER232-33. CBD noted that "[c]ombustion of logging 'residues' (typically branches, tops, and small trees) may incur somewhat shorter carbon debt periods," and the carbon debt associated with combustion of mill waste "might [also] be relatively short" depending on the fuels' alternative fates. PER233-34. CBD's own comments serve to further show that EPA reasonably concluded that the types of biomass SPI is allowed to burn are generally considered to have "lower" net atmospheric contributions than the materials SPI is prohibited from burning, namely timber harvested for the purpose of combustion. *See* PER93-94, 134.

C. CBD's Criticisms of the Court's Descriptions of Its Arguments Do Not Warrant Rehearing

CBD also contends that the Court misdescribes CBD's arguments. Pet. 5-6. That is incorrect, and CBD's disputes with the characterizations of its contentions would not warrant rehearing in any event.

CBD first contends that it did not argue "that EPA is equipped to proceed with a quantitative analysis of different biomass fuel stocks at Step 1," Pet. 4 (quoting Op. 29). This contention is belied by CBD's own briefs. CBD clearly argued that EPA was able and required to perform a quantitative analysis of the different biomass fuel stocks. *See* CBD Br. 52-53 (arguing that EPA's explanation that it "lacks the tools at this time to undertake a quantitative comparison of the net

atmospheric contribution of different biomass feedstocks," "fails as a matter of law"); CBD Reply Br. 17-18 (arguing that the Court should not "defer to [EPA's] judgment that quantitative analysis was impossible . . . [because] EPA has not borne the requisite 'heavy burden' of demonstrating that analysis was impossible, not merely difficult"). CBD argued, only in the alternative, that if EPA could perform a qualitative analysis of the fuels at Step 4 it should have done that analysis at Step 1. *See* CBD Br. 56; CBD Reply Br. 18.

Regardless of the quantitative or qualitative nature of the assessment CBD demanded, neither the statute nor EPA's guidance required such an assessment at Step 1, as opposed to Step 4. *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 476 n.7 (2004); PER668. As EPA explained, the agency has traditionally ranked options based on their reduction of direct emissions at Step 3. Yet, different types of biomass feedstock do not produce different levels of direct CO_2 emissions, and there was thus no basis to list them separately at Step 1 or to rank them at Step 3. PER232. It is Step 4 where EPA has long "considered *indirect* environmental impacts," EPA Br. 94, and the agency thus acted consistently with its past practice when it considered the relative net atmospheric contributions of different biomass feedstocks at that part of its BACT analysis. SPI Br. 38. And, in any event, nothing in the statute requires any of these steps,

much less requires that particular types of analysis take place at any particular step. SPI Br. 6.

CBD also disagrees that it "attack[ed] the Bioenergy BACT Guidance," or expressed "concerns [that were] not particular to the Sierra Pacific permit," Pet. 5 (quoting Op. 26). CBD has not explained why this would warrant rehearing, and its contention is again belied by the record in any event. In its original briefing, CBD repeatedly attacked the Bioenergy BACT Guidance's rationale for concluding that combustion of biomass alone can be BACT. *See* CBD Br. 2, 26, 44-45. It made that argument even though EPA did *not* conclude here that combustion of biomass fuel alone is BACT (as CBD now acknowledges, Pet. 7). CBD also argued that the Bioenergy BACT Guidance would "convert BACT analysis into a freewheeling forum for discussion of policy preferences," CBD Br. 41, even though there was no indication (or even argument) that EPA had relied on policy preferences to issue the permit here. Accordingly, the Court's opinion accurately describes CBD's concerns as "not particular to the Sierra Pacific permit" but rather an attack on the Bioenergy BACT Guidance. Op. 26.

II. With One Non-Material Exception, CBD's Requests For Modification Are Baseless

CBD also asks the Court to modify its opinion in several respects. CBD's principal requests for modification are groundless.

A. CBD faults the Court for purportedly concluding that the Bioenergy BACT Guidance "is rational" in its entirety and "consistent with EPA's prior guidance" because, CBD posits, "[t]he rationality of the Bioenergy BACT Guidance as a whole . . . was not before the Court." Pet. 6-9. CBD attacks a conclusion the Court did not draw. The Court's opinion states that the Bioenergy BACT Guidance is rational *as applied* by EPA here. *See* Op. 30 ("The Bioenergy BACT Guidance EPA *applied to* the greenhouse gas emissions from Sierra Pacific's new facility is rational." (emphasis added)). And, the Court explained, the Guidance is consistent with prior EPA practice in the sense that it rationally applied that practice to a new context. *See* Op. 26 ("The Bioenergy BACT Guidance builds on the NSR Manual that EPA has used for decades and proposes a more detailed analysis for a particular pollutant."). CBD's over-reading of the opinion's language does not necessitate its modification.

B. CBD also argues (Pet. 9-10) that the Court incorrectly stated that the list of approved fuels in the EPA's permit was modified both in response to SPI's request to make the list of fuels "more consistent with the original application" and in response to CBD's comments. According to CBD, the modification came only at the behest of SPI to "better define" the fuels that it could burn at the facility. Pet. 10. CBD fails to explain why these distinctions matter, and, in any event, the

Court accurately described the reasons for revisions to the fuel restrictions condition in the PSD permit.

In its comments to EPA, CBD complained that the fuel restrictions in the draft permit, as written, would allow combustion of "almost any legally harvested wood or wood waste" and would allow the combustion of wood harvested for the purpose of "virtually all forms of timber management." PER234-35. As EPA expressly stated, the agency then revised the permit in *response* to those CBD comments to clarify that SPI would be limited to burning specified biomass fuels and would be prohibited from harvesting timber solely for the purpose of combustion. *See* PER133 ("*[I]n response to several points raised by CBD*, EPA is revising *Permit Condition X.G.*, Fuel Restrictions to clarify that SPI will be limited to particular types of biomass fuels." (emphasis added)); PER134 ("*[I]n response to the commenter's concerns*, EPA's revisions to *Permit Condition X.G.* are intended to preclude the use of [timber harvested solely for the purpose of biomass combustion]." (emphasis added)).

The permit was also revised in response to SPI's request to make the list of fuels more consistent with SPI's application. PFER22-23; *see* PER744, PER354; *cf.* Pet. 10. Consistent with SPI's proposals, the final permit's list of biomass fuels tracked the fuels that SPI proposed to use in its original application and supplemental materials. *Compare* PFER22-23, *with* PER744, and PER354.

C. Finally, CBD asks the Court to modify its opinion to reflect that the Environmental Impact Report ("EIR") mentioned in the opinion was prepared by a consultant for the Shasta County Department of Resource Management, rather than by EPA. Pet. 9. CBD does not attribute any significance to the identity of the EIR's author. In any event, CBD is correct, PER537, and SPI does not oppose a modification of the panel's decision in this limited respect.

CONCLUSION

The petition should be denied.

Respectfully submitted,

Dated: December 14, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 14, 2016.

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Dated: December 14, 2016 s/ Joseph R. Palmore

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 40-1

I certify that pursuant to Ninth Circuit Rule 40-1, the foregoing response is proportionately spaced, has a typeface of 14 points or more and contains 2,395 words (petitions and answers must not exceed 4,200 words).

Dated: December 14, 2016 s/ Joseph R. Palmore