

Ninth Circuit Invalidates EPA's Approval of Valley's 2004 One-Hour Ozone SIP Based On Failure to Address "Stale" Emissions Data

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Environmental Litigation

Recently, Honorable Judge Ronald M. Gould, writing for a panel of the Ninth Circuit Court of Appeals, found the [Environmental Protection Agency's](#) ("EPA") 2010 approval of the San Joaquin Valley's 2004 1-hour ozone National Ambient Air Quality Standard plan ("2004 SIP") was arbitrary and capricious, citing EPA's failure to adequately address the potential staleness of mobile source emissions data used to formulate the plan's emissions inventory. The [court's decision](#) invalidates EPA's approval of the plan and requires the agency to conduct its review process anew. The case potentially signals EPA's more stringent review of the accuracy and currency of emission inventories during its plan approval process.

Following EPA's approval of the 2004 SIP, [Sierra Club](#) and several environmental groups petitioned the [Ninth Circuit Court Appeals](#) to review EPA's approval on the basis that mobile source data, current at the time the plan was submitted to EPA in 2004, was outdated and inaccurate by the time the plan, which was amended in 2006 and clarified in 2008, was approved in 2010. During the six-year period between plan submission and approval, California had replaced the computer modeling tool it used to estimate mobile source emissions with the next generation of that modeling tool, which was better able to capture emissions from heavy-duty trucks. Also during that time period, California had presented EPA with the Valley's 2007 SIP for the 8-hour ozone standard ("2007 SIP"), which relied on data compiled through the use of the updated tool. The court noted that a comparison of the emissions inventories in the 2004 and 2007 plans revealed apparent disparities in emissions estimates for nitrogen oxides (NOx), with the 2004 SIP potentially underpredicting total daily NOx emissions in the Valley. In the court's opinion, these disparities, which the court attributed to the state's change in modeling tools, undermined the accuracy and currency of the 2004 SIP emission inventory data.



In rendering the decision of the court, Judge Gould acknowledged that the court's role was not to substitute its conclusions for those of the agency, clarifying that the court "express[ed] no opinion as to what conclusion EPA should have reached, with respect to the validity of the 2004 SIP, upon consideration of the 2007 data." However, the court refused to "silently rubber stamp agency action that [was] arbitrary and capricious," specifically EPA's "reliance on old data without meaningful comment on the significance of more current compiled data."

In considering a 2002 policy memorandum relied upon by EPA to support its position, Judge Gould noted, "[w]hile there is some period of time after the release of a new computer modeling tool in which the [Clean Air Act] does not require a finding that SIPs based on the previous version are not current and accurate, there comes a time after which reliance on outdated models and data is inconsistent with requisite guidelines for ensuring that agency action is timely and responsive to current public needs." In the instant case, EPA did not approve the 2004 SIP until more than 3 years after the release of California's more current computer modeling tool; EPA had access to data compiled through the use of the more current tool; and the new data revealed significantly different measurements of expected NOx emissions in the Valley. Based on these facts, EPA had to either 1) analyze the new data or 2) cogently explain why it was exercising its discretion not to consider the new data. EPA's approach, however, was to "merely repeat[] its mantra that EPA had no duty under the [Clean Air Act] to consider new data so long as the data relied upon was current and accurate when submitted." This approach was not only arbitrary and capricious, but further left the court "with no means of determining whether there is any merit to [intervenor San Joaquin Valley Unified Air Pollution Control] District's argument" that it was appropriate for EPA to ignore the 2007 8-hour ozone emissions inventory data because any comparison to the 2004 1-hour ozone emissions inventory data would not be "an apples to apples comparison."

The court's decision makes clear that if EPA does not require states to rework previously submitted air quality plans as new emissions data becomes available, EPA will have to either reconcile the older and newer data, or cogently explain

why it has not. Forcing EPA to provide a reasoned explanation for its choice, may result in more states having to update existing SIPs or SIPs awaiting approval when new information indicates that the SIP is inaccurate or not current.

While environmental groups have emphasized the importance of emissions inventories and argued that plans should have current and accurate inventories upon approval, EPA has expressed the practical concern that states could never effectively plan for air quality improvements if they had to constantly revise their inventories as new data became available.

Although the 1-hour ozone standard was revoked in 2005 and replaced with the 8-hour ozone standard, for purposes of “anti-backsliding,” EPA still requires the Valley to have a fully-approved attainment demonstration plan for the 1-hour standard.

The Case is *Sierra Club, et al., v. United States Environmental Protection Agency, et al.*, Case No. 10-71457 (9th Cir., Jan. 20, 2012).

BACKGROUND FACTS TO INFORM YOUR READING:

The Act: The Clean Air Act is a comprehensive program that sets forth a cooperative state-federal approach to improving the nation’s air quality. Under the Act, EPA publishes a list of air pollutants and sets national ambient air quality standards (“NAAQS”) for each pollutant identified. Each state has “primary responsibility for assuring air quality” within the region comprising such state, and each state must develop a state implementation plan (“SIP”) detailing the rules and regulations that the state will use to satisfy the NAAQS.

Emissions Inventories: As part of a SIP, states submit “a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants of the area.” After developing base year emissions inventories, states use modeling and other analyses to calculate future emissions projections and target emissions levels, which inform the State’s development of progress milestones and control strategies for attaining NAAQs.

The Pollutant: Nitrogen oxides form when fuel burns at high temperatures, such as in motor vehicle engines. Nitrogen oxides cause a variety of health and environmental problems, such as ozone and smog. Ozone and smog form in the atmosphere when nitrogen oxides mix with volatile organic compounds and sunlight.

The Suit: The Clean Air Act allows citizens to directly petition the United States Court of Appeals for the applicable circuit court for review of EPA’s final approval of air quality plans.