

Summary

A new federal appeals court ruling requires tougher measures to clean up air pollution in areas whose air doesn't meet federal standards. The dissent argued that the majority misunderstood the statute and that the ruling would have dire repercussions. The majority said that this kind of policy consideration was none of the court's business.

Last week, the Ninth Circuit decided [*Committee for a Better Arvin v. EPA*](#), which is both a significant air pollution case and an interesting case study in how the Supreme Court has changed judicial review of agency actions. The case was brought by a group in Arvin, CA, a small city near Bakersfield.

When an area has failed to attain the air quality required by the Clean Air Act, special “nonattainment” provisions go into effect. In particular, the state is required to adopt an EPA-approved plan for bringing the area into attainment by a specific deadline. If that plan fails to deliver results on schedule, § 172(c)(9) comes into effect. Since this is a case about statutory interpretation, it's important to look at the exact language of the statute. As one of the requirements for the state's attainment plan, it requires the plan to include certain contingency measures:

“Such plan shall provide for 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 applicable under this part. Such measures 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.”

You'll notice that the statute doesn't say anything specific about what contingency measures are required. It seems a clear inference, however, that they're supposed to move a state meaningfully closer to attainment. Otherwise, what's the point? The House report on the bill says that the measure must be “adequate to compensate for any emission reduction shortfall,” but the statute itself isn't that specific.

The San Joaquin Valley (the lower two-thirds of the Central Valley) has terrible air

pollution, partly because pollutants are blown in from Southern California. In reviewing the state's non-attainment plan, EPA concluded that the contingency measures for nitrogen oxide pollution wouldn't produce one-year's worth of progress toward meeting the nonattainment goal, which EPA has generally required. However, it said, any more stringent pollution limits wouldn't be technologically or economically feasible. EPA interprets feasibility to require that a measure would take only sixty days to implement and achieve emissions reductions within a year. The question before the Court was whether § 179 allowed EPA to take feasibility, as so defined, into account.

None of the opinions in the case talk about this, but EPA's interpretation of feasibility seems somewhat perverse. It means that, rather than adopting measures that are a little slower to take effect than EPA likes, the state doesn't have to do anything at all (or at least, nothing that will get the state back on track). Surely it would be more rational to say that the state has to use the faster measures if they are available, but if not, it has to use the slower ones. Why should it be an excuse if a measure would take sixty-one days to implement instead of sixty?

The majority on the Ninth Circuit said feasibility wasn't relevant under the statute. It admitted that the statute was ambiguous. Under the *Chevron* doctrine, which long governed judicial review of agency decisions, the court would have upheld any reasonable interpretation of the statute by the agency. However, the *Loper Bright* case eliminated that deference to agencies and instead requires courts to decide for themselves on the best interpretation of the statute. Given that the Clean Air Act specifically imposes feasibility requirements in many situations, the court considered that its failure to do so here was deliberate. The court also concluded that the statute should not be read to give EPA discretion to impose a feasibility requirement, because doing so would undermine the statutory purpose of eliminating hazardous air pollution and would allow indefinite postponement of progress. The majority said that it was up to Congress to decide if a feasibility requirement would be good policy.

Judge Bress's dissent calls the majority opinion "alarming" and "Kafkaesque," putting the states in an "untenable stranglehold." Part of the problem seems to stem from prior Ninth Circuit decisions that prevent states from accelerating measures that were supposed to be implemented later under the state plan. The dissent's basic argument is that the "feasibility requirements" are mislabeled. Rather, the dissent argues, only rapid emission reduction methods count as "contingency measures." This interpretation seems to build on the statute's

requirement that the measures must be primed to “take effect” without any further action by the state.

That seems like a reasonable argument, though not necessarily persuasive in the end. The basic problem is that it makes the statute's preference for speed into an excuse for doing little or nothing. That's not an inevitable way of reading the statute. Instead, we could interpret a preference for speed as part of the “further progress” requirement rather than part of the definition of contingency measures. That would require the state to do the best it can to get back on track rather than giving it an excuse to basically abandon the effort.

The dissent suggests that the unavailability of effective contingency measures won't matter because the state will be required to come up with a new attainment plan anyway. I'm skeptical about that, since the process of mandating state plans obviously hasn't worked so far. I also don't see how defanging one element of a contingency plan will do anything except reduce the plan's effectiveness.

Although I don't think the dissent's policy argument is bulletproof, I'm also less of an expert on the situation than EPA (assuming they're not just following orders from above). I sympathize with the state, especially since Congress has just made it much harder for California to clean up its air. Much of the air pollution in the state comes from cars and trucks, but Congress has blockaded what may be the only effective way to deal with that problem, which is transitioning to non-polluting electric vehicles. That leaves the state in a bind. Maybe EPA is right on policy, but the question is whether that's relevant.

The majority opinion suggests strongly that the court might have reached a different result under the *Chevron* doctrine. While the court says that it lacks the authority to take policy into account, EPA could well have done so, deciding what interpretation of an ambiguous statute to adopt. When it overruled *Chevron*, however, the Supreme Court shut the door to do that kind of statutory interpretation. There may be a reasonable policy basis for EPA's policy, but the Supreme Court doesn't seem to think that should be part of statutory interpretation. It's yet to be seen, however, how serious the Court will be about that.