GOVERNOR GREG ABBOTT

May 11, 2018

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW, 1101A
Washington, D.C. 20460

Re: Ozone Designation for the San Antonio Metropolitan Area, EPA-HQ-OAR-2017-0548

Dear Administrator Pruitt:

On February 28, 2018, I urged EPA to designate Bexar County as in attainment of the 2015 National Ambient Air Quality Standard (NAAQS) for ozone. In the alternative, I explained that "under no circumstances should Bexar County receive a designation worse than unclassifiable."[1] On March 19, 2018, you responded that EPA intends "to designate all or portions of Bexar County as, at best, Unclassifiable" and invited me to submit additional information for EPA's consideration.[2] I write to provide that additional information.

EPA should designate Bexar County as "attainment" or, at worst, "unclassifiable" under the 2015 ozone NAAQS. If EPA chooses to designate Bexar County as "nonattainment"—despite the discretion to do otherwise—EPA should at least defer the effective date of that designation until Bexar County has had the opportunity to meet the 2015 NAAQS on its own.

I. EPA Should Exercise Discretion to Designate Bexar County as in Attainment

I previously recommended that EPA designate Bexar County as in attainment of the 2015 ozone NAAQS, and I stand by that recommendation. Bexar County is projected to meet the 2015 NAAQS by 2020 without additional federal intervention. Indeed, Bexar County would have already met that standard if not for foreign emissions that it cannot control.

I appreciate that your March 19 letter acknowledged two important factual underpinnings for my recommendation of attainment. First, EPA acknowledged projections that Bexar County will meet the 2015 ozone NAAQS by 2020. Second, EPA noted that foreign emissions

[1] Letter from Gov. Abbott to Administrator Pruitt (Feb. 28, 2018), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0548-0297.
[2] Letter from EPA to Gov. Abbott (Mar. 19, 2018), https://www.epa.gov/sites/production/files/2018-03/documents/san_antonio_naaqs_epa_ltr_3_19_2019.pdf.

adversely affect Bexar County's ozone levels.[3] Unfortunately, the Technical Support Document (TSD) attached to that March 19 letter also contained significant legal and factual errors that underlie the proposed modification to my recommendation. Once those errors are corrected, the propriety of designating Bexar County as in attainment becomes clear.

A. As a Matter of Law, EPA Has Discretion to Designate Bexar County as In Attainment

The TSD misstates the law. It asserts that "EPA *must* designate as nonattainment any area that violates the NAAQS." TSD at 6 (emphasis added). Elsewhere, the TSD suggests that this result is compelled by Section 107(d) of the Clean Air Act. *See id.* at 2.

That is not true. As I explained in my previous letter, EPA's discretion is recognized in the plain text of the CAA, judicial interpretations of the CAA, and EPA's past practices under the CAA. It would be legally erroneous for EPA to ignore these authorities and to follow instead a nonbinding guidance document issued by the previous Administration.

1. First consider the text of the CAA. Section 107(d) grants EPA significant discretion in making designation decisions. It establishes a two-step process in which Governors make initial recommendations and then the Administrator "make[s] such modifications as the Administrator deems necessary." 42 U.S.C. § 7407(d)(1)(B)(ii). Section 107 "says nothing of what precisely will render a modification 'necessary' " and thus leaves the necessity of modifications to EPA's discretion. *Catawba Cty., N.C. v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009).

2. Courts likewise have recognized this discretion when interpreting materially identical language in related sections of the CAA. For example, section 231 of the CAA empowers EPA to regulate emissions from aircraft and requires the Administrator to "issue such regulations with such modifications as he deems necessary." 42 U.S.C. § 7571(a)(3). The D.C. Circuit described this "deems necessary" language, which Section 107 also contains, as an "explicit and extraordinarily broad" delegation of authority. *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1229 (D.C. Cir. 2007). "Finding nothing in 'the text or structure of the statute to indicate that the Congress intended to preclude the EPA from considering [factors other than air quality],' [the court] refused 'to infer from congressional silence an intention to preclude the agency from considering factors other than those listed in a statute.'" *Id.* at 1230 (quoting *George E. Warren Corp. v. EPA*, 159 F.3d 616, 623–24 (D.C. Cir. 1998)).

So too here. Section 107 grants EPA broad discretion to consider factors beyond monitoring data, including Bexar County's projected improvements in air quality and the adverse effect of foreign emissions, as the case law cited in my previous letter demonstrated. *See*, *e.g.*, *Sierra Club v. McCarthy*, No. 13-cv-3953, 2015 WL 889142, at *1 (N.D. Cal. Mar. 2, 2015), *aff'd sub nom. Sierra Club v. North Dakota*, 868 F.3d 1062 (9th Cir. 2017) (recognizing "EPA's

[3] Texas: San Antonio, Intended Area Designations for the 2015 Ozone NAAQS, Technical Support Document at 21, https://www.epa.gov/sites/production/files/2018-03/documents/tx_sanantonio_120d_tsd_draft_3-2018_r6.pdf.

discretion to determine, based on available information, whether an area is in 'attainment' or 'nonattainment' with the [relevant] air quality standard, or whether the area is 'unclassifiable' "). I am aware of no contrary authority.[4]

3. EPA has long used discretion to avoid nonattainment designations. When EPA considers changing an area's previous designation, it exercises discretion regarding whether to redesignate an area as in nonattainment. For example, under the Early Action Compact (EAC) program, EPA agreed to use its discretion to avoid redesignating EAC areas as "nonattainment" in exchange for local governments making voluntary improvements to their air quality:

> [I]n deciding whether to redesignate an EAC area to nonattainment, EPA will consider the factors in section 107(d)(3)(A) of the CAA. If an EAC area continues to meet its compact milestones, EPA believes those factors should weigh in favor of not redesignating the area to nonattainment immediately, but rather waiting to see if the programs the area puts in place will bring it back into attainment.

Early Action Compact Areas With Deferred Effective Dates, 69 Fed. Reg. 23,858, 23,871 (Apr. 30, 2004). In other words, EPA "deem[ed] necessary" a wait-and-see approach for redesignations that allowed areas not meeting the NAAQS to avoid the regulatory burdens of a nonattainment designation while they were making progress toward cleaner air.

EPA should do the same here. That EPA has exercised discretion in the redesignation process under Section 107(d)(3) weighs heavily in favor of exercising discretion in the designation process under Section 107(d)(1) because the two provisions are similar in both text and purpose. *See* 42 U.S.C. § 7407(d)(3)(C) ("[T]he Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B) [the provision at issue here].").

4. Statutory text, court decisions, and EPA's previous actions all make clear that EPA has discretion to designate Bexar County as in attainment. Against those authorities, EPA's March 19 response cited a non-binding policy memorandum, prepared under the previous Administration, suggesting that EPA lacks discretion over designations.

[4] EPA should also consider that one regulatory monitor and numerous non-regulatory monitors all show that ozone levels in Bexar County satisfy the 2015 NAAQS. Your response asserts that the data "do not meet EPA quality assurance criteria and cannot be used for regulatory purposes," TSD at 21, but it makes no effort to distinguish the multiple recent instances in which EPA has considered similar data. "[W]hen an agency takes inconsistent positions, as [EPA] did here, it must explain its reasoning." *Gulf Power Co. v. FERC*, 983 F.2d 1095, 1101 (D.C. Cir. 1993).

But that unreasoned *ipse dixit* is not the law. The memorandum itself recognizes that "[a]ny guidance contained herein is *not binding* on states, tribes, the public or the EPA."[5] As former Attorneys General, we both know that the previous Administration's legal assertions cannot be taken at face value. For that reason, more than a year ago, President Trump ordered EPA to review existing environmental policies to ensure that they "comply with the law." Presidential Executive Order on Promoting Energy Independence and Economic Growth § 1(e) (Mar. 28, 2017). More recently, the President specifically directed you to "evaluate EPA's existing rules, guidance, memoranda, and other public documents relating to the implementation of NAAQS." Presidential Memorandum for the Administrator of the Environmental Protection Agency § 9 (Apr. 12, 2018). I respectfully urge you to follow the President's lead, independently review EPA's legal authority, and for the reasons outlined above, conclude that EPA has the discretion to designate Bexar County as in attainment.

Failing to recognize and exercise EPA's discretion in this regard would render any nonattainment designation "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "[A] court 'can compel an official to exercise his discretion where he has obviously failed or refused to do so.' " *NAACP v. Sec'y of Housing & Urban Devel.*, 817 F.2d 149, 160 (1st Cir. 1987) (quoting *Mastrapasqua v. Shaughnessy*, 180 F.2d 999, 1002 (2d Cir. 1950)); *see also United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) ("[W]e object to the Board's alleged failure to exercise its own discretion, contrary to existing valid regulations."); *Bargmann v. Helms*, 715 F.2d 638, 641 (D.C. Cir. 1983) ("[W]e are presented with an agency's refusal to exercise its discretion, based on its belief that it has no power to do otherwise. . . . It is well within the tradition of our review of agency action on petitions for rulemaking to make an independent inquiry into an agency's allegation that it lacks the statutory authority to act.").

B. Foreign Emissions Caused Bexar County to Exceed the 2015 Ozone NAAQS

The TSD also misunderstands the relevant facts. As I explained in my February 28 letter, "[r]ecent photochemical modeling shows that emissions from foreign sources likely contribute 10–24 ppb of ozone to eight-hour ozone concentrations in Bexar County. Without these foreign emissions, Bexar County's ozone levels would be well below the 2015 NAAQS."[6]

1. The TSD downplays the significance of these foreign emissions because they include both man-made and naturally occurring foreign emissions. TSD at 21. The TSD's objection fails for two independent reasons. First, considering all foreign emissions, regardless of cause, is the more relevant analysis. Second, considering man-made foreign emissions alone, as the TSD suggests, does not change the result. In the absence of foreign man-made emissions, Bexar County would have satisfied the 2015 ozone NAAQS.

---

[5] Memo. from Acting Assistant Administrator Janet G. McCabe to Regional Administrators re Area Designations for the 2015 Ozone National Ambient Air Quality Standards at 9 (Feb. 25, 2016), https://www.epa.gov/sites/production/files/2016-02/documents/ozone-designations-guidance-2015.pdf (emphasis added).

[6] Letter from Gov. Abbott to Administrator Pruitt at 6 (Feb. 28, 2018), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0548-0297.

There is no legitimate reason to punish Bexar County for emissions that it cannot control, regardless of whether those emissions are naturally occurring or man-made. For that reason, EPA has traditionally defined background ozone, which is not subject to regulatory controls, as including *all* foreign emissions as well as naturally-caused domestic emissions.[7] There is no reason to exclude consideration of naturally occurring foreign emissions.

My letter called attention to both the impact of foreign emissions in particular and the problem of background ozone in general. Consideration of total foreign emissions is not too broad; in fact, a broader-still consideration of all background ozone is appropriate. Consistent with EPA's historical understanding of background ozone, EPA should consider that only 49 percent of relevant Bexar County ozone emissions come from domestic man-made sources.[8] In other words, neither EPA nor Bexar County could regulate a majority of the ozone affecting Bexar County.

2. Moreover, the TSD is wrong to suggest that foreign man-made ozone is insignificant. In fact, EPA has previously estimated the effects of foreign man-made emissions on ozone levels, and EPA's own analysis suggests that Bexar County would have met the 2015 ozone NAAQS if not for foreign man-made ozone.

EPA estimated the effect of "global methane emissions related to recent human activity as well as anthropogenic emissions outside of North America" on Bexar County as 8–10 ppb.[9] EPA then noted that the increase in methane was probably responsible for 4–5 ppb of ozone nationwide.[10] That leaves 4–5 ppb that EPA attributed to man-made emissions from outside North America. Of course, that estimate understates total foreign man-made emissions by omitting man-made emissions from Mexico, Canada, and other foreign countries in North America. Because Bexar County exceeded the 2015 ozone NAAQS by only 3 ppb, EPA's own data suggest that it would have met the 2015 ozone NAAQS if foreign man-made emissions had not interfered.

3. Instead of undertaking this analysis, the TSD claims that "the impacts from manmade emissions from Mexico is on the order of less than 1 ppb." TSD at 21. First, that statement is factually incorrect. Only part of Mexico was included within the modeling domain, meaning that Mexican emissions were split between what the model labelled "Mexico" and what

[7] EPA, Implementation of the 2015 Primary Ozone NAAQS: Issues Associated with Background Ozone at 2 (Dec. 30, 2015), https://www.epa.gov/sites/production/files/2016-03/documents/whitepaper-bgo3-final.pdf; *see also* Presidential Memorandum for the Administrator of the Environmental Protection Agency (Apr. 12, 2018) (defining ozone "background levels" as the "levels associated with natural sources or emissions originating outside of the United States").
[8] *Id.* at 22 (Table 2a).
[9] EPA, Policy Assessment for the Review of the Ozone National Ambient Air Quality Standards (Aug. 2014) at 2A-29, https://www3.epa.gov/ttn/naaqs/standards/ozone/data/20140829pa.pdf (estimating 6–15 ppb for the United States as a whole and noting that 8–10 ppb was the "most frequent bin"); *id.* at 2A-31, Figure 8b (showing Bexar County as 8–10 ppb).
[10] *Id.* at 2A-29.

the model labelled "Boundary conditions/International."[11] As a result, the TSD's estimate is too low. Second, the TSD's focus on Mexico, to the exclusion of all other foreign sources, cannot be squared with the President's recent order that EPA "not limit its considerations to emissions emanating from Mexico or Canada, but rather consider[ ], where appropriate, emissions that may emanate from any location outside the United States." Presidential Memorandum for the Administrator of the Environmental Protection Agency § 4(b) (Apr. 12, 2018). The TSD's Mexico-only analysis, in addition to being wrong, is irrelevant.

In short, Bexar County would have already met the 2015 ozone NAAQS if it did not have to contend with foreign emissions. EPA's preliminary conclusion to the contrary was premised on a fundamental misunderstanding of the data.

II. Alternatively, EPA Should Designate Bexar County as Unclassifiable

EPA is considering whether to withdraw the 2015 NAAQS. In fact, EPA has used that potential withdrawal to justify staying a challenge to the lawfulness of the 2015 NAAQS. *See* Respondent EPA's Third Status Report, Doc. No. 1711911, *Murray Energy Corp., et al. v. EPA*, No. 15-1385 (D.C. Cir. Jan. 8, 2018) (consolidated with 15-1392, 15-1490, 15-1491 & 15-1494). As I previously explained in my February 28 letter, EPA should not proceed with designations while the fate of the 2015 NAAQS is still uncertain.

Legal uncertainty surrounding the 2015 NAAQS counsels in favor of, at worst, an unclassifiable designation. Because EPA cannot give effect to an unlawful rule, "available information" is insufficient to establish the 2015 NAAQS as "the national primary or secondary ambient air quality standard" for purposes of Section 107, much less can "available information" show that Bexar County "is not meeting" that standard. 42 U.S.C. § 7407(d)(1)(A)(iii).

In addition, considerable factual uncertainty means that Bexar County "cannot be classified [as nonattainment] on the basis of available information." *Id.* As has been recently reported, a coal-fired power plant in Bexar County is planning to cease operations by the end of this year.[12] Because this plant is upwind of the relevant monitors, its suspension of operations is likely to significantly improve ozone levels. While such a major change is pending, a nonattainment designation based on soon-to-be-out-of-date information would be unreasonable. *See, e.g.*, *Permian Basin Petrol. Ass'n v. Dep't of the Interior*, 127 F. Supp. 3d 700, 716–17 (W.D. Tex. 2015) (failure to consider "updated . . . numbers" was arbitrary and capricious

[11] Letter from Gov. Abbott to Administrator Pruitt at App'x C, pp.1–2 (Feb. 28, 2018), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0548-0297. Moreover, the TSD erroneously claims that the modeling cited in my previous letter inappropriately includes ozone "generated from emissions within the US and recirculated into the domain." TSD at 21. As the Texas Commission on Environmental Quality has explained, because the modeling boundary "is at least 200 miles away from any continental U.S. border," it is likely "that emissions and ozone outside this boundary did not originate within the continental United States." Letter from Gov. Abbott to Administrator Pruitt at App'x C, p.1 (Feb. 28, 2018), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0548-0297. Similarly, the impact of Hawaiian and Alaskan emissions is likely negligible.

[12] U.S. Energy Information Administration, Natural Gas Weekly Update (Mar. 14, 2018), https://www.eia.gov/naturalgas/weekly/archivenew_ngwu/2018/03_15/ ("Units 1 and 2 at the 840-MW JT Deely coal-fired plant are planned for retirement by the end of this year.").

because "reliance on out-of-date or incomplete information may render the analysis of effects speculative and uncertain" (quoting *City of Dallas v. Hall*, 562 F.3d 712, 720 (5th Cir. 2009))); *Sierra Club v. Babbitt*, 15 F. Supp. 2d 1274, 1284 (S.D. Ala. 1998) (agency finding was "arbitrary and capricious" due to reliance "on insufficient, inadequate, and out of date data").

Under no circumstances should Bexar County receive a designation worse than unclassifiable.

III. EPA Should Defer the Effective Date of Any Nonattainment Designation

If, contrary to my recommendation, EPA chooses to designate Bexar County as in nonattainment, EPA should at least defer the effective date of that designation.

In the past, EPA has deferred effective dates for nonattainment designations when localities have demonstrated a willingness and an ability to improve their air quality without additional federal intervention. Through the EAC program discussed above, EPA deferred the effective date of nonattainment designations in exchange for local governments agreeing to clean their air more quickly than the CAA would otherwise require.

Such a deferral would be a mutually beneficial solution that advances cooperative federalism, which you have rightly described as "key to maintaining clean air."[13] First, and most important, citizens get cleaner air more quickly with fewer economic drawbacks. Second, States and localities avoid the bureaucratic nightmares that follow from nonattainment designations and maintain "primary responsibility for assuring air quality." 42 U.S.C. § 7407(a). Third, EPA is able to meet its legal obligation to "promulgate the designations . . . as expeditiously as practicable" while advancing the CAA's goal of clean air. *Id.* § 7407(d)(1)(B)(i).

For these reasons, EPA has consistently reaffirmed the legality of deferring the effective date of a nonattainment designation. *See* Final 8-Hour Ozone National Ambient Air Quality Standards Designations for the Early Action Compact Areas, 73 Fed. Reg. 17,897, 17,899 (Apr. 2, 2008); Extension of the Deferred Effective Date for 8-Hour Ozone National Ambient Air Quality Standards for Early Action Compact Areas, 70 Fed. Reg. 50,988, 50,992 (Aug. 29, 2005); Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards; Early Action Compact Areas With Deferred Effective Dates, 69 Fed. Reg. 23,858, 23,869–70 (Apr. 30, 2004).

As your response acknowledged, Bexar County is projected to meet the 2015 ozone NAAQS by 2020 without additional federal intervention.[14] Local leaders are eager to clean their

[13] EPA News Release, EPA Advances Cooperative Federalism through Designation Process for Sulfur Dioxide and Ozone Standards (Dec. 22, 2017), https://www.epa.gov/newsreleases/epa-advances-cooperative-federalism-through-designation-process-sulfur-dioxide-and.

[14] Moreover, EPA itself has projected that all three of Bexar County's regulatory monitors will be well below 70 ppb, even in the absence of additional local actions, by 2025. EPA Regulatory Impact Analysis of the Final Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone at 2A-61 (Sept. 2015), https://www.epa.gov/sites/production/files/2016-02/documents/20151001ria.pdf.

air and have already implemented many successful reforms to do so. Deferring the effective date of any nonattainment designation would provide local leaders with the regulatory flexibility necessary for efficient reduction of Bexar County's ozone levels.

In fact, EPA and Bexar County have successfully used a deferred effective date to spur air quality improvements before. Under the EAC program, Bexar County "agreed to reduce ground-level ozone pollution earlier than the CAA would require" and then "successfully attained" the 1997 ozone standard. TSD at 5 n.10. As a result, Bexar County "was ultimately designated as attainment." TSD at 20 n.20. Bexar County's history of success with deferred effective dates strongly supports a similar approach for the 2015 ozone NAAQS.

* * *

In its March 19 letter, EPA committed to "implementing the [NAAQS] using a common sense approach that improves air quality and minimizes the burden on state and local governments." No common-sense approach could support immediately burdening Bexar County with the regulatory consequences of an effective nonattainment designation. I therefore reiterate my recommendation that Bexar County should be designated as in attainment of the 2015 ozone NAAQS.

Sincerely,

Greg Abbott
Governor

cc: Senator John Cornyn
Senator Ted Cruz
Congressman Will Hurd
Congressman Beto O'Rourke
Congressman Joaquin Castro
Congressman Henry Cuellar
Congressman Lloyd Doggett
Congressman Lamar Smith
Congressman Mike Conaway
Congressman Roger Williams
Anne Idsal, EPA Administrator for Region 6
Bryan W. Shaw, Chairman of TCEQ
Richard Hyde, Executive Director of TCEQ