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Bahr v. Regan

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

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I. INTRODUCTION

Bahr v. Regan[1] is the most recent challenge to the United States Environmental Protection Agency's ("EPA") Exceptional Events Rule ("EER") and highlights the Clean Air Act's ("CAA") shortcomings in addressing wildfire smoke pollution.

Between June 17, 2015 to June 21, 2015 the Lake Fire consumed roughly 29,813 acres of California's San Bernardino National Forest.[2] Three days later, in Phoenix, Arizona, three hundred miles east of the fire, six air quality monitors registered abnormally high concentrations of ozone that exceeded the standards under the National Ambient Air Quality Standard ("NAAQS").[3] Phoenix had long been out of attainment with ozone NAAQS and faced a July 2018 deadline to demonstrate attainment.[4] The EPA determined Phoenix had successfully attained the ozone NAAQS by the deadline, but only after using the EER to exclude the June 2015 readings.[5] This meant Arizona avoided additional and stricter regulatory burdens, including a need to develop contingency measures for failing to attain the NAAQS by the deadline.[6]

A group of Phoenix citizens ("Petitioners") sought review of the EPA's final decision to exclude the June 2015 exceedances under the EER. The Ninth Circuit denied the petition for review, determining the EPA's findings and conclusion that Arizona "achieved the statutory required reduction in ozone concentration by July 2018" complied with the CAA.[7] This case illustrates the misalignment between public health, air quality, and wildfire smoke associated with the EPA's EER.

II. FACTUAL AND PROCEDURAL HISTORY

Wildfire smoke pollution has become a pervasive public health threat with few regulatory solutions.[8] Scientists assert growing frequency and intensity of wildfires is largely attributable to symptoms of climate

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1. 6 F.4th 1059 (9th Cir. 2021).
2. Bill Gabbert, Lake Fire, east of San Bernardino, California, WILDFIRE TODAY, June 18, 2015, https://perma.cc/7RYZ-RN26.
3. *Bahr*, 6 F.4th at 1063.
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id.* at 1059.
8. Jennifer Hijazi, *Wildfires Highlight What's 'Gone Wrong' in Pollution Mitigation*, BLOOMBERG LAW (Aug. 11, 2021), https://perma.cc/ZH3G-5DJN.

change such as prolonged drought and periods of excessive heat.[9] Fine particulate matter released by wildfires can be dangerous to human health when breathed at high concentrations.[10]

The Lake Fire started on June 17, 2015 and burned a section of the San Bernardino National Forest roughly the size of San Francisco.[11] Smoke billowing off the Southern California fire caused hazy skies in Arizona but did not incite a health advisory from the Arizona Department of Environmental Quality ("ADEQ").[12] Prior to the Lake Fire, the EPA classified the nonattainment status of the Phoenix area as "moderate" and issued a revised attainment date of July 20, 2018.[13]

On June 20, 2015, six Phoenix ozone monitors in that nonattainment region recorded 0.075ppm,[14] exceeding the 2008 ozone NAAQS.[15] The ADEQ notified the EPA in July 2016 they would seek to exclude these six exceedances under the EER. The EPA formally accepted ADEQ's request and excluded those readings.[16] The EER requires the EPA to exclude monitoring data if the exceedance was clearly caused by exceptional, uncontrollable events.[17] The EPA revised the EER in October 2016, replacing the 2007 version.[18] In 2020, Sandra Bahr and two co-plaintiffs challenged the EPA's final rule excluding the exceedances, alleging the retroactive application of the 2016 EER to a 2015 wildfire event was improper.[19]

III. CLEAN AIR ACT

The CAA's general purpose is to promote public health and welfare through protections and enhancements to the United States' air.[20] To effectuate this purpose, the CAA authorizes comprehensive federal and state regulations to limit emissions from stationary and mobile sources.[21]

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9. Peter Szekely & Steve Gorman, *Western wildfire smoke causes cross-country air pollution*, REUTERS (Jul. 21, 2021), https://perma.cc/KBM2-CNNV.

10. Nadja Popovich & Josh Katz, *See How Wildfire Smoke Spread Across America*, THE N.Y. TIMES (July 21, 2021), https://perma.cc/5JHA-6HR6.

11. Haeyoun Park, Damien Cave, & Wilson Andrews, *After Years of Drought, Wildfires Rage in California*, THE N.Y. TIMES (July 15, 2015), https://perma.cc/68QA-TYDQ.

12. Brian Rinker, *California fire sends haze towards Grand Canyon, Arizona*, AZ CENTRAL (Jun. 19, 2015), https://perma.cc/2FKH-Q4NN.

13. *Bahr*, 6 F.4th 1059, 1068 (9th Cir. 2021).

14. *Id*.

15. *Id.*

16. *Id*.

17. *Id*. at 1059.

18. *Id.*

19. *Id.* at 1064; *see* 42 U.S.C. § 7607(b)(1) (2018) (petitions for review for final action of the Administrator under the CAA which is "locally or regionally applicable" must be filed only in the United States Court of Appeals for the appropriate Circuit).

20. 42 U.S.C. § 7401(b).

21. *Evolution of the Clean Air Act*, U.S. ENVIRONMENTAL PROTECTION AGENCY, https://perma.cc/5MGP-YKFZ (last visited Aug. 3, 2021).

This is a goal-driven statute enacted for pollution prevention through federal, state, and local governmental administration.[22]

Despite this structure, the CAA operates predominantly through state action, not direct federal control.[23] NAAQS and State Implementation Plans ("SIPs") are two of the most important regulatory devices the CAA uses to address air pollution. These fall under the directive of the EPA, directly and indirectly through their setting and revising regional NAAQS and reviewing SIPs.[24] Further, the CAA provides liberal use for wildfire smoke as an exceptional event.[25]

An objection to a rule or procedure under the CAA must be "raised with reasonable specificity during the period for public comment may be raised during judicial review."[26] This is a threshold questions for the court to determine if a petitioner fulfilled the requirement to provide the agency sufficient notice so they may rectify the alleged violation that falls under the CAA.[27]

A. NAAQS and SIPs

The NAAQS program requires the EPA to set limits on the atmospheric concentrations of six principal pollutants.[28] The EPA set the ozone standard under NAAQS at 0.075ppm.[29] Areas that do not meet the standards set under the NAAQS are identified by the EPA as "nonattainment areas."[30] A region attains NAAQS if each monitoring station in the nonattainment area has a "3-year calculated value at or below 0.075ppm".[31] The manner in which the EPA has designed monitoring site compliance with NAAQS can lead to a single monitoring site to significantly impact the entire region's attainment of NAAQS.[32] The EPA addresses wildfire emissions primarily through these specific air pollutant standards.[33]

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22. Emily Williams, Comment, *Reimagining Exceptional Events: Regulating Wildfires Through the Clean Air Act*, 96 WASH. L. REV. 765, 77-778 (2021).

23. *Bahr*, 6 F.4th at 1065.

24. 40 C.F.R. §§ 50.4–50.12 (2020).

25. Williams, *supra* note 26, at 768.

26. 42 U.S.C. § 7607(d)(7)(B) (2018).

27. *Bahr*, 6 F.4th at 1070.

28. 40 C.F.R. §§ 50.1–50.19; *see also NAAQS Table*, U.S. ENVIRONMENTAL PROTECTION AGENCY, https://perma.cc/YCN4-YNRC (describes "criteria" air pollutants as primary and secondary standards with the average time and levels not to be exceeded).

29. *Bahr*, 6 F.4th at 1066.

30. *Id*. at 1064.

31. *Id.* at 1066.

32. *Id.* at 1066 n.6.

33. Bryan C. Williamson, *Screaming "Wildfire" in a Crowded Clean Air Act*, THE REGULATORY REVIEW (Aug. 8, 2017), https://perma.cc/CYH6-N8P8.

SIPs are state-developed technical reports that show how a state is in compliance or will reach compliance with NAAQS.[34] Though states create SIPs, the EPA plays an important role by collaborating with a state's environmental quality agency to develop a SIP Further, the EPA must review and approve or disapprove each element within the SIP and ensure the opportunity for public comment.[35]

Through an agency memorandum later codified in regulation,[36] the EPA established a "Clean Data Policy" that functions as the agency's interpretation of the SIP requirements.[37] The Clean Data Policy allows the EPA to suspend certain SIPs obligations for nonattainment areas while the area is actively attaining NAAQS ozone requirements, but before the area is redesignated formally.[38] However, the SIPs requirements are only suspended "as long as the nonattainment area continues to monitor attainments of the standard."[39]

B. EPA's Exceptional Event Rule

Under the EER, when the EPA makes an attainment determination, it must exclude any exceedances where the air quality was influenced by an "exceptional event".[40] For an event to qualify as exceptional it must be caused by human activity that is unlikely to recur as a particular natural event.[41] It must also be considered not reasonably controllable or preventable.[42] Further, to warrant exclusion as an exceptional event there must be a "clear causal relationship" between the NAAQS exceedance and the specified event.[43] This requires a demonstration that the proposed event caused the specific air pollution concentration at the particular monitoring locations which experienced an exceedance.[44] The EER specifically excludes stagnation of air masses, meteorological inversions or events involving high temperature or lack of precipitation, or air pollution due to source noncompliance.[45]

Wildfires that cause ozone exceedances are often designated as exceptional events.[46] This permits the air pollution created from these

34. 42 U.S.C. § 7410(a)–(j) (2018).
35. *Id.* § 7427.
36. Memorandum from John S. Seitz, Director, Office of Air Quality Planning Standards (May 10, 1995) at 1 [hereinafter Seitz Memo]; 40 C.F.R. § 51.118 (2020).
37. *Bahr*, 6 F.4th at 1065–66.
38. *Id.* at 1065–1066; *see* 40 C.F.R. § 51.118; 42 U.S.C. § 7502(b), (c).
39. *Bahr*, 6 F.4th at 1066; *see* Seitz Memo, *supra* note 36, at 4; 40 C.F.R. § 51.1118.
40. *Bahr*, 6 F.4th at 1066 (citing 42 U.S.C. § 7619(b) (2018)).
41. 42 U.S.C. § 7619(b)(1)(A)(iii) (2018).
42. *Id.* § 7619(b)(1)(A)(ii).
43. *Bahr*, 6 F.4th at 1066–67.
44. 42 U.S.C. § 7619(b)(3)(B)(ii).
45. *Id.* § 7619(b)(1)(B)(i)–(iii).
46. *Bahr*, 6 F.4th at 1067.

events to be excluded from state efforts to meet air quality standards.[47] The EPA replaced the 2007 EER with a revised 2016 version revising the state demonstration requirements.[48] This new rule took away the "in excess of normal historical fluctuations" and "but for the event" standards and imported new demonstration standards.[49]

The EPA finalized revisions to the EER in October 2016.[50] The previous version, from 2007, required a state to prove, among other things, exceedances were outside historical fluctuations and caused by a "but for" event.[51] The 2016 EER revisions took these standards out and imported new standards for a successful demonstration by the state.[52]

To exclude data in air quality measurements, the state must request that the EPA flag measurements it may want to exclude at a later date.[53] The state must prove wildfire emissions were: "(1) transported to monitor; (2) affected the monitor; and (3) caused the ozone exceedances".[54]

i. Presumption Against Retroactivity

The presumption against retroactivity generally prevents interpreting statutes and regulations to apply to events occurring prior to their effective date.[55] The Supreme Court established a two-step approach to evaluate when the presumption against retroactivity does not apply in *Landgraf v. USI Film Products*.[56] Under *Landgraf*, it must be determined whether "'Congress has expressly prescribed' that a regulation is to be retroactively applied"[57] and "whether application of the regulation would have retroactive effect."[58] Presumption against retroactivity exists where the retroactive application of statues and rules impairs "prior-existing rights and . . . affect[s] reliance interests."[59]

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47. Hijazi, *supra* note 8.
48. *Bahr*, 6 F.4th at 1067.
49. *Id*.
50. *Id*.
51. *Id.* at 1067.
52. *Id*.
53. Kirsten H. Engel, *Perverse Incentives: The Case of Wildfire Smoke Regulation*, 40 ECOLOGY. L.Q. 623, 649 (2013).
54. *Bahr*, at 1067–68 (This standard of proof is known as a Tier 3 demonstration under EPA guidance documents and is used for complex causation relationships between wildfire and ozone. More straightforward instances require less documentation and proof under Tier 1 or Tier 2.).
55. *Id.* at 1069.
56. 511 U.S. 244, 280 (1994).
57. *Bahr*, 6 F.4th at 1072 (citing Garcia-Ramirez v. Gonzales, 423 F.3d 935, 939 (9th Cir. 2005) (citation omitted)).
58. *Id.* (citing Mejia v. Gonzales, 499 F.3d 991, 997 (9th Cir. 2007)).
59. *Id*. (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 265, 270 (1994)).

IV. DECISION

The Ninth Circuit ruled the EPA complied with the CAA.[60] Under the APA, courts set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[61] The court found Petitioners failed to bring their objections in a timely manner and did not exhaust administrative remedies.[62] Further, the court held the EPA's exclusion of the June 2015 exceedances under the 2016 EER was permissible under the CAA framework. Accordingly, the court denied the petition for review.[63]

A. Retroactive Application of the 2016 Version of the EER was Proper

The court determined the EPA did not violate the presumption against retroactivity by applying the 2016 EER to a 2015 wildfire.[64] The court reasoned the rule did not have a prohibitive retroactive effect because the use of the 2016 version in lieu of the 2007 version did not impair "vested rights, create new obligations, or otherwise impact any interests in fair notice, reasonable reliance, or settled expectations."[65] The court considered whether Petitioners exhausted administrative remedies on the issue before evaluating the argument's merits.[66]

1. Petitioners Did Not Exhaust Administrative Remedies

The court reviewed the administrative remedies provided by the CAA and determined Petitioners had not exhausted those remedies.[67] The court noted the CAA allows objections to rules or procedures to be justiciable if raised "with reasonable specificity during the period for public comment."[68] Though the court acknowledged a procedural exhaustion requirement should be broad in its interpretation, it may only considers issues sufficiently and clearly expressed to the decision-making agency to understand and rule on the issue raised.[69] In short, an objection to an agency's action must be sufficiently clear to put the agency on notice. Petitioners acknowledged the likely absence of sufficient clarity as their comment implicitly contested the EPA's decision but failed to explicitly

60. Sebastian Malo, *9th Circ. denies challenge to EPA approval of Arizona ozone levels*, REUTERS July 28, 2021, https://perma.cc/Z7GX-BN9V.

61. *Bahr*, 6 F.4th at 1069 (quoting 5 U.S.C. § 706(2)(A) (2018) (internal quotation marks omitted).

62. *Id.* at 1085.

63. *Id.*

64. *Id.* at 1074.

65. *Id*.

66. *Id*. at 1071.

67. *Id*. at 1070.

68. *Id.* at 1069–70 (quoting 42 U.S.C. § 7607(d)(7)(B) (2018) regarding petition for judicial review of administerial action promulgating any national primary or secondary ambient air quality standard).

69. *Id*. at 1070.

do so. Petitioners' comment addressed one requirement unique to the 2007 rule: a failure to show exceedances were "in excess of historical fluctuations" by the ADEQ.[70] Further, they claimed their comment critiqued the analysis ADEQ used to demonstrate the "but for" requirement.[71] However, because Petitioners themselves did not discuss this explicitly, the court found the EPA would be challenged to interpret this criticism as a suggestion the governing rule should be the 2007 version rather than the 2016.[72] The court found Petitioners' comments, on their face, to be an observance of exceedance and not a clearly stated argument regarding failures of the 2007 "in excess of historical fluctuations" exceedance requirement.[73] The court held Petitioners failed to exhaust their administrative remedies regarding application of the 2007 or 2016 EER.[74]

2. Applying the 2016 Exceptional Events Rule Does Not Violate a Presumption Against Retroactivity

Even if Petitioners had satisfied the necessary administrative procedures, the court nonetheless found the application of the 2016 EER did not have an impermissibly retroactive effect.[75] There is no dispute that six air quality monitors in Phoenix recorded exceedances of the ozone pollution standard of 0.075 parts per million on June 20, 2015.[76] Here, Petitioners asserted the 2007 EER should have applied to the Lake Fire exceedances. This claim rested on the presumption against retroactivity, which generally prevents applying statutes and regulation to events having occurred prior to their effective date.[77] However, this presumption exists only where application of those statues and rules has a retroactive effect "impairing prior-existing rights and . . . affecting reliance interests."[78] Therefore, the EPA's application of the 2016 EER in lieu of the 2007 rule is valid only if it there is no impact on Petitioners' vested rights and did not effect a regulated party's interest for notice, reasonable reliance, or a settled expectations.[79]

The court used the approach set forth in *Landgraf* to determine the presumption against retroactivity did not apply.[80] For the first step, neither party contended the EPA possesses expressed retroactive authority as

70. *Id*.
71. *Id*. at 1070 n.11.
72. *Id.*
73. *Id.* at 1070.
74. *Id.* at 1071.
75. *Id*.
76. Petitioner's Opening Brief at 31, *Bahr v. Regan*, 6 F.4th 1059 (9th Cir. 2020) (No. 20-70092), ECF No. 13.
77. *Bahr*, 6 F.4th at 1069.
78. *Id*. (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 265, 270, (1994)).
79. *Id*. at 1071.
80. *Id.* at 1072.

applied to exceptional events.[81] For the second step in the *Landgraf* analysis, the court looked to the timing of the exceedances to determine if any vested rights under the CAA were impaired by the EPA's application of the 2016 EER rather than the 2007 version.[82] The court held Petitioners' interest was not in the "application of any particular rule on any particular date," but rather in the "accurate and faithful enforcement" according to best scientific judgement.[83] Petitioners offered no evidence contradicting the revised rule as a "valid and faithful endeavor by the EPA to implement the Clean Air Act," and rather than impairing Petitioners' interests, those interests were better served under the revised rule.[84]

With no complaint from the ADEQ and no demonstration from Petitioners that the EPA's application of the 2016 EER retroactively impaired any vested rights or other concerns, the court held the retroactive application the EPA was permissible.[85]

B. A Clear Causal Relationship Existed Between California's Lake Fire and the June 20 Exceedances in Phoenix

The court upheld the EPA's finding that a clear causal relationship existed between the 2015 Lake Fire and the measured exceedances in Phoenix.[86] The EPA's findings on this relationship were reviewed under the APA's "arbitrary or capricious" standard.[87] Because the review consisted primarily of factual issues, the court deferred to the agency's technical expertise. [88] The EPA reviewed ADEQ's petition to exclude data and determined whether ADEQ adequately demonstrated a clear causal relationship that the Lake Fire smoke emissions were "(1) transported to the six monitors; (2) affected the monitors; and (3) caused the ozone exceedances."[89] The court determined a rational connection existed between the evidence relied upon by the EPA and their conclusions regarding these three requirements.[90] Petitioners provided no supporting technical models for their comment to the EPA, rather they argued the evidence relied upon by the EPA failed to support a clear causal relationship.[91] The court found little merit in several of Petitioners' arguments.[92]

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81. *Id*.
82. *Id*. at 1073.
83. *Id*.
84. *Id.* at 1074.
85. *Id*.
86. *Id*.
87. *Id.* at 1075.
88. *Id*.
89. *Id.* (A petition to exclude is a request from state air pollution officials for the EPA to review a demonstration seeking to exclude data from monitoring sites where there was an exceedance preventing compliance with NAAQS standards.).
90. *Id*.
91. *Id.*
92. *Id*. at 1076 n.17.

First, Petitioners argued against evidence that the smoke emissions were transported to the six monitors. They primarily disagreed with the following submissions of the ADEQ: (1) satellite images and the National Oceanic and Atmospheric Administration smoke maps illustrating smoke plumage trajectories of the Lake Fire; and (2) geographic pattern of heightened ozone concentrations for Arizona on June 19 and 20.[93] The court relied on the EPA's expertise, particularly as Petitioners failed to show the absence of a rational connection between ADEQ's factual demonstrations and the EPA's conclusion that smoke from the Lake Fire affected the six ozone monitors.[94]

To determine whether the Lake Fire affected the six monitors, the court deferred to the EPA conclusions that organic carbon and elemental carbon are relevant to the causation analysis as those compounds are largely associated with biomass smoke emitted during wildfires.[95] The court concluded the EPA's Wildfire Ozone Guidance permits using data from "co-located or nearby" monitors, meaning the EPA's use of Phoenix Supersite Data was justified.[96] This rationally connected the Lake Fire to the six exceedances. The court failed to find fault with the EPA's technical conclusions with no contrary evidence or demonstration of analytical error.[97]

Finally, the court looked at the demonstration that the Lake Fire emissions caused the ozone exceedances.[98] The ADEQ submitted three matching day analyses comparing the June 20, 2015, exceedances to previous readings based on: "(1) days with similar meteorological conditions, (2) days which also recorded exceedances, and (3) days of the week."[99] The EPA determined this evidence, along with other submitted analyses, sufficiently demonstrated "a clear casual connection between Lake Fire emissions and the exceedances."[100] Because the court found Petitioners' arguments undermined their own positions and failed to contradict the EPA's findings, it rule the EPA had not acted arbitrarily or capriciously.[101]

C. The EPA Properly Interpreted Suspending SIP Attainment Contingency Measures

In an issue of first impression, the court looked at whether the CAA requires SIPs to contain attainment contingency measures where the EPA determines a nonattainment area has attained the NAAQS by the

93. *Id*. at 1076–77.
94. *Id.* at 1077.
95. *Id*. at 1077–78.
96. *Id*.
97. *Id*. at 1077.
98. *Id*.
99. *Id.* at 1079.
100. *Id.*
101. *Id*.

attainment date.[102] The court granted the agency *Chevron* deference after concluding the CAA is silent regarding whether SIPs must contain such measures.[103] Where a statute is silent or ambiguous on an issue, *Chevron* directs courts to defer to an agency interpretation so long as that interpretation is reasonable.[104] The court looked first at whether administrative remedies were exhausted and then whether *Chevron* deference supported the EPA's construction of the CAA contingency measures requirement

The EPA argued Petitioners forfeited their argument as their comment did not assert that the EPA's proposal to suspend the attainment contingency measures requirement was unlawful under the CAA.[105] Though Petitioners did comment, they did not address the agency's interpretation of the nonattainment plan provisions under 42 U.S.C § 7502(c)(9).[106] The court noted that Petitioners, in their comment failed to understand the EPA was not applying its Clean Data Policy, but rather interpreting attainment contingency measures under the CAA.[107] Therefore, the court held Petitioners failed to exhaust administrative remedies because they failed to raise their issue with sufficient clarity to the EPA.[108]

The court then considered, had administrative remedies been exhausted, whether the CAA prevented the EPA from suspending the attainment contingency measure requirements. The court found the EPA was not prevented from suspending the requirements under the circumstances.[109] With the CAA silent on this matter, the court applied *Chevron* deference and determined the EPA reasonably interpreted 42 U.S.C. § 75029(c)(9).[110] The court determined the EPA's decision to suspend only attainment contingency measures was a narrow interpretation and did not violate NAAQS.[111] Further, the court found the EPA's interpretation was not a means for a state to avoid their responsibilities under the CAA to meet NAAQS attainments.[112]

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102. *Id*. at 1082.

103. *Id*. at 1085 (citing Chevron, U.S.A., Inc., v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) which created the two-part legal test granting deference to government agency's when interpreting statutes for which that agency is tasked with administering).

104. Williams, *supra* note 26, at 792.

105. *Bahr*, 6 F.4th at 1080.

106. *Id*. at 1081 (42 U.S.C. § 7502(c)(9) (2018) relates to contingency measures requiring plans to "provide 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 . . . .such plans 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").

107. *Id*. at 1081.

108. *Id*. at 1082.

109. *Id.*

110. *Id*. at 1085.

111. *Id*.

112. *Id*.

Therefore, the EPA could suspend attainment contingency measure requirements despite Phoenix's previous failures to reach the necessary air quality standards by the attainment date.

V. CASE ANALYSIS

The legal framing the court used is well-founded and within precedent, however the framework itself neglects to consider the shift of wildfire regimes and mechanisms to mitigate air quality concerns. The EER's inclusion of wildfires as an exceptional event fails to support the purposes of the CAA. Exposure to smoke is one of the most pressing public health concerns.[113] Wildfire smoke inhalation is the cause of numerous health problems and has been linked to early death, low infant birth weight, and a series of severe respiratory problems for vulnerable populations.[114] With fire events increasing in severity and frequency, the risks of smoke exposure are similarly increasing. This is largely due to the history of the United States Forest Service's ("USFS") forest and wildfire management across the West.

The USFS wildfire suppression strategy became the principal management directive of the USFS after the 1910 fires swept across Idaho, Montana, and Washington, devastating more than three million acres of private and federal lands, and killing at least 85 people.[115] The dominant narrative post-1910 to suppress fires and the public threat of fire influenced the legislative and executive for several generations of land managers. More than 100 years of this fire suppression strategy led to extensive fuel build-up and increased the likelihood of high-severity and high-frequency fires. When wildfires are suppressed, opportunities to create fuel breaks, reduce departure from natural fire regimes, and decrease future extreme fire behavior are lost.[116] Though fire seasons are expected to worsen, there is no mechanism for accountability in air quality consequences with wide-reaching threats to public health.[117]

A. The Exceptional Events Rule Fails to Support the Intent of the CAA

The EER does not support the purpose of the CAA. There are three major areas of concern with the EPA's engagement of air quality issues relating to wildfire management and smoke emissions. These issues are: (1) allowing states to petition to exclude NAAQS exceedances from wildfire smoke emissions, (2) the inclusion of wildfire as an exceptional event, and (3) EER classifying wildfires as "natural" rather than

113. Williams, *supra* note 26, at 776.

114. *Id*.

115. *The 1910 Fires*, FOREST HISTORY SOCIETY, https://perma.cc/AX2M-Z6RD (last visited Aug. 23, 2021).

116. Brett H. Davis, Carol Miller, & Sean A. Parks, *Retrospective Fire Modeling: Quantifying the Impacts of Fire Suppression*, U.S. DEPARTMENT OF AGRICULTURE (Apr. 2010), at 1, https://perma.cc/PJ8Q-VD87.

117. Hijazi, *supra* note 8.

"anthropogenic" given the extensive history of fire suppressions role in the current fire regime. At their root, each of these three issues can be traced back to how the EPA and CAA think about fire and the language used.

The EPA should cease granting state requests to exclude air pollution readings attributable to wildfire. These requests are made when determining the state's compliance with NAAQS. By allowing states to petition for excluding NAAQS exceedances, smoke management is dictated by reactive wildfire management efforts that are unable to address air pollution issues. Changes to air quality laws to incentivize proactive management efforts should require NAAQS to include emissions from large wildfires or limit the discretion of local air regulators to block prescribed fire projects that look to mitigate wildfire risks and smoke emissions.[118]

The EPA should exclude uncontrolled wildfires from the EER.[119] Currently, the EPA interprets the EER to exempt wildfire events from CAA compliance with air quality management. To incentivize prescribed fires, wildfires need to be included in NAAQS compliance to encourage local air management districts to use managed fires to reduce risks of severe fires.[120] In removing wildfire emission from the EER, smoke management could implement proactive treatment strategies, such as prescribed fire. Though failures in air standard compliance may still threaten public health, proactive, rather than reactive management, would reduce the risk of catastrophic wildfires. at the severity seen today.[121]

Another place for revision is abandoning the distinction between "natural" and "anthropogenic" when considering wildfires and prescribed fire events in regulation.[122] Given the consequences of fire suppression policy, unplanned wildfires as a "natural" phenomenon is a disingenuous descriptor.[123] Even outside the EPA's EER, referring to unplanned wildfires as "natural" post-suppression gives a public impression wildfire smoke is less harmful to health and visibility than smoke from prescribed fires.[124] Importantly, the EPA's treatment of wildfires as per se natural events is inconsistent with the agency's own definition which classifies a wildfire as an unplanned ignition and includes the language "unauthorized and accidental human caused fires".[125]

The air quality threats resulting from wildfires should no longer be deemed exceptional as it becomes the new normal.[126] Satellite-based

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118. *Id*. at 366.
119. *Id*. at 368.
120. *Id*.
121. *Id.*
122. Engel, *supra* note 55, at 665.
123. *Id.*
124. *Id.*
125. *Id.* at 666.
126. Michael Wara, TWITTER (Aug. 18, 2020, 9:53 AM), https://twitter.com/michaelwwara/status/1295750731593420801 (referencing the Clean Air Act § 319(b): air quality monitoring data influenced by exceptional events).

estimates show a steady increase of "smokey days" across the United States with smoke quickly becoming a regional air pollution issue.[127] To better address worsening air pollution issues from wildfire smoke emissions, the EER will need to stop considering wildfires an exceptional event. In *Bahr*, the court relied on the correct legal framework, however an opportunity was missed in critiquing how these exceptions to air pollution standards affect public health. The Ninth Circuit is comprised largely of western states adversely and persistently affected by the smoke emissions of worsening wildfire seasons. Neglecting to address how excluding wildfire smoke emissions from NAAQS standards via the EER shows a failure in understanding the heart of the CAA's intent.

B. Cross-boundary Smoke Can Cause NAAQS Exceedances

Wildfires are a recurring, episodic source of air pollution with intensifying threats to public health in the face of climate change.[128] Smoke does not adhere to state boundaries, rather it travels at the behest of weather patterns. Jet streams and cross-continental air currents can carry smoke and ash thousands of miles, affecting people nowhere near the fire itself with air contaminants.[129] It is not uncommon for wildfires in different states, or even from Canada, to adversely affect ambient air quality across the continent. In 2021, wildfire smoke from Canada and Western United States triggered unhealthy air quality levels across must of the East Coast.[130]

The *Bahr* court recognized the agency's technical expertise supported the clear causal relationship between the Lake Fire in California and the six exceedances 300 miles away in Phoenix, Arizona. Though this is a meaningful requirement to exempt an event under the EER, it is increasingly less relevant to addressing the real issues around wildfire and air quality exceedance.

Dedicating resources and time to proving the relationship between a particular fire and specific exceedances does little to address the issue of air pollution from wildfire smoke emissions. Agencies have continuously sought to better develop technical tools and mapping techniques to better understand fire behavior and smoke emissions. This expertise is accessible and well-understood across the scientific discipline. Rather than requiring an agency to prove an exceedance has a clear causal relationship to a wildfire, resources should be spent in proactive management that seeks to avoid those exceedances in the first place. This will require administrative guidance from the EPA and United States Forest Service that promotes

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127. Marshall Burke, Sam Heft-Neal, & Michael Wara, *Managing the growing cost of wildfire*, STANFORD INSTITUTE FOR ECONOMIC POLICY RESEARCH (Oct. 2020), https://perma.cc/N6LH-5AGH.

128. Shawn Urbanski, Matt Landis, & Russell Long, *An Evaluation of Wildland Fire Smoke Sensors*, ROCKY MOUNTAIN RESEARCH STATION (last modified June 3, 2021), https://perma.cc/NA6A-8VKF.

129. Szekely & Gorman, *supra* note 9.

130. Popovich & Katz, *supra* note 10.

proactive treatments and management strategies across western forests. These strategies may include treatments such as thinning or prescribed fire to reduce hazardous fuels that will combust in aa wildfire event and emit smoke, particularly around densely populated parts of the western U.S. By treating fuel loads before a fire ignites, hazardous levels of smoke emissions will be mitigated, and NAAQS exceedances will decrease in frequency.

C. Chevron Deference is in Trouble

The court's analysis of the question regarding the EPA's suspension of SIP attainment contingency measures was done primarily through the standard set forth in *Chevron.* Though agencies often have specialized expertise that is worth considering, *Chevron* deference is becoming increasingly controversial.

In recent years, some justices on the current United States Supreme Court have been critical of this established law. Justice Thomas criticized *Chevron* in his concurrence in *Michigan v. EPA*,[131] while Justices Kavanaugh and Gorsuch have publicly criticized this doctrine prior to their appointment to the Supreme Court.[132] Despite this criticism, the Supreme Court has so far declined to reexamine *Chevron*.[133] With Justice Barrett's confirmation, there is some anticipation the Robert Court may weaken, if not overturn, this agency deference.[134] Circuit and district courts continue to apply *Chevron* and would still likely apply to the CAA even if it is limited in other ways as it is strongest when it is applied to a direct agency delegation of "complicated and expert driven regulations.[135]

Looking forward, it is important to note Arizona statutorily overturned *Chevron* deference with respect to most of the state's agencies with House Bill 2238 in 2018.[136] Where state agencies interpretation or expertise is in question in future cases, deference will no longer be given. This requires the court, in reviewing a final administrative decision "brought by or against a regulated party" to decide all legal questions without deference and without "any previous determination by the agency."[137] Though petitions for review like in *Bahr* go straight to a Court of Appeals in the appropriate circuit, the court may still consider the state's choice to remove *Chevron* deference when considering a state agency's actions.

It is reasonable to expect *Chevron* deference may be weakened or entirely unavailable for a court to rely on when considering an agency's interpretation of an ambiguous statute. This will provide a different scope of review for the courts to determine if an agency's action was proper.

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131. 576 U.S. 743, 760–61 (2015).
132. Williams, *supra* note 26, at 793.
133. *Id*. at 794.
134. *Id*.
135. *Id.*
136. H.R. 2238, 53rd Leg., 2d Sess. (Ariz. 2018).
137. H.R. 2238, 53rd Leg., 2d Sess. (Ariz. 2018).

Given the turmoil of the Trump Administration in appointing agency administrators, the loss of *Chevron* may not be as bleak as it appears. The EPA had two administrators over the course of four years, both of whom broadly supported the fossil fuels industry, made careers attacking the agency they would head, and public questions climate science.[138] Decisions made under those administrators would still be subject to this standard of review for actions that may disregard the CAA implicitly. The swings in policy between administrations appointing the heads of agency should be of concern when those agencies are given broad deference for actions taken. However, *Chevron* allows agencies to focus on the scope of their work with the knowledge that judicial review of agency action will fall under this deference and that can be a benefit for agencies.

VI. CONCLUSION

Across the western United States, increased wildfire risk resulting from historic fire suppression strategies and climate change calls for fire management reform.[139] The current legal framework to address issues of wildfire smoke emissions on air quality is well-formed yet in need of revision to better align the regulations with the purpose of the CAA. First and foremost, the EER is reactive and limits proactive approaches to wildfire and smoke management by disincentivizing prescribed fire while misrepresenting the continuous negative impact of wildfires on ambient air quality standards. By removing modern wildfires as an "exceptional event," more proactive approaches to mitigate conditions contributing to offending smoke emissions are more realistic. Further, suspending SIPs attainment measures is contrary to the CAA because it fails to support the Act's stated purpose of promoting public health and welfare through protections and enhancements to the United States' air resource.

This case was decided on the brink of administrative, scientific, and management shifts, all of which are considering how symptoms of climate change are impacting the frequency and severity of wildfires and how that is growing to be a constant public health threat from smoke emissions. Moving forward, more issues about the EPA's Exceptional Events Rule and NAAQS will need to be addressed by the courts. However, it will unlikely be through the lens of retroactive presumption and SIPs contingency measures. It is important to think about how these regulations are not supportive of the CAA as they stand with wildfire smoke emissions. Particularly, if *Chevron* deference is weakened or becomes a more stringent test, the EPA may struggle to continue applying these regulations on smoke emissions related to wildfires.

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138. Rebecca Hersher & Brett Neely, *Scott Pruitt Out at EPA*, NPR (July 5, 2018), https://perma.cc/C3E3-XT6H.

139. Weir et al., *Liability and Prescribed Fire: Perception and Reality*, 72 RANGELAND ECOLOGY & MGMT. 533 (2019).