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Helping Hand Tools v. United States Environmental Protection Agency

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Helping Hand Tools v. United States Environmental Protection Agency, 836 F.3d 999 (9th Cir. 2016)

Emily Slike

When the EPA decided to treat biomass fuel sources differently within the BACT analysis, the Ninth Circuit continued *Chevron*'s legacy and granted the agency deference. The Bioenergy BACT may develop as science continues to evolve, but because the EPA took a "hard look" during a thorough permit review, the court held that agency issuance of new BACT guidelines was reasonable.

I. INTRODUCTION

The Clean Air Act ("CAA") requires the Environmental Protection Agency ("EPA") to issue prevention of significant deterioration ("PSD") permits to new and modified major emitting facilities provided they meet national ambient air quality standards ("NAAQS") and use best available control technologies ("BACT").¹ The EPA developed more specific Bioenergy BACT guidelines to address the unique carbon dioxide biomass properties from facilities using biomass fuel.² In September 2012, the EPA issued a proposed permit for Sierra Pacific Industries ("SPI").³ SPI wanted to use its biomass waste in a new facility.⁴ After public comment, the permit was issued.⁵ Helping Hand Tools ("plaintiff") petitioned the Environmental Appeals Board ("Board"), which rescinded the permit issuance and required public hearing.⁶ The plaintiffs took issue with the Bioenergy BACT, primarily arguing the EPA should have considered other alternative fuels in step-one of the BACT analysis.⁷ The final permit was issued in April 2014.⁸ The plaintiff appealed to the Board, which dismissed for lack of jurisdiction because of an earlier circuit court ruling requiring the EPA to conduct a supplemental BACT analysis on the same permit.⁹ Plaintiff appealed to the Ninth Circuit which held that the permit went through a thorough review process, and the Bioenergy BACT was consistent with past EPA decisions.¹⁰

1. *Helping Hand Tools v. U.S. Env't Prot. Agency*, 836 F.3d 999, 1001-02 (9th Cir. 2016).

2. *Id.* at 1002-03.

3. *Id.* at 1004.

4. *Id.* at 1001.

5. *Id.* at 1004.

6. *Id.*

7. *Id.* at 1005.

8. *Id.*

9. *Id.*

10. *Id.* at 1012-13.

II. FACTUAL AND PROCEDURAL BACKGROUND

The CAA requires new and modified major emitting facilities to obtain a permit from the EPA, to meet NAAQS and to demonstrate BACT use before beginning construction.¹¹ Pollutants subject to CAA regulation utilize BACT, which is “an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation...from any emitting facility . . . achievable through application of production processes and available methods systems, and techniques.”¹² In 2011, the EPA created the Bioenergy BACT guidance for carbon dioxide emissions from facilities primarily using biomass as their fuel source.¹³ This change was due to biomass’s emitted carbon dioxide integrating differently into the carbon cycle and replenishing more quickly than other fuels.¹⁴

There are five Bioenergy BACT steps. First, evaluate other fuel types.¹⁵ If biomass is the primary purpose of the project, the agency may rely on that purpose to determine if another fuel type would redefine the project.¹⁶ If another fuel type does redefine the project, options include utilizing biomass alone, energy efficiency improvements, or carbon capture and sequestration.¹⁷ Second, eliminate technically infeasible options and document elimination reason.¹⁸ Third, rank remaining options in order of overall effectiveness.¹⁹ Fourth, complete an “environmental, economic and energy impact analysis, which includes direct and indirect considerations.”²⁰ Fifth, choose the most effective control option as the BACT.²¹

In September 2012, the EPA proposed to issue SPI a permit which required using add-on technologies and lower emitting controls as BACT for the pollutants analyzed.²² After public comment, the EPA issued the permit.²³ The plaintiff then petitioned the Board for review.²⁴ In July 2013, the Board remanded the permit to the EPA because the EPA did not hold a public hearing.²⁵ No other abuse of discretion was found.²⁶ Most notably, the Board found no abuse of discretion when the EPA declined to consider including other fuel sources because inclusion would impermissibly redefine the source, and the basic business purpose was to utilize as much

11. *Id.* at 1001-02.

12. *Id.* at 1002.

13. *Id.* at 1002-03.

14. *Id.* at 1003.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 1004.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

surplus biomass possible.²⁷ The Board also found the EPA's decision to limit the fuel mix to 90% biomass and 10% natural gas reasonable because its only uses were "startup, shutdown, and flame stabilization."²⁸

Shortly before the Board's decision, the D.C. Circuit Court vacated the EPA's rule that deferred greenhouse gas emission BACT determinations from those similar to SPI's facilities.²⁹ The decision resulted in a supplemental BACT analysis by the EPA.³⁰ The plaintiff argued that the EPA had to consider more than biomass fuel alone as a control option in step one, and instead, should have directly compared environmental impacts of different biomass fuel stocks.³¹

In April 2014, the EPA issued the final permit.³² The plaintiff appealed to the Board which dismissed for lack of jurisdiction because of the D.C. Circuit Court's ruling.³³ The plaintiff appealed to the Ninth Circuit once all administrative remedies were exhausted.³⁴

III. ANALYSIS

Under the Administrative Procedures Act, a court may only discard an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."³⁵ Additionally, a rational connection between the facts found and choice made must exist to uphold an agency action.³⁶ The court maintains a highly deferential review when examining agency decisions, including determining if the permit was based on a "clearly erroneous finding of fact or conclusion of law."³⁷ Examination of the "redefining the source" doctrine or the Bioenergy BACT is one of first impression in the Ninth Circuit, so the court examined the EPA's use of each in granting SPI's permit application.³⁸

The court first examined the plaintiff's claim that the EPA should have considered a greater mix of other control technologies in the BACT analysis.³⁹ If control alternatives "redefine the source," they need not be considered.⁴⁰ Determining if the control technology would redefine the source is a two-step process.⁴¹ Step one is reviewing the permit application, which defines the proposed facility's purpose, or basic

27. *Id.*

28. *Id.*

29. *Id.* at 1005. *See* *Ctr. for Biological Diversity v. U.S. Env't Prot. Agency*, 722 F.3d 401, 412 (D.C. Cir. 2013).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 1006.

41. *Id.*

design.⁴² The proposed purpose must be “objectively discernable” and not motivated by air permitting, cost saving or risk avoidance.⁴³ Step two requires a “hard look” by the EPA at the proposed definition by determining what design elements are essential to the proposed purpose and what elements could change without disturbing the basic business purpose.⁴⁴ Courts defer to the EPA’s determination and refinement of the statutory definition of “control technology.”⁴⁵ Only the project submitted requires BACT analysis.⁴⁶ If no line is drawn between control technology and redesign, the EPA would have the burdensome task of considering *all* fuels.⁴⁷

The court next examined whether the EPA erred in deciding that the use of alternative energy sources in the proposed facility would impermissibly redefine the source.⁴⁸ SPI stated that the facility would utilize its existing sources of biomass.⁴⁹ The plaintiff thought the Board improperly deferred to SPI’s proposed purpose of generating “steam for lumber drying kilns and to make electricity,” which would “read ‘clean fuels’ out of the CAA.”⁵⁰ The court concluded that the EPA took a “hard look” at the record and SPI’s facility, and reasonably concluded that using a co-located fuel source was inherent to the proposal.⁵¹

The court next determined whether the proposed alternative clean fuels should be “considered, or if they would impermissibly redefine the source” because biomass was an inherent design element.⁵² The court held that simply because a design component is cleaner does not mean it should undergo a BACT analysis.⁵³ Additionally, the court stated the Board rightly determined that considering a greater natural gas mix needed further examination because access existed to multiple on-site fuel sources: clean natural gas and dirty biomass.⁵⁴ Only when the business purpose is not disrupted must a company consider a different natural gas mix.⁵⁵ The court concluded a different natural gas mix was not necessary because burning additional natural gas would disrupt SPI’s purpose of burning biomass waste.⁵⁶ SPI would use natural gas in a limited amount, making it incidental to the business purpose.⁵⁷ The court determined that

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 1006-07.

47. *Id.* at 1007.

48. *Id.* at 1009.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

the EPA did not act arbitrarily by not considering greater natural gas use.⁵⁸ The determination of distinguishing a control technology from redefining the source is a technical one allowing the EPA deference.⁵⁹ Sufficient justification existed in the record that burning biomass, rather than alternative clean fuels, was inherent to the facility's design, so the EPA did not act arbitrarily or capriciously.⁶⁰

The plaintiff further contended that the EPA should have considered additional control options to biomass fuel at step-one, and that the EPA should have directly compared the effects of biomass fuel stocks at step-one, not step-four.⁶¹ The court invoked the *Chevron* analysis because considering additional options was a statutory interpretation question.⁶² Where Congress does not directly speak to an issue, the court will defer to the agencies if the interpretation is reasonable, especially in decisions involving special expertise.⁶³ Because BACT analysis occurs for each application, the court found BACT guidance is not intended to "carry the force of law."⁶⁴ The court determined each publication is promulgated to provide further meaning to the guiding BACT statute following Congressional intent.⁶⁵

The plaintiff attacked the entirety of the Bioenergy BACT, but the court found it "thorough, rational, and consistent with EPA's prior practice."⁶⁶ The Bioenergy BACT helps the EPA create a better analysis for certain greenhouse gas emissions from unique biomass fuels.⁶⁷ The plaintiff argued that biomass alone could not be considered at step-one, because BACT does not control biomass emissions.⁶⁸ However, the EPA stated the option was only a baseline and other options were compared.⁶⁹ The plaintiff also stated biomass fuel stock burning was not a step one consideration.⁷⁰ The EPA agreed, but argued the scientific data to make such quantitative determinations was currently unavailable.⁷¹ Thus, analysis was done at step four.⁷² Furthermore, the EPA originally allowed less restrictive limits of biomass fuels to burn, but SPI requested more

58. *Id.*

59. *Id.* at 1010.

60. *Id.*

61. *Id.*

62. *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

63. *Id.*

64. *Id.* at 1011.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

restrictive limits, more consistent with the original application.⁷³ The EPA adopted and modified the analysis in response to the plaintiff's comments, clarifying fuel restrictions and ensuring appropriate fuel restrictions were written into the permit.⁷⁴ Additional concerns could be alleviated by the EPA's assurance that only readily available lumber would be used for biomass.⁷⁵ The EPA could not conduct quantitative analysis of different biomass stocks at step-one.⁷⁶ The court deferred to EPA expertise and reasonable decision-making because "the agency [was] acting at the frontier of science."⁷⁷

The court determined the permit went through an extensive process before approval.⁷⁸ The project was properly defined, and the control technologies that would redefine the project were rejected with a thoughtful and reasonable explanation.⁷⁹ Further, the Bioenergy BACT was rational and consistent with the EPA's past actions.⁸⁰ Lastly, the court made clear its place was not to interfere with the EPA's expertise when the record showed a reasonable process.⁸¹

IV. CONCLUSION

The court deferred to the EPA again in deciding how best to handle biomass fuel sources because the agency took the required "hard look" at the permit. Although the EPA violated procedure by not examining all potential BACT options, it acted rationally, consistently and reasonably. Taking action on science's frontier involves great uncertainty. Agency deference should continue in situations regarding interpretations that follow reasonable processes and past actions.

73. *Id.* at 1011-12.

74. *Id.* at 1012.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1012-13.

81. *Id.* at 1013.