Liquid Natural Gas Plant/Clean Air Act: Fifth Circuit Court of Appeals 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 ("Fifth Circuit") addressed in an August 12th 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, et. al*., 2025 WL 2318680.

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 liquid natural gas plant and export terminal ("Plant"). The Permit application had identified emissions 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:

…9 parts per million by volume, dry ("ppmvd") of NOx, 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 LNG ("Rio Grande") facility PSD Permit issued by TCEQ which had lower emission limits for the refrigeration combustion turbines. It would be using different pollution control equipment (Dry-Low NOx and Combustors). However, it had not been constructed.

TCEQ ultimately determined that Rio Grande's stricter refrigeration compression emission limits did not have any operational data indicating they were actually achievable.

PACAN appealed.

The Fifth Circuit submitted the following question of law to the Supreme Court of Texas:

- Does the phrase “has proven to be operational” in Texas'[ ] 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?

See 92 F.4th at 1152.

The Texas Supreme Court clarified that under Texas law, BACT cannot refer to methods that are not yet operational.

In its August 12th Decision the Fifth Circuit first addressed an argument that PACAN lacked Article III standing to challenged TCEQ’s Permit approval. Standing was found based on testimony of association members reflecting reasonable concerns about the negative effect of pollution on their personal interest.

The Fifth Circuit notes that the Texas Supreme Court held that the phrase “has proven to be operational” within the definition of BACT turned not on whether TCEQ had previously issued a permit approving such methods, but whether the technology itself was technically practical, economically reasonable, operational, obtainable, and capable of reducing or eliminating emissions. It rejected PACAN’s argument that theoretical proof of a method’s operability in the future is not enough (noting that the organization’s petition was not supported by real-world operational data).

In addition, the Texas Supreme Court had clarified that the existence of a previous permit issued to a facility does not necessarily have any bearing on the standards another facility must meet to satisfy BACT. The Fifth Circuit states that the Texas Supreme Court:

…observed that because TCEQ is obliged to issue a permit for a facility that employs technology that is “at least BACT,” an issued permit could reflect technology that controls pollution “beyond what is currently available, technically practical, and economically reasonable.”

This was deemed to foreclose PACAN’s use of the Rio Grande LNG facility's approved-but-not-yet-operational BACT emissions levels as a comparator for Port Arthur LNG's draft permit.

PACAN’s additional arguments included:

- The record reveals ample evidence that emissions limits of 5ppm NOx and 15ppm CO are achievable – pointing to vendor guarantees.
- TCEQ's approval of Rio Grande LNG's lowered emissions limits.

The Fifth Circuit rejected these arguments noting that neither constitutes operations evidence that available technology, which is employed to achieve those lowered emissions limits, has already proven, through experience and research, to be operational, obtainable, and capable of reducing emissions.

The Fifth Circuit also rejected PACAN’s argument that CEQ's definition of BACT undermines the federal definition of the same term. However,. PACAN was stated to have not identified any difference in stringency. The EPA approved concurrent nature of the Texas and federal BACT requirements was deemed to not undermine the federal Clean Air Act.

A copy of the Decision can be downloaded here.