

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ALLIANCE OF NURSES FOR HEALTHY)
ENVIRONMENTS)
2901 Shepherd St.)
Mount Rainier, MD 20712)

DOWNWINDERS AT RISK)
1808 S. Good-Latimer #202)
Dallas, TX 76226)

HEAL UTAH)
824 S. 400 W., Ste. B111)
Salt Lake City, UT 84101)

SIERRA CLUB)
2101 Webster St., Suite 1300)
Oakland, CA 94612,)

Plaintiffs,)

v.)

MICHAEL S. REGAN, in his official capacity)
as Administrator, United States Environmental)
Protection Agency)
1200 Pennsylvania Ave., NW)
Washington, DC 20460,)

Defendant.)

Civil Action No. 1:22-cv-1606

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. Under the Clean Air Act, all areas of the country are legally entitled to healthy, clean air. Not all areas have it. Plaintiffs Alliance of Nurses for Healthy Environments, Downwinders at Risk, HEAL UTAH, and the Sierra Club bring this action for a declaratory judgment and injunctive relief to compel Defendant Michael S. Regan, in his official capacity as Administrator of the U.S. Environmental Protection Agency, to carry out his overdue legal

obligation to officially determine whether certain “marginal nonattainment areas” of the country attained, or did not attain, the 2015 National Ambient Air Quality Standards for ozone by the statutory deadline. This deadline, which triggers necessary actions to strengthen air-quality protections, was created by Congress to ensure that communities with unhealthy levels of ozone pollution come into compliance with EPA’s clean-air standards.

2. Ground-level ozone, or smog, seriously harms human health and the environment. Ozone is formed when volatile organic compounds and nitrogen oxides—which are emitted from tailpipes, smokestacks, and oil-and-gas operations, for example—react with sunlight. At high enough levels, it impairs breathing, inflames lungs, sends people to the hospital, and can even kill. Ozone also harms growing plants and ecosystems. The Clean Air Act requires EPA to establish health- and welfare-protective national ambient air quality standards to limit the amount of ozone allowed in the outdoor air. 42 U.S.C. § 7409(a), (b). Areas with ozone pollution levels that violate these standards must clean up their air.

3. EPA created the ozone standard at issue here in 2015, based on its finding that the prior ozone standard was inadequate to protect public health and welfare. 80 Fed. Reg. 65,292 (Oct. 26, 2015). After creating a new ozone standard, EPA works with states to determine which areas of the country have “attained,” or met, the new standards, and which areas of the country have “not attained,” or have not met, the new standards, through modeling and air monitoring data. EPA then designates these areas as being either in attainment, in nonattainment, or unclassifiable. Here, EPA completed nonattainment area designations and classifications for the 2015 ozone standard on June 4, 2018, for all areas of the country—except for eight counties in the San Antonio, Texas metropolitan area—making the designations legally effective on August 3, 2018. 83 Fed. Reg. 25,776. EPA completed its nonattainment area designation for the eight

counties in the San Antonio, Texas area—finding only Bexar County, Texas in nonattainment—on July 24, 2018, with the designations becoming legally effective on September 24, 2018. 83 Fed. Reg. 35,136. Areas designated as nonattainment must implement measures to come into attainment as “expeditiously as practicable,” with an applicable attainment deadline based on its classification of nonattainment, from “marginal” nonattainment up to “extreme” nonattainment. 42 U.S.C. § 7502(a)(2). For areas designated as being in “marginal” nonattainment, their attainment deadline is three years after the effective date of their designation as nonattainment. 42 U.S.C. § 7511; 83 Fed. Reg. 10,376, 10,380 (Mar. 9, 2018).

4. Under the Clean Air Act, the Administrator is required to publish a Federal Register notice no later than six months after an area’s attainment deadline—here, August 3, 2021 for the majority of areas, and September 24, 2021 for Bexar County, Texas—stating whether the area did or did not timely attain the standard. 42 U.S.C. §§ 7509(c), 7511(b)(2). Any area that remains in violation of an ozone standard on its attainment date must be reclassified to a higher classification so that it is subject to more effective protections. 42 U.S.C. § 7511(b)(2)(A); 83 Fed. Reg. 10,376 (Mar. 9, 2018). Thus, for each area that the Administrator identifies as having failed to timely attain a standard, the notice must also reclassify the area to the appropriate higher classification. 42 U.S.C. § 7511(b)(2)(B).

5. While the relevant deadlines have passed, the Administrator has not yet finalized attainment determinations and published the required notice in the Federal Register for marginal nonattainment areas under the 2015 ozone standard. These areas include some of the most polluted areas of the country, where millions of people live and work, including Petitioners’ members. EPA’s failure to meet the deadline that Congress prescribed violates the Clean Air Act. Thus, Plaintiffs seek both declaratory relief and an order to compel the Administrator to

make and publish in the Federal Register final determinations for the following areas: Allegan County, MI; Amador County, CA; Atlanta, GA; Baltimore, MD; Berrien County, MI; Bexar County, TX; Butte County, CA; Calaveras County, CA; Chicago, IL-IN-WI; Cincinnati, OH-KY; Cleveland, OH; Dallas-Fort Worth, TX; Denver Metro/North Front Range, CO; Detroit, MI; Greater Connecticut, CT; Houston-Galveston-Brazoria, TX; Imperial County, CA; Las Vegas, NV; Louisville, KY-IN; Manitowoc County, WI; Mariposa County, CA; Milwaukee, WI; Muskegon County, MI; Northern Wasatch Front, UT; Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE; Phoenix-Mesa, AZ; San Francisco Bay Area, CA; San Luis Obispo (Eastern Part), CA; Sheboygan County, WI; Southern Wasatch Front, UT; St. Louis, MO-IL; Sutter Buttes, CA; Tuolumne County, CA; Uinta Basin, UT; Washington, DC-MD-VA; Yuma, AZ.

JURISDICTION AND VENUE

6. This action arises under the Clean Air Act, 42 U.S.C. § 7511(b)(2)(A), (B). This Court has jurisdiction pursuant to 42 U.S.C. § 7604(a) and 28 U.S.C. §§ 1331 and 1361. This Court may grant the relief Plaintiffs request pursuant to 42 U.S.C. § 7604(a)(2) and 28 U.S.C. §§ 2201(a), 2202, and 1361. Plaintiffs have a right to bring this action pursuant to the Clean Air Act, 42 U.S.C. § 7604(a)(2); 28 U.S.C. § 1361.

7. Plaintiffs provided the Administrator with written notices of this action on February 22, 2022 and April 1, 2022, as required by the Clean Air Act, 42 U.S.C. § 7604(b)(2), and 40 C.F.R. Part 54. As sixty days have passed since these submissions, Plaintiffs have satisfied the notice requirements in 42 U.S.C. § 7604(b)(2).

8. Venue is proper in this Court under 28 U.S.C. § 1391(e) because the Defendant, EPA Administrator Michael S. Regan, resides in this district.

PARTIES

9. Plaintiff Alliance of Nurses for Healthy Environments (ANHE) is a national non-profit organization based in Maryland that works with nurses and nursing organizations across the country at the intersection of health and the environment. ANHE harnesses the power of nurses in support of their mission to promote healthy people and healthy environments by educating and leading the nursing profession, advancing research, incorporating evidence-based practice, and influencing policy.

10. Plaintiff Downwinders at Risk is a nonprofit corporation organized and existing under the laws of the State of Texas, with its headquarters located in Dallas, Texas. Downwinders at Risk is a diverse grassroots citizens group dedicated to protecting public health and the environment from air pollution in North Texas.

11. Plaintiff HEAL Utah promotes renewable energy and clean air, and protects public health and the environment from dirty, toxic, and nuclear energy threats. HEAL works to address health and environmental impacts that affect the lives of all Utahns. HEAL uses decades of experience in grassroots advocacy, science-based policymaking, and coalition building to support environmental justice throughout Utah.

12. Plaintiff Sierra Club is a nonprofit corporation with its headquarters located in Oakland, California. The Sierra Club is a national membership organization dedicated to the protection of public health and the environment, including clean air, with chapters in Arizona, California, Colorado, Georgia, Maryland, Michigan, Missouri, Ohio, Pennsylvania, Texas, Utah, Wisconsin, and other states, and with more than 800,000 members who reside in all 50 states, the District of Columbia, and U.S. territories.

13. Defendant Michael Regan is the Administrator of the EPA. In that role he is charged with the duty to uphold the Clean Air Act and to implement the required air-quality protections by the relevant statutory deadlines. 42 U.S.C. § 7601.

FACTUAL BACKGROUND

14. Ozone, the main component of smog, is a corrosive air pollutant that inflames the lungs and constricts breathing. It can cause asthma attacks, emergency-room visits, and hospitalizations. Ozone-induced health problems can force people to change their ordinary activities, requiring children to stay indoors and forcing people to take medication and miss work or school.

15. Ozone can harm healthy adults, but others are more vulnerable. Because their respiratory tracts are not fully developed, children are especially vulnerable to ozone pollution, particularly when they have elevated respiratory rates, as when playing outdoors. People living with lung disease and the elderly also have heightened vulnerability. People living with asthma suffer more severe impacts from ozone exposure than healthy individuals and are more vulnerable at lower levels of exposure.

16. Ozone also damages vegetation and forested ecosystems, causing or contributing to widespread stunting of plant growth, tree deaths, visible leaf injury, reduced carbon storage, and reduced crop yields. By harming vegetation, ozone can also damage entire ecosystems, leading to ecological and economic losses.

STATUTORY AND REGULATORY BACKGROUND

17. Congress enacted the Clean Air Act “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b)(1). One “primary goal” of the statute is “pollution prevention.” *Id.* § 7401(c). Congress found the Act to be necessary in part because “the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare.” *Id.* § 7401(a)(2).

18. Central to the Act is the requirement that EPA establish national ambient air quality standards for certain widespread air pollutants that endanger public health and welfare, referred to as “criteria pollutants.” *Id.* §§ 7408-7409. One criteria pollutant is ground-level ozone. *See* 40 C.F.R. §§ 50.9, 50.10, 50.15, 50.19.

19. The national ambient air quality standards establish allowable concentrations of criteria pollutants in ambient air, i.e., outdoor air. “Primary” standards protect public health, including that of sensitive populations such as asthmatics, children, and the elderly. 42 U.S.C. § 7409(b)(1). “Secondary” standards protect public welfare, including protection against damage to animals, crops, vegetation, and water. *Id.* §§ 7409(b)(2), 7602(h). EPA must review and, as appropriate, revise these standards at least every five years. *Id.* § 7409(d)(1).

20. After EPA sets or revises a standard, the Clean Air Act requires the agency to take additional steps to implement the standard. Within two years of revising a standard, EPA must “designate” areas as not meeting the standard, or being in “nonattainment”; meeting the standard, or being in “attainment”; or, if EPA lacks information to make a designation, “unclassifiable.” 42 U.S.C. § 7407(d)(1)(A)-(B).

21. States must develop plans for attaining new or revised standards. And they must implement certain protections designed to ensure that air quality in nonattainment areas will meet ozone standards by specified deadlines. *Id.* §§ 7410(a), (c), 7502; *see also id.* §§ 7511-7511f (provisions specific to ozone nonattainment areas). Among these protections is a preconstruction permitting program, which requires modified and new “major” factories and power plants in nonattainment areas to operate state-of-the-art pollution controls and to secure reductions in emissions of air pollution from other sources sufficient to more than offset the new pollution they will emit. *Id.* §§ 7503, 7511a. Each state must adopt a “state implementation plan” that includes all the protections Congress required for nonattainment areas and any specific measures the state determines should be implemented to address local sources of air pollution contributing to elevated ozone levels. *Id.* § 7410(a)(2)(I).

22. Simultaneous with designations, the Act requires EPA to classify each ozone nonattainment area based on the severity of its ozone pollution. *Id.* § 7511(a)(1) tbl.1. The classifications are, in increasing order, “marginal,” “moderate,” “serious,” “severe,” and “extreme.” *Id.*

23. The higher the classification, the longer an area has to come into attainment, but the more stringent the controls a state must adopt. For example, in a “marginal” nonattainment area, the Act’s preconstruction permitting program applies to “major” sources with the potential to emit at least 100 tons per year of an ozone-forming pollutant, and it requires such sources to offset each new ton with 1.1 tons of reductions in that pollutant. *Id.* §§ 7511a(b)(5), 7602(j). By contrast, in a “moderate” nonattainment area, the offset ratio increases to 1.15 tons of reductions for every ton proposed to be emitted. *Id.* § 7511a(c), (c)(10). Furthermore, in a moderate nonattainment area, all existing major stationary sources are required to implement “reasonably

availably control technologies” to reduce their emissions of volatile organic compounds, or VOCs. *Id.* § 7511a(b)(2); *see id.* § 7502(c)(1). Thus, in a moderate nonattainment area, all major sources of ozone precursors must attain higher emission reductions of ozone precursors than sources in a marginal nonattainment area.

24. Within six months of the passage of an attainment deadline, the Act requires EPA to determine whether each area met the deadline. Areas that failed to meet their deadline are reclassified by operation of law, and EPA must publish notice in the Federal Register of its attainment determinations and any reclassifications by the same date that these areas are required to be reclassified. 42 U.S.C. § 7511(b)(2)(A), (B). Under limited circumstances, an area may qualify for up to two one-year extensions. *Id.* § 7511(a)(5); 40 C.F.R. § 51.1107.

25. In 2015, EPA strengthened the ozone standard based on an extensive scientific record demonstrating that the prior ozone standards were inadequate to protect public health and welfare. 80 Fed. Reg. 65,292 (Oct. 26, 2015). EPA set the new standard at 70 parts per billion.

26. Violations of the 2015 ozone standard are found by analyzing air-monitoring data to determine whether the three-year average of the annual fourth highest eight-hour ozone concentration exceeded 70 parts per billion. 40 C.F.R. § 50.15(b).

27. Following its revision of the ozone standard, EPA had two years to “promulgate the designations of all areas” of the country as meeting (being “in attainment of”) or not meeting (being “in nonattainment of”) the standard—a deadline, in other words, of October 1, 2017. 42 U.S.C. § 7407(d)(1)(B)(i).

28. After missing that deadline, EPA eventually completed its designations under the revised 2015 ozone standard in three rounds. On November 16, 2017, EPA published

designations for 2,646 counties, or about 85% of the country, as Attainment/Unclassifiable and three counties as Unclassifiable. 82 Fed. Reg. 54,232.

29. On June 4, 2018, EPA completed designations for the rest of the country, except for eight counties in the San Antonio, Texas metropolitan area. 83 Fed. Reg. 25,776 (Jun. 4, 2018). This round of designations included the marginal nonattainment designations for most of the metropolitan areas that are the subject of this suit, with effective date of August 3, 2018.

30. And on July 25, 2018, EPA completed its designations for the San Antonio metropolitan area, designating Bexar County as being in marginal nonattainment of the ozone standard, with an effective date of September 24, 2018. 83 Fed. Reg. 35,136 (July 25, 2018).

31. Under the Clean Air Act, the majority of areas subject to this lawsuit had until August 3, 2021, to attain the 2015 ozone standard, with Bexar County having until September 24, 2021—three years after the effective date of the relevant designations. 42 U.S.C. § 7511(a); 40 CFR § 51.1303; 83 Fed. Reg. at 25,776 (June 4, 2018). The Act also required the Administrator to publish a notice in the Federal Register within six months after this attainment date—that is, by February 3, 2022 for the majority of areas, and March 24, 2022 for Bexar County—listing the areas that failed to attain and their reclassifications.

32. March 24, 2022, has now passed, and to date, EPA has failed to make the required attainment determinations under the 2015 standard, and to publish the required notice in the Federal Register, for the following marginal areas: Allegan County, MI; Amador County, CA; Atlanta, GA; Baltimore, MD; Berrien County, MI; Bexar County, TX; Butte County, CA; Calaveras County, CA; Chicago, IL-IN-WI; Cincinnati, OH-KY; Cleveland, OH; Dallas-Fort Worth, TX; Denver Metro/North Front Range, CO; Detroit, MI; Greater Connecticut, CT; Houston-Galveston-Brazoria, TX; Imperial County, CA; Las Vegas, NV; Louisville, KY-IN;

Manitowoc County, WI; Mariposa County, CA; Milwaukee, WI; Muskegon County, MI; Northern Wasatch Front, UT; Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE; Phoenix-Mesa, AZ; San Francisco Bay Area, CA; San Luis Obispo (Eastern Part), CA; Sheboygan County, WI; Southern Wasatch Front, UT; St. Louis, MO-IL; Sutter Buttes, CA; Tuolumne County, CA; Uinta Basin, UT; Washington, DC-MD-VA; Yuma, AZ.

PLAINTIFFS' INJURIES

33. Plaintiffs' members include individuals who live, work, travel, and engage in recreational activities in the areas for which EPA has failed to make and publish final attainment determinations, including reclassifications, in the timeframe required by 42 U.S.C. § 7511(b)(2)(A). These areas include major metropolitan areas where air quality continues to violate the 2015 ozone standard, such as Baltimore, Chicago, Cleveland, Dallas-Fort Worth, Denver, Houston, Las Vegas, Philadelphia, Phoenix, Salt Lake City, San Antonio, and San Francisco, as well as other communities like Berrien County, Michigan.

34. The acts and omissions of EPA alleged here harm Plaintiffs' members by prolonging poor air-quality conditions that adversely affect or threaten their health, and by nullifying or delaying measures and procedures mandated by the Act to protect their health from ozone pollution in places where they live, work, travel, and recreate. Indeed, ozone levels that exceed the 2015 standard can exacerbate Plaintiffs' members' health problems, such as asthma and chronic obstructive pulmonary disease, causing physical problems that force them to limit outdoor activities that they would otherwise be able to do and enjoy.

35. The acts and omissions of EPA alleged here also harm Plaintiffs' members because their reasonable concerns about the health effects of ozone exposure diminish their

enjoyment of activities they previously enjoyed or would like to continue to engage in, and of areas they previously enjoyed or would like to continue to use.

36. The acts and omissions of EPA alleged here further harm Plaintiffs' members' welfare interest in using and enjoying the natural environment in areas that do not meet the 2015 standard. Elevated levels of ozone damage plant life, aquatic life, and natural ecosystems, thus harming Plaintiffs' members' recreational and aesthetic interests. Ozone damage to vegetation can lead to wildlife avoidance of certain areas, as well as a reduction in biodiversity or other changes to a local community's ecosystem, making it more difficult for Plaintiffs' members to observe, enjoy, cultivate, study, research, or write about wildlife, plants, or ecosystems.

37. Even Plaintiffs' members who live in places that are downwind of the areas at issue in this case are injured by EPA's failure to act. By delaying enhanced controls on ozone pollution in the areas at issue here, EPA has prolonged and exacerbated ozone levels downwind that harm Plaintiffs' members in those areas.

38. The acts and omissions of EPA alleged here further deprive Plaintiffs and their members of procedural rights and protections to which they would otherwise be entitled, including, but not limited to, the right to participate in proceedings to determine whether their communities (or upwind communities) meet the 2015 ozone standard or must increase protections against ozone pollution; the right to judicially challenge final attainment determinations adversely affecting their members; the right to enforce requirements of the Act for preparation and implementation of plans to remedy and prevent violations of the 2015 ozone standard; and the right to comment on and judicially challenge such plans.

39. EPA's failure also hampers Plaintiffs' ability to perform certain programmatic functions essential to their missions, such as ensuring that states put in place the public-health

and environmental protections that accompany more stringent nonattainment classifications, and educating the public about these protections.

40. Accordingly, the health, recreational, aesthetic, procedural, and organizational interests of Plaintiffs and their members have been and continue to be adversely affected by the acts and omissions of EPA alleged here.

41. A court order requiring EPA to promptly make and publish final determinations for the nonattainment areas complained of here, as the law requires, would redress Plaintiffs' and Plaintiffs' members' injuries.

CLAIM FOR RELIEF

42. The allegations of all foregoing paragraphs are incorporated as if set forth fully here.

43. EPA's deadlines for making marginal-area attainment determinations under the 2015 ozone standard and publishing notice of them in the Federal Register was February 3, 2022, for all such areas except for Bexar County, Texas, and March 24, 2022, for Bexar County, Texas. 42 U.S.C. § 7511(b)(2)(A)-(B). While these deadlines have now passed, the Administrator has failed to make and publish the required attainment determinations and reclassifications for the following marginal areas: Allegan County, MI; Amador County, CA; Atlanta, GA; Baltimore, MD; Berrien County, MI; Bexar County, TX; Butte County, CA; Calaveras County, CA; Chicago, IL-IN-WI; Cincinnati, OH-KY; Cleveland, OH; Dallas-Fort Worth, TX; Denver Metro/North Front Range, CO; Detroit, MI; Greater Connecticut, CT; Houston-Galveston-Brazoria, TX; Imperial County, CA; Las Vegas, NV; Louisville, KY-IN; Manitowoc County, WI; Mariposa County, CA; Milwaukee, WI; Muskegon County, MI; Northern Wasatch Front, UT; Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE; Phoenix-Mesa, AZ; San Francisco

Bay Area, CA; San Luis Obispo (Eastern Part), CA; Sheboygan County, WI; Southern Wasatch Front, UT; St. Louis, MO-IL; Sutter Buttes, CA; Tuolumne County, CA; Uinta Basin, UT; Washington, DC-MD-VA; and Yuma, AZ.

44. This constitutes a “failure of the Administrator to perform ... [an] act or duty ... which is not discretionary” within the meaning of the Clean Air Act, 42 U.S.C. § 7604(a)(2), and thus is a violation of the Act. EPA’s violations are ongoing.

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court:

(1) Declare that EPA’s failure to timely make and publish in the Federal Register attainment determinations, including any reclassifications, for the following marginal areas under the 2015 National Ambient Air Quality Standards for ozone by the deadline required by 42 U.S.C. § 7511(b)(2)(A) and (B) constitutes a “failure of the Administrator to perform any act or duty under this chapter which is not discretionary” within the meaning of 42 U.S.C. § 7604(a)(2): Allegan County, MI; Amador County, CA; Atlanta, GA; Baltimore, MD; Berrien County, MI; Bexar County, TX; Butte County, CA; Calaveras County, CA; Chicago, IL-IN-WI; Cincinnati, OH-KY; Cleveland, OH; Dallas-Fort Worth, TX; Denver Metro/North Front Range, CO; Detroit, MI; Greater Connecticut, CT; Houston-Galveston-Brazoria, TX; Imperial County, CA; Las Vegas, NV; Louisville, KY-IN; Manitowoc County, WI; Mariposa County, CA; Milwaukee, WI; Muskegon County, MI; Northern Wasatch Front, UT; Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE; Phoenix-Mesa, AZ; San Francisco Bay Area, CA; San Luis Obispo (Eastern Part), CA; Sheboygan County, WI; Southern Wasatch Front, UT; St. Louis, MO-IL; Sutter Buttes, CA; Tuolumne County, CA; Uinta Basin, UT; Washington, DC-MD-VA; and Yuma, AZ;

(2) Enjoin the Administrator from continuing to violate the above-described nondiscretionary duty for each such area;

(3) Order the Administrator to make attainment determinations for each of the marginal nonattainment areas under the 2015 National Ambient Air Quality Standards for ozone listed above and to publish notice in the Federal Register identifying the attainment determination and reclassification, if any, by an expeditious date-certain deadline specified by this Court;

(4) Retain jurisdiction to ensure compliance with the Court's decree;

(5) Award Plaintiffs the costs of this action, including attorneys' fees; and,

(6) Grant such other relief as the Court deems just and proper.

DATED: June 7, 2022

Respectfully Submitted,

Marvin C. Brown IV
Associate Attorney
Seth L. Johnson
Senior Attorney
Earthjustice
1001 G Street NW, Suite 1000
Washington, DC 20001
Tel: (202) 667-4500
Fax: (202) 667-2356

*Counsel for Plaintiffs Alliance of Nurses for
Healthy Environments, Downwinders at Risk,
HEAL Utah and Sierra Club*