

2024 WL 655983

Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

PORT ARTHUR COMMUNITY
ACTION NETWORK, Petitioner,

v.

TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY; Jon Niemann, in his official capacity
as Chairperson of the Texas Commission
on Environmental Quality, Respondents.

No. 22-60556

|

FILED February 16, 2024

Appeal from Texas Commission on Environmental Quality,
Agency No. 2021-0942-AIR

Attorneys and Law Firms

Colin Cox, Environmental Integrity Project, Austin, TX,
Natasha Bahri, Amy Catherine Dinn, Chase Porter, Lone Star
Legal Aid, Houston, TX, Caroline Crow, Lone Star Legal
Aid, Equitable Development Initiative/Environmental Justice
Project, Houston, TX, for Petitioner.

Jessica Amber Ahmed, Erin Kathleen Snody, Assistant
Attorney General, Office of the Attorney General of Texas,
Environmental Protection Division, Austin, TX, Toby Baker,
Executive Director, Texas Commission on Environmental
Quality, Environmental Law Division, Austin, TX, Aaron
Lloyd Nielson, Lanora Christine Pettit, Office of the Texas
Attorney General, Solicitor General Division, Austin, TX, for
Respondents.

Aaron Michael Streett, Christopher Beau Carter, Baker
Botts, L.L.P., Houston, TX, Z.W. Julius Chen, Akin Gump
Strauss Hauer & Feld, L.L.P., Washington, DC, Derek
Raymond McDonald, Baker Botts, L.L.P., Austin, TX,
Michael Weisbuch, Akin Gump Strauss Hauer & Feld, L.L.P.,
San Francisco, CA, for Intervenor.

Trevor W. Ezell, Office of the Governor of Texas, General
Counsel, Austin, TX, for Amicus Curiae Governor of Texas.

Before Wiener, Graves, and Douglas, Circuit Judges.

ON PETITIONS FOR REHEARING AND REHEARING EN BANC

Per Curiam:

*1 The petitions for rehearing en banc and petition for panel
rehearing are DENIED. *FED. R. APP. P. 35* and 5th Cir.
R. 35. We withdraw our previous opinion and substitute the
following:

* * *

Port Arthur Community Action Network (PACAN) petitions
this court for review of a decision by the Texas Commission
on Environmental Quality (TCEQ) not to impose certain
emissions limitations on a new liquid natural gas (LNG)
facility that it previously imposed on another such facility.
The petition raises the question of whether Texas's definition
of “best available control technology” encompasses air
pollution control methods that TCEQ has permitted but
that are not yet in operation. Specifically, we are asked to
determine whether the term “proven to be operational” means
currently in operation or capable of operation. Because we
cannot confidently make an *Erie* guess, we CERTIFY the
question to the Supreme Court of Texas.

Texas administers the federal **Clean Air Act** through TCEQ.
In turn, TCEQ is tasked with issuing Prevention of Significant
Deterioration (**PSD**) permits before any “major stationary
source” of pollution may be constructed in an area that has
attained EPA clean air standards. *40 C.F.R. § 52.21(a)(2)(i)*.
To receive a **PSD** permit, an applicant must demonstrate that
its facility will satisfy “best available control technology,”
or BACT. *42 U.S.C. § 7475(a)(4)*; *TEX. HEALTH &
SAFETY CODE § 382.0518(b)(1)*. Texas law defines BACT
as a pollution-control method that “through experience
and research, has proven to be operational, obtainable,
and capable of reducing or eliminating emissions.” *TEX.
ADMIN. CODE § 116.10(1)*. When considering whether to
issue a permit, TCEQ's Air Permit Reviewer Reference Guide
requires it to consider limits “previously accepted as BACT”
in recently approved permits and, if it declines to follow those
limits, justify any deviation.

Port Arthur Community Action Network v. Texas Commission on..., --- F.4th ---- (2024)

In this case, TCEQ issued a permit to Intervenor Port Arthur LNG to construct an LNG plant with certain emissions limits. PACAN, a non-profit organization focused on environmental issues, challenged the permit in a proceeding before TCEQ. It argued that Port Arthur LNG must adopt the emissions limits of another planned facility, Rio Grande LNG, or that TCEQ must justify the deviation from Rio Grande LNG's limits.

TCEQ rejected this argument, explaining that Rio Grande LNG'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." In other words, TCEQ concluded that Rio Grande LNG's limits were not "proven to be operational" because the plant was not completed. PACAN timely petitioned this court for review.

This case turns on whether Rio Grande LNG's emissions limits were BACT under Texas law. If so, then TCEQ should have either applied those limits to Port Arthur LNG's **PSD** permit or explained why the limits were not technically feasible.

The Texas Rules of Appellate Procedure authorize the Supreme Court of Texas to "answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent." [TEX. R. APP. P. 58.1](#). The issues presented here satisfy those conditions. They also satisfy the three factors that the Fifth Circuit uses in deciding whether to certify:

- *2 1) [T]he closeness of the question and the existence of sufficient sources of state law;
- 2) [T]he degree to which considerations of comity are relevant in light of the particular issue and case to be decided; and
- 3) [P]ractical limitations on the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court.

In re Gabriel Inv. Grp., 24 F.4th 503, 507 (5th Cir. 2022). Here, we are presented with a novel question that requires us to interpret a Texas statute. "[A]ny *Erie* guess would involve more divining than discerning." *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 202 (5th Cir. 2020). Comity interests also favor certification because the resolution of this case impacts the procedures of a major state regulator. And we are aware of no practical limitations on certification.

* * *

Accordingly, we CERTIFY the following determinative 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?

We disclaim any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the question certified. We will resolve this case in accordance with any opinion provided on this question by the Supreme Court of Texas. The Clerk of this Court is directed to transmit this certification and request to the Supreme Court of Texas in conformity with the usual practice.

QUESTION CERTIFIED.

All Citations

--- F.4th ----, 2024 WL 655983