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Ninth Circuit orders EPA to require real backup plan for air quality shortcomings

A three-judge panel concluded the Clean Air Act requires emissions-reducing backup plans that are separate and distinct from measures previously put in place.

[NICHOLAS IOVINO](#) / August 26, 2021



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SAN FRANCISCO (CN) — The U.S. Environmental Protection Agency must require states to have meaningful contingency plans in place for when efforts to reduce air pollution to safe levels fail, a Ninth Circuit panel ruled Thursday.

The three-judge panel found the EPA improperly approved a deficient contingency plan proposed by the state of California to reduce emissions in the San Joaquin Valley, one of the most air-polluted areas in the United States.

“The Clean Air Act requires a meaningful backup plan when air pollution control strategies fail, and the court recognized that the San Joaquin Valley has a history of failure, and that EPA’s approval relied on measures that aren’t a real backup plan to deliver reductions if and when the valley fails to attain this important health-based standard,” attorney Brent Newell said in a phone interview Thursday.

Newell represents the Association of Irrigated Residents (AIR), a California nonprofit that challenged the EPA’s 2018 approval of an emissions-reducing contingency plan for the San Joaquin Valley. The state proposed repealing a rule that legalized selling small containers of paint. The EPA estimated the paint restriction would reduce emissions by one ton per day, far less than the 11.4 tons per day that would be required if other emissions-reducing measures fail to curtail smog in the valley.

The EPA insisted that surplus pollution reductions from existing emissions-curbing efforts would make up the difference, but the Ninth Circuit refused to accept that argument.

The panel reasoned that if a contingency plan is triggered by a failure to improve air quality, the existing measures that were expected to bring “surplus reductions” would have already failed.

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In its 2016 ruling in *Bahr v. EPA*, the Ninth Circuit held that the EPA may not approve contingency measures that were already put in place under a previously adopted plan.

In an [18-page opinion](#) issued Thursday, the panel accused the EPA of trying to sidestep its prior decision by relabeling the valley’s existing pollution-reduction efforts as “surplus reductions.”

“The agency may not avoid the need for robust contingency measures by assuming that they will not be needed,” U.S. Circuit Judge Eric Miller, a Donald Trump appointee, wrote for the panel.

Newell said the opinion issued Thursday further extends the Ninth Circuit’s holding in *Bahr* that states may not cite previously implemented pollution-reduction measures as part of their contingency plans.

“The Clean Air Act requires a meaningful plan B when the primary strategy fails, and EPA failed to hold the state accountable to that standard,” Newell said.

He added that California has already tried to use the same strategy of relying on existing efforts as a contingency measures in other air quality improvement proposals submitted to the EPA.

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The Ninth Circuit ruled in favor of the EPA on another legal question: whether the agency could approve the state's plan to step up enforcement of air polluters as a "strengthening" measure for improving air quality. AIR argued the enhanced enforcement plan should have been rejected because the state could not be held accountable if it failed to meet emissions-reducing targets as part of that plan.

The Ninth Circuit disagreed, finding the state would be required to issue a report within 60 days of failing to meet pollution-reduction targets. Such a report would have to determine the probable causes of failure, a proposal for additional measures and an explanation of why those additional efforts will be effective.

"If the report is not drafted, or if the chosen program is not implemented, those failings may be challenged either by the EPA or by citizens," Miller wrote. "The program is therefore consistent with the statutory requirement that measures included in the plan be enforceable."

Newell characterized that aspect of the ruling as less important because the EPA previously agreed with AIR's position that enhanced enforcement could not be considered a contingency measure. The EPA instead approved the proposal as a "strengthening" measure.

"We've already succeeded in keeping better enforcement out as a contingency measure," Newell said.

U.S. Circuit Judge Mark Bennett, also a Trump appointee, and U.S. District Judge Benita Pearson, a Barack Obama appointee sitting on the panel by designation from the Northern District of Ohio, joined Miller on the panel.

The EPA did not immediately return an email requesting comment Thursday.

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