

EPA's finding that wildfires did not preclude NAAQS attainment is upheld

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On July 28, 2021, the Ninth Circuit Court of Appeals denied a petition for review brought by environmental non-governmental organizations (ENGOs) challenging EPA's conclusion that the Phoenix-Mesa, Arizona metropolitan area, which had been designated nonattainment for a National Ambient Air Quality Standard (NAAQS) for ozone, had met that standard by the applicable deadline.¹

Failure to have met the standard would have had implications in terms of additional controls in the area. At the crux of the disagreement was EPA's decision that Arizona could exclude from consideration six monitored values that exceeded the ozone NAAQS level of 75 parts per billion (ppb), all of which occurred on June 20, 2015.

The court concluded that EPA's decision was reasonable and was not arbitrary or capricious. EPA found that a California wildfire had clearly been the cause of the exceedances and that they should not be used to determine whether the area had attained the NAAQS.

The court recognized that the Clean Air Act (CAA or Act) allows exclusion of air quality measurements clearly caused by an exceptional event such as a wildfire and deferred to EPA's technical conclusions that the evidence submitted by the state demonstrated that this was the case for the measurements at issue. Further, the court agreed that EPA's suspension of the requirement for attainment contingency measures for the Phoenix-Mesa area relied on a reasonable interpretation of the CAA.

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The treatment of exceptional events has garnered significant attention in the past several years, with increased wildfire activity that generates pollutants like NO_x and particulate matter, which often are transported to neighboring states.

The exceptional events policy is grounded in the statute, however, and has existed for many years. Section 319(b) of the Act, 42 U.S.C. § 7619(b), requires EPA to exclude air quality monitoring data that have "a clear causal relationship" with an exceptional event from use in making determinations concerning exceedances or violations of NAAQS.

EPA first adopted regulations for exceptional events in 2007 and "replaced" those regulations in 2016.² Under EPA's 2016 regulations, when a wildfire fire is shown to have "a clear causal relationship" with a monitored concentration above a NAAQS, that monitoring value will not be considered in determining if the NAAQS has been violated.³

The court found "EPA articulated a rational connection between the evidence and its own conclusions" and "did not act arbitrarily or capriciously in finding a clear causal connection."

The ENGOs first argued that EPA erred in applying the 2016 regulations and should have applied the 2007 version in evaluating the state's claim that the exceedances were due to an exceptional event. The court disagreed, finding that the Petitioners had not established that applying the 2016 rule "impaired any vested rights, created any new obligations, or otherwise impacted any interest in fair notice, reasonable reliance, or settled expectations."⁴

Turning to the substance of EPA's determination that the state had demonstrated a clear causal relationship between a wildfire and the monitored exceedances of the ozone NAAQS, the court found "EPA articulated a rational connection between the evidence and its own conclusions" and "did not act arbitrarily or capriciously in finding a clear causal connection."⁵

Finding it was "bound to defer" to EPA's technical expertise,⁶ the court recognized that three submissions, by Arizona,⁷ which included trajectory analyses, satellite photos, smoke contour maps, and maps of ozone concentrations showing a regional rise in ozone

across the state on the date in question justified EPA's conclusion that emissions from the Lake Fire in San Bernardino National Forest were transported to the monitors in question.⁸

The court also deferred to EPA's judgment that the state's comparisons of historical readings at the specific monitors and analyses of regional concentrations of other emissions from wildfires demonstrated that the monitors were impacted by emissions from the wildfire.⁹

Finally, the court agreed with EPA that the state's submittal of matching day analyses comparing the exceedances to be excluded with monitor readings on days with similar meteorological conditions, other days on which exceedances were recorded, and matching weekdays showed that the emissions from the Lake Fire caused the exceedances of the ozone NAAQS.¹⁰

The decision bodes well for states that can meet the causal connection standard reflected in the 2016 regulations.

The court dismissed Petitioners' arguments against the evidence because they "failed to produce evidence sufficient to overcome the required deference to EPA's technical factual findings for any of the[se] factors."¹¹

With regard to EPA's decision to suspend the requirement for contingency measures that would have taken effect if the area had failed to attain the NAAQS by the applicable deadline, the court "defer[red] to EPA's reasonable construction" of the CAA.¹²

The court did so while noting, "[E]vidence suggests the area ozone levels have since lapsed back to exceed the standard."¹³ The court explained that the Act requires contingency measures that "may take effect in either of two circumstances: (1) the area fails to make reasonable further progress ('RFP contingency measures'); or (2) the area fails to attain the NAAQS by the attainment date ('attainment contingency measures')."¹⁴

The court considered whether a State Implementation Plan (SIP) must contain attainment contingency measures for an area once EPA has found that the area attained by the applicable deadline, characterizing this as an issue of first impression.¹⁵ The court concluded that the CAA does not address this issue.¹⁶

Further, the court found, "It would not make sense" for the Act to require SIPs to contain contingency measures "contingent upon

an already resolved condition that excuses their implementation: attainment of NAAQS."¹⁷

Finally, citing other SIP requirements that remain in effect in an area that has not been redesignated to attainment, the court stated, "EPA's interpretation does not operate as a way for states to avoid their ultimate responsibility ... to obtain a lasting attainment of the NAAQS."¹⁸ The court therefore found EPA's suspension of attainment contingency measures for the Phoenix-Mesa area was based on a reasonable construction of the CAA.

The decision bodes well for states that can meet the causal connection standard reflected in the 2016 regulations. In such cases, they will not be required to "count" those monitored NAAQS exceedances in their attainment demonstrations.

States are highly motivated to demonstrate attainment because the consequences of not meeting the statute's deadlines include being "bumped up" to more stringent area designations and requirements, additional restrictions on economic growth, and the potential for sanctions.

As a practical matter, the burden of demonstrating the clear causal association may be considerable and states should be mindful of gathering the needed data to make the required showings.

Notes

¹ *Bahr v. Regan*, 6 F.4th 1059 (9th Cir. 2021).

² *Bahr*, 6 F.4th at 1067.

³ 40 C.F.R. § 50.14(b)(4).

⁴ *Bahr*, 6 F.4th at 1074.

⁵ *Id.* at 1080.

⁶ *Id.* at 1075.

⁷ *Id.* at 1063.

⁸ *Id.* at 1076-77.

⁹ *Id.* at 1078-79.

¹⁰ *Id.* at 1079-80.

¹¹ *Id.* at 1080.

¹² *Id.* at 1082.

¹³ *Id.* at 1063.

¹⁴ *Id.* at 1083.

¹⁵ *Id.* at 1082.

¹⁶ *Id.* at 1083.

¹⁷ *Id.*

¹⁸ *Id.* at 1085.

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