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Haley Prevatt

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WATCH YOUR SPEED...THE EPA IS TICKETING IN *BRAZORIA COUNTY V. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY*

HALEY PREVATT*

I. INTRODUCTION

Citizens in Texas are mindful to drive under fifty-five miles per hour at all times, inspect and maintain their vehicles regularly, and limit their use of lawn care equipment. The reason is not that Texans are more conscientious than the rest of the nation; rather, the citizens are merely following regulations imposed in the name of cleaner air, use of which were upheld by the Texas Appellate Court in *Brazoria County v. Texas Comm'n on Envtl. Quality*.[1] In an effort to satisfy the national ambient air quality standard for ozone in the Houston-Galveston area, the Texas Transportation Commission imposed environmental speed limits, and the Texas Commission on Environmental Quality created its state implementation plan.[2] In this case, Brazoria County, one of the eight counties affected by the new regulations, challenged the Texas Transportation Commission, arguing noncompliance with the Texas Clean Air Act, the Texas Transportation Code, and the Texas Administrative Procedure Act.[3] The County could not sway the Court, which affirmed the district court's decision that the agencies were not acting beyond the scope of their statutory power and that they were in compliance with the Texas Administrative Procedure Act.[4]

The Court focused on the powers of the state agencies as delegated by the state's statutes and the Federal Clean Air Act. However, the Court neglected to comment on the public policy implications of such a decision. The case has enormous potential to be used by other states to impose similar regulations. Arguably, few would be opposed to the imposition of similar regulations made in an effort to provide cleaner air for the benefit of all. However, once states and state agencies move beyond generally accepted societal goals, the situation becomes less comfortable. It seems that this decision, which in the immediate future will serve only to trade

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* Staff Member 2005-2006, Articles Editor 2006-2007, JOURNAL OF NATURAL RESOURCES & ENVIRONMENTAL LAW, 2005-2007. B.B.A., University of Kentucky, 2003. J.D./M.B.A. expected May 2007, University of Kentucky College of Law. The author thanks her parents for their love, support and invaluable friendship.

[1] Brazoria County v. Texas Comm'n on Envtl. Quality, 128 S.W.3d 728 (Tex. App. 2004).

[2] *Id.* at 732.

[3] *Id.* at 732, 734.

[4] *Id.* at 732.

minor inconveniences for a great societal benefit, may lead the way to more state regulations imposed to reach goals that may not be well-received by the people they affect. The case leaves many questions unanswered. It is unclear what may lie in the future and what other regulations states may impose in an effort to achieve the popular goals of the time.

II. BACKGROUND

The United States Environmental Protection Agency (EPA) was given authority by the Federal Clean Air Act to set the national standards for cleanliness of ambient air.[5] Those standards set by the EPA are more commonly known as National Ambient Air Quality Standards (NAAQS) and are set for various air pollutants.[6] There are both primary and secondary standards.[7] National primary ambient air quality standards are set based on evidence showing they are necessary to protect public health, while National secondary ambient air quality standards are preventive in nature and are set to protect the public welfare from effects of having the pollutant in the air.[8] To put this in perspective, the limits created by the primary standards are in place to protect especially sensitive people, including asthmatics, children, and the elderly.[9] The secondary standards are in place for the benefit of the public welfare, with an emphasis on protection of visibility, animals, crops, vegetation and buildings.[10]

A. *State Implementation Plans*

The states are given a choice in implementation of the NAAQS. Each state has primary responsibility for its own air quality and must develop its own plan, called a state implementation plan (SIP), which explains how it will satisfy and maintain the requirements of both primary and secondary air quality standards.[11] Before a state's SIP is adopted, it must set forth regulations that can be carried out consistent with the relevant local laws.[12] In the event a state chooses not to comply with the requirement of submitting an SIP or submits an unacceptable plan, the EPA may impose sanctions and replace the state's plan with its own federally-created plan.[13] States are given an opportunity to devise their own ways to

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[5] 42 U.S.C.A. § 7407 (West 2003).
[6] 42 U.S.C.A. § 7409 (West 2003).
[7] 42 U.S.C.A. § 7409(a)(1)(A) (West 2003).
[8] 42 U.S.C.A. § 7409(b) (West 2003).
[9] United States Environmental Protection Agency, *National Ambient Air Quality Standards (NAAQS)* (2005), http://www.epa.gov/air/criteria.html.
[10] *Id.*
[11] 42 U.S.C.A. § 7407 (West 2003).
[12] 42 U.S.C.A. § 7410(a)(2)(E) (West 2003).
[13] 42 U.S.C.A. § 7410(m) (West 2003).

comply with the federal mandate, but if they fail, the government will step in to repair the deficiency so as to maintain a national standard.[14]

The breadth of the states' discretion in creating SIPs was addressed in *Union Elec. Co. v. Envtl. Prot. Agency*.[15] States have "virtually absolute power" to adopt any combination of control devices in order to meet national standards for ambient air.[16] The discretion is so broad that the EPA cannot even consider claims of economic or technological infeasibility when determining whether or not an SIP is acceptable.[17] Based on the Supreme Court's interpretation of the Federal Clean Air Act, it seems the burden of proof was on the Counties to establish that the Texas regulations were evidence of the state overstepping its authority.

B. *The Houston-Galveston Area: Prelude to a Lawsuit*

At the core of this fight was the EPA's initial designation of eight Texas counties, which create the Houston-Galveston area ("HGA"), as a severe-17 one-hour ozone non-attainment area.[18] In other words, the NAAQS were not met, and the state had to devise a plan in order to reach the national requirement of .12 parts per million.[19] This deficiency in air quality meant Texas had to devise an SIP that would both propose a plan to meet the goal by November 15, 2007, and be accepted by the EPA.[20]

Since each state bears the primary responsibility for its air quality, Texas had the Texas Commission on Environmental Quality ("TCEQ") oversee air quality in the state.[21] The duties of the TCEQ included establishing and controlling the level of quality to be maintained in the air, and it was to accomplish these goals by using practical methods that were also economically feasible.[22] In an effort to comply with these statutory requirements, the TCEQ set forth its SIP, which had three main functions and effects.[23] To be effective in the HGA, the SIP set forth a vehicle inspection and maintenance program and environmental speed limits ("ESLs") which lowered the speed limit to 55 mph on all highways, and were adopted by the Texas Transportation Commission.[24] The SIP also imposed lawn-maintenance rules, which limited use of commercial lawn-maintenance equipment to afternoon hours from April 1 to October 31 each

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[14] 42 U.S.C.A. § 7410(c) (West 2003).
[15] Union Elec. Co. v. Envtl. Prot. Agency, 96 S.Ct. 2518 (1976).
[16] *Id.* at 2530.
[17] *Id.* at 2529.
[18] *Brazoria County*, 128 S.W.3d at 733.
[19] *Id.* at 733.
[20] 42 U.S.C.A. §§ 7410 (West 2003); 42 U.S.C.A 7511(a)(2) (West 2003).
[21] *Brazoria County*, 128 S.W.3d at 733.
[22] TEX. HEALTH & SAFETY CODE ANN. § 382.011(a)(2), (3) (Vernon 2005).
[23] *Brazoria County,* 128 S.W.3d at 733.
[24] *Id.*

year.[25] Brazoria County was not happy with the newly-created regulations, so it challenged the state by claiming it went above and beyond the promulgations of the Texas Clean Air Act and Texas Transportation Code, was not in compliance with the Texas Administrative Procedure Act, and was simply unjustified.[26]

III. THE TEXAS DECISION

A. *Environmental Speed Limits*

The Court was faced with deciding whether the Transportation Commission acted beyond its authority when it changed speed limits because of air quality concerns, whether it followed the requisite procedures, and whether the Commission had the authority to allow the TCEQ to make the changes.[27]

The Court decided ratification by the legislature was sufficient to justify the Transportation Commission's considerations of air quality when deciding to alter the speed limits.[28] The Commission was given the authority to change the highway speed limits if it found the current speed limits were unreasonable or unsafe.[29] The Commission used this broad authority to create the ESLs.[30] Although the Texas legislature later revoked any prior power the Commission had to create ESLs, the Court based its decision to allow the ESLs on the legislature's declaration that the amendment was made only to prevent future ESLs and was intended to be enforced retroactively.[31]

The Court appears to have relied heavily on statutory interpretation to determine if the procedures followed were adequate and if the Commission was justified in its considerations of air quality. The relevant statute allows the modification of speed limits to accommodate "the safety of the monitoring public."[32] Air quality was determined to fall into this permissible category of considerations and was affirmed by the Court.[33]

In response to the argument that the TCEQ was impermissibly authorized to change speed limits, the Court relied on the fact that the Commission never made a delegation of authority and simply used the TCEQ in the capacity of advisor.[34] The separation of the two governmental

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[25] *Id.* at 734.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 735.
[29] TEX. TRANSP. CODE ANN. § 543.353 (Vernon 2004).
[30] 43 TEX. ADMIN. CODE §§ 25.23(a), (f) (2005).
[31] *Brazoria County*, 128 S.W.3d at 736.
[32] TEX. TRANSP. CODE ANN. § 545.353(e) (2004).
[33] *Brazoria County*, 128 S.W.3d at 737.
[34] *Id.*

units appears to have been important in the determination that the changes were allowed.

It was on a technicality that the Court disagreed with the County in the procedural aspects of the changes. The statute delegating this modification authority states the Commission may create a new speed limit "by order recorded in its minutes."[35] The County contended the changes were rules, which would require a more elaborate procedure for approval and would arguably keep the present speed limits from being enforced.[36] The Court looked to the intent of the legislature with this wording and determined a desire for the Commission to be able to implement changes simply and quickly.[37] The legislature seemingly wanted to give broad discretion to the Commission in its decisions whether or not to change speed limits for the health of the people of Texas. As further evidence of this statement, the determination of a minute order rather than a rule eliminated any justification for the ESLs.[38]

B. *Inspection and Maintenance Rules*

Because these were in fact rules, rather than minute orders, the Commission was required to provide reasoned justification for them.[39] The County argued such justification was lacking in the areas of phased implementation and the absence of an "opt-out" clause for Brazoria County.[40]

While the EPA required reaching the air quality goal by November 15, 2007, the TCEQ chose to carry out the plan in Brazoria County on May 1, 2003.[41] The County was unhappy with the earlier date since it went above and beyond the federal requirements.[42] However, the Court pointed out that Brazoria County was not singled out, and that the TCEQ, in several counties, was using an acceptable phase-in approach which was justified based on the needs of the counties and effective implementation of the plan.[43] The time scheme was also justified by the Clean Air Act, based on the Supreme Court's interpretation that the Act even permits states to develop SIPs that go above and beyond the federal requirements.[44]

Brazoria County's claim that it was unfairly denied an "opt-out" clause, based on the fact other counties were allowed to choose alternative

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[35] TEX. TRANSP. CODE ANN. § 545.353(a) (2004).
[36] *Brazoria County*, 128 S.W.3d at 738.
[37] *See id.*.
[38] *Id.* at 739.
[39] *Id.* at 740.
[40] *Id.*
[41] *Id.*
[42] *Brazoria County*, 128 S.W.3d at 740.
[43] *Id.* at 741.
[44] Union Elec. Co., 96 S.Ct. at 2529.

solutions, was quickly rejected by the Court.[45] The Court agreed with the TCEQ's rationale that counties that were not a primary source of the pollutants should not be as strictly monitored.[46] Apparently, not only was Brazoria County unwilling to submit to the proposed plan, but it was also more than a minor contributor to the ozone problem.

Contrary to the County's contention that more analyses had to be performed before the rules could be implemented, the Court looked to the Commission's intent to deny further analysis.[47] If a rule's impact would go beyond that which is mandated by the government, Texas law requires a regulatory-impact analysis of the proposed rule.[48] Accordingly, Brazoria County demanded such testing.[49] However, because the Court determined the Inspection and Maintenance ("I/M") rules were created to meet the standards of the NAAQS, rather than be imposed independently, the I/M rules should not be compared to other similar federal rules.[50] Once again, in determining their validity, the Court chose to focus on the very technical aspects of the regulations rather than look at their substantive impact.

C. *Lawn-Maintenance Rules*

In response to Brazoria County's contention that the rules exceeded statutory authority, the Court, consistent with its stance on I/M rules, said that these rules were developed in order to satisfy federal NAAQS and were not independent regulations set forth by the state.[51] Therefore, they were beyond the reach of the statutory law[52] which would have disallowed this attempt to control air pollution.[53] For the same reason, there was no requirement of a regulatory-impact analysis.[54] Unlike the I/M rules, which had federal equivalents, the lawn-maintenance rules were unparalleled in the federal system.[55] The Court did not agree that the presence of a unique state rule not present in the federal standards necessitated a regulatory-impact analysis.[56] The Court was simply unwilling to side with Brazoria County on any of its issues.

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[45] *Brazoria County*, 128 S.W.3d at 741.
[46] *See id.*
[47] *Id.* at 741-42.
[48] TEX. GOV'T CODE ANN. § 2001.0225(a)(1), (b) (Vernon 2000).
[49] *Brazoria County*, 128 S.W.3d at 741.
[50] *Id.* at 742.
[51] *Id.* at 743.
[52] *See* TEX. HEALTH & SAFETY CODE ANN. § 382.017(f)(1) (Vernon 2001).
[53] *Brazoria County*, 128 S.W.3d at 743.
[54] *Id.*
[55] *Id.*
[56] *Id.*

IV. ANALYSIS AND IMPACT

A. *What This Means for Texas in the Short Term*

As a result of the Court's decision, citizens in Brazoria County will have to live with the new regulations. On any of the county's highways, they can drive no faster than 55 mph, even if the roads previously had higher limits.[57] Vehicles must be regularly inspected to assure they meet emissions requirements.[58] During certain periods of the year, citizens may only use commercial lawn-maintenance equipment in the afternoon.[59] These are arguably minor adjustments that these Texans must make in their lives. The trade-off between minor inconvenience and healthy ozone levels in the ambient air seems to be well worth the effort. Other states may react to this decision and impose their own regulations, perhaps extending the inconvenience to create less-acceptable modifications to people's lives.

B. *What This Could Mean for Other States in the Future*

As of yet, this case has not been followed for the purpose of setting similar SIPs. However, the impact of this decision could create endless possibilities as states struggle with ways to meet the NAAQS. These standards have been set for several pollutants, including carbon monoxide, lead, nitrogen dioxide, ozone, and sulfur oxides.[60] The lengths to which states may go with their SIPs to address the problems created by pollutants have the potential to be extreme.

Kentucky has statutes in place which are similar to those in *Brazoria County*. "If the secretary of transportation determines...that any speed limit is greater or less than is reasonable or safe...upon any part of a state highway, the secretary of transportation may establish by official order a reasonable and safe speed limit at the location."[61] This certainly leaves open the possibility that a traffic and engineering investigation may be conducted, which leads to the conclusion that the ESLs need to be implemented in order to comply with NAAQS.

Kentucky also has an air pollution control board, which sets regulations for compliance with the Federal Clean Air Act.[62] Currently, the Board may require permits before certain equipment may be built or replaced if the equipment has the potential to discharge certain air

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[57] *Id.* at 733.
[58] 30 TEX ADMIN. CODE §§ 114.50-.53 (2005).
[59] *See Brazoria County*, 128 S.W.3d at 733-34.
[60] 42 U.S.C.A. § 7409 (West 2003)
[61] KY. REV. STAT. ANN. § 189.390 (West 1998).
[62] KY. REV. STAT. ANN. § 77.195 (West 1994).

contaminants.[63] This requirement could lead to a situation in which lawn maintenance equipment would be in the category of items for which a permit must be issued prior to use. In an effort to satisfy the NAAQS, the next step may be to limit the groups to whom such equipment is sold.

C. *State Limitations on the Extreme Impact of Environmental Regulations*

In the related area of water pollution, many states have begun to implement "No More Stringent" laws. Nearly one third of states have statutes which limit the state regulatory agencies' ability to enact regulations more stringent than applicable federal regulations.[64] Some of the states prohibit adoption of rules more stringent than those set out by the federal government when it is simply shown that the federal government has acted in this or a similar area.[65] Other states will make an exception to the prohibition upon a showing of necessity.[66] Kentucky's "No More Stringent" law states that the Department of Natural Resources and Environmental Protection "shall not impose under any permit...any effluent limitation, monitoring requirement, or other condition which is more stringent than the effluent limitation, monitoring requirement, or other condition which would have been applicable under federal regulation if the permit were issued by the federal government."[67]

Although these statutes may help to eliminate extreme regulations imposed by states, they are not a cure. In *Brazoria County*, the TCEQ was enforcing requirements which were intended only to meet the federal standards.[68] The federal government and the states must be cognizant of the strategies state agencies may use to find ways to comply with federal requirements while still technically staying within boundaries imposed by states. Plans implemented by state agencies may produce the same results as those states wished to avoid by enacting laws to counteract regulations.

V. CONCLUSION

The *Brazoria County* Court's decision to allow the Texas SIP, which imposed environmental speed limits, lawn-maintenance rules, and inspection and maintenance rules, was made in favor of cleaner Texas air. However, in making its decision, the Court focused on technicalities of the

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[63] *Id.*

[64] United States Environmental Protection Agency, *Polluted Runoff (Nonpoint Source Pollution)*, March 23, 2006, http://www.epa.gov/owow/nps/elistudy/appendix.html.

[65] *Id.*

[66] *Id.*

[67] KY. REV. STAT. ANN. § 224.16-050 (West 2005).

[68] *See generally Brazoria County*, 128 S.W.3d 728.

statutes rather than on policy and the implications of the SIP. The Court's authorization of the broad regulations leaves the door open for other states to follow suit. The future is uncertain. Will other states impose similar regulations, creating minor inconveniences for citizens in order to benefit society as a whole? Or, will they gradually go further, one decision at a time, until extreme regulations are in place? Perhaps states may one day be able to regulate how many miles citizens can drive each year, all in the name of cleaner air. Perhaps they may then regulate additional activities in an effort to achieve other popular goals. Or, possibly "No More Stringent" laws and other similar regulations will place enforceable limits on state agencies. It is unclear how states will be influenced by this decision. Only time will tell.