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Bahr v. Regan—Ninth Circuit rejects Clean Air Act challenge to EPA determination that Arizona had achieved required reduction in ozone concentration

The Environmental Protection Agency classified the Phoenix-Mesa, Arizona area in 2015 as a marginal nonattainment area under the CAA. The agency specified a 2015 attainment date, but the State failed to meet that requirement with respect to the applicable ozone standard. EPA therefore reclassified the area to the status of moderate nonattainment and imposed a revised attainment date for July 2018. As a result of a July 2015 eastern California forest fire (the Lake Fire), the Arizona Department of Environmental Quality notified EPA in 2016 that it would seek to exclude June 20, 2015 CAA exceedances pursuant to the agency's Exceptional Events Rule. The Rule implements CAA § 7619(b) that directs EPA to "exclude any data of a concentration of a pollutant above the [National Ambient Air Quality Standard] ('exceedances') if the air quality was influenced by 'exceptional events.'" ADEQ submitted its initial request under a 2007 version of the Rule and then supplemental supporting demonstrations after the Rule was revised in 2016. The 2016 Rule is somewhat less restrictive than the 2007 Rule. Applying the revised Rule, EPA accepted ADEQ's request and proposed in June 2019 to issue a determination under CAA § 7511(b)(2) that the Phoenix attainment area had satisfied the ozone NAAQS by the July 2018 deadline once the Fire Lake-related exceedances were omitted from consideration. The determination additionally proposed suspending the ozone attainment contingency measures then included pursuant to CAA § 7502(c)(9) in the state implementation plan.

Two of the petitioners submitted comments opposing the proposed determination, and after responding to all comments EPA issued a final determination. Determination of Attainment by the Attainment Date for the 2008 Ozone National Ambient Air Quality Standards; Phoenix-Mesa, Arizona, 84 Fed. Reg. 60,920 (Nov. 12, 2019). These petitioners and others sought judicial review in the Ninth Circuit on three issues: (1) "EPA violated the presumption against retroactivity when it applied the 2016 version of the Exceptional Events Rule because the 2007 rule had been in effect when the 2015 Lake Fire and exceedances occurred"; (2) "Arizona's evidence does not support EPA's finding that a clear causal connection existed between the Lake Fire and the June 20, 2015 exceedances"; and (3) "EPA acted contrary to the Clean Air Act in suspending Arizona's contingency measures requirement in EPA's July 2018 final rule." The court of appeals unanimously rejected the first and third arguments on exhaustion grounds and, in an opinion joined in by two panel members, alternatively on the merits. All panel members joined in the opinion insofar as it rejected the second argument on the merits. *Bahr v. Regan*, No. 20-70092, 2021 WL 3179429 (9th Cir. Jul. 28, 2021).

The absence of exhaustion of administrative remedies as to the first and third issues derived from petitioners' failure to raise them, as explained with respect to the first issue, "with sufficient clarity

to allow EPA to understand and rule upon it." The third panel member would have ended discussion of these issues at that point. The panel majority nonetheless chose to address the merits as well.

As to the retroactivity claim, the majority followed the path marked out in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). There, "'[t]he Supreme Court articulated a two-step approach for evaluating when the normal presumption against retroactivity should not apply. Our "first task" under *Landgraf* is to "determine whether Congress has expressly prescribed"' that a regulation is to be applied retroactively." The majority had no difficulty with this step since "neither party contends EPA possesses express retroactivity authority as to the elements which compose an exceptional event." The second step required determining "'whether application of the regulation would have a retroactive effect.'" On this point, the majority explained that "'[a] [regulation] has retroactive effect when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past."'" That did not occur here:

> [W]e must determine whether the timing of the exceedances vested Petitioners with some right under the Clean Air Act which was impaired by EPA's decision to apply the 2016 Exceptional Events Rule instead of the 2007 rule. Petitioners—"Phoenix residents who are adversely affected by unhealthy levels of ozone"—claim they have a "right ... to have requests to excuse exceedances as 'exceptional events' evaluated under the requirements that existed at the time of the exceedances themselves." Petitioners cite no statutory, regulatory, or case authority for such claim and neither could we find any. Rather, if Petitioners—who are not directly regulated by the Clean Air Act or the Exceptional Events Rule—have any rights implicated by the retroactivity concern identified here (putting aside whether they are vested or not), the Clean Air Act might grant them a right in the eventual attainment of healthy levels of ozone concentration in the Phoenix region's ambient air. ... To that end, Petitioners' interest here would not be in the application of any particular rule on any particular date, but in EPA's accurate and faithful enforcement—according to its best scientific judgment—of the commands of the Clean Air Act.

The majority found that this interest in CAA compliance was unaffected "by a refined implementation of statutory requirements or by a matured scientific understanding as to which factors most accurately demonstrate the existence of an exceptional event"—something that had taken place by virtue of the fact that EPA's "best scientific judgment had evolved" as to the methods for determining the existence of an exceptional event by 2016 when the agency addressed the effect of the Lake Fire on Phoenix attainment area exceedances.

As to the third issue, the majority acknowledged that "whether the Clean Air Act requires State Implementation Plans to contain attainment contingency measures even after EPA determines a nonattainment area has attained the NAAQS by the applicable attainment date ... appears to be an issue of first impression." Because the 2019 attainment determination served the same function as an agency rule, it therefore applied *Chevron* standards to resolve whether deference should be paid to EPA's interpretation of CAA § 7502(c)(9). That subsection provides:

> Such [SIP] shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part. Such

> measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

With respect to *Chevron* step one—"whether a gap or ambiguity exists, or 'whether Congress has directly spoken to the precise question at issue'"—the majority observed that the determination in dispute involved an attainment area reclassification—i.e., from "marginal" to "moderate"—under CAA § 7511(b)(2) and that "the statute does not state whether the requirement for a SIP to contain attainment contingency measures—expressly conditioned on a past event (the failure to obtain a positive attainment determination)—should still apply." It reasoned that, "[l]ogically, the attainment contingency measures provision of the Clean Air Act must concern only State Implementation Plans approved prior to a nonattainment area's attainment date. It would not make sense to make these measures contingent upon an already resolved condition that excuses their implementation: attainment of NAAQS." In so construing § 7502(c)(9), the majority looked to decisions from the Tenth and D.C. Circuits that "have found a statutory gap exists as to whether EPA may excuse certain SIP requirements for nonattainment areas that actually attain the NAAQS but are not yet redesignated as 'in attainment.'" *Sierra Club v. EPA*, 99 F.3d 1551 (10th Cir. 1996); *NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009). It "recognize[d] that those courts were analyzing the [reasonable further progress] contingency measure requirement [under CAA § 7502(c)(2)], but the premise applies equally to the attainment contingency measures requirement after the EPA determines a nonattainment area has attained the NAAQS by the attainment date, as was done here as to July 2018." As to *Chevron* step two—whether EPA's construction of § 7502(c)(9) was a permissible one—the majority derived from the definition of "contingency" in Black's Law Dictionary the proposition that "[a] contingency measure's sole purpose is to be implemented in the event the defined condition occurs." Thus, "EPA's interpretation that such measures may be waived or suspended if the only contingency upon which such measures are triggered cannot possibly occur does no violence to the statute or to EPA's ability to enforce the Clean Air Act's NAAQS program." The majority was not dissuaded from this conclusion by the petitioners' contention that the Phoenix area "has ... supposedly lapsed back into nonattainment" but "with no contingency measures to ensure future attainment of the NAAQS." It responded, in part, that "[u]ntil the Phoenix nonattainment area is officially redesignated as in attainment, other SIP requirements remain in effect, including, as EPA points out in its brief, 'requirements for emissions inventories, modeled demonstration of attainment, reasonably available control measures, reasonable further progress, motor vehicle emissions budgets, vehicle inspection and maintenance programs, new source review rules, and offsets.'" Given these requirements, "EPA's interpretation does not operate as a way for states to avoid their ultimate responsibility under the Clean Air Act to obtain a lasting attainment of the NAAQS."

The remaining issue—"Whether EPA's Conclusion That There Was a Clear Causal Relationship Between the Lake Fire and the June 20 exceedances Was Arbitrary or Capricious"—was resolved under the settled Administrative Procedure Act standard that "a rational connection [existed] between the facts found and EPA's conclusion as to each of these three requirements under the Wildfire Ozone Guidance." Those requirements were (1) the Lake Fire emissions were transported to the ADEQ Phoenix-area exceedance monitors; (2) the emissions affected the monitors; and (3) the emissions caused the ozone exceedances.

Decision Link: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/07/28/20-70092.pdf