

CONTINGENCY MEASURE ISSUES

Sunil Kumar
Principal Environmental Engineer

MWAQC-TAC
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Contingency Measures – Issues

1. Use of already implemented measures as contingency measures in Attainment & Maintenance Plans
2. Amount of emissions reductions needed through contingency measures in case of failure to meet RFP requirements and attainment by the deadline



Contingency Measures in CAA

Contingency Measure Requirements for Attainment Plan

CAA Section 172(c)(9)

<https://www.govinfo.gov/content/pkg/USCODE-2013-title42/html/USCODE-2013-title42-chap85-subchapl-partD-subpart1-sec7502.htm>

“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.”

CAA Section 182(c)(9)

“In addition to the contingency provisions required under section 7502(c)(9) of this title, the plan revision shall provide for the implementation of specific measures to be undertaken if the area fails to meet any applicable milestone. Such measures shall be included in the plan revision as contingency measures to take effect without further action by the State or the Administrator upon a failure by the State to meet the applicable milestone.”



Contingency Measures in CAA

Contingency Measure Requirements for Maintenance Plan

<https://www.govinfo.gov/content/pkg/USCODE-2013-title42/html/USCODE-2013-title42-chap85-subchapl-partD-subpart1-sec7505a.htm>

Section 175A(d)

“Each plan revision submitted under this section shall contain such contingency provisions as the Administrator deems necessary to assure that the State will promptly correct any violation of the standard which occurs after the redesignation of the area as an attainment area. Such provisions shall include a requirement that the State will implement all measures with respect to the control of the air pollutant concerned which were contained in the State implementation plan for the area before redesignation of the area as an attainment area. The failure of any area redesignated as an attainment area to maintain the national ambient air quality standard concerned shall not result in a requirement that the State revise its State implementation plan unless the Administrator, in the Administrator's discretion, requires the State to submit a revised State implementation plan.”



Use of Already Implemented Contingency Measures

Use of already implemented measures as contingency measures in Attainment & Maintenance Plans

2015 Ozone NAAQS Implementation Rule (Page 63026)

EPA allowed the use of measures already implemented to be included as contingency measures for the 2015 ozone SIPs (See specific text below).

“The EPA believes that the language of sections 172(c)(9) and 182(c)(9) is ambiguous with respect to this issue, and that it is reasonable for the agency to interpret the statutory language to allow approval of already implemented measures as contingency measures, so long as they meet other parameters such as providing excess emissions reductions that the state has not relied upon to make RFP or for attainment in the nonattainment plan for the NAAQS at issue.”

Use of Already Implemented Contingency Measures

“States located in circuits other than the Ninth* may elect to rely on the EPA’s longstanding interpretation of section 172(c)(9) allowing early triggered measures to be approved as contingency measures, in appropriate circumstances. The EPA’s revised Regional Consistency regulations pertaining to SIP provisions authorize the agency to follow this interpretation of section 172(c)(9) in circuits other than the Ninth. See 40 CFR part 56. To ensure that early triggered contingency measures appropriately satisfy all other relevant CAA requirements, the EPA will carefully review each such measure contained in an air agency’s submission, and intends to consult with air agencies considering such measures early in the attainment plan development process.”

* U.S. Court of Appeals for the Ninth Circuit in *Bahr v. EPA* (2016) ruled that measures that have already been implemented cannot be used as contingency measures for Arizona’s PM10 SIP. EPA cited the Fifth circuit court, which upheld EPA’s interpretation of the use of already implemented measures for contingency.

Court decision - Sierra Club Vs EPA (1.29.2021)

Petitioners challenged EPA’s above interpretation in the 2015 ozone NAAQS implementation rule in the United States Court of Appeals For The District Of Columbia Circuit. The Court ruled that previously implemented measures cannot qualify as contingency measures.



Contingency Measures – Amount of Emissions Reductions

Amount of emissions reductions needed through contingency measures in case of failure to meet RFP requirements and attainment by the deadline

Clean Air Act

Amount of emission reduction not specified

2015 Ozone NAAQS Implementation Rule (Page 63026)

EPA requires 1 years' worth of emissions reductions or approximately 3 percent of the baseline emissions inventory (See specific text below).

“Contingency measures required under CAA sections 172(c)(9) and 182(c)(9) must be fully adopted rules or measures that can take effect without further action by the state or the EPA upon failure to meet milestones or attain by the attainment deadline. Per the EPA guidance, these measures should provide 1 years' worth of emissions reductions, or approximately 3 percent of the baseline emissions inventory. Once triggered, if these adopted contingency measures are insufficient to attain the standard, an air agency must conduct additional control measure development and implementation for the area as necessary to correct the shortfall.”



Contingency Measures – Amount of Emissions Reductions

Court decision - Association of Irrigated Residents V. EPA (8.26.2021)

The Ninth Circuit reversed EPA's approval of California's non-attainment ozone SIP in the San Joaquin Valley, finding defects with the contingency measures.

EPA approved California's SIP, which contained a single contingency measure that would reduce ozone emissions by 1 tpd when one year's worth of reasonable further progress emissions was approximately 11.4 tpd. EPA argued the CAA does not specify the quantity of emission reductions a contingency measure must achieve, and therefore, does not guide nor bind EPA in approving contingency measures.

The court concluded "EPA still must give a reasoned explanation for departing from agency practice or policy" and "[b]ecause the agency did not provide a reasoned explanation for approving the state plan, the rule is arbitrary and capricious." As a result, California will need to include additional contingency measures in its SIP or better justify its decision.

