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DC Circ. Ruling Warns EPA To Rein In Emissions Rulemaking

By **Keith Goldberg**

Law360, New York (July 16, 2013, 9:02 PM ET) -- The D.C. Circuit's decision last week to nix a U.S. Environmental Protection Agency rule giving biomass power plants a temporary exemption from carbon dioxide emission standards serves as a warning that the federal appeals court will grant the agency little leeway to craft new greenhouse gas rules, experts say.

In a 2-1 ruling, the majority said the government had failed to explain why it was treating biogenic sources of greenhouse gas emissions differently than other sources, and vacated the rule giving biomass power plants a reprieve from carbon dioxide emission standards until July 2014. It rejected the EPA's argument that it needed three years to complete a scientific study and that its "one-step-at-a-time" doctrine allowed it to take a gradual approach toward the Clean Air Act's mandate.

In a concurring opinion, U.S. Circuit Judge Brett M. Kavanaugh went even further, saying the agency had no authority to distinguish biogenic carbon emissions — those produced by living organisms — from other forms of carbon pollution.

By siding with the Center for Biological Diversity and other environmental groups, which argued the EPA had no authority to exempt biomass plants from its emissions rule for stationary sources, the D.C. Circuit is casting a skeptical eye on the EPA's ability to deviate from full implementation of the rules, experts say.

"This CBD case is further proof that the D.C. Circuit is going to adopt a very broad and literalist view that CO2 is fully an air pollutant and EPA has very little discretion to phase in and slow down treatment of it under the CAA," said Eric Groten, a partner in the environmental practice at Vinson & Elkins LLP.

The EPA used the one-step-at-a-time doctrine and other administrative law doctrines in justifying its so-called tailoring rule, which tailors emissions permitting programs to focus on the largest polluters, shielding smaller sources. The D.C. Circuit upheld the rule its June 2012 decision in Coalition for Responsible Regulation et al. v. EPA, which backed the agency's finding that greenhouse gas emissions threaten human health and welfare.

But in dismissing the challenges to the tailoring rule, the appeals court didn't rule on the EPA's ability to use those doctrines, leaving it an open question as to how much the agency could use them in its greenhouse gas-related rulemaking, experts say.

The D.C. Circuit's Friday decision provides some clarity on that issue, says Squire Sanders partner Allen Kacenjar Jr.

"The door isn't as wide-open for EPA to flexibly interpret the Clean Air Act as it was before," Kacenjar told Law360. "This decision helps draw a boundary on how far at least this [judicial] panel thinks those doctrines should go."

In saying the EPA needed to present an interpretation of the CAA that would allow it to exempt biomass emissions, the D.C. Circuit is telling EPA it needs to do a better job in using real administrative law principles to justify delays in any regulation, according to Stroock & Stroock & Lavan special counsel and former EPA attorney Gail Suchman.

Having to adhere strictly to the CAA could make the EPA's future greenhouse gas rulemaking a more arduous process, experts say.

"There have been thorny questions in how you apply GHG standards, whether they're appropriate for CO2, and how do we start phasing them in," Quarles & Brady LLP partner Peter Tomasi told Law360. "At a high level, it only means EPA's job will be more difficult in drafting and finalizing those standards."

That includes the most significant, and controversial, rules on the horizon: the EPA's rules capping greenhouse gas emissions from new and existing power plants.

President Barack Obama recently ordered the agency to issue a proposal for new power plants by Sept. 20, propose an existing plant emissions rule by June 2014 and nail down a final rule by June 2015.

Those rules will be crafted under a section of the CAA that commands source-specific limits based on best demonstrated control technologies, according to Groten. This means alternative compliance strategies considered by the EPA — such as an emissions trading program for utilities — might not pass muster in court, he says.

And a staggered rulemaking approach could be equally problematic, Kacenjar says.

"If [the EPA] is interested in phasing in regulation of power plant emissions or [providing] deferrals, it needs to need to rethink those approaches in light of this decision," he said.

Yet the EPA has to be creative in developing greenhouse gas emissions rules, says Alston & Bird LLP partner Maureen Gorsen, a former environmental regulator in California.

"They've got to apply the Clean Air Act to something it wasn't intended to apply to — they have a very unwieldy tool to deal with a very unwieldy problem," Gorsen told Law360. "I think they're just going to try to paper the record so there's much more substantial evidence to support what they do — that this is the most reasonable, rational approach while keeping in the spirit of the statute."

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

Industry intervenors are represented by Roger R. Martella Jr., Lisa E. Jones and Timothy Kenly Webster of Sidley Austin LLP, Shannon S. Broome and Charles H. Knauss of Katten Muchin Rosenman LLP and Norman W. Fichthorn and Allison D. Wood of Hunton & Williams 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.

--Additional reporting by Sean McLernon. Editing by Kat Laskowski and Chris Yates.