

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

December 23, 2020

Lyle W. Cayce
Clerk

No. 18-60606

STATE OF TEXAS; GREG ABBOTT, *Governor of the State of Texas*;
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; SIERRA
CLUB,

Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY;
ANDREW WHEELER, *Administrator of the United States Environmental
Protection Agency*,

Respondents.

On Petitions for Review of Final Action of the
United States Environmental Protection Agency

Before CLEMENT, ELROD, and DUNCAN, *Circuit Judges*.

JENNIFER WALKER ELROD, *Circuit Judge*:

The State of Texas and Sierra Club challenge the Environmental Protection Agency's action designating Bexar County, Texas as in nonattainment and three neighboring counties as in attainment with the 2015 Ozone National Ambient Air Quality Standards (NAAQS). In 2018, EPA modified Texas's designation of Bexar County from attainment to nonattainment. Texas challenges this action on the basis that the State's

modeling projected the county to be in attainment by the year 2020. Sierra Club insists that EPA should have designated three of Bexar's neighboring counties (Atascosa, Comal, and Guadalupe) as nonattainment because they impacted more than one percent of Bexar's ambient ozone levels. Because the relevant statutory language grants EPA discretionary authority to make the changes it "deems necessary," and because EPA's interpretation and implementation of the statute is reasonable, we DENY both petitions.

I.

A.

Ground level (or ambient) ozone is associated with negative health effects, such as decreased lung function and respiratory symptoms. *See Miss. Comm'n on Env't Quality v. EPA*, 790 F.3d 138, 147 (D.C. Cir. 2015) (citation omitted). It can also have detrimental effects on trees, vegetation, and crops, as well as indirect effects on soil, water, and wildlife. *Id.* Ozone forms when nitrous oxides and volatile organic compounds react with sunlight. Because states cannot regulate sunlight, ozone regulation focuses on "ozone-precursor producers like power plants, industrial compounds, motor vehicles and combustion engines." *Id.*

The Clean Air Act establishes a comprehensive system for protecting the country's air quality. 42 U.S.C. §§ 7401–7671q. In this system, state and federal actors work together to reduce air pollution. The Clean Air Act "requires the Administrator of EPA to promulgate NAAQS for each air pollutant for which 'air quality criteria' have been issued under . . . 42 U.S.C. § 7408." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 462 (2001). "[A]t five-year intervals . . . the Administrator shall complete a thorough review" of the NAAQS and "promulgate such new standards as may be appropriate." 42 U.S.C. § 7409(d)(1). Once EPA designates a NAAQS for a pollutant, "the standards become the centerpiece of a complex statutory regime aimed at reducing the pollutant's atmospheric concentration." *Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 358–59 (D.C. Cir. 2002).

When new standards are issued or old standards are revised, the states and EPA work within the Clean Air Act's structure of cooperative federalism to implement the new standards. Governors must "submit to the Administrator a list of all areas (or portions thereof) in the State, designating [each area] as . . . nonattainment, . . . attainment, . . . or unclassifiable." *Id.* § 7407(d)(1)(A). The Administrator then "promulgate[s] the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable." *Id.* § 7407(d)(1)(B)(i). "In making [those] promulgations . . . the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas" submitted by the states. *Id.* § 7407(d)(1)(B)(ii). "If the Governor fails to submit the list . . . the Administrator shall promulgate the designation that the Administrator deems appropriate for any area . . . not designated by the State." *Id.* If EPA intends to modify a state's plan, the Administrator must "notify the State and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate." *Id.*

An area is designated nonattainment if it "does not meet (or . . . contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant." 42 U.S.C. § 7407(d)(1)(A)(i). Nonattainment areas are further classified as marginal, moderate, serious, severe, or extreme, depending on the severity of air pollution. *See* 40 C.F.R. § 51.1303 (2018). The higher a county's nonattainment classification, the more stringent the air planning requirements are to bring the county back into compliance. 42 U.S.C. §§ 7511, 7511a.

Any area that meets the NAAQS for a given pollutant will be designated as attainment. 42 U.S.C. § 7407(d)(1)(A)(ii). If an area "cannot be classified on the basis of available information as meeting or not meeting the [NAAQS] for the pollutant," it is designated unclassifiable. *Id.* § 7407(d)(1)(A)(iii). EPA considers an "area designated as either

attainment, unclassifiable, or attainment/unclassifiable” to be an “[a]ttainment area.” 40 C.F.R. § 51.1100(g) (2015).

For the 2015 ozone NAAQS, attainment is met “when the 3-year average of the annual fourth-highest daily maximum 8-hour average O₃ concentration . . . is less than or equal to 0.070 ppm.” 40 C.F.R. pt. 50, Appx. U(4)(a) (2015). EPA requires states to submit “an annual monitoring network plan which shall provide for the documentation of the establishment and maintenance of an air quality surveillance system.” 40 C.F.R. § 58.10(a)(1) (2016). This system uses air monitoring stations to gather air quality data. Where monitoring stations are located depends largely upon population. This means that many counties with fewer than 350,000 residents have no monitoring station. *See* 40 C.F.R. pt. 58, Appx. D, Table D-2 (2016).

Counties with no monitoring stations can still be designated nonattainment if they “contribute[] to ambient air quality” in a nearby nonattainment area. 42 U.S.C. § 7407(d)(1)(A)(i). EPA evaluates the contribution of such counties to neighboring nonattainment counties using a five-factor balancing test that considers: (1) air quality data; (2) emissions and emissions-related data; (3) meteorological data; (4) geography/topography; and (5) jurisdictional boundaries. *See* Janet G. McCabe, Acting Assistant Administrator, *Area Designations for the 2015 Ozone National Ambient Air Quality Standards*, Attachment 3 (Feb. 25, 2016).

Once a county has been designated nonattainment, the state has “the primary responsibility for assuring air quality within” its borders. 42 U.S.C. § 7407(a). The state must develop a state implementation plan (SIP) that “provides for implementation, maintenance, and enforcement” of the unattained standard. 42 U.S.C. § 7410(a)(1). At that point, “the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter.” 42 U.S.C. § 7410(k)(3).

B.

In 2015, EPA revised its ozone NAAQS from 0.075 ppm to 0.07 ppm. National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015). Texas submitted the required initial designations for its counties. Because Bexar County's monitors reported a certified 2013–2015 design value of 0.078 ppm, Texas recommended that it be designated nonattainment. For seven of Bexar's neighboring counties (including Atascosa, Comal, and Guadalupe counties), Texas recommended a designation of “unclassifiable/attainment.” One year later, Texas asked EPA “to allow the state more time to show that additional data and considerations” warranted an attainment designation for Bexar County. In February 2018, the Texas governor wrote EPA to assert that “Bexar County is projected to satisfy the 2015 NAAQS by 2020, and that projected compliance is sufficient to support an attainment designation.”

EPA rejected Texas's revised designation. It called for public comments, which Texas, Sierra Club, and Environmental Defense Fund submitted. In July 2018, the Administrator promulgated the final designations for the eight counties in the San Antonio region. *See Additional Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards—San Antonio, Texas Area*, 83 Fed. Reg. 35,136–01 (July 25, 2018). The agency designated Bexar County as a marginal nonattainment area “based on air quality monitoring data from the 3 most recent years of certified data, which are 2015–2017.” 83 Fed. Reg. at 35,138–39. The other seven neighboring counties were designated as attainment/unclassifiable after EPA conducted its five-factor contribution analysis. 83 Fed. Reg. at 35,140.

Texas and Sierra Club timely filed petitions for review. Texas sought review in this court, while Sierra Club sought review in the D.C. Circuit. Texas filed an opposed motion in this court to confirm venue. The D.C. Circuit consolidated the challenges and placed them in abeyance pending this court's resolution of the venue motion. This court granted Texas's motion

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