

## Federal Court Strikes Down EPA’s “Deferral Rule” – Landfill Carbon Dioxide Emissions and Other Biogenic Sources Cannot Be Treated Differently in Greenhouse Gas Permitting

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According to the D.C. Circuit Court of Appeals, the U.S. EPA acted in an arbitrary and capricious manner in promulgating the 2011 “Deferral Rule” which, albeit temporarily, treated biogenic sources of carbon dioxide differently than greenhouse gas emissions from fossil-fuel combustion in vehicle tailpipes and stationary sources such as coal-fired power plants for purposes of greenhouse gas permitting. The D.C. Circuit’s recent **decision** to vacate the Deferral Rule in *Center for Biological Diversity v. EPA*, essentially means that sources of biogenic carbon dioxide – such as landfill gas, wastewater treatment plants, manure management facilities, biomass combustion sources, and ethanol production plants – may no longer rely on the temporary deferral and must now consider such emissions as part of **pre-construction and construction permitting (PSD and NSR)** and **major source operating permits (Title V)**.

When EPA began effectively regulating greenhouse gas emission from stationary sources with the promulgation of the **Timing Rule and the Tailoring Rule in 2010**, the agency noted the unique role and impact that natural sources of biogenic carbon have in the carbon cycle. As a result, EPA issued its Deferral Rule in July 2011, which postponed regulation of biogenic sources of carbon dioxide for three years for further consideration concerning if, and how, to regulate such biogenic emissions. **76 Fed. Reg. 43490 (July 20, 2011)**. In other words, the Deferral Rule complemented the Tailoring Rule in which EPA staggered the applicability of PSD/NSR and Title V permits so as to avoid an overwhelming permitting burden all at once.

Relying on multiple principles of administrative law, EPA sought to defend its issuance of the Deferral Rule and argue that it had authority under the Clean Air Act to treat biogenic sources differently.

- De Minimis Doctrine – EPA initially argued that it could exempt biogenic sources given their negligible or positive effect of such sources, but the agency backed away from this position in its court briefing papers;
- “One-step-at-a-time” Doctrine - EPA advocated a one-step-at-a-time doctrine in order to provide adequate time to study the science underlying biogenic sources, but the court rejected this rationale because nowhere did EPA justify that the Clean Air Act allows the agency to statutorily treat biogenic sources of carbon dioxide differently;
- Administrative Necessity – EPA also argued that it was impossible to satisfy its statutory objectives of GHG permitting without the Deferral Rule, but the court determined that EPA rejected a middle-ground option that it could have promulgated; and
- Absurd Results Doctrine – EPA alleged that biogenic sources may actually reduce net emission and it would run afoul of congressional intent to regulate these sources, but because EPA failed to timely raise the issue, such rationale was post hoc and did not support the rule.

Given the limited passage of time since the court’s July 12, 2013, ruling, it is unclear how EPA and the states will begin treating biogenic sources for purposes of PSD/NSR and Title V permitting. In the short term, however, sources must recognize that the Deferral Rule is no longer in effect and no longer provides a deferral from calculating carbon dioxide emissions for permitting requirements.

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