FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATION OF IRRITATED RESIDENTS, a California non-profit corporation, *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as Administrator of the U.S. Environmental Protection Agency; DEBORAH JORDAN, in her official capacity as Acting Regional Administrator for Region IX of the U.S. Environmental Protection Agency, *Respondents*, SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT, *Intervenors.*	No. 19-71223 OPINION

On Petition for Review of an Order of the
Environmental Protection Agency

Argued and Submitted July 7, 2020
Portland, Oregon

Filed August 26, 2021

Before: Mark J. Bennett and Eric D. Miller, Circuit Judges, and Benita Y. Pearson,[*] District Judge.

Opinion by Judge Miller

SUMMARY[**]

Clean Air Act / Standing

The panel granted in part, and denied in part, a petition for review of a final rule of the Environmental Protection Agency ("EPA") approving the State of California's plan for meeting the air quality standard for ozone in the San Joaquin Valley, 84 Fed. Reg. 11,198 (Mar. 25, 2019).

The plan contained a single contingency measure that would be activated if the other provisions of the plan do not achieve reasonable further progress toward meeting the standard. An environmental organization petitioned for review, arguing that the contingency measure was inadequate.

[*] The Honorable Benita Y. Pearson, United States District Judge for the Northern District of Ohio, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that petitioner, Association of Irritated Residents ("AIR"), a California nonprofit corporation with members who reside in the Valley, met the requirements for Article III standing. AIR's members established injury in fact by submitting declarations containing credible allegations of respiratory distress as well as harm to their recreational and aesthetic interests as a result of ozone depletion in the Valley. The threat that the Valley will continue to fail to meet the ozone standard–and therefore that the contingency measure will be activated–is neither conjectural nor hypothetical, but a reasonable inference from the historical record. The panel also concluded that AIR's challenge was ripe for review.

AIR contended that the EPA's approval of the contingency measure in the State's plan reflected an unreasonable interpretation of the Clean Air Act and was arbitrary and capricious because the measure provided only a nominal emissions reduction of one ton per day. The panel agreed that the EPA's approval was arbitrary and capricious. Under the Administrative Procedure Act, when an agency changes its policy, it must display awareness that it is changing position and show that there are good reasons for the new policy. In approving a contingency measure that provided a far lower emissions reduction, the EPA did not acknowledge that it had changed its understanding of what reasonable further progress meant. The panel rejected the EPA's contention that its new position was a response to this court's decision in *Bahr v. EPA*, 836 F.3d 1218 (9th Cir. 2016). The panel held that the EPA may not avoid the need for robust contingency measures by assuming that they will not be needed. Because the EPA did not provide a reasoned explanation for approving the State plan, the rule was arbitrary and capricious.

The panel rejected AIR's challenge to the EPA's approval of the State's Enhanced Enforcement Activities Program. The EPA did not recognize the program as a stand-alone contingency; instead the agency approved it as a plan strengthening measure. The panel held that because the program did not create any emission limitation that was less stringent than one in effect in the state plan, nothing in the Clean Air Act prohibited the State from pursuing it. The panel further held that the program was consistent with the statutory requirement that the measures included in the plan be enforceable.

COUNSEL

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Jessica E. Hafer Fierro (argued) and Annette A. Ballatore-Williamson, San Joaquin Valley Unified Air Pollution Control District, Fresno, California; Barbara Baird and Mary J. Reichert, South Coast Air Quality Management District, Diamond Bar, California; for Intervenors.

OPINION

MILLER, Circuit Judge:

The Environmental Protection Agency adopted a final rule approving the State of California's plan for meeting the air quality standard for ozone in the San Joaquin Valley. 84 Fed. Reg. 11,198 (Mar. 25, 2019). The plan contains a single contingency measure that will be activated if the other provisions of the plan do not achieve reasonable further progress toward meeting the standard. Arguing that the contingency measure is inadequate, an environmental organization petitions for review. Because we agree that the agency's approval of the plan was arbitrary and capricious, we grant the petition in part and remand.

I

A

The Clean Air Act establishes "a cooperative state-federal scheme for improving the nation's air quality." *Vigil v. Leavitt*, 381 F.3d 826, 830 (9th Cir. 2004). Under the Act, the EPA issues standards for atmospheric pollutants such as ozone. 42 U.S.C. §§ 7408(a), 7409(a); *see, e.g.*, 40 C.F.R. § 50.15. States, in turn, establish plans to meet those standards and submit them to the EPA for approval. 42 U.S.C. §§ 7407(a), 7410(a). When an area does not meet a standard, it is designated a "nonattainment" area. *See id.* §§ 7407(d)(1)(A), 7501(2). There are several degrees of nonattainment, ranging from marginal to extreme, *id.* § 7511(a)(1), and each classification imposes increasingly stringent requirements to reduce emissions and promote progress toward attainment, *id.* § 7511a(b)(1)(A), (c)(2)(B), (d), (e).

A state plan must "include enforceable emission limitations" to attain the relevant air quality standard. 42 U.S.C. § 7410(a)(2)(A); *see id.* § 7502(c)(6); *Committee for a Better Arvin v. EPA*, 786 F.3d 1169, 1176 (9th Cir. 2015). Plans covering nonattainment areas must also include provisions to ensure "reasonable further progress," 42 U.S.C. § 7502(c)(2), that is, "annual incremental reductions in emissions" to achieve attainment, *id.* § 7501(1); *see* 40 C.F.R. § 51.1100(t) (defining "reasonable further progress" for emissions relevant to meeting ozone standards); *id.* § 51.1110(a)(2) (same). For extreme ozone nonattainment areas, the plan must provide for reasonable further progress of "at least 3 percent of baseline emissions each year." 42 U.S.C. § 7511a(c)(2)(B)(i), (d), (e).

The Act requires assessment of progress at triennial "milestones." 42 U.S.C. § 7511a(g)(1). At each milestone, "the State shall determine whether each nonattainment area . . . has achieved a reduction in emissions during the preceding intervals equivalent to the total emission reductions required to be achieved by the end of such interval." *Id.* If the State does not meet a milestone in an extreme nonattainment area, it must submit a plan revision within nine months. *Id.* § 7511a(g)(5).

Congress recognized that a State's implementation plan might not succeed. Thus, plans covering nonattainment areas must "provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress" or fails to attain the relevant air quality standard. 42 U.S.C. § 7502(c)(9). Those contingency measures "shall . . . take effect in any such case without further action by the State or the [EPA] Administrator." *Id.* Similarly, any plan revision covering an extreme nonattainment area "shall provide for the implementation of specific measures to be

undertaken if the area fails to meet any applicable milestone." *Id.* § 7511a(c)(9); *see id.* § 7511a(d), (e). Those measures also take effect automatically "upon a failure by the State to meet the applicable milestone." *Id.* § 7511a(c)(9), (d), (e); *see also* 80 Fed. Reg. 12,264, 12,285–86 (Mar. 6, 2015) (finalizing requirements for contingency measures in state plans). By requiring contingency measures, the Act closes any potential gap in progress should a nonattainment area miss a milestone. *See* 42 U.S.C. §§ 7502(c)(9), 7511a(c)(9).

B

The San Joaquin Valley is a large inland area of California extending from the Sacramento-San Joaquin Delta in the north to the Tehachapi Mountains in the south. The Valley has long struggled to attain air quality standards for ozone. In 2012, the EPA classified the Valley as an extreme nonattainment area for the 8-hour ozone standard. *See* 40 C.F.R. § 51.1103(a), (d); 77 Fed. Reg. 30,088, 30,092 (May 21, 2012).

The San Joaquin Valley Air Pollution Control District is responsible for developing the state implementation plan for the Valley. 83 Fed. Reg. 44,528, 44,529 (Aug. 31, 2018). Another state agency, the California Air Resources Board, is responsible for submitting the state plan to the EPA for approval. *Id.* We refer to these entities collectively as the State.

In late 2018, the State proposed updates to its plan for the Valley. The updates reflected a response to our decision in *Bahr v. EPA*, 836 F.3d 1218 (9th Cir. 2016), in which we held that contingency measures may not include measures that have already been implemented in a state plan. *Id.* at 1235–36; *accord Sierra Club v. EPA*, 985 F.3d 1055,

1067–68 (D.C. Cir. 2021). The State explained that previous plans for the Valley had "featured contingency measures that relied upon reductions from the continued implementation of programs already adopted," which "provided excess emission reductions beyond what was required for attainment or reasonable further progress." Because those measures could no longer count as contingency measures after *Bahr*, the plan provided for a different contingency measure: the repeal of a rule allowing for the sale of small containers of paint. The plan also prescribed an "Enhanced Enforcement Activities Program"—a menu of options to reduce emissions if the State was unable to meet a milestone or attainment.

The EPA approved the revised plan. 84 Fed. Reg. at 11,198. The agency acknowledged that it had previously "recommended in guidance that contingency measures should provide emissions reductions approximately equivalent to one year's worth of [reasonable further progress], which, with respect to ozone in the . . . Valley," amounted to about 11.4 tons per day. *Id.* at 11,205. The agency estimated that the one contingency measure proposed by the State—the repeal of the small-container exemption for paint—would provide reductions of only one ton per day. *Id.* at 11,206. But the agency stated that it now "do[es] not believe that the contingency measures themselves must provide for one year's worth of [reasonable further progress]." *Id.* Under its new approach, the agency permitted the State to count "additional emission reductions projected to occur that a state has not relied upon for purposes of [reasonable further progress] or attainment . . . and that result from measures the state has not adopted as contingency measures." *Id.*

The EPA also approved the Enhanced Enforcement Activities Program, but it did not consider that program to be "a stand-alone contingency measure." 84 Fed. Reg. at 11,204; *see id.* at 11,203. Instead, the agency approved the program as "a [plan]-strengthening portion of the contingency measure." *Id.* at 11,204.

II

The Association of Irritated Residents (AIR), a California nonprofit corporation with members who reside in the Valley, petitions for review of the EPA's final rule approving the state plan. The San Joaquin Valley Air Pollution Control District and the South Coast Air Quality Management District have intervened in defense of the rule. Although the EPA does not question AIR's standing, the intervening districts do, so we begin by considering their argument.

To establish Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). AIR meets those requirements.

It is well established "that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972));

accord Ecological Rts. Found. v. Pacific Lumber Co., 230 F.3d 1141, 1149 (9th Cir. 2000). Applying that reasoning, we have explained "that evidence of a credible threat to the plaintiff's physical well-being from airborne pollutants falls well within the range of injuries to cognizable interests that may confer standing." *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001); *see also Sierra Club v. EPA*, 762 F.3d 971, 977 (9th Cir. 2014).

AIR's members have established injury in fact by submitting declarations containing credible allegations of respiratory distress as well as harm to their recreational and aesthetic interests as a result of ozone pollution in the Valley. But the districts argue that those injuries are not caused by the EPA's approval of the contingency measure in the State's plan, and, correspondingly, that setting aside the plan's approval would not redress the injuries. That is so, they say, because the contingency measure has not yet been activated, so its implementation is merely "hypothetical."

We disagree. An injury is fairly traceable to a challenged action as long as the links in the proffered chain of causation "are 'not hypothetical or tenuous' and remain 'plausib[le].'" *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (alteration in original) (quoting *National Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002)). Similarly, a plaintiff can meet the redressability requirement by showing that "it is likely, although not certain, that his injury can be redressed by a favorable decision." *Wolfson v. Brammer*, 616 F.3d 1045, 1056 (9th Cir. 2010); *accord Friends of the Earth*, 528 U.S. at 181. Neither part of the test demands absolute certainty, and both are satisfied here.

The Valley has long been "an area with some of the worst air quality in the United States," and it has repeatedly failed to meet air quality standards. *Committee for a Better Arvin*,

786 F.3d at 1173. In 2001, the EPA found that the Valley did not attain the 1-hour ozone standard that was then in effect and reclassified the Valley as a severe nonattainment area for the 1-hour ozone standard. 66 Fed. Reg. 56,476, 56,481 (Nov. 8, 2001). Since 2004, the Valley has been designated as a nonattainment area for the 8-hour ozone standard. *See* 69 Fed. Reg. 23,858, 23,888–89 (Apr. 30, 2004). And in 2012, the Valley was reclassified as an extreme nonattainment area for the 8-hour ozone standard. *See* 40 C.F.R. § 51.1103(a), (d); 77 Fed. Reg. at 30,092. The threat that the Valley will continue to fail to meet the ozone standard—and therefore that the contingency measure will be activated—is neither conjectural nor hypothetical, but a reasonable inference from the historical record.

As the districts acknowledge, their arguments relate more to ripeness than to standing. The ripeness doctrine, which aims to avoid premature and potentially unnecessary adjudication, "is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *National Park Hosp. Ass'n v. Department of Interior*, 538 U.S. 803, 808 (2003) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)). "The constitutional component of ripeness overlaps with the 'injury in fact' analysis for Article III standing," and therefore "the inquiry is largely the same: whether the issues presented are 'definite and concrete, not hypothetical or abstract.'" *Wolfson*, 616 F.3d at 1058 (quoting *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)). For the reasons we have already explained, constitutional ripeness is satisfied here.

To assess prudential ripeness, we must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott*

Labs. v. Gardner, 387 U.S. 136, 149 (1967); *see Colwell v. Department of Health & Hum. Servs.*, 558 F.3d 1112, 1124 (9th Cir. 2009). The issue here is fit for review because it is a purely legal question presented in the concrete setting of the EPA's approval of the specific plan adopted by the State. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 479 (2001) (concluding that an issue was ripe when it was "purely one of statutory interpretation that would not benefit from further factual development of the issues presented" (internal quotation marks omitted)); *see also Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012); *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998). And delaying review would cause hardship to AIR because it would mean that the allegedly inadequate contingency measure could not be reviewed until it was already implemented, when any review would be too late to redress the injuries suffered by AIR's members. We conclude that the challenge is ripe for review.

III

According to AIR, the EPA's approval of the contingency measure in the State's plan reflects an unreasonable interpretation of the Clean Air Act and is arbitrary and capricious because the measure will provide only a nominal emissions reduction of one ton per day. The EPA responds with the observation that the statute does not "specify the quantity of emission reductions that a contingency measure must provide," and it argues that "there exists no binding requirement for the particular amount of emission reductions that EPA must require in a contingency measure."

All parties agree that we must review the EPA's interpretation of the Clean Air Act using the deferential

framework of *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). The first step under *Chevron* is to determine whether Congress has "directly addressed the precise question at issue." *Id.* at 843. AIR does not argue that the EPA's interpretation fails at step one of *Chevron* but instead relies on step two, arguing that the agency has adopted an unreasonable interpretation of the statute. *See id.* at 843–44. AIR observes that the EPA has long taken the position that contingency measures "should be approximately equal to the emissions reductions necessary to demonstrate [reasonable further progress] for one year." 57 Fed. Reg. 13,498, 13,543–44 (Apr. 16, 1992); *see also* 80 Fed. Reg. at 12,286 ("The EPA's long-standing interpretation is that a 3 percent emissions reduction from the [reasonable further progress] baseline . . . is the minimum contingency measure adoption requirement."). In AIR's view, the EPA's new, contrary interpretation of the statute is unreasonable.

As the District of Columbia Circuit has observed, there is considerable overlap between a challenge at *Chevron* step two and an argument that an agency's action is arbitrary and capricious: "Whether a statute is unreasonably interpreted is close analytically to the issue whether an agency's actions under a statute are unreasonable." *General Instrument Corp. v. FCC*, 213 F.3d 724, 732 (D.C. Cir. 2000); *accord Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011); *see also Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1076 (9th Cir. 2020). We think AIR's challenge is most appropriately evaluated under the arbitrary-and-capricious framework, and we agree with AIR that even assuming that the EPA's interpretation of the statute is permissible, its action cannot survive review.

Under the Administrative Procedure Act, "[w]hen an administrative agency sets policy, it must provide a reasoned explanation for its action." *Judulang*, 565 U.S. at 45. Of

particular relevance here, when an agency changes its policy, it "must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). The requirement of a reasoned explanation "is not a high bar, but it is an unwavering one." *Judulang*, 565 U.S. at 45. The EPA's reasoning does not clear that bar.

In the challenged rule, the EPA acknowledged the traditional relationship between contingency measures and the requirement of reasonable further progress: "The purpose of emissions reductions from implementation of contingency measures is to ensure that, in the event of a failure to meet a[] [reasonable further progress] milestone or a failure to attain the [air quality standards] by the applicable attainment date, the state will continue to make progress toward attainment at a rate similar to that specified under the [reasonable further progress] requirements." 84 Fed. Reg. at 11,205. It also recognized that it had adopted a specific understanding of the necessary scale of contingency measures, having previously said "that contingency measures should provide emissions reductions approximately equivalent to one year's worth of [reasonable further progress], which, with respect to ozone in the San Joaquin Valley nonattainment area," is about 11.4 tons per day. *Id.*

In approving a contingency measure that provides a far lower emissions reduction—only one ton per day—the EPA did not say that it had changed its understanding of what reasonable further progress means. Instead, it said that "contingency measures themselves" do not need to "provide for one year's worth of [reasonable further progress]."

84 Fed. Reg. at 11,206. Now, according to the agency, a State can combine emissions reductions achieved through contingency measures with "sources of surplus emissions reductions," that is, "additional emission reductions projected to occur that a state has not relied upon for purposes of [reasonable further progress] or attainment or to meet other nonattainment plan requirements." *Id.*

The EPA described its new position as a response to our decision in *Bahr*, but it cannot be reconciled with our reasoning in that case. Under *Bahr*, contingency measures may not be measures that the State is already implementing in its plan. 836 F.3d at 1236. Our decision was based on the plain language of the statute, which reflects the commonsense idea that if currently existing measures are not successful in ensuring progress, then it is unreasonable to rely upon them as contingency measures. *Id.* In *Sierra Club*, which endorsed the holding of *Bahr*, the District of Columbia Circuit explained the idea well: "[M]easures that are already implemented are not measures 'to take effect' or 'to be undertaken' if the area fails to satisfy the applicable requirements. . . . They are simply measures that have failed." 985 F.3d at 1068 (quoting 42 U.S.C. § 7502(c)(9)). But here, the agency has relied on "surplus" emissions reductions from existing measures to make up for what everyone agrees would otherwise be an inadequate contingency measure. That approach is a transparent effort to circumvent *Bahr*. Having been told that it could not rely on projected emissions reductions from existing measures as contingency measures, the agency has simply relabeled them "surplus reductions." In doing so, it has severed the relationship between the requirement of contingency measures and the benchmark of reasonable further progress, without an adequate explanation of why the new—and far more modest—contingency measure is reasonable.

The EPA argues that its prior statements tying contingency measures to reasonable further progress did not have the force of law. That is beside the point because the EPA still must give a reasoned explanation for departing from agency practice or policy. *See Encino Motorcars*, 136 S. Ct. at 2125–26. If already-implemented measures cannot themselves be contingency measures—and *Bahr* makes clear that they cannot—then neither can they be a basis for declining to establish contingency measures that would otherwise be appropriate.

The premise of the EPA's rule appears to be that contingency measures will not be needed "because already-implemented measures (although not relied upon for the purpose[] of meeting the statutory contingency measure requirement) will also ensure sufficient continued progress in the event of a failure to achieve a[] [reasonable further progress] milestone." 84 Fed. Reg. at 11,206. But the reason the statute requires contingency measures is to have a backup that can be put in place immediately in case already-implemented measures in a plan fail to achieve reasonable further progress. *See Sierra Club*, 985 F.3d at 1068; *Bahr*, 836 F.3d at 1235. The agency may not avoid the need for robust contingency measures by assuming that they will not be needed. Because the agency did not provide a reasoned explanation for approving the state plan, the rule is arbitrary and capricious.

IV

AIR also challenges the EPA's approval of the State's Enhanced Enforcement Activities Program. The scope of that challenge is narrow because the EPA recognized that the program "fails to include all of the characteristics necessary to provide for a stand-alone contingency measure" and therefore did not approve it as one. 84 Fed. Reg. at 11,204.

Nor did the agency "credit the [program] as achieving any emissions reductions." *Id.* at 11,206. Instead, the agency approved it as a plan "strengthening" measure. *Id.* at 11,204. The dispute, then, concerns only whether such a measure is permissible under the Act.

The Act generally charges the States with responsibility for meeting air quality standards, and it permits the adoption of emissions limitations. 42 U.S.C. §§ 7407(a), 7416. The only restriction is "that if an emission standard or limitation is in effect under an applicable implementation plan . . . , such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan." *Id.* § 7416. Because the program does not create any emission limitation that is less stringent than one in effect in the state plan, nothing in the statute prohibits the State from pursuing it.

Of course, once a State seeks to incorporate an additional emissions limitation into its plan, section 7410(a)(2)(A) requires that the limitation be enforceable. *See Committee for a Better Arvin*, 786 F.3d at 1176. The EPA acknowledges that the program must be enforceable to be incorporated into the plan, and it argues that those components of the program that were approved as part of the plan are indeed enforceable. We agree. Under the program, if an area does not meet a milestone or attainment, the State must prepare a report within 60 days that "include[s] a determination of the probable causes of the failure and . . . state[s] the type and quantity of additional enforcement resources that will be utilized within the failing area along with an explanation of why the type and quantity of enforcement resources allocated (Enhanced Enforcement Program) are appropriate." The measures identified in the program must then be implemented. 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. *See* 42 U.S.C. §§ 7509, 7604(a). The program is therefore consistent with the statutory requirement that measures included in the plan be enforceable. *See Committee for a Better Arvin*, 786 F.3d at 1177.

PETITION GRANTED in part and DENIED in part; REMANDED.