

PSD/Clean Air Act: Federal Appellate Court Certifies Texas Commission on Environmental Quality/BACT Question



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The United States Court of Appeals, Fifth Circuit (“Fifth Circuit”) in a February 16th Order considered the Port Arthur Community Action Network (“PACAN”) Petition for a review of a decision by the Texas Commission on Environmental Quality (“TCEQ”) involving the Clean Air Act. See Port Arthur Community Action Network v. Texas Commission on Environmental Quality, 2024 WL 655983.

The Petition addressed the question of whether Texas’ definition of Best Available Control Technology (“BACT”) encompasses air pollution control methods that TCEQ had permitted but were not yet in operation.

A new liquid natural gas facility (“Port Arthur LNG”) applied for a Clean Air Act Prevention of Significant Deterioration (“PSD”) permit. One of the requirements for obtaining a PSD permit is the facility’s ability to satisfy BACT.

Texas law is stated to define BACT as a pollution-control method that:

... through experience and research, has proven to be operational, obtainable, and capable of reducing or eliminating emissions.

The Fifth Circuit notes that in determining whether to issue a permit, TCEQ guidance requires that it consider limits:

... “previously accepted as BACT” in recently approved permits and, if it declines to follow those limits, justify any deviation.

TCEQ had issued a permit to Port Arthur LNG to construct the facility with certain emission limits.

PACAN argued in an appeal before TCEQ that the plant must adopt emission limits of another similar planned facility. In the alternative, it argued that TCEQ was required to justify the deviation from the other facility’s emission limits.

TCEQ responded that the other facility’s limits:

... “do [] not satisfy the EPA’s or the TCEQ’s definition of BACT,” because there is no “operational data to prove that their permitted limits are achievable.”

The Fifth Circuit states that the question is are the other facility’s emissions limits BACT under Texas law.

The Fifth Circuit denies PACAN’s Petition for Rehearing En Banc and withdraws a previous opinion. Instead, it determines that the question is a novel one that would require it to interpret a Texas statute. It further concludes that certification is favored because:

. . . the resolution of this case impacts the procedures of a major state regulator.

Therefore, the Fifth Circuit is submitting the following question of law to the Supreme Court of Texas:

Does the phrase “has proven to be operational” in Texas's definition of “best available control technology” codified at Section 116.10(1) of the Texas Administrative Code require an air pollution control method to be currently operating under a permit issued by the Texas Commission on Environmental Quality, or does it refer to methods that TCEQ deems to be capable of operating in the future?

The Fifth Circuit states that it will resolve the case in accordance with any Opinion provided on the question by the Supreme Court of Texas.

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