

# KIRKLAND ALERT

August 27, 2018

## EPA Designates Bexar County, TX as “Nonattainment” for Air Quality; Operators in the County Could be Subject to Additional Air Permitting Obligations

The U.S. Environmental Protection Agency (“EPA”) has finalized area designations for eight counties in the San Antonio, Texas metropolitan area for the 2015 ozone National Ambient Air Quality Standards (“NAAQS”). EPA designated Bexar County as “Marginal” nonattainment while designating the remaining counties in that area, including counties in the Eagle Ford Shale play, as attainment/unclassifiable. As a result of the Marginal nonattainment designation, major sources (including certain oil and gas operators) in Bexar County will be subject to additional air permitting and emissions reporting obligations. Bexar County will be required to meet the 2015 ozone NAAQS within three years.

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### *Summary*

On July 17, 2018, EPA promulgated area designations for the eight counties in the San Antonio-New Braunfels, Texas area with respect to the 2015 primary and secondary NAAQS for ozone. EPA’s new designations for these eight counties address the 2015 revision of the ozone NAAQS from 75 parts per billion (“ppb”) to 70 ppb. EPA designated Bexar County as a nonattainment area, and classified the nonattainment area as Marginal. EPA designated the remaining seven counties — Atascosa, Bandera, Comal, Guadalupe, Kendall, Medina, and Wilson counties — as attainment/unclassifiable. The designations will take effect on September 24, 2018.

### *Background*

When EPA promulgates a new or revised NAAQS for a particular criteria air pollutant, the Clean Air Act (“CAA”) requires EPA to evaluate the concentration of pollutants in all areas (generally counties) comprising air quality control regions<sup>1</sup> in the U.S. and designate them as attainment, nonattainment or unclassifiable.<sup>2</sup> The CAA defines a nonattainment area as “any area that does not meet the national primary or secondary ambient air quality standard for the pollutant.”<sup>3</sup> An area that contributes to another area’s inability to meet NAAQS is also designated as a nonattainment area.<sup>4</sup> If the air quality in a geographic area meets or is cleaner than the national standard, it is designated attainment/unclassifiable.<sup>5</sup> In cases where EPA is not able to determine an area’s status after evaluating the available information, the area is designated unclassifiable.<sup>6</sup> The CAA also requires that nonattainment areas

be classified based on the severity of the air quality problem at the time of the designation. There are five classification categories for nonattainment areas: Marginal, Moderate, Serious, Severe and Extreme.<sup>7</sup> The “Marginal” classification is the lowest severity classification and denotes pollutant levels that are “closest to the [NAAQS] at the time of designation.”<sup>8</sup>

Below is a brief chronology of major EPA actions leading to the agency’s air quality designations in the San Antonio area:

- On October 1, 2015, EPA implemented a more stringent eight-hour ozone standard, setting the ozone NAAQS at 70 ppb.<sup>9</sup> Pursuant to the 2015 ozone NAAQS, an area is in violation of the CAA if the annual fourth-highest eight-hour average ozone concentration, averaged over three consecutive years, exceeds 70 ppb.<sup>10</sup>
- On November 6, 2017, EPA established initial air quality designations for the 2015 ozone NAAQS for approximately 85% of the areas in the U.S.<sup>11</sup>
- In December 2017, EPA was sued in two separate lawsuits filed by environmental organizations and a coalition of fifteen states, claiming that the agency failed to meet its mandatory obligation to designate all areas of the U.S. for the 2015 ozone NAAQS within two years of promulgation of the standards.<sup>12</sup> The court extended the deadline for all remaining designations to April 30, 2018, except for the eight counties in the San Antonio area, the deadline for which was extended to July 17, 2018.
- On April 30, 2018, EPA designated all remaining geographical areas except the eight counties in the San Antonio area.

### *Implications of Nonattainment Designation for Bexar County*

The CAA imposes certain planning requirements on a state after an area within the state is designated nonattainment. Generally, when an area is designated nonattainment (and depending on the severity classification), a state is required to file a nonattainment state implementation plan (“SIP”) that focuses on reduction of emissions from major pollution sources within that area. The state must submit a SIP that outlines a strategy to attain NAAQS for the area, and depending on the severity classification, may be required to submit further demonstrations of progress toward improved air quality (e.g., reasonable further progress plan).<sup>13</sup>

The SIP will generally include control strategies targeting various emissions sectors, including area sources (defined by the CAA as sources emitting less than 10 tons per year of certain air pollutants) and major sources (defined by the CAA as stationary sources having the potential to emit 10 or more tons per year). Control strategies can include enhanced air quality monitoring, more stringent permitting requirements for new or modified sources, and required installation of additional pollution control at existing sources aimed at reducing emissions. For Marginal nonattainment areas, like Bexar County, the CAA does not require states to develop

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nonattainment SIPs, but Marginal nonattainment areas are required to come into compliance faster than other severity classifications — within three years from the effective date of the designation.<sup>14</sup>

Even though a nonattainment SIP is not required, the Texas Commission on Environmental Quality (“TCEQ”) will be responsible for implementing a nonattainment New Source Review (“NNSR”) permitting program for Bexar County. This is a permitting program for industrial sources designed to ensure that new major sources and major modifications at existing “major sources” do not impede progress toward improved air quality. The TCEQ’s definition of a major source in the NNSR program depends on the severity classification of the nonattainment area in which the source is located. For a Marginal ozone nonattainment area, a major source is defined as one that has the potential to emit greater than 100 tons per year of volatile organic compounds or oxides of nitrogen, the criteria pollutants that contribute to the formation of ozone.

NNSR requirements are customized for the nonattainment area, but EPA mandates that all NNSR programs require the installation of the lowest achievable emission rate (via process modification or add-on controls), emission offsets (generally a emissions reduction credit program), and opportunity for public involvement (e.g., public comment on permits and proposed regulations and the opportunity to request a public hearing before permits are issued).<sup>15</sup> Separate from the NNSR program, the TCEQ will also be required to compile a baseline emissions inventory of all point sources in the nonattainment area and major sources in the area will be required to submit annual emissions statements.

### *Applicability to Eagle Ford Shale Play*

In connection with finalizing the air quality designations for the San Antonio area, EPA reviewed and responded to comments made by the public during the comment period. Many commenters urged EPA to evaluate the impact from counties in the Eagle Ford Shale play on the air quality in Bexar County. EPA conducted technical analyses, summarized in the Technical Support Document accompanying the final published rule, and concluded that the remaining counties “should be designated attainment/unclassifiable because they are not violating the standard and do not contribute to the violations . . . in Bexar County.”<sup>16</sup> Based on this finding, sources located in the Eagle Ford Shale play in any of the counties designated attainment/unclassifiable would not be subject to the NNSR and emissions reporting requirements imposed on major sources in Bexar County.

### *Next Steps*

EPA previously proposed an implementation rule for the 2015 ozone NAAQS, outlining state SIP requirements.<sup>17</sup> The agency anticipates finalizing that rule this year.<sup>18</sup> EPA has also indicated that additional tools and guidance documents designed to assist nonattainment areas in addressing emissions are forthcoming.

**Marginal nonattainment areas are required to come into compliance faster than other severity classifications — within three years from the effective date of the designation.**

Bexar County must come into compliance with the 2015 ozone NAAQS by September 2021. In the meantime, TCEQ must implement more stringent permitting and emissions reporting requirements that will apply to new major sources and major modifications of existing major sources in Bexar County. Opponents of the nonattainment designation have argued that these supplemental requirements will have a significant economic impact on the area. The Acting EPA Administrator has indicated that, based on monitoring information provided by the TCEQ, the agency expects that Bexar County will be able to demonstrate that it meets the 2015 ozone NAAQS in 2020, well in advance of the required attainment date.

Investors and operators in the oil and gas sector in or around Bexar County should monitor the implementation rule and consider working with counsel and potential outside technical consultants to determine the legal, technical and cost implications of the new rules.

**Opponents of the nonattainment designation have argued that these supplemental requirements will have a significant economic impact on the area.**

## References

U.S. EPA, *Fact Sheet - Final Area Designations for the National Ambient Air Quality Standards for Ozone Established in 2015 - San Antonio, Texas*, July 2018, [https://www.epa.gov/sites/production/files/2018-07/documents/fact\\_sheet\\_final\\_ozone\\_designations\\_san\\_antonio.pdf](https://www.epa.gov/sites/production/files/2018-07/documents/fact_sheet_final_ozone_designations_san_antonio.pdf).

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Ashley Alvarez and Carol Schliesinger, *EPA Designates Bexar County Air Quality in Nonattainment*, July 18, 2018, <https://www.sanantonio.gov/sustainability/MediaCenter/NewsReleases/ArtMID/7-461/ArticleID/13419/EPA-designates-Bexar-County-Air-Quality-in-Nonattainment>.

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<sup>1</sup> Air quality control regions designated by the Administrator of the EPA are codified at 40 CFR Part 81, Subpart B. Bexar County is part of the Metropolitan San Antonio Intrastate Air Quality Control Region.

<sup>2</sup> 80 Fed. Reg. 65296 (October 26, 2015).

<sup>3</sup> 42 U.S.C. § 7407(d)(1)(A)(i).

<sup>4</sup> *Id.*

<sup>5</sup> U.S. EPA, “NAAQS Designation Process,” available at <https://www.epa.gov/criteria-air-pollutants/naaqs-designations-process> (last visited Aug. 2, 2018).

<sup>6</sup> *Id.*

<sup>7</sup> 42 U.S.C. § 7511(a).

<sup>8</sup> 83 Fed. Reg. 35136 (July 25, 2018).

<sup>9</sup> 80 Fed. Reg. 65296.

<sup>10</sup> *Id.*

<sup>11</sup> 83 Fed. Reg. 35136.

<sup>12</sup> *Id.* See also, *American Lung Association v. Pruitt* (N.D. Cal. No. 4:17-cv-06900) (Filed Dec. 4, 2017) and *State of California v. Pruitt* (N.D. Cal. No. 4:17-cv-06936) (Filed Dec. 5, 2017).

<sup>13</sup> See, U.S. EPA, “Required SIP Elements by Nonattainment Classification,” available at <https://www.epa.gov/ozone-pollution/required-sip-elements-nonattainment-classification> (last visited Aug. 2, 2018).

<sup>14</sup> *Id.*

<sup>15</sup> U.S. EPA, “Nonattainment NSR Basic Information,” available at <https://www.epa.gov/nsr/nonattainment-nsr-basic-information> (last visited Aug. 2, 2018).

<sup>16</sup> U.S. EPA, “Responses to Significant Comments on Air Quality Designations for the 2015 National Ambient Air Quality Standards for the San Antonio, Texas Area,” Docket No. EPA-HQ-OAR-2017-0548, July 2018.

<sup>17</sup> 81 Fed. Reg. 81276 (Nov. 17, 2016).

<sup>18</sup> 83 Fed. Reg. 35136.

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