Opinion No. 87-11

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OPINION OF: HAL STRATTON, Attorney General

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TO: Senator Caleb Chandler, 1919 Miller, Clovis, New Mexico 88101

QUESTIONS

1. Is New Mexico's Air Quality Control Act more stringent than the federal Clean Air Act?

CONCLUSIONS

Generally no, but in those areas of air pollution prevention not preempted by the Clean Air Act and not precluded by the limiting provisions in the Air Quality Control Act, New Mexico has established: 1) standards more stringent than federal standards; and 2) standards for which there is no federal equivalent.

ANALYSIS

The Clean Air Act, 42 U.S.C. §§ 7401 through 7626, has been interpreted to permit states to adopt and enforce more stringent standards and regulations than those required by it. See e.g., Union Elect. Co. v. E.P.A., 427 U.S. 246 (1976). The New Mexico Air Quality Control Act, §§ 74-2-1 through 74-2-17 NMSA (1986 Repl.) ("AQCA"), however, provides that in several areas New Mexico regulations "shall be no more stringent than but at least as stringent as" the federal requirements. §§ 74-2-5(B) and 74-2-7(A) NMSA (1986 Repl.). These areas include regulations that:

(1) protect visibility in mandatory Class I areas; (2) prevent significant deterioration of air quality; (3) achieve national ambient air quality standards in nonattainment areas; (4) prescribe standards of performance for emission sources; (5) prescribe emissions standards for hazardous air pollutants; and

(6) concern permits for the construction or modification of any air emission source. In addition, any New Mexico regulations relating to the control of motor vehicle emissions must be "consistent with federal law." § 74-2-5(B)(1) NMSA (1986 Repl.).

The Clean Air Act provides that states and their political subdivisions have the right to adopt and enforce air pollution prevention limitations and requirements. 42 U.S.C. § 7416. These rights are limited only to the extent that the Clear Air Act and its regulations preempt state regulation. See e.g., Washington v. General Motors Corp., 406 U.S. 109, 115 (1972); People of State of Cal., etc. v. Dept. of Navy, 431 F. Supp. 1271, 1275 (N.D. Cal. 1977). Therefore, in those areas not preempted by the Clean Air Act and not

specifically precluded in the AQCA, New Mexico both can promulgate standards and regulations that are more stringent than the federal standards and regulations and can promulgate standards and regulations for which there is no equivalent federal standard or regulation. For example, New Mexico's ozone standard is more stringent than the federal ozone standard and New Mexico has standards for hydrogen sulfide, heavy metals, and total hydrocarbons for which no federal standards exists.

QUESTIONS

2. Can New Mexico's enforcement of air pollution prevention laws be stricter than the EPA's enforcement of those laws?

CONCLUSIONS

See Analysis.

ANALYSIS

Although it is primarily New Mexico's responsibility to enforce the Clean Air Act, its regulations, and the AQCA's incorporation of those federal requirements, the EPA is permitted and generally required to enforce the federal requirements if New Mexico fails to enforce these laws and regulations. See e.g., Union Elect. Co. v. E.P.A., supra; Baughman v. Bradford Coal Co., Inc., 592 F.2d 215 (5th Cir. 1979); Plan for Arcadia, Inc. v. Anita Associates, 379 F. Supp. 311, aff'd, 501 F.2d 390 (9th Cir. 1974); 42 U.S.C. §§ 7411(c), 7413, 7477. As to this general obligation to enforce federal law, the EPA has greater powers than does New Mexico. Under the Clean Air Act, the EPA can seek penalties of up to $50,000. 42 U.S.C. §§ 7413(b) and (c), 7603. New Mexico is limited, under the AQCA, to seeking fines of no more than $1,000 per violation. § 74-2-12(E) NMSA (1986 Repl.). The Clean Air Act permits imprisonment for up to two years for violations of its requirements or the EPA's orders. 42 U.S.C. § 7413(c); see United States v. Adamo Wrecking Co., 545 F.2d 1 (6th Cir. 1976). The AQCA does not provide for prison terms. § 74-2-14 NMSA (1986 Repl.). The Clean Air Act permits the EPA to issue administrative orders, including emergency orders, to require compliance with the federal requirements. 42 U.S.C. §§ 7413 (a) and (d), 7603. The AQCA only provides for the issuance of administrative orders for compliance in emergencies. § 74-2-10 NMSA (1986 Repl.). Finally, the Clean Air Act does not require the EPA to seek voluntary compliance before filing suit; the AQCA does require the State to seek compliance before initiating a legal action. See State ex rel. N.M. Wat., etc. v. Molybdenum Corp. of Amer., 89 N.M. 552, 555 P.2d 375, 377 (Ct. App. 1976); § 74-2-12(A) NMSA (1986 Repl.).

The EPA cannot enforce any New Mexico air pollution standards or regulations that are more stringent than or in addition to the federal standards or regulations, unless those standards or regulations are contained in New Mexico's State Implementation Plan ("SIP") and approved by the EPA. A state's SIP, a plan for the implementation, maintenance, and enforcement of federal embient air quality standards, must be

submitted to and approved by the EPA. 42 U.S.C. § 7410. Absent inclusion in the SIP and approval by the EPA, enforcement of New Mexico regulations and standards more stringent than or in addition to the federal standards and regulations is New Mexico's responsibility.

QUESTIONS

3. Which New Mexico agency is responsible for enforcing the AQCA?

CONCLUSIONS

The Environmental Improvement Board ("EIB") has state-wide responsibility; the Albuquerque-Bernalillo County Air Quality Control Board has this responsibility in the Albuquerque-Bernalillo County Area.

ANALYSIS

The EIB is the New Mexico "state air pollution control agency" with the responsibility for enforcing the AQCA. §§ 74-2-3(A) and 74-2-5(B)(3) NMSA (1986 Repl.); see Kennecott Copper Corp. v. N.M. EIB, 94 N.M. 610, 614 P.2d 22 (Ct. App. 1980). The AQCA provides that any Class A county, or municipality within a Class A county, may provide by ordinance for the local administration and enforcement of the AQCA. § 74-2-4(A) NMSA (1986 Repl.). Bernalillo County is the only county within New Mexico that qualifies as a Class A county. See Chapman v. Luna, 101 N.M. 59, 678 P.2d 687 (1984). By ordinance, the Albuquerque-Bernalillo County Air Quality Control Board ("A-B C Board") was established to per- form the functions of the EIB and to enforce the AQCA within the Albuquerque-Bernalillo County area. See 1982 Op. Att'y Gen. No. 82-7. The standards and regulations of the A-B C Board cannot be less stringent than those of the EIB. § 72-2-4(A) NMSA 1986 Repl.). The EIB still retains jurisdiction and control for administration and enforcement of the AQCA within the Albuquerque-Bernalillo County area if "any act or failure to act" of the A-B C Board causes or contributes to air pollution. § 74-2-4(B) NMSA (1986 Repl.).

QUESTIONS

4. May the EIB, the A-B C Board, or local governments require the use of oxygenated fuels in New Mexico?

CONCLUSIONS

Yes; see analysis.

ANALYSIS

The Clean Air Act permits New Mexico to regulate in the area of fuel additives, for its provides that "a state may prescribe and enforce, for purposes of motor vehicle

emission control, a control or prohibition respecting the use of a fuel or fuel additive..." 42 U.S.C. § 7545(c)(4)(C). Oxygenated fuels consist of fuel combined with certain additives, such as MTBE or ethanol, that result in lower carbon monoxide emissions from vehicles. If the EPA has regulated a specific fuel additive such as lead, however, New Mexico is not permitted to regulate that additive. See 1985 Amendments to Clean Air Act, P.L. 99-198, 42 U.S.C. § 7545. See also Natural Resources Defense Council, Inc. v. Train, 545 F.2d 320 (2nd Cir. 1976); Exxon Corp. v. City of New York, 356 F. Supp. 660, remanded on other grounds, 480 F.2d 460 (2nd Cir. 1973); Allway Taxi, Inc. v. City of New York, 340 F. Supp. 1120, aff'd, 468 F.2d 624 (2nd Cir. 1972).

The AQCA provides that any EIB regulation relating to the control of motor vehicle emissions "shall be consistent with federal law, if any, ..." § 74-2-5(B)(1) NMSA (1986 Repl.). This provision of the AQCA does not bar New Mexico from requiring the use of certain oxygenated fuels. The Clean Air Act permits New Mexico to regulate oxygenated fuels absent EPA regulation, and this provision apparently relates to motor vehicle engine specifications or engine devices for controlling emissions. See 42 U.S.C. § 7521.

New Mexico's SIP must contain, however, the "control or prohibition" concerning fuel additives. 42 U.S.C. § 7545(c)(4)(C). Because carbon monoxide is an air pollutant for which the EPA has established a national ambient air quality standard, any regulation concerning it must be included in the SIP. In addition, the EPA only may approve the provisions in a SIP regarding fuel additives if the EPA finds that those provisions are necessary to achieve the federal standard for carbon monoxide. 42 U.S.C. § 7545(c)(4)(C). A SIP can be revised, as New Mexico's would have to be, if New Mexico requires the use of oxygenated fuels. 42 U.S.C. § 7410(a).

In sum, the EIB by regulation could require the use of oxygenated fuels if New Mexico's SIP, approved by the EPA, included such a "control or prohibition". The A-B C Board by regulation could require the use of oxygenated fuels in its area, if New Mexico's SIP, approved by the EPA, incorporated the requirements. The EIB only could require the use of oxygenated fuels in the Albuquerque-Bernalillo County area if the A-B C Board failed to require such use and the EIB found that this failure caused or contributed to air pollution. § 74-2-4(B) NMSA (1986 Repl.).

The Albuquerque-Bernalillo County area is the only area in New Mexico that is in violation of the federal carbon monoxide standard. Therefore, it is the only area in New Mexico for which the EPA probably would approve any "control or prohibition" concerning the use of oxygenated fuels, because it is the only area the EPA could find that an oxygenated fuels requirement was necessary to achieve the federal standard for carbon monoxide. 42 U.S.C. § 7545(c)(4)(C). If other New Mexico municipalities or counties required the use of oxygenated fuels, and if these requirements were included in New Mexico's SIP, the EPA probably would not approve them, because EPA could not find that such a requirement was necessary to achieve the federal standard for carbon monoxide in those municipalities or counties. 42 U.S.C. § 7545(c)(4)(C).

QUESTIONS

5. May the EIB or the A-B C Board require the use of oxygenated fuels without violating the constitutional prohibition against interference with interstate commerce?

CONCLUSIONS

Yes.

ANALYSIS

As a general rule, the Commerce Clause of the United States Constitution, U.S. Const. art. 1, sec. 8, cl. 3, prevents states from erecting barriers to the free flow of interstate commerce. See Cooley v. Board of Wardens, 53 U.S. 299 (1851). On the other hand, states can pass legislation or regulations that serve legitimate state interests even though the legislation or regulations may have an impact upon interstate commerce. See Hood v. Du Mond, 336 U.S. 525 (1949). No absolute rule has been established to determine when a state may regulate in its own interest. Rather, a balancing test is followed: Where the [state] regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits...If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

No state has regulations requiring the use of oxygenated fuel, although Colorado currently is considering such regulation. Analogous regulations or laws, however, have been upheld as not being violative of the Commerce Clause. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (regulations concerning retail marketing of gasoline upheld); Exxon Corp. v. City of New York, supra (city regulations prescribing maximum lead content in gasoline upheld); see also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (statute prohibiting sale of milk in nonreturnable, nonrefillable containers upheld because local purpose of promotion of conservation outweighed any effects on interstate commerce); South Terminal Corp. v. EPA, 504 F.2d 646 (5th Cir. 1974) (Congress has power to delegate authority to regulate local transportation activities for the purpose of reducing vehicle emissions.). Thus, whether the EIB or the A-B C Board can require the use of oxygenated fuels depends upon: (1) whether there is a legitimate local interest in such a requirement; and (2) whether the requirement would impose a burden on interstate commerce that is "clearly excessive" in relation to the local benefit.

At least three legitimate New Mexico interests come to mind: the need to come into compliance with the federal standard on carbon monoxide; the need to avoid federal sanctions for failure to come into compliance; and the need to pre- serve and improve the air quality in the Albuquerque-Bernalillo County area. Without benefit of reviewing

any specific regulations, and without an analysis of the regulations' economic and practical effects, however, it is difficult for our Office to state definitively at this time their validity with reference to any burden on interstate commerce. By declining to state an opinion on this issue at this time, however, we do not at all imply that New Mexico's requirement of the use of oxygenated fuels unduly would burden interstate commerce.

ATTORNEY GENERAL

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