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ENERGY IN THE LAW

D.C. Circuit Court of Appeals Orders EPA to Consider Expanding Colorado's Ozone Nonattainment Area

By Chris Colclasure

On Friday, July 10, the D.C. Circuit Court of Appeals decided the case of *Clean Wisconsin v. EPA*. Environmental organizations, local governments, and one state challenged EPA's designation of certain counties and regions as ozone "attainment areas" under the 2015 National Ambient Air Quality Standards (NAAQS) of 70 parts per billion (ppb). One party challenged EPA's analysis of the emissions data and topography as it relates to Weld County north of approximately Wellington, Colorado, claiming it should be included in the Denver Metro/North Front Range ozone nonattainment area.

The court ordered the EPA to reconsider its designation of northern Weld County as an attainment area and left that designation in effect while EPA reevaluates. If EPA expands the non-attainment area to include northern Weld County, more stringent air quality requirements will apply and oil and gas operators will face increased costs.

Background

Ozone nonattainment areas are subject to more stringent air quality requirements. The specific requirements depend on whether the area is classified as marginal, moderate, serious, severe, or extreme. Each time a nonattainment area misses an attainment deadline, it is bumped up to the next higher classification. For example, in marginal nonattainment areas, facilities that emit 100 tons per year (tpy) of ozone precursors must obtain a "major source" air permit. In serious ozone areas, the major source threshold drops to 50 tpy and additional requirements apply. Severe and extreme areas face even more stringent requirements.

Two federal ozone standards are currently in effect. The Denver Metro/North Front Range is a serious nonattainment area under the 2015 ozone NAAQS of 70 ppb and a marginal area under the 2008 NAAQS of 75 ppb, with identical boundaries.

Denver Metro/North Front Range Nonattainment Area Boundary

EPA excluded northern Weld and Larimer Counties from the nonattainment area based on the number of facilities in the region, the emissions, terrain, meteorology, and other factors. The court noted that it gives an "extreme degree of deference" to EPA's evaluation of scientific data but nonetheless rejected EPA's rationale with respect to Weld County. The court found that Weld County sources generate "exceptionally high" emissions and that elevated terrain known as the Cheyenne Ridge is too far away to prevent emissions originating in northern Weld County from contributing to high ozone levels in the Denver Metro/North Front Range area. The court was silent about the boundary in Larimer County, even though plaintiffs challenged both.

Next Steps

EPA must reconsider its designation of northern Weld County "as expeditiously as practicable." If EPA expands the boundary of the 2015 NAAQS marginal ozone nonattainment area to include all of Weld County, oil and gas facilities in the expansion area would need to inspect for leaks more frequently and comply with certain other rules. However, the major source permitting threshold would initially remain at 100 tpy. The permitting threshold could drop to 50 tpy in approximately 2025 if the area fails to attain the 70 ppb standard.

Although the court's ruling applies only to Weld County and only to the 2015 ozone NAAQS of 70 ppb, the plaintiff could ask EPA to revise the Larimer County designation. Clean Air Act section 107(d)(3) allows EPA to revise its area designations in some circumstances, either on its own initiative or when requested by a state. In addition, because the nonattainment area boundaries are currently identical for the 70 ppb and 75 ppb standards and were supported by similar technical analyses, the court's ruling raises questions regarding whether the plaintiff would ask EPA or Colorado to simultaneously expand the boundary of the 75 ppb nonattainment area. Expansion of the 75 ppb non-attainment boundary could subject facilities in the expansion area to the serious nonattainment area's 50 tpy major source permitting threshold more quickly.

Please contact Chris Colclasure for more information.