

Case Nos. 14-72553 and 14-72602

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

HELPING HAND TOOLS, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
et al.,

Respondents,

SIERRA PACIFIC INDUSTRIES,

Respondent-Intervenor.

On Petition for Review of Final Action of the
United States Environmental Protection Agency

**RESPONSE BY RESPONDENTS U.S. EPA, et al. TO PETITION FOR
PANEL REHARING AND/OR MODIFICATION OF OPINION**

Of Counsel:

KARA CHRISTENSON
U.S. EPA, Region IX
Office of Regional Counsel

BRIAN DOSTER
NORA GREENGLASS
JOHN KRALLMAN
U.S. EPA
Office of General Counsel

JOHN C. CRUDEN
Assistant Attorney General

DUSTIN J. MAGHAMFAR
Environmental Defense Section
Environment & Natural Resources Div.
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1806

December 14, 2016

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. EPA DOES NOT OPPOSE MODIFICATION OF THE COURT’S OPINION TO CORRECT TWO INCONSEQUENTIAL FACTUAL INACCURACIES 2

II. THE CENTER’S ARGUMENTS MISCONSTRUE EPA’S ACTUAL CONCLUSIONS, TO WHICH THE COURT PROPERLY DEFERRED 4

III. THE OPINION’S STATEMENTS REGARDING THE BIOENERGY BACT GUIDANCE ARE SUPPORTED BY THE RECORD AND DO NOT MERIT MODIFICATION 7

CONCLUSION 11

STATEMENT OF RELATED CASES 12

CERTIFICATE OF SERVICE..... 12

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION 12

TABLE OF AUTHORITIES

CASES

Baltimore Gas & Electric Co. v. Natural Resources Defense Council,
462 U.S. 87 (1983)..... 7

Helping Hand Tools v. EPA,
836 F.3d 999 (9th Cir. 2016) 1, 3, 4, 5, 6, 7, 8, 9, 10

National Mining Ass’n v. McCarthy,
758 F.3d 243 (D.C. Cir. 2014)..... 9

FEDERAL RULES OF APPELLATE PROCEDURE

Fed. R. App. P. 40(a)(2) 1

STATUTES

42 U.S.C. § 7479(3) 5

GLOSSARY

BACT	Best Available Control Technology
CAA or Act	Clean Air Act, 42 U.S.C. §§ 7401-7671q
CO ₂	Carbon dioxide
EPA	United States Environmental Protection Agency
PSD	Prevention of Significant Deterioration, 42 U.S.C. §§ 7470-7479
RTC	Response to Comments
SPI or Sierra Pacific	Sierra Pacific Industries, the permittee and Intervenor-Respondent

INTRODUCTION

Petitioner Center for Biological Diversity's (the "Center") petition for panel rehearing and/or modification of the opinion should be denied. The Court correctly held that Respondents United States Environmental Protection Agency; Gina McCarthy, Administrator; and Alexis Strauss, Acting Regional Administrator, Region 9¹ (collectively, "EPA") did not act arbitrarily or capriciously when EPA issued a prevention of significant deterioration ("PSD") permit under the Clean Air Act ("CAA" or the "Act") to Respondent-Intervenor Sierra Pacific Industries, Inc. ("Sierra Pacific"). *Helping Hand Tools v. EPA*, 836 F.3d 999 (9th Cir. 2016) (the "Opinion"). The Court properly considered the relevant law and facts in reaching its decision, and the Center has failed to establish otherwise. *See* Fed. R. App. P. 40(a)(2). Accordingly, with the possible exception of making two minor factual corrections that are inconsequential to the Court's holding, the Court should deny the Center's petition.

¹ Ms. Strauss is automatically substituted as a Respondent for Jared Blumenfeld pursuant to Federal Rule of Appellate Procedure 43(c)(2).

ARGUMENT

I. EPA DOES NOT OPPOSE MODIFICATION OF THE COURT'S OPINION TO CORRECT TWO INCONSEQUENTIAL FACTUAL INACCURACIES.

The Center alleges that the Opinion contains two factual errors. Pet. at 9-10. The first regards who prepared an environmental impact report for permittee Sierra Pacific's proposed facility. The Center is correct that EPA did not prepare the environmental impact report. *Id.* at 9. The De Novo Planning Group (a consulting firm) prepared the report for the Shasta County Department of Resource Management, the lead agency under the California Environmental Quality Act. *See* PER537-44. However, the Center does not argue that this factual inaccuracy is of any consequence, and EPA submits that it has none. No party challenged the inclusion of the environmental impact report in the administrative record or challenged the substance of the report. The Court's reasoning did not hinge on EPA having prepared the report. EPA does not oppose modification of the opinion to correct this mistake.

The second alleged factual error challenged by the Center regards revisions to the draft permit's description of allowable biomass fuels. Pet. at 9-10 (discussing Opinion page 28). Contrary to the Center's

argument, the record does demonstrate that EPA's decision to limit the allowable biomass fuels in the permit conditions was in response to the Center's comments. *See* EPA Br. 34-35, 89-92 (citing 2014 RTC at 11-12, PER133-34) ("Nevertheless, in response to several points raised by [the Center], EPA is revising Permit Condition X.G, Fuel Restrictions, to clarify that [Sierra Pacific] will be limited to particular types of biomass fuels . . ."). Specifically, as discussed at oral argument, EPA prohibited the use of timber harvested solely for the purpose of combustion for energy. *See* EPA Br. at 90-92. However, EPA does not dispute that Sierra Pacific requested revisions to a list of allowable biomass fuels in order to make the limiting language in the final permit consistent with EPA's terminology in the draft Accounting Framework. *See* Pet. at 10, citing PFER22-23.

As with the identity of the author of the environmental impact report, the evolution of this permit language does not affect the Court's reasoning. There is no dispute that EPA, and EPA alone, made the final decisions as to the content of the permit. As the Opinion correctly noted (836 F.3d at 1012; Op. at 28), EPA considered the Center's comments and revised the permit in response. Any minor modifications the Court

may deem appropriate in describing the administrative chronology will not in any way call into question the Court's overall analysis or conclusions.

II. THE CENTER'S ARGUMENTS MISCONSTRUE EPA'S ACTUAL CONCLUSIONS, TO WHICH THE COURT PROPERLY DEFERRED.

The core of the Center's petition (Pet. at 2-6) is little more than a rehashing of its merits arguments. The Center argues (Pet. at 2) that EPA reached "an explicit conclusion" about the net atmospheric CO₂ contribution only from mill residues, and not for the other biomass feedstocks allowed under the permit. The Center then alleges that EPA "arbitrarily extended this narrow conclusion regarding mill residue . . . to a far broader slate of fuels." Pet. at 3. The fatal flaw in this argument—aside from the fact that the Court properly rejected it—is that it does not accurately reflect EPA's analysis or conclusions.

The Court correctly understood and reasonably deferred to EPA's technical judgment that EPA did not possess a sufficient basis to differentiate quantitatively between and among the individual biomass feedstocks Sierra Pacific had proposed to use. 836 F.3d at 1011-12; Op. at 28-29. Although EPA acknowledged that one feedstock in

particular—mill residues, which would constitute the vast majority of the fuel used at Sierra Pacific’s facility—was likely to have a negligible net atmospheric CO₂ contribution, EPA concluded that it “was not prepared at the time to compare the environmental impacts of sawmill residue versus other biomass wastes . . .” *Id.* EPA discussed this at length in the record. *See* 2014 RTC at 9-13, PER131-35. Thus, EPA simply made a “rough qualitative assessment,” “[b]ased on its current understanding and information,” that the proposed feedstocks “are unlikely to result in a significant increase in atmospheric [carbon dioxide] loading.” 2014 RTC at 11, PER133. *See also* EPA Br. at 89-99.

The Center misconstrues (Pet. at 3) the antecedent of EPA’s subsequent “based on this assessment” statement in arguing that EPA arbitrarily extended its conclusion regarding mill residues to other biomass feedstocks. To support its contention that EPA’s decision regarding allowable feedstocks ran “counter to the evidence,” the Center points (Pet. at 4) to nothing more than the Bioenergy BACT² Guidance to support the Center’s contention that EPA’s decision

² BACT is “Best Available Control Technology,” defined in the Act in 42 U.S.C. § 7479(3). *See* EPA Br. at 8-11, 15-22.

regarding allowable feedstocks ran “counter to the evidence.” The Bioenergy BACT Guidance does in fact support both EPA’s observations regarding mill residues and EPA’s conclusion that it lacked sufficient evidence to differentiate between and among different biomass feedstocks. *See* Bioenergy BACT Guidance at 23-24, PER634-35.

Moreover, the “assessment” in question was not just in reference to the discussion of mill residues. EPA’s “assessment,” and the “evidence” before it, encompassed the entirety of the administrative record. Notably, this includes the Center’s own comments, which said that the combustion of whole trees has a higher net atmospheric impact, and that mill residues may have a relatively low impact. PER232-33. Based on and in response to the Center’s comments, EPA precluded the use of the feedstock the Center said would have a high impact: whole trees harvested for the purpose of energy production. 836 F.3d at 1012; Op. at 28-29. *See also* 2014 RTC at 12-13, PER133-34; EPA Br. at 88-92.

Thus, EPA did not make the conclusion regarding the net atmospheric CO₂ contribution of feedstocks other than mill residues

that the Center claims the Agency did. As such, the Center's argument (Pet. at 4-6) that the Court misapprehended the law in extending deference to that non-existent conclusion necessarily lacks merit.³ The Court reasonably deferred to the scientific determination that EPA did make: that the Agency was not able to perform a quantitative comparison of the net atmospheric contributions of different biomass feedstocks. *Id.* at 1011-12; Op. at 27-29. *See* EPA Br. at 47, 89-99.

Although the Center disagrees with the Court's reasoning and conclusion, the Center has not established that the Court overlooked or misapprehended any facts or law in deferring to EPA's reasonable conclusions. Rehearing should therefore be denied.

III. THE OPINION'S STATEMENTS REGARDING THE BIOENERGY BACT GUIDANCE ARE SUPPORTED BY THE RECORD AND DO NOT MERIT MODIFICATION.

The Center overstates the Opinion's concluding statements regarding the Bioenergy BACT Guidance by contending that the Opinion categorically held that the Bioenergy BACT Guidance in its

³ Notably, the cases cited by the Center (Pet. at 4) as examples of the Ninth Circuit declining (in 2008 and 2013) to apply the deferential standard in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983), were not cited in the Center's opening or reply briefs.

entirety is rational. Pet. at 6-9. This is simply inaccurate. As the Court correctly noted, EPA “largely” followed its own guidance—the Bioenergy BACT Guidance⁴ among other guidance documents—but analyzed Sierra Pacific’s application individually, consistent with the requisite case-by-case BACT analysis. 836 F.3d at 1010; Op. at 24-26.

The Court’s analysis of EPA’s application of the Bioenergy BACT Guidance to Sierra Pacific’s permit application appropriately focused only on the subset of issues most relevant to the Center’s claims, i.e., the analysis of the net atmospheric contribution of biomass feedstocks at “Step 1” and “Step 3” versus “Step 4” under the guidance. *Id.* at 1011-12; Op. at 26-29. In the concluding paragraph, the Court stated: “The Bioenergy BACT Guidance *EPA applied* to the greenhouse gas emissions from Sierra Pacific’s new facility is rational and thoroughly consistent with EPA’s prior guidance.” *Id.* at 1012-13; Op. at 30

⁴ For the reasons explained in EPA’s Brief (at 86-89), the Court correctly noted that the Center’s attacks on the Bioenergy BACT Guidance went beyond the relevance of that guidance to EPA’s permitting decision. 836 F.3d at 1011; Op. at 26. The Center’s claim (Pet. at 5-6) that “all” of its concerns are specific to the Sierra Pacific permit is not correct. More importantly, even if the Center were correct, the Court’s analysis and reasoning demonstrate that it correctly understood the Center’s arguments, and the Center’s protestation of this characterization does not establish grounds for rehearing.

(emphasis added). The Center’s broad objections to this language fail to appreciate the context of the Opinion’s conclusions. Notably absent from the relevant discussion is any mention of the Bioenergy BACT Guidance’s conclusion that BACT can be the use of biomass fuel alone. This makes sense, as EPA reached a different conclusion with respect to Sierra Pacific’s permit and did not follow that element of the Bioenergy BACT Guidance.⁵ The Opinion therefore cannot be reasonably interpreted as issuing a holding regarding the Bioenergy BACT Guidance’s conclusion that the use of biomass fuel alone can be BACT for greenhouse gases.

Moreover, the record and the Court’s analysis amply support the Court’s conclusion that the portion of the Bioenergy BACT Guidance that EPA applied to Sierra Pacific’s application is “thoroughly

⁵ EPA did not “expressly disavow[]” the Bioenergy BACT Guidance in any way. *See* Pet. at 7, 8. Rather, proceeding as it must on a case-by-case basis, EPA reached a BACT determination for Sierra Pacific’s facility that differed from the potential BACT determination supported by the reasoning described in the Bioenergy BACT Guidance. EPA Br. at 20-22, 39, 86-89. The very nature of a guidance document like the Bioenergy BACT Guidance is that it is a flexible and non-binding policy statement, and therefore may be adapted and applied as appropriate in any particular case. *See generally, e.g., National Mining Ass’n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014).

consistent with EPA’s prior guidance.” *Id.* at 1013; Op. at 30. As the Court explained, the “Bioenergy BACT Guidance *builds on* the NSR Manual” and “proposes a more detailed analysis” for “greenhouse gas emissions from biomass fuels.” *Id.* at 1011; Op. at 26 (emphasis added). For example, EPA’s decision to follow the Bioenergy BACT Guidance’s recommendation to consider the net atmospheric contribution of biomass fuels at Step 4 is consistent with decades of EPA practice considering collateral and indirect effects of pollution control options within Step 4, and nothing in past guidance precludes shifting the frame of reference in that analysis for biomass fuels. *Id.* at 1011; Op. at 27. *See also, e.g.*, EPA Br. at 80, 93-96.

Accordingly, no modification to the Court’s discussion of the Bioenergy BACT Guidance is warranted.

CONCLUSION

For the foregoing reasons, with the exception of inconsequential factual modifications that the Court may or may not choose to make, the Center's petition for panel rehearing and/or modification of the opinion should be denied.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

Dated: December 14, 2016

s/ Dustin J. Maghamfar
DUSTIN J. MAGHAMFAR
United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
Tel: (202) 514-1806
Fax: (202) 514-8865
dustin.maghamfar@usdoj.gov

Attorneys for Respondents

Of Counsel:

KARA CHRISTENSON
U.S. Environmental Protection Agency, Region IX
Office of Regional Counsel

BRIAN DOSTER
NORA GREENGLASS
JOHN KRALLMAN
U.S. Environmental Protection Agency
Office of General Counsel

STATEMENT OF RELATED CASES

EPA is unaware of any cases pending in this Court related to this proceeding.

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2016, a copy of the foregoing was served electronically through the Court's CM/ECF system on all registered counsel.

Dated: December 14, 2016

s/Dustin J. Maghamfar
DUSTIN J. MAGHAMFAR
Attorney for Respondents

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

I certify that pursuant to Rule 32(c)(2) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 40-1(a), this brief is proportionately spaced, has a typeface of 14 points, and contains 1,979 words. I have relied on Microsoft Word's calculation feature.

Dated: December 14, 2016

s/Dustin J. Maghamfar
DUSTIN J. MAGHAMFAR
Attorney for Respondents