State Implementation Plan/Clean Air Act: Federal Appellate Court Addresses Challenge to Colorado Exclusion of Temporary Emissions

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

09/22/2023

Co-Author: Diana Aguirre

The Tenth Circuit United States Court of Appeals ("Court") addressed in a September 18th Opinion a petition filed by the Center for Biological Diversity ("Center") alleging that the U.S. Environmental Protection Agency ("EPA") violated the Clean Air Act when it approved a revision to Colorado's State Implementation Plan ("SIP") See *Ctr. for Biological Diversity v. United States Env't Prot. Agency*, No. 22-9546, 2023 WL 6056417 (10th Cir. Sept. 18, 2023).

EPA had determined that Colorado's Nonattainment New Source Review ("NNSR") permit program meets the requirements of the 2015 National Ambient Air Quality Standard ("NAAQS") for ozone.

The Center argued that the SIP's exclusion of "temporary emissions" and "emissions from internal combustion engines" violated the Clean Air Act.

The states are primarily responsible for ensuring attainment and maintenance of National Ambient Air Quality Standards ("NAAQS") once the EPA has established them. Each state is therefore required to formulate, subject to EPA approval, an implementation plan (i.e., SIP) designed to achieve each NAAQS.

States are given broad discretion in formulating a SIP. Nevertheless, the SIP must 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. However, the SIP (including revisions) must be reviewed and approved by EPA to determine that the criteria set forth in Section 110 of the Clean Air Act are met. Such review includes revisions to the SIP.

The Center first argued that the EPA failed to comply with the Administrative Procedure Act ("APA"). ***Id.* at *1**. Substantively, the Center asserted that the EPA should not have approved the Colorado SIP's exclusions of "temporary emissions" and "emissions from internal combustion engines on any vehicle" contrary to the Clean Air Act ("CAA") when determining whether stationary sources of emissions were subject to the NNSR's permit program. ***Id.***

The Center's procedural challenge was rejected by the Court. ***Id.***

For the substantive allegations, the Court ruled that the EPA violated the Clean Air Act by permitting the exclusion of temporary emissions. However, it upheld EPA's determination that the Colorado SIP's exclusion of "emissions from internal combustion engines on any vehicle" was permissible. ***Id*.**

In analyzing whether the exclusion of temporary emissions was within the scope of the Clean Air Act, the Court reviewed the language of 40 CFR § 51.165. This federal regulation provides that secondary emissions:

. . . include emissions which would occur because of the construction or operation of a major stationary source or major modification [ ] but do not come from the major stationary source or major modification itself.'" ***Id*.**

The regulation also excludes secondary emissions from a determination of whether a stationary source has "potential to emit." ***Id.***

EPA noted the regulation's definition of secondary emissions and its absence from the "potential to emit" calculation. Consequently, the agency argued that § 51.165 is ambiguous. If so, the agency further argued that it was appropriate to use its interpretation that "a stationary source's potential to emit includes 'continuous operating emissions of a stationary source and not temporary emissions or emissions associated with construction.' Apple. Br. 36" ***Id.*** This was the basis for EPA's determination that Colorado's temporary-emissions exclusion was allowed.

The Court rejected this argument. EPA interpreted the omission of the term "secondary emissions" to mean that "temporary emissions" could reasonably be excluded. The Court concluded that " § 51.165's omission of the term 'temporary emissions' — while at the same time expressly excluding secondary emissions…strongly implied that the EPA did not intend to exclude all temporary emissions in determining whether a new or modified stationary source is major." ***Id*. at *5**.

The regulation was noted to only exclude secondary emissions and certain fugitive emissions from potential-to-emit determinations, and the "secondary emissions" definition was deemed to "not plainly encompass all temporary emissions." ***Id.*** Viewing the regulations in this manner, the Court found that the EPA should not have approved Colorado's exclusion of temporary emissions under its NNSR permit program. ***Id*. at *6**.

The Court also turned to the plain language of statutes in its determination that the EPA was within its rights to authorize Colorado "to exclude emissions from internal combustion engines on any vehicle under its permit program." ***Id.*** NNSR permit programs only regulate major stationary sources, which do not include emissions from "nonroad engine[s]." ***Id*. at *7**. 40 C.F.R § 1068.30 defines a nonroad engine to be "'an internal combustion engine that…[b]y itself or in or on a piece of equipment…is portable or transportable.'" ***Id.***

Colorado complied with the CAA's definition of "nonroad engine" in their exclusion of emissions from "internal combustion engines on any vehicle," which can be understood to be a subset of nonroad engines. ***Id.***

Circuit Judge Tymkovich authored a dissenting opinion, where he claimed that Colorado's exception for "temporary emissions" should be permissible because its "definition of 'temporary emissions' is as or more stringent than the federal definitions of 'potential to emit' and secondary emissions.'" ***Id.* at *8**.

A copy of the Opinion can be downloaded here.