

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

CENTER FOR BIOLOGICAL DIVERSITY,
CONSERVATION LAW FOUNDATION, and
NATURAL RESOURCES COUNCIL OF MAINE,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, and LISA P. JACKSON,
Administrator, United States Environmental
Protection Agency,

Respondent.

No. 11-1101

DECLARATION OF DAVID P. TENNY

I, David P. Tenny, declare as follows:

1. I am the President and Chief Executive Officer of the National Alliance of Forest Owners (“NAFO”).
2. I make this Declaration in support of NAFO’s Motion to Intervene in *Center For Biological Diversity, et al. v. Environmental Protection Agency, et al.* (Case No. 11-1101) (the “*CBD Litigation*”). Unless otherwise stated, I have personal knowledge of the facts stated below.
3. NAFO was incorporated as a 501(c)(6) not-for-profit organization in March 2008 and has been working aggressively since then to sustain the ecological, economic, and social values of forests and to assure an abundance of healthy and productive forest resources for present and future generations. NAFO’s members

represent 79 million acres of private forests in 47 states. NAFO's mission is to protect and enhance the economic and environmental values of private forests through targeted political advocacy at the national level.

4. Privately owned forests are an important part of the national economy. Combined, private forests contribute 2.5 million jobs, \$187 billion in annual payroll, and \$115 billion to our nation's annual GDP.
5. NAFO's members' economic livelihoods depend on strong market demand for forest products, including biomass combusted for energy production. Sales of forest products for biomass combustion currently represent a significant portion of the revenue received by NAFO's members and this demand is expected to continue to grow as long as biomass is viewed as a viable alternative to fossil fuel-based energy.
6. NAFO has been an active partner in EPA's development of greenhouse gas emissions regulations including the development and promulgation of the "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" ("Tailoring Rule"). In response to EPA's many requests for comments and calls for information, NAFO has provided technical expertise and policy guidance regarding the forestry sector in general and carbon dioxide ("CO₂") emissions from biomass combustion. Throughout the process, NAFO has supported the established EPA policy of accounting for CO₂ emissions from the forestry sector through land use changes rather than at the source of emission.
7. In a sudden and unexpected reversal of established EPA policy and the regulatory approach embodied in the proposed Tailoring Rule, the final Tailoring Rule provided that CO₂ emissions from biomass combustion would count toward the rule's emissions thresholds for the Prevention of Significant Deterioration

(“PSD”) and Title V permitting programs in the same manner as fossil fuel-based emissions. EPA did not offer a reasoned explanation for reversing its prior policy and did not provide an opportunity for public comment on this policy reversal.

8. On July 30, 2010, NAFO filed its “Petition to Reconsider the Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule and to Stay the Rule Pending Reconsideration.” NAFO asserted that EPA’s decision to count CO₂ emissions from biomass combustion toward the rule’s applicability thresholds was improper because (1) EPA did not provide a reasoned explanation for reversing the position taken in the proposed Tailoring Rule with respect to carbon dioxide emissions from biomass combustion and (2) EPA’s unexpected change-of-course in the final Tailoring Rule was not a logical outgrowth of the proposed Tailoring Rule. NAFO requested that EPA (1) reconsider its decision to count CO₂ emissions from biomass toward applicability thresholds for PSD and Title V and (2) stay the application of the PSD and Title V permitting programs to emissions of CO₂ from biomass combustion pending reconsideration.

9. On January 12, 2011 EPA sent letters to NAFO and to Congress announcing that it was granting NAFO’s Petition for Reconsideration. In the letters, EPA stated its intention to (1) complete rulemaking to defer for three years the application of PSD and Title V permitting to CO₂ emissions from biomass combustion, (2) issue interim guidance regarding biomass combustion, (3) undertake a scientific and technical study of CO₂ emissions from biomass combustion, and (4) establish, within three years, a system for determining the applicability of PSD and Title V permitting to CO₂ emissions from biomass combustion. The letters were immediately posted on EPA’s website.

10. On March 21, EPA published a proposed rule entitled “Deferral for CO₂ Emissions From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs: Proposed Rule” (“Deferral Rule”) which proposes to defer for three years the application of PSD and Title V permitting to carbon dioxide emissions from biomass combustion. 76 Fed. Reg. 15,249 (Mar. 21, 2011). EPA simultaneously released interim guidance regarding biomass combustion.

11. NAFO’s members’ economic and legal interests will be directly affected by the outcome of the *CBD Litigation*. If Petitioners were to succeed on the merits of their petition, the remedies that they seek are likely to significantly and negatively impact the interests of NAFO’s members in at least the following ways:
 - a. To the extent that EPA’s January 12, 2011 letters granting the Petition for Reconsideration constitute final agency action, NAFO – as the petitioner – is the primary affected party. By granting the Petition for Reconsideration, EPA announced that it would review the science regarding CO₂ emissions from biomass combustion, would consider deferring the applicability of PSD and Title V during the review process, and would consider establishing an alternative to the Tailoring Rule that could permanently exclude CO₂ emissions from biomass combustion from PSD and Title V. The granting of the Petition for Reconsideration thus provides immediate benefits for NAFO and its members as EPA will reconsider policies that are currently detrimental to their interests. The proposed three-year deferral would benefit NAFO and its members by reestablishing the status quo that excludes CO₂ emissions from biomass from source-based regulation. The deferral would spur the market for biomass energy and increase the biomass sales of NAFO’s members by

removing the regulatory uncertainty and compliance costs that has inhibited capital investment in biomass energy facilities. NAFO and its members would also obtain substantial benefits if the Agency were to conclude ultimately that biomass emissions should not be subjected to the PSD and Title V permitting programs, as requested in NAFO's Petition for Reconsideration. Through their Petition for Review, Petitioners seek to reverse those benefits. Therefore any remedy obtained by Petitioners will have a direct and adverse effect on NAFO and its members.

- b. At a minimum, a successful resolution for Petitioners will create legal uncertainty with respect to EPA's subsequent actions including the proposed Deferral Rule, scientific review, implementation of a new regulatory system to address biomass combustion, and the interim guidance issued to states. Regardless of the eventual outcome, the interim effect of the legal uncertainty will be to stall the continued growth and development of the biomass energy sector and reduce the demand for biomass products supplied by NAFO's members. This legal uncertainty will be exacerbated by the fact that the Tailoring Rule will apply to CO₂ emissions from biomass combustion until the legal uncertainty is resolved. Given the high cost of complying with PSD and Title V permitting requirements, there are strong reasons to believe that the biomass energy sector could stagnate until the legal uncertainty is resolved.
- c. Finally, if Petitioners prevail in this action, and that victory delays or undercuts the Deferral Rule, it could result in regulation of biomass and fossil fuel-based CO₂ in the same manner, an outcome that will favor increased use of fossil fuels and result in the stagnation of the biomass

energy market. Wood to electricity facilities are expected to be a central component of renewable fuel portfolios across the country and total capacity is expected to increase four-fold during the next decade.

Treating biomass and fossil fuels in the same manner could jeopardize biomass' status as a renewable fuel. Furthermore, the cost associated with the Tailoring Rule, including direct permitting costs, increased capital costs due to permitting-induced delays, and potential BACT compliance costs will dramatically reduce demand for biomass energy.

A recent study by Forisk Consultants estimates that the Tailoring Rule, as currently configured, will apply to 90% of existing and proposed biomass facilities and will reduce their ability to purchase biomass at a competitive price. All told, the Tailoring Rule's impact on the biomass energy sector will include a 5,384 MW reduction in biomass energy production, a loss of at least 11,844 jobs, an \$18 billion reduction in capital investments, and a 53.8 million ton reduction in biomass energy consumption. As the primary suppliers of forest products, NAFO's members rely on strong market demand for their livelihood and continued viability. A 53.8 million ton reduction in demand will have a profound and negative effect on them.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'David P. Tenny', with a long horizontal flourish extending to the right.

David P. Tenny