



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Liquid Natural Gas Plant/Clean Air Act: Federal Appellate Court Addresses Challenge to Texas Commission on Environmental Quality PSD BACT Determination

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The United States Court of Appeals for the Fifth Circuit (“Court”) addressed in a November 14th decision a challenge to a Clean Air Act Prevention of Significant Deterioration (“PSD”) permit issued by the Texas Commission on Environmental Quality (“TCEQ”). See *Port Arthur Community Action Network v. Texas Commission on Environmental Quality*, 2023 WL 7528906.

The issue involved TCEQ’s Best Available Control Technology (“BACT”) determination for a new natural gas plant/export terminal.

Port Arthur LNG, L.L.C. (“Port Arthur”) applied for a PSD permit from TCEQ to build a liquified natural gas plant and export terminal (“Plant”). The permit application identified emission sources which included:

- Turbines
- Engines
- Oxidizers
- Flares

Emission rates were proposed for each source.

The proposed emission rate for the refrigeration compression turbines is stated to have been:

. . . nine parts per million by volume, dry (“ppmvd”) of NO_x and 25 ppmvd of CO.

TCEQ issued a preliminary decision and draft permit that included Port Arthur’s proposed emission rate for the refrigeration compression turbines. A final decision by TCEQ’s Executive Director concluded that Port Arthur’s draft permit complied with applicable law and a final decision was referred to TCEQ.

Port Arthur Community Action Network (“PACAN”) challenged various aspects of the PSD permit. It cited the Rio Grande LNB (“Rio Grande”) facility PSD permit issued by TCEQ which has lower emission limits for the refrigeration combustion turbines. It would be using different pollution control equipment (Dry-Low NO_x and combustors). However, it had not been constructed.

TCEQ ALJs determined that Port Arthur failed to identify Rio Grande in its BACT analysis and did not demonstrate why a lower CO emission limit would not constitute BACT. They therefore proposed that

TCEQ approve the application subject to amendments that limited Port Arthur's refrigeration compression turbine emissions to 5 ppmvd of NOx and 15 ppmvd of CO (i.e., the same as Rio Grande).

The TDEQ Executive Director objected to the ALJs' proposal stating that Rio Grande's emission limits had not been "demonstrated in practice."

The Executive Director cited to the United States Environmental Protection Agency New Source Review Manual and APDG. 6110, noting Rio Grande was not yet in operation.

TCEQ rejected the ALJs' proposed amendments. It stated that Rio Grande's stricter refrigeration compression emission limits did not have any operational data indicating they were actually achievable.

PACAN appealed.

The Court framed the issue as to whether TCEQ committed legal error by disregarding the Rio Grande emission limits because that proposed facility was "not in operation." It initially noted:

. . . Contrary to the Commission's analysis, both state and federal guidelines direct the agency to adhere to previously imposed emissions limits in evaluating BACT.

Both the TCEQ guidance document (APDG. 6110) and EPA's New Source Review Manual were cited for the proposition that it is sufficient justification to assume technical feasibility if the technology or emission limit has been or is soon to be deployed.

The Court recognized TCEQ's argument that the cited guidance documents were non-regulatory and do not constitute binding legal requirements. However, it responded that they are not irrelevant.

The Court held that an agency must explain its reasoning when it appears to have departed from its earlier administrative policy or is inconsistent in its determination. It noted that TCEQ guidance states that a new facility must reduce emissions to a degree "at least equivalent" to prior facilities that were previously accepted as BACT.

As a result, the Court concluded that TCEQ departed from its policy of adhering to earlier permit limits. This, therefore, triggered a requirement that TCEQ adequately explain why it made this decision.

Note that the Court stated that TCEQ is not:

. . . forever bound to the emission limits that it set for Rio Grande LNG for all subsequent permits.

BACT determinations were recognized as case-by-case determinations. However, in making such individualized determination, TCEQ must:

- Demonstrate that it is treating permit applications consistently
- Adequately explain why it made a different decision

The Court vacates Port Arthur's permit application and remands it to TCEQ.

A copy of the Opinion can be downloaded [here](#).