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Association of Irritated Residents v. USEPA—Ninth Circuit invalidates contingency measure in updated CAA state implementation plan for San Joaquin Valley

In 2012, the Environmental Protection Agency classified the San Joaquin Valley as an extreme nonattainment area for the 8-hour ozone standard under the CAA. The San Joaquin Valley Air Pollution Control District and the California Air Resources Board proposed updates to the state implementation plan in 2018 that added a new contingency measure—i.e., a measure "'to be undertaken if the area fails to make reasonable further progress' or fails to attain the relevant air quality standard"—under which a rule authorizing the sale of small paint containers would be repealed.

The EPA approved the updated SIP. 8-Hour Ozone Nonattainment Area Requirements; San Joaquin Valley, California, 84 Fed. Reg. 11,198 (Mar. 25, 2019). "The agency acknowledged that it had previously 'recommended in guidance that contingency measures should provide emissions reductions approximately equivalent to one year's worth of [reasonable further progress], which, with respect to ozone in the ... Valley,' amounted to about 11.4 tons per day" and that the paint-container rule repeal would reduce ozone emissions by only one ton per day. The EPA nevertheless explained "that it now 'do[es] not believe that the contingency measures themselves must provide for one year's worth of [reasonable further progress].'" *Ass'n of Irritated Residents v. USEPA*, No. 19-71223, 2021 WL 3779747, at *3 (9th Cir. Aug. 26, 2021). Instead, "[u]nder its new approach, the agency permitted the State to count 'additional emission reductions projected to occur that a state has not relied upon for purposes of [reasonable further progress] or attainment ... and that result from measures the state has not adopted as contingency measures.'" *Id.* Standing in the background of California's proposed contingency measure and the EPA's approval was *Bahr v. EPA*, 836 F.3d 1218 (9th Cir. 2016), which, as the latter explained, "concluded that contingency measures must be measures that would take effect at the time the area fails to make [reasonable further progress] or to attain by the applicable attainment date, not before. Thus, within the geographic jurisdiction of the Ninth Circuit, states cannot rely on already-implemented control measures to comply with the contingency measure requirements under CAA sections 172(c)(9) and 182(c)(9) [42 U.S.C. §§ 7502(c)(9) and 7511a(c)(9)]." 84 Fed. Reg. at 11,199 (footnote omitted). The EPA also conditionally approved an Enhanced Enforcement Activities Program proposed by CARB as part of the SIP update, stating that "[t]hough we are not approving the [EEAP] as submitted to fulfill the requirements of CAA 172(c)(9) and 182(c)(9), we consider the program to have merit in achieving additional emissions reductions in the San Joaquin Valley nonattainment area in the event that the area fails to meet an RFP milestone or to attain the 2008 ozone NAAQS by the attainment date." *Id.* at 11,200.

The petitioner, a nonprofit corporation with members residing in the San Joaquin Valley, sought judicial review alleging violation of the CAA. The Ninth Circuit granted the petition insofar as it challenged the contingency measure's adequacy but denied it with respect to the EEAP challenge. *Ass'n of Irritated Residents v. USEPA*, *supra*.

The panel began by rejecting a claim by one respondent and an intervenor that the petitioner lacked Article III standing or that prudential ripeness was absent. The former argued that, while the AIR members' declarations "contain[ed] credible allegations of respiratory distress as well as harm to their recreational and aesthetic interests as a result of ozone pollution in the Valley[,] ... those injuries are not caused by the EPA's approval of the contingency measure in the State's plan, and, correspondingly, that setting aside the plan's approval would not redress the injuries." Not so held the panel:

> The Valley has long been "an area with some of the worst air quality in the United States," and it has repeatedly failed to meet air quality standards. ... In 2001, the EPA found that the Valley did not attain the 1-hour ozone standard that was then in effect and reclassified the Valley as a severe nonattainment area for the 1-hour ozone standard. ... Since 2004, the Valley has been designated as a nonattainment area for the 8-hour ozone standard. ... And in 2012, the Valley was reclassified as an extreme nonattainment area for the 8-hour ozone standard. ... The threat that the Valley will continue to fail to meet the ozone standard—and therefore that the contingency measure will be activated—is neither conjectural nor hypothetical, but a reasonable inference from the historical record.

As to the lack-of-ripeness claim, the panel responded that "[t]he issue here is fit for review because it is a purely legal question presented in the concrete setting of the EPA's approval of the specific plan adopted by the State" and that "delaying review would cause hardship to AIR because it would mean that the allegedly inadequate contingency measure could not be reviewed until it was already implemented, when any review would be too late to redress the injuries suffered by AIR's members."

Turning to the contingency-measure challenge, the panel began by observing that "[a]ll parties agree that we must review the EPA's interpretation of the Clean Air Act using the deferential framework of *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)" and that *Chevron*'s first step was satisfied because Congress had not directly addressed the precise question at hand. But, as to the second step—whether the EPA's interpretation of the CAA provisions was permissible—the panel chose to follow D.C. Circuit precedent for the proposition that "there is considerable overlap between a challenge at *Chevron* step two and an argument that an agency's action is arbitrary and capricious." It thus determined that "AIR's challenge is most appropriately evaluated under the arbitrary-and-capricious framework, and we agree with AIR that even assuming that the EPA's interpretation of the statute is permissible, its action cannot survive review." That was so because when an agency changes policy, "it 'must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy."'" The EPA did not do this in light of *Bahr*'s reasoning:

> The EPA described its new position as a response to our decision in *Bahr*, but it cannot be reconciled with our reasoning in that case. Under *Bahr*, contingency measures may not be measures that the State is already implementing in its plan. ... Our decision was based on the plain language of the statute, which reflects the

> commonsense idea that if currently existing measures are not successful in ensuring progress, then it is unreasonable to rely upon them as contingency measures. ... But here, the agency has relied on "surplus" emissions reductions from existing measures to make up for what everyone agrees would otherwise be an inadequate contingency measure. That approach is a transparent effort to circumvent *Bahr*. Having been told that it could not rely on projected emissions reductions from existing measures as contingency measures, the agency has simply relabeled them "surplus reductions." In doing so, it has severed the relationship between the requirement of contingency measures and the benchmark of reasonable further progress, without an adequate explanation of why the new—and far more modest—contingency measure is reasonable.

Simply put, "[i]f already-implemented measures cannot themselves be contingency measures—and *Bahr* makes clear that they cannot—then neither can they be a basis for declining to establish contingency measures that would otherwise be appropriate."

The panel viewed the EEAP challenge to raise only the question "whether such a measure is permissible under the Act." Given that the EPA did not approve the program as "'a standalone contingency measure'" and that "the program does not create any emission limitation that is less stringent than one in effect in the state plan," the panel found that "nothing in the statute prohibits the State from pursuing it." Portions of the EEAP, however, were incorporated into the SIP as updated and accordingly must be enforceable under the CAA. *See* 42 U.S.C. § 7410(a)(2). On this point, the panel agreed with the EPA that the EEAP, to the extent incorporated into the SIP, was enforceable, since it set forth a mandatory process for determining the type and quantity of additional resources to be applied in the event of nonattainment, whose end-result could "be challenged either by the EPA or by citizens" under the CAA.

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/26/19-71223.pdf