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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, Administrator, United States Environmental Protection Agency,

Respondents.

AMERICAN PETROLEUM INSTITUTE; COLORADO OIL AND GAS ASSOCIATION,

Amici Curiae.

No. 22-9546

Petition for Review of an Order from the Environmental Protection Agency (EPA No. EPA-R08-OAR-2020-0644)

Robert Ukeiley (Ryan Maher, with him on the briefs) of the Center for Biological Diversity, Denver, Colorado, for Petitioner-Appellant.

Alan D. Greenberg, Attorney (Todd Kim, Assistant Attorney General, with him on the brief), Environment and Natural Resources Division, United States Department of Justice, Denver, Colorado, for Respondents-Appellees.

John H. Bernetich, Jennifer L. Biever, and Corey Y. Lim of Williams Weese Pepple & Ferguson PC, Denver, Colorado, for the American Petroleum Institute, Inc., and Christopher L. Colclasure of Beatty & Wozniak PC, Denver, Colorado, for the Colorado Oil and Gas Association filed an Amicus Curiae Brief.

Before **TYMKOVICH**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

MORITZ, Circuit Judge.

In a May 2022 final rule, the U.S. Environmental Protection Agency (EPA) approved a revision to Colorado's State Implementation Plan (SIP). The revision certified that Colorado's existing, EPA-approved Nonattainment New Source Review (NNSR) permit program regulating new or modified major stationary sources of air pollution in the Denver Metro-North Front Range area meets the requirements for attaining the 2015 National Ambient Air Quality Standards (NAAQS) for ozone. The Center for Biological Diversity now challenges the EPA's final rule on procedural and substantive grounds. Procedurally, the Center argues that the EPA violated the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706, by failing to include the state regulations that comprise Colorado's permit program in the rulemaking docket during the public-comment period. And substantively, the Center asserts that the EPA acted contrary to law when it approved Colorado's SIP revision because Colorado's permit program excludes all "temporary emissions" and "emissions from internal combustion engines on any vehicle" in determining whether a new or modified stationary source is "major" and therefore subject to the permit process. 5 Colo. Code

Regs. § 1001-5:3D.II.A.23.f, 25.f (2021). According to the Center, the Clean Air Act (CAA) and its implementing federal regulations do not authorize these exclusions.

Because the EPA's notice of proposed rulemaking was adequate under the APA, we reject the Center's procedural challenge. We agree with the Center, however, that the EPA acted contrary to law in allowing Colorado to exclude all temporary emissions under its permit program; the federal regulation the EPA relied on in approving this exclusion plainly does not authorize such an exclusion. But the Center identifies no similar problem with the EPA allowing Colorado to exclude emissions from internal combustion engines on any vehicle. We therefore grant the Center's petition in part, vacate a portion of the EPA's final rule, and remand for further proceedings.

Background

The CAA provides "a cooperative-federalism approach to regulate air quality." *U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1159 (10th Cir. 2012). It tasks the EPA with establishing NAAQS, which "are standards that say the air can safely contain only so much of a particular pollutant." *Sierra Club de P.R. v. EPA*, 815 F.3d 22, 23 (D.C. Cir. 2016). And after setting or revising those NAAQS, the EPA must designate areas within states "as attainment (it meets the EPA-set pollutant level), nonattainment (it does not meet the EPA-set pollutant level), or unclassifiable." *Ass'n of Irritated Residents v. EPA*, 790 F.3d 934, 937 (9th Cir. 2015).

The CAA then delegates to the states "the primary responsibility for assuring air quality." 42 U.S.C. § 7407(a). Specifically, each state must adopt and submit for

the EPA's approval a SIP that implements, maintains, and enforces the NAAQS within its areas. *Id.* § 7410(a)(1), (a)(2)(H). The CAA requires a state with a nonattainment area to include, among other things, an NNSR permit program in its SIP. *See id.* §§ 7502(c)(5), 7503, 7410(a)(2)(C). That program must "require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area." *Id.* § 7502(c)(5). A "stationary source," as relevant here, is "any source of an air pollutant except those emissions resulting directly from . . . a nonroad engine." *Id.* § 7602(z). And a stationary source is "major" if it "emit[s], or ha[s] the potential to emit," pollutants above preestablished thresholds. *Id.* § 7479(1). Federal regulations implementing the CAA's NNSR permitting requirements define "potential to emit" as "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design." 40 C.F.R. § 51.165(a)(1)(iii). But both "secondary emissions" and certain "[f]ugitive emissions" are excluded "in determining the potential to emit of a stationary source." *Id.* § 51.165(a)(1)(iii), (iv)(C).

Once approved by the EPA, a SIP has "the force and effect of federal law." *Utah Physicians for a Healthy Env't v. Diesel Power Gear, LLC*, 21 F.4th 1229, 1237 (10th Cir. 2021) (quoting *Espinosa v. Roswell Tower, Inc.*, 32 F.3d 491, 492 (10th Cir. 1994)). The CAA prohibits the EPA from approving any revision to a SIP that "would interfere with any applicable requirement concerning attainment . . . or any other applicable [CAA] requirement." 42 U.S.C. § 7410(*l*).

In 2018, the EPA designated the Denver Metro-North Front Range area in Colorado as a nonattainment area for the 2015 ozone NAAQS.[1] 83 Fed. Reg. 25776, 25792 (June 4, 2018). Two years later, Colorado submitted to the EPA for approval the SIP revision at issue here, which certified that Colorado's existing, EPA-approved NNSR permit program meets the requirements for attaining the 2015 ozone NAAQS.[2] *See* 83 Fed. Reg. 62998, 63002 (Dec. 6, 2018) (permitting states to submit "written statement certifying that . . . existing regulation is adequate to meet applicable nonattainment[-]area planning requirements of CAA . . . for a revised ozone NAAQS . . . in lieu of submitting new revised regulations"). Notably, Colorado's NNSR permit program provides for the exclusion of "emissions resulting from temporary activities, such as construction or exploration," and "emissions from internal combustion engines on any vehicle" in determining whether a new or modified stationary source is "major" and therefore subject to the permit process. 5 Colo. Code Regs. § 1001-5:3D.II.A.23.f, 25.f (2021).

In November 2021, the EPA proposed to approve Colorado's SIP revision, without including the state regulations that constitute Colorado's permit program in the rulemaking docket. *See* 86 Fed. Reg. 60434 (proposed Nov. 2, 2021). The Center

[1] The parties here are specifically concerned with ground-level ozone, which is "emitted by many types of pollution sources, including motor vehicles, power plants, industrial facilities, and area[-]wide sources, such as consumer products and lawn and garden equipment." App. vol. 1, 2.

[2] In 2018, the EPA approved Colorado's NNSR permit program as meeting the requirements for attaining the 2008 ozone NAAQS. *See* 83 Fed. Reg. 31068, 31070 (July 3, 2018).

objected, asserting that the EPA's failure to include the relevant state regulations in the rulemaking docket during the public-comment period was "a fundamental violation of administrative law." App. vol. 2, 1560. The Center also asked the EPA to reject Colorado's SIP revision because in the Center's view, the CAA and its implementing federal regulations do not authorize the exclusion of all temporary emissions and emissions from internal combustion engines on any vehicle in determining whether a new or modified stationary source is major. The EPA disagreed and issued a final rule approving Colorado's SIP revision. *See* 87 Fed. Reg. 29232, 29235 (May 13, 2022). That final rule took effect in June 2022. *See id.* at 29232. The Center now petitions for review.

Analysis

The APA provides the relevant legal standards for "reviewing the EPA's actions under the CAA." *Oklahoma v. EPA*, 723 F.3d 1201, 1211 (10th Cir. 2013). Under those standards, we may set aside the EPA's actions if, as relevant here, "it acted . . . not in accordance with the law . . . or 'without observance of procedure required by law.'" *WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 784 F.3d 677, 682 (10th Cir. 2015) (quoting 5 U.S.C. § 706(2)(D)). With the APA's deferential standards in mind, we first consider the Center's procedural argument that the EPA's notice was inadequate. We then address the Center's substantive challenges to the EPA's approval of Colorado's NNSR permit program and its emissions exclusions.

I. Adequate Notice

The Center first argues that the EPA provided inadequate notice of its proposed rulemaking. The APA requires agencies to "issue a '[g]eneral notice of proposed rule[]making,' ordinarily by publication in the Federal Register." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (first alteration in original) (quoting 5 U.S.C. § 553(b)). The notice need only include "(1) a statement of the time, place, and nature of public rule[]making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." § 553(b). And after providing such notice, "the agency shall give interested persons an opportunity to participate in the rule[]making." § 553(c).

Here, the Center does not dispute the first element, so we do not consider it. Turning to the second, the EPA's notice of proposed rulemaking stated that the EPA was "taking this action pursuant to [§§] 110, 172, and 173 of the [CAA]." 86 Fed. Reg. at 60434. And third, it informed the public that the EPA was proposing to approve Colorado's SIP revision after determining that Colorado's permit program meets the requirements for attaining the 2015 ozone NAAQS. The notice also included a list of relevant subjects, including "[e]nvironmental protection" and "[a]ir[-]pollution control," and the EPA published the notice in the Federal Register. *Id.* at 60436.

The Center contends that the EPA's notice was nevertheless deficient because the EPA did not include the full text of the state regulations that comprise Colorado's

permit program in either the notice or rulemaking docket. In support, the Center emphasizes the difficulty of locating the relevant state regulations outside the rulemaking docket and asserts that the EPA's omission failed to "give interested persons an opportunity to participate in the rule[]making." Aplt. Br. 20–21 (quoting § 553(c)). But as the EPA explained in the final rule and reiterates now before us, the EPA's notice provided the public with "an opportunity to participate in the rule[]making" process by clearly identifying the relevant, publicly available state regulations. § 553(c).

Indeed, the notice specifically stated that Colorado's permit program is "established in the Colorado Code of Regulations (CCR), Regulation 3[,] Part D." 86 Fed. Reg. at 60435. The notice also cited precise CCR provisions when describing relevant aspects of Colorado's permit program. And it then advised the public, again, that "[t]he EPA [wa]s proposing to approve Colorado's certification that the SIP-approved [NNSR] permitting requirements in *Regulation 3, Part D of the CCR* meet the requirements" for attaining the 2015 ozone NAAQS. *Id.* at 60436 (emphasis added). The notice thus made clear that the public could locate the relevant state regulations at Regulation 3, Part D of the publicly available CCR and allowed interested persons to participate in the rulemaking process.[3] *See* § 553(c).

[3] The public could participate despite the EPA's acknowledgment in the final rule that during the public-comment period, its website was out-of-date and did not reflect certain revisions to Colorado's permit program approved by the EPA in 2019. *See* 87 Fed. Reg. at 29233 n.2. According to the Center, the EPA's oversight is evidence of how difficult it was to locate the relevant state regulations. But it is

Insisting otherwise, the Center responds that the EPA's analysis oversimplifies the notice requirements. It asserts that SIPs are "living documents subject to frequent change," so it is difficult for the public to determine which state regulations constitute Colorado's permit program at a given time.[4] Rep. Br. 20. To be sure, SIPs "are revised frequently; and original or revised, they are long documents containing many different regulations." *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1034 (7th Cir. 1984). And we do not quarrel with the Center's assertion that the EPA could have provided the relevant state regulations without much difficulty. The EPA, after all, "had to review these provisions anyway, [so] it would impose a minimal additional burden . . . to include a copy of these provisions in the rulemaking docket to aid the public's review." Rep. Br. 26–27. But as explained, § 553(b) only requires the EPA to give general notice of a proposed rulemaking, and the EPA's notice here did just that. The EPA's notice also gave interested persons an opportunity to participate in the rulemaking process by identifying the relevant, publicly available state regulations. *See* § 553(c). As a result, we are satisfied that the EPA's notice was adequate under the APA and decline to remand for a new public-comment period.[5] *See Perez*, 575 U.S. at 102 ("Beyond the APA's minimum requirements, courts lack

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undisputed that the public had access to the relevant state regulations through many other publicly available means.

[4] The Center describes a "SIP gap," for instance, which occurs when a state revises its regulations that were part of its SIP before the EPA has had an opportunity to approve the revised SIP. Rep. Br. 22; *see also* 87 Fed. Reg. 42324, 42325 (July 15, 2022) (describing SIP gaps).

[5] Having concluded that the EPA's notice was adequate, we need not address the EPA's argument that Colorado's SIP revision also provided adequate notice.

authority 'to impose upon [an] agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good.'" (alteration in original) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 529 (1978))); *Hall v. EPA*, 273 F.3d 1146, 1162 (9th Cir. 2001) ("There is no rigid requirement that . . . the EPA publish the text of proposed SIP revisions.").

II. Emissions Exclusions

We now consider the Center's substantive challenges, which focus on the EPA's approval of Colorado's NNSR permit program and its emissions exclusions. Recall that under Colorado's permit program, "temporary emissions" and "emissions from internal combustion engines on any vehicle" are not considered in determining whether a new or modified stationary source is "major," meaning it emits or has the potential to emit air pollutants above preestablished thresholds and is therefore subject to the permit process. 5 Colo. Code Regs. § 1001-5:3D.II.A.23.f, 25.f (2021). In approving Colorado's SIP revision, the EPA determined that Colorado's permit program complies with the CAA and 40 C.F.R. § 51.165, the federal regulation that implements the CAA's NNSR permitting requirements. *See* 87 Fed. Reg. at 29235. The Center contends that the CAA and § 51.165 do not authorize Colorado to exclude all temporary emissions or emissions from internal combustion engines on any vehicle in determining whether a stationary source is major under its permit program. We address each challenged exclusion in turn, beginning with temporary emissions.

A. Temporary Emissions

In the final rule approving Colorado's SIP revision, the EPA noted that 40 C.F.R. § 51.165 excludes "secondary emissions" in determining a stationary source's "potential to emit." 87 Fed. Reg. at 29234. It also 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." *Id.* And based on those observations, the EPA determined that an NNSR permit program "concerns continuous operating emissions of a stationary source and not temporary emissions or emissions associated with construction." *Id.* It therefore concluded that Colorado's temporary-emissions exclusion "is allowable per the definition of secondary emissions and exclusion of secondary emissions under the definition of potential to emit." *Id.*

The Center asserts that the EPA's approval was contrary to law because nothing in § 51.165 says that temporary emissions may be excluded under Colorado's permit program. The EPA, for its part, does not contest that § 51.165 includes no reference to temporary emissions. Instead, the EPA argues that § 51.165 is ambiguous and asks us to defer to its interpretation, under which a stationary source's potential to emit includes "continuous operating emissions of a stationary source and not temporary emissions or emissions associated with construction." Aplee. Br. 36 (quoting 87 Fed. Reg. at 29234).

We may defer to the EPA's interpretation of § 51.165 only if "(1) the regulation is 'genuinely ambiguous,' (2) the [EPA's] interpretation is 'reasonable,' and (3) the 'character and context of the [EPA's] interpretation entitles it to controlling weight.'" *Walker v. BOKF, Nat'l Ass'n*, 30 F.4th 994, 1006 (10th Cir.) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–18 (2019)), *cert. denied*, 143 S. Ct. 354 (2022). In assessing whether § 51.165 is genuinely ambiguous, we must "use the traditional tools of construction." *Sierra Club v. EPA*, 964 F.3d 882, 891 (10th Cir. 2020). We begin with the plain language of § 51.165, and in particular, its definitions of "potential to emit" and "secondary emissions." *See Mitchell v. Comm'r*, 775 F.3d 1243, 1249 (10th Cir. 2015).

Section 51.165 defines "potential to emit" as "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design." § 51.165(a)(1)(iii). This definition plainly does not include any express exception for temporary emissions in determining a stationary source's potential to emit. Although § 51.165 does provide that "[s]econdary emissions do not count in determining the potential to emit of a stationary source," *id.*, the definition of "secondary emissions" also does not expressly except temporary emissions:

> Secondary emissions means emissions which would occur as a result 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. For the purpose of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions include emissions from any offsite support facility which would not be constructed or increase its emissions except as a result of the construction or operation of the

> major stationary source or major modification. Secondary emissions do not include any emissions which come directly from a mobile source, such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.

§ 51.165(a)(1)(viii).

Recognizing as much, the EPA attempts to locate genuine ambiguity in this very absence. Specifically, it contends that § 51.165 is genuinely ambiguous because the definitions of "potential to emit" and "secondary emissions" "do not expressly address whether other temporary emissions that are not from the physical and operational design of the stationary source are excluded from the potential-to[-]emit calculation." Aplee. Br. 37. But far from creating ambiguity, § 51.165's omission of the term "temporary emissions"—while at the same time expressly excluding secondary emissions and certain fugitive emissions from the potential-to-emit calculation—strongly implies that the EPA did *not* intend to exclude all temporary emissions in determining whether a new or modified stationary source is major.[6] *See United States v. Brown*, 529 F.3d 1260, 1265 (10th Cir. 2008) ("Under the doctrine of *expressio unius est exclusio alterius*, 'to express or include one thing implies the exclusion of the other.'" (quoting Black's Law Dictionary (8th ed. 2004))). The opposite interpretation that the EPA advances here is based on an unsupported

[6] "Fugitive emissions" are "those emissions which could not reasonably pass through a stack, chimney, vent[,] or other functionally equivalent opening." § 51.165(a)(1)(ix). The EPA did not rely on this exclusion in determining that the exclusion of all temporary emissions was proper, and we may uphold the EPA's action only "on the basis articulated by the agency itself." *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1060 (10th Cir. 2014) (quoting *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006)).

assumption that all temporary emissions should be excluded from the potential-to-emit calculation merely because § 51.165 fails to mention such emissions. But our task here is first and foremost to "examin[e] the plain language of the text." *Mitchell*, 775 F.3d at 1249. And when we do so, we see that § 51.165 unambiguously excludes from the potential-to-emit calculation only secondary emissions and certain fugitive emissions.

Section 51.165's definition of "secondary emissions," moreover, does not plainly encompass all temporary emissions. Indeed, § 51.165 tells us that secondary emissions result from "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." § 51.165(a)(1)(viii). It explains that "[s]econdary emissions include emissions from any offsite support facility which would not be constructed or increase its emissions except as a result of the construction or operation of the major stationary source or major modification." *Id.* Secondary emissions, moreover, "do not include any emissions which come directly from a mobile source, such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel." *Id.* And notably, under each portion of this definition, a dispositive characteristic in determining whether emissions are "secondary emissions" is the *source* of the emissions, not their *duration*. To be sure, some temporary emissions may be secondary emissions if, for instance, they result from the construction or operation of a major stationary source or modification that does not come from the major stationary source or modification

itself. But the converse is not necessarily true—that is, not *all* temporary emissions are secondary emissions.

In short, had the EPA originally intended to exclude all temporary emissions under § 51.165, it would have said so. Having found no genuine ambiguity on this point, we do not defer to the EPA's interpretation. *See Kisor*, 139 S. Ct. at 2415 ("If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law."). And because § 51.165 plainly does not authorize states to exclude under their NNSR permit programs all temporary emissions in determining whether a new or modified stationary source is major, we hold that the EPA acted contrary to law by allowing Colorado to do so under its NNSR permit program.[7] *See* 5 U.S.C. § 706(2)(A).

[7] The dissent agrees with us that, contrary to the EPA's argument, the federal regulations are unambiguous. Nevertheless, it conducts its own textual analysis (one not proffered by the EPA) to conclude that the EPA's approval was proper. In the dissent's view, Colorado's temporary-emissions exclusion meets the federal requirements because the "state and federal regulations fixate on the structural sources of emissions" and "operate under materially similar terms." Dissent 5. But the problem is that the state regulations do not fixate on the emissions' source at all—the regulations instead treat as dispositive their duration, excluding emissions so long as they are temporary. And although the dissent faults us for failing to "engage with" the definition of "temporary emissions," *id.*, we question the extent to which Colorado's regulations actually include one. At best, the regulations identify emissions from "construction" and "exploration" as examples of emissions that are "temporary." 5 Colo. Code Regs. § 1001-5:3D.II.A.25.f. From this, the dissent would conclude that "any other terms that fall under 'temporary emissions' must be associated with 'construction' and 'exploration,'" asserting in a conclusory fashion that such terms would therefore necessarily "fall under the broad umbrella of the 'operation' exclusion" in the federal regulations. Dissent 4–5. Yet given the temporal nature of "temporary emissions," the additional mention of two possible sources for

B. Emissions from Internal Combustion Engines on Any Vehicle

We next consider the Center's contention that the EPA acted contrary to law in authorizing Colorado to exclude emissions from internal combustion engines on any vehicle under its permit program. Recall that NNSR permit programs regulate "new or modified major stationary sources" of air pollution and that a "stationary source" is "generally any source of an air pollutant except," as relevant here, "those emissions resulting directly . . . from a nonroad engine." 42 U.S.C. §§ 7502(c)(5), 7602(z). Federal regulations implementing the CAA define "nonroad engine" to include "an internal combustion engine that . . . [b]y itself or in or on a piece of equipment . . . is portable or transportable." 40 C.F.R. § 1068.30.

In turn, Colorado's permit program provides that stationary-source emissions do not include "[t]hose emissions resulting directly from . . . a non[]road engine," which includes "an internal combustion engine . . . [t]hat, by itself or in or on a piece of equipment is portable or transportable." 5 Colo. Code Regs. § 1001-5:3A.I.B.31.a.(iii), 43 (2021). And Colorado's permit program specifically excludes

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such short-term emissions does not solve the problem with Colorado's regulation: Even though some temporary emissions excluded in Colorado will also meet the federal definition of "secondary emissions," that will not always be the case. Additionally, we question the dissent's view that there is a broad "operation exclusion" in the federal definition of "secondary emissions." To be sure, the definition excludes emissions that "occur as a result of the construction or *operation* of a major stationary source or modification," but the very next phrase clarifies that secondary emissions "do not come from the major stationary source or major modification itself." 40 C.F.R. § 51.165(a)(1)(viii) (emphasis added). And unlike the federal regulations, Colorado's regulations do not "carefully cabin" the temporary-emissions exclusion in this way. Dissent 3. That renders Colorado's temporary-emissions exclusion broader than the federal regulations allow.

emissions from "internal combustion engines on any vehicle." *Id.* § 1001-5:3D.II.A.23.f, 25.f. In approving this exclusion, the EPA concluded that Colorado's permit program tracked the federal definitions and determined that the exclusion was "appropriate" because emissions from a "[n]onroad engine" are generally "not considered . . . part of the operating emissions of a stationary source." 87 Fed. Reg. at 29234.

The Center argues that the EPA's approval was contrary to law because although the CAA generally does not regulate emissions from "nonroad engines," *see* 42 U.S.C. §§ 7502(c)(5), 7602(z), it does not provide for the exclusion of emissions from "internal combustion engines on any vehicle," which is the language used in the challenged exclusion, 5 Colo. Code Regs. § 1001-5:3D.II.A.23.f, 25.f. But the EPA persuasively responds that, despite Colorado's decision not to use the specific term "nonroad engine," the exclusion complies with the CAA and federal regulatory requirements. As the Center recognizes, NNSR permit programs generally do not regulate emissions from "nonroad engines." And both the CAA's implementing federal regulations and Colorado's permit program define "nonroad engine" to include an internal combustion engine that is portable or transportable on a piece of equipment. *See* 40 C.F.R. § 1068.30; 5 Colo. Code Regs. § 1001-5:3A.I.B.43 (2021). So when Colorado says that its permit program excludes "emissions from internal combustion engines on any vehicle," it is simply saying that its permit program excludes emissions from a subset of nonroad engines, as the CAA and its

implementing federal regulations allow.[8] Because we can discern from the EPA's explanation a reasonable basis to reject the Center's argument, we hold that the EPA did not act contrary to law by allowing Colorado to exclude emissions from internal combustion engines on any vehicle under its permit program. *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) ("We will . . . 'uphold a decision of less[-]than[-]ideal clarity if the agency's path may reasonably be discerned.'" (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974))).

Conclusion

Because the EPA's notice was adequate under the APA, we decline to remand this matter for a new public-comment period. But we vacate the EPA's final rule approving Colorado's SIP revision insofar as it allowed Colorado to exclude all temporary emissions under its NNSR permit program—§ 51.165 plainly does not authorize such an exclusion. We see, however, no similar problem with the exclusion

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[8] For the first time in its reply brief, the Center argues that this "'close enough' approach" fails to meet the federal regulatory requirements because "there are specific, large [federal] exceptions to what constitutes a nonroad engine, while the undefined term 'emissions from internal combustion engines on any vehicle' does not have exceptions." Rep. Br. 16–17. By using this undefined term, the Center contends, Colorado improperly excludes emissions from nonroad engines that fall within those federal exceptions. But because the Center did not raise this concern during the public-comment period and does so only in its reply brief, we decline to consider it. *See Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1151 n.11 (10th Cir. 2016) (noting that party generally waives argument by failing to raise it during public-comment period); *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006) (explaining that "failure to raise an issue in an opening brief waives that issue" (quoting *Anderson v. U.S. Dep't of Lab.*, 422 F.3d 1155, 1174 (10th Cir. 2005))).

of emissions from internal combustion engines on any vehicle based on the sole argument the Center properly presents here. We accordingly grant the Center's petition in part, deny it in part, and remand this matter to the EPA for further proceedings consistent with this opinion.

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TYMKOVICH, Circuit Judge, dissenting in part.

Because I conclude that Colorado's exclusion of temporary emissions is as stringent or more stringent than the "potential to emit" and "secondary emissions" definitions in the federal regulations, I dissent as to that part of the majority opinion. I join the rest of the opinion.

Given the technical nature of this analysis, I provide the relevant federal and Colorado provisions already discussed by the majority. Federal regulations require all state implementation plans to use the specific definitions provided in the permit-requirements regulation. 40 C.F.R. § 51.165(a)(1). If the plan's language deviates from the federal regulations, its definitions must be at least as stringent or more stringent than the federal definitions. *Id.*

The Clean Air Act and associated regulations supply the federal definitions. The Act mandates that nonattainment plans "require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title." 42 U.S.C. § 7502(c)(5). The federal regulations define major stationary source as "[a]ny stationary source of air pollutants that emits, or has the potential to emit . . ." 40 C.F.R. § 51.165(a)(1)(iv)(A)(1). "Potential to emit means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design," excluding "secondary emissions." *Id.* § 51.165(a)(1)(iii). Secondary emissions are "emissions which would occur as a result 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.* § 51.165(a)(1)(viii). "Construction means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in emissions." *Id.* § 51.165(a)(1)(xviii).

The Colorado regulations use different language. They provide that "emissions resulting from temporary activities, such as construction or exploration, shall be excluded in determining whether a source is a major stationary source." R., Vol. 2 at 1066 (5 CCR 1001-5, Part D, II.A.25.f). Colorado's definition of "construction" is essentially identical to the federal regulations: "[C]onstruction means any physical change or change in the method of operation (including, but not limited to, fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions." *Id.* at 0892 (5 CCR 1001-2, I.G).

I agree with the majority on the threshold question: the federal regulations are unambiguous. But from there, I diverge. As the majority correctly emphasizes, the federal regulations do not specifically include the term "temporary emissions." But the federal regulations allow for deviations from the specific definitions where "the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definition." § 51.165(a)(1). And here, instead of comparing the federal regulations with the Colorado regulations, the majority skips ahead and concludes that because the federal regulations do not include the requisite term, Colorado's regulations must fail. But my review of the regulations at issue reveals that Colorado's definition of

"temporary emissions" is as or more stringent than the federal definitions of "potential to emit" and "secondary emissions."

The relevant federal provisions do not directly regulate temporary emissions. As an overarching matter, the federal definitions of potential to emit and secondary emissions focus on the consistent, regular emissions resulting from a physical structure. Indeed, the federal definition of potential to emit is limited to the actual structure of the emitting source—the "maximum capacity of a stationary source to emit a pollutant *under its physical and operational design*." *Id.* § 51.165(a)(1)(iii) (emphasis added). Likewise, the federal regulations carefully cabin the secondary emissions definition to only include emissions not from the source or modification of the source itself. *Id.* § 51.165(a)(1)(viii).

The methodologies detailed by the federal regulations strengthen this reading. The net-emissions methodologies in the federal regulations, which affect whether a modification is considered major, reflect this emphasis on the operation of the source: "An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred *becomes operational* and begins to emit a particular pollutant." *Id.* § 51.165(a)(1)(vi)(F) (emphasis added). This suggests that these federal regulations do not target the transient—or temporary—emissions sometimes associated with a physical structure. Rather, the federal regulations focus on capturing the pollutants from the *physical and operational design* of the source's structure.

With this focus in mind, I turn to the challenged Colorado provision, comparing it with the relevant federal regulations. The federal definition of secondary emissions

encompasses temporary emissions. It excludes "emissions which would occur as a *result 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.* § 51.165(a)(1)(viii) (emphasis added). "Operation" is generally defined as "working, activity; a manner of working, the way in which a thing works" and "[t]he condition of functioning, or being operative or active." *Operation*, *Oxford English Dictionary* (3d ed. 2004). "Operation" in this context thus makes the federal secondary emissions definition quite broad.

The overlap in the language of the Colorado provision and federal regulations demonstrates that Colorado's use of temporary emissions falls within the bounds of the definitions in the federal regulations. Both the Colorado temporary emissions definition and the federal secondary emissions definition reference construction, and both state and federal law define construction similarly. True, Colorado includes "construction" and "exploration" in a nonexclusive list while the federal regulations integrate "construction" into the secondary emissions definition and do not reference "exploration." But any other terms that fall under "temporary emissions" must be associated with "construction" and "exploration." *See* Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 195 (2012) (Associated-Words Canon). "Exploration" in this context commonly means "[t]he searching and testing of a designated area for natural resources, in order to determine whether mining or extraction activities are commercially viable." *Exploration*, *Oxford English Dictionary* (3d ed. 2016). Colorado's use of "exploration" and any other terms that may be associated with "exploration" and "construction" fall

under the broad umbrella of the "operation" exclusion—the condition of functioning or manner of working. Drilling or digging for minerals does not conceive as a working or operational well or mine.[1]

The majority relies on *expressio unius est exclusio alterius* to support its conclusion that the federal regulations' omission of temporary emissions is evidence "that the EPA did *not* intend to exclude all temporary emissions in determining whether a new or modified stationary source is major." Maj. at 13. But in applying this canon, the majority does not engage with the temporary emissions term by providing its definition. The majority ignores the overlap in the use of construction. And it overlooks the federal regulations' use of operation. That leads to the conclusion that "not *all* temporary emissions are secondary emissions." *Id.* at 15. But as I explain above, this conclusion misses the essence of Colorado's regulatory scheme.

Both state and federal regulations fixate on the structural sources of emissions. And both state and federal regulations operate under materially similar terms. Because this renders Colorado's regulatory regime as or more restrictive as the federal alternative, I would defer to the EPA's approval.

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[1] Other regulatory provisions address emissions from these activities. Emissions from engines used in drilling and hydraulic fracturing are regulated as mobile sources under other provisions of the Clean Air Act. *See* 42 U.S.C. §§ 7521–7590. Well completion and flowback phases are regulated under the New Source Performance Standards for the oil and natural gas industry. 40 C.F.R. Pt. 60 Subpart OOOOa; 5 CCR § 1001-9. And an internal combustion engine on a drilling rig is a "nonroad engine" subject to regulation under Title II of the Act. *See* 43 U.S.C. § 7550(10); 40 C.F.R. § 1068.30.

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RE: 22-9546, Center for Biological Diversity v. EPA, et al
Dist/Ag docket: EPA-R08-OAR-2020-0644

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: John Bernetich
Jennifer L Biever
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CMW/jm