United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 22, 2020 Decided January 29, 2021

No. 15-1465

SIERRA CLUB, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY AND ANDREW WHEELER, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

STATE OF TEXAS AND TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
INTERVENORS

Consolidated with 19-1024

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

Seth L. Johnson argued the cause and filed the briefs for petitioners.

David O'Brien Frederick and *Amy Catherine Dinn* were on the brief for *amicus curiae* Caring for Pasadena Communities in support of petitioners.

Perry M. Rosen, Senior Attorney, United States Department of Justice, argued the cause for the respondents. With him on the brief were *Jeffrey Bossert Clark*, Assistant Attorney General, and *Jonathan D. Brightbill*, Principal Deputy Assistant Attorney General.

Ken Paxton, Attorney General, Office of the Attorney General for the State of Texas, *Jeffrey C. Mateer*, First Assistant Attorney General, *Priscilla M. Hubenak*, Chief, Environmental Protection Division, and *Linda B. Secord*, Assistant Attorney General, were on the brief for intervenor-respondents the State of Texas and the Texas Commission on Environmental Quality.

Bayron T. Gilchrist, *Barbara Baird*, and *Megan E. Lorenz Angarita* were on the brief for *amicus curiae* South Coast Air Quality Management District in support of respondents.

Aaron M. Flynn, *Lucinda Minton Langworthy*, *Daryl L. Joseffer*, *Michael B. Schon*, and *Peter Tolsdorf* were on the brief for *amicus curiae* American Chemistry Council, et al. in support of respondents.

Before: TATEL and KATSAS, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: In these consolidated cases, we consider challenges to four provisions of the Environmental Protection Agency's 2015 and 2018 rules implementing the National Ambient Air Quality Standards for ozone. For the reasons set forth below, we vacate two provisions—the interprecursor trading program and the interpretation of the

Clean Air Act's contingency measures requirements—because they contravene the statute's unambiguous language. We vacate another provision—the implementation of the milestone compliance demonstration requirement—because it rests on an unreasonable interpretation of the statute. Lastly, we deny the petition for review with respect to the alternative baseline years provision.

I.

Under the Clean Air Act, the Environmental Protection Agency (EPA) must publish a list of air pollutants that "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). For each air pollutant, EPA must set primary and secondary National Ambient Air Quality Standards (NAAQS), specifying the levels of air quality "based on such criteria and allowing an adequate margin of safety" that are "requisite to protect the public health" for primary NAAQS, *id.* § 7409(b)(1), and specifying levels that are "requisite to protect the public welfare" for secondary NAAQS, *id.* § 7409(b)(2).

"Once EPA establishes NAAQS for a particular pollutant," those NAAQS become "the centerpiece of a complex statutory regime aimed at reducing the pollutant's atmospheric concentration." *Natural Resources Defense Council v. EPA* (*NRDC I*), 777 F.3d 456, 458 (D.C. Cir. 2014) (internal quotation marks omitted). After setting NAAQS, EPA establishes air quality control regions, 42 U.S.C. § 7407, and areas within those regions are designated as "nonattainment" when they do not meet the NAAQS for a specific pollutant, "attainment" when they do meet them, or "unclassifiable" when it cannot be determined "on the basis of available information" whether they meet the NAAQS, *id.* § 7407(d)(1)(A). States have "the primary responsibility for assuring air quality," *id.* § 7407(a), and they must submit state

implementation plans (SIPs) that "provide[] for implementation, maintenance, and enforcement of" the NAAQS. *Id.* § 7410(a)(1).

This case concerns the implementation of the NAAQS for ozone, "an essential presence in the atmosphere's stratospheric layer" that is "dangerous at ground level." *South Coast Air Quality Management District v. EPA* (*South Coast I*), 472 F.3d 882, 887 (D.C. Cir. 2006). Not directly emitted through human activity, ozone "forms when other atmospheric pollutants—ozone 'precursors'—react in the presence of sunlight." *American Trucking Associations, Inc. v. EPA*, 283 F.3d 355, 359 (D.C. Cir. 2002). These precursors include volatile organic compounds (VOCs) and oxides of nitrogen (NO_X). *South Coast I*, 472 F.3d at 887.

In 1990, Congress amended the Clean Air Act, finding that the statute had failed to produce the anticipated reductions of ozone and certain other pollutants. Accordingly, it "abandoned the discretion-filled approach of two decades prior in favor of more comprehensive regulation of six pollutants," including ozone, "that Congress found to be particularly injurious to public health." *South Coast I*, 472 F.3d at 887. Congress first redesignated the existing approach as Subpart 1, and that approach "continued to apply as a default matter to pollutants not specifically addressed in the amended portions of the Act." *NRDC I*, 777 F.3d at 460. Congress then added Subpart 2, which focuses on ozone and its precursors. *See* 42 U.S.C. §§ 7511–7511f. Subpart 2 directs that each ozone nonattainment area shall be classified as "marginal," "moderate," "serious," "severe," or "extreme" based on how much the ozone level in that area exceeds the NAAQS. *Id.* §§ 7511(a)–(b). Nonattainment areas must achieve the primary NAAQS "as expeditiously as practicable," *id.* § 7511(a)(1), although "[a]n area that exceeds the NAAQS by a greater

margin is given more time to meet the standard but is subjected to progressively more stringent emissions controls for ozone precursors," chiefly, VOCs and NO_X. *South Coast Air Quality Management District v. EPA* (*South Coast II*), 882 F.3d 1138, 1143 (D.C. Cir. 2018) (internal quotation marks omitted).

Setting the stage for this case, EPA promulgated a new NAAQS for ozone in 2008. National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436 (Mar. 27, 2008). Seven years later, in 2015, it promulgated a rule implementing the 2008 NAAQS. Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements (2015 Implementation Rule), 80 Fed. Reg. 12,264 (Mar. 6, 2015). Several petitioners in this case challenged various provisions of that 2015 Implementation Rule, and our court resolved all but one of those challenges in *South Coast Air Quality Management District v. EPA*, or *South Coast II*, 882 F.3d 1138. That remaining challenge related to a provision called the "interprecursor trading program." While *South Coast II* was pending, EPA granted an administrative petition to reconsider that program, so the *South Coast II* panel severed the challenge, leaving it unresolved. Order, *South Coast Air Quality Management District v. EPA*, No. 15-1115 (D.C. Cir. Dec. 18, 2015).

Three years later, EPA included the interprecursor trading program in a rule implementing new ozone NAAQS that it had issued in 2015. *See* National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015); Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements (2018 Implementation Rule), 83 Fed. Reg. 62,998 (Dec. 6, 2018). That 2018 Implementation Rule is the focus of this case.