Holland & Hart



Sydney Sell

Associate
801.799.5899
Salt Lake City
sjsell@hollandhart.com



Aaron Tucker

Partner
303.295.8369
Denver, Santa Fe
abtucker@hollandhart.com



Emily Schilling

Partner
801.799.5753
Salt Lake City
ecschilling@hollandhart.com

Tenth Circuit Ruling on Temporary Emissions in Colorado Will Have Widespread Impacts on Air Permitting in Western States

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In a decision with implications for air permitting across the West, a divided three-judge panel of the Tenth Circuit Court of Appeals vacated and remanded EPA's approval of Colorado's state implementation plan (SIP) based upon its exclusion of temporary sources of air emissions when assessing applicability of its major source permit provisions.

In *Center for Biological Diversity v. EPA*, the split Court ruled that EPA acted contrary to law by allowing Colorado to exclude all temporary emissions under its Nonattainment New Source Review (NNSR) permit program when determining whether a source is "major," and therefore subject to NNSR permitting requirements. The ruling has the potential to affect air permitting - particularly related to emissions from exploration and construction of oil and gas sources - not only in Colorado, but in other Western states that treat temporary emissions similarly.

Background of the Litigation

The Center for Biological Diversity (CBD) challenged EPA's approval of Colorado's SIP revision, which certified that the state's existing NNSR permit program meets the requirements for attaining the 2015 ozone National Ambient Air Quality Standards (NAAQS). Raising both procedural and substantive issues, CBD alleged that the approval was flawed because Colorado's NNSR permit program improperly excluded "emissions resulting from temporary activities, such as construction or [oil and gas] exploration" for purposes of determining whether a source is a major stationary source. According to CBD, neither the Clean Air Act (CAA) nor corresponding federal regulations authorize exclusion of these temporary emissions when determining whether a source's emissions, or its "potential to emit," exceed the major source threshold.

EPA's Reasoning

Under the CAA, a stationary source is major if it "emits" or has "the potential to emit" emissions above certain thresholds. 40 U.S.C. § 7479(1). EPA regulations define "potential to emit" as the "potential maximum capacity of a stationary source to emit a pollutant under its physical and operational design," however "[s]econdary emissions do not count in determining the potential to emit of a stationary source." 40 C.F.R. § 51.165(a)(1)(iii). EPA approved Colorado's SIP revision after determining

that the federal regulation implementing the CAA's NNSR permitting requirements excludes “secondary emissions” when determining a source's potential to emit.

EPA explained that § 51.165 defines secondary emissions “to 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.” Air Plan Approval, 87 Fed. Reg. 29,232, 29,234 (May 13, 2022). Based on that finding, EPA determined that an NNSR permit program “concerns continuous operating emissions of a stationary source and not temporary emissions or emissions associated with construction.” EPA reasoned that Colorado's temporary emissions exclusion was “allowable per the definition of secondary emissions and exclusion of secondary emissions under the definition of potential to emit.” *Id.* Although EPA acknowledged that § 51.165 contains no explicit reference to temporary emissions, it argued that the provision is ambiguous, and the court should defer to its interpretation.

Tenth Circuit Decision

The Tenth Circuit disagreed with EPA's conclusion and determined that § 51.165 is not ambiguous. Instead, the Court held that § 51.165's omission of the term “temporary emissions,” paired with its exclusion of “secondary emissions” and certain fugitive emissions from the potential-to-emit calculation, demonstrated that EPA did not intend to exclude all temporary emissions from the calculation. The Court noted that “[h]ad the EPA originally intended to exclude all temporary emissions under § 51.165, it would have said so.” Order at 15. The Court held that EPA acted contrary to law when it approved the SIP revision, and thus vacated EPA's final rule approving the SIP revision “insofar as it allowed Colorado to exclude all temporary emissions under its NNSR permit program” and remanded to EPA for further proceedings.

CBD also challenged Colorado's exclusion of “emissions from internal combustion engines on any vehicle” from major source determination, but the Court found that such an exclusion was permitted under the CAA as nonroad engines are specifically excluded from the federal definition of a stationary source. *See* 42 U.S.C. §§ 7502(c)(5), 7602(z) (Defining a “stationary source” as “any source of an air pollutant except those emissions resulting directly from . . . a nonroad engine.”).

Implications for the Industry

Inclusion of temporary emissions in the potential-to-emit calculation is a substantial shift from the current regulation of air emissions in the Denver Metro North Front Range (DMNFR) area. There are now several potential impacts to the permitting of oil and gas facilities. For instance, under Colorado's existing rules, air emissions from the construction and exploration of oil and gas production facilities have not included a facility's potential to emit. As a result of the Tenth Circuit's ruling, new or modified oil and gas facilities in the DMNFR area may be required to account for temporary sources of emissions unless those emissions can be classified

as “secondary emissions,” under § 51.165, or originate from nonroad engines. Including temporary emissions may push some stationary sources over the threshold from a minor to a major source for purposes of air quality permitting, subjecting them to additional procedural and substantive requirements, including more stringent pollution controls and emissions reductions offsets.

Following the ruling, CBD indicated that it plans to file similar challenges in New Mexico, Texas, and Pennsylvania. And state agencies within the Tenth Circuit will likely review their regulations addressing treatment of temporary emissions in assessing permitting applicability.

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