Exceptional Events/Clean Air Act: Federal Appellate Court Addresses Challenge to Approval of Colorado SIP

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07/31/2018

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The Tenth Circuit Court of Appeals ("10th Circuit") addressed in a July 24th opinion a challenge to the United States Environmental Protection Agency ("EPA")approval of a Colorado State Implementation Plan ("SIP"). See *Ukeiley v. United States Envtl. Prot. Agency*, No. 16-9556, 2018 WL 3543036 (10th Cir. July 24, 2018).

The federal appellate court considered whether EPA acted in an arbitrary and capricious manner when it allowed thirty-four PM-10 exceedances on the basis they were exceptional events.

The states are primarily responsible for ensuring attainment and maintenance of Clean Air Act National Ambient Air Quality Standards ("NAAQS") once EPA has established them. Each state is therefore required to formulate, subject to EPA approval, an SIP designed to achieve each NAAQS. The United States Supreme Court noted in *Union Electric Co. v. EPA* that each state is given wide discretion in formulation its SIP. The SIPs will contain the measures and actions the state proposes to undertake to attain each NAAQS. These measures or actions must be enforceable through state regulations and typically include emission limits applicable to certain types of stationary sources.

The states are generally free to make their own choices as to how they will attain the NAAQS through their SIPs. Further, the SIPs are in theory dynamic documents which the state can choose to change as it continues to determine the appropriate means of attaining or maintaining the various NAAQS. The SIP and subsequent revisions must be reviewed and approved by the EPA is the criteria set forth in section 110 are met. A change in a NAAQS may require a revision in the SIP. The SIPs and/or revisions must be adopted pursuant to public notice and hearing and includes various substantive requirement such as:

- the emission limitations and the control measures that will be used by the state;
- the schedules and timetables for compliance;
- the means used to monitor and analyze data on ambient air quality;
- the permitting procedures and controls used for stationary sources; and
- the enforcement procedures used.

The 10th Circuit in the Ukeiley opinion states the Lamar area in the eastern plains of Colorado was classified as nonattainment in 1991 for PM-10. PM-10 is "particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers." *Ukeiley v. United States Envtl. Prot. Agency,* No. 16-9556, 2018 WL 3543036, at *1 (10th Cir. July 24, 2018) *citing* 42 U.S.C. § 7602(t).

Colorado submitted an attainment plan to the EPA in 2002 to bring the Lamar area into attainment. EPA approved the plan in 2005.

In 2013, Colorado submitted to EPA a ten year maintenance plan. The state requested that the EPA exclude fifty-five days that exceeded the air quality standards for PM-10. EPA approved thirty-four days for exclusion from its consideration and approved the ten year maintenance plan.

The EPA is required to promulgate rules that "govern the review and handling of air quality monitoring data influenced by exceptional events." *Ukeiley*, 2018 WL 3543036, at *2 *citing* 42 U.S.C. § 7619(b)(2). The Clean Air Act describes an exceptional event as one that:

1. affects air quality;
2. is not reasonably controllable or preventable;
3. is caused by human activity that is unlikely to recur at a particular location or a natural event; and
4. the EPA has certified the exceptional event criteria have been met.

Id. citing 42 U.S.C. § 7619(b)(1).

EPA promulgated a rule in accordance with the statute, which states that "[a] State . . . may request the Administrator to exclude data showing exceedances or violations of any national ambient air quality standard that are directly due to an exceptional event. . ."*Id*. *citing* 40 C.F.R. 50.14(a)(l)(ii). "Exceptional event" is defined as "an event(s) and its resulting emissions that affect air quality in such a way that there exists a clear causal relationship between the specific event(s) and the monitored exceedance(s) or violation(s), is not reasonably controllable or preventable, is an event(s) caused by human activity that is unlikely to recur at a particular location *or a natural event(s)." Id. citing* 40 C.F.R 50.1(j).

Mr. Ukeiley, plaintiff and a resident of the Lamar area, challenged EPA's approval of Colorado's plan. He argued that the term "exceptional" should be given its ordinary meaning. The ordinary meaning of the term includes "out of the ordinary' and "rare." The court applied *Chevron* deference, which allows the court to interpret a rule if it is ambiguous. The court found that it was not proper to give the term its ordinary meaning because it was not ambiguous. Instead, it was explicitly defined.

Although the high wind events occurred multiple times and were therefore not "exceptional" in the ordinary meaning, they were determined to be within the meaning of a natural event under the "exceptional event" exception. A natural event is defined as "an event and its resulting emissions, *which may recur at the same location, in which human activity plays little or no direct causal role."* For purposes of the definition of a natural event, anthropogenic sources that are reasonably controlled shall be considered to not play a direct role in causing emissions." *Id. citing* 40 C.F.R 50.1(k).

The 10th Circuit concluded that an exceptional event that is human caused may not be one that is likely to recur, but a natural event may be recurring. It determined that EPA did not act in an arbitrary and capricious manner because it relied on substantial wind and meteorological data to make its determination.

A copy of the opinion can be downloaded here.