

Ethanol and Other Biomass Plants No Longer Exempt from Carbon Dioxide Emission Limits: D.C. Circuit Vacates EPA's Three-Year Deferral for Biogenic CO₂ Sources

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In a decision that will impact the ethanol and biomass industry, among others, the D.C. Circuit Court of Appeals vacated the Environmental Protection Agency (EPA)'s biogenic deferral rule. The deferral rule was EPA's attempt to delay for three years the Clean Air Act (CAA) permitting requirements for sources of biogenic carbon dioxide emissions, including ethanol plants. Biogenic carbon dioxide emissions are defined in the deferral rule as emissions “directly resulting from the combustion or decomposition of biologically-based materials other than fossil fuels and mineral sources of carbon.” Deferral for CO₂ Emission Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs, 76 Fed. Reg. 43,490, 43,493 (July 20, 2011).

In 2011 EPA explained the purpose of the rule as providing the agency three years to research the actual impacts of biogenic carbon dioxide emissions on the atmosphere, considering the total carbon lifecycle. From a policy perspective, the deferral would prevent the CAA permitting requirements from stifling the construction or operation of potentially beneficial energy generation, manufacturing or other facilities that rely on non-fossil fuel and/or renewable resources which, when processed or burned, create biogenic carbon dioxide emissions. As finalized, the deferral rule was optional, each state could decide whether or not to incorporate the deferral into its State Implementation Plan (SIP).

Examples of biogenic CO₂ emissions include, but are not limited to:

- CO₂ generated from the biological decomposition of waste in landfills, wastewater treatment or manure management processes;
- CO₂ from the combustion of biogas collected from biological decomposition of waste in landfills, wastewater treatment or manure management processes;
- CO₂ from fermentation during ethanol production;
- CO₂ from combustion of the biological fraction of municipal solid waste or biosolids;

- CO₂ from combustion of the biological fraction of tire-derived fuel; and
- CO₂ derived from combustion of biological material, including all types of wood and wood waste, forest residue, and agricultural material.

When EPA promulgated the deferral rule, it relied on three doctrines of administrative law -- the de minimis, one-step-at-a-time, and administrative necessity doctrines -- to insert flexibility into otherwise rigid congressional mandates to require CAA permits for sources that exceed permitting thresholds. Environmental groups challenged the deferral rule and claimed it was arbitrary and capricious and contrary to the mandates of the CAA. The court agreed that EPA's action was arbitrary and capricious because the agency provided no legal justification to rely on those three administrative doctrines. First, in its own legal brief, EPA acquiesced that its reliance on the de minimis doctrine was flawed. Second, the Court found the one-step-at-a-time doctrine

inapplicable because reliance on that doctrine requires the rule at issue to be the first step in achieving full compliance with the congressional mandate, and EPA utterly failed to articulate what "full compliance" with the CAA mandate would be. The Court explained, "we simply have no idea what EPA believes constitutes 'full compliance' with the statute. In other words, the deferral rule is one step towards . . . what? Without a clear answer to that question, EPA has no basis for invoking the one-step-at-a-time doctrine." Finally, the Court rejected EPA's reliance on the administrative necessity doctrine because the Court found EPA failed to demonstrate that it would be impossible to attain the CAA mandates, and because the agency did not carve out the narrowest of exemptions for biogenic emission sources, as the doctrine requires.

Importantly, the Court did not determine whether the three-year deferral was in fact contrary to the CAA mandates.

The Court of Appeals decision is significant because the effect of a vacatur is that, legally, it is as though the rule never existed. That means, facilities that have relied upon the deferral to construct or modify a source of biogenic carbon dioxide emissions without obtaining a CAA permit now face significant regulatory uncertainty with respect to their compliance status. Equally as important are those facilities that established construction plans and secured financing for a project that may now require a CAA permit and the imposition of new, different, more stringent and likely more expensive pollution control technology.

If this rule affects a constructed facility or proposed project at your facility, we recommend you seek legal advice to determine the most appropriate next steps.

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