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www.jw.com

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100 Congress Avenue
Suite 1100
Austin, TX 78701

Dallas
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San Antonio, TX 78205

Fifth Circuit Reverses EPA's Disapproval of Texas' Flexible Permit Program

By **Bill Cobb**

On August 13, 2012, the U.S. Court of Appeals for the Fifth Circuit rebuked the Environmental Protection Agency ("EPA") for its 2010 disapproval of a 1994 revision to Texas' State Implementation Plan ("SIP") establishing the Flexible Permit Program ("Flex Permit Program"). The Court held that EPA's actions were based "on demands for language and program features of the EPA's choosing, without basis in the Clean Air Act ("CAA") or its implementing regulations."

EPA disapproved Texas Flexible Permit Program for three reasons: (1) the Program might allow major sources to avoid Major New Source Review ("NSR"); (2) the provisions for monitoring, recordkeeping and reporting were inadequate; and (3) the methodology for calculating emissions caps lacked clarity and were not replicable. Judges Jolly and Southwick rejected each of these arguments with ease, while Judge Higginbotham dissented.

Rejection of EPA's Arguments

EPA purported to disapprove Texas' SIP revision on the basis that the Flexible Permit Program did not have an express negative statement prohibiting the circumvention of Major NSR. The Court found, however, that "EPA's rejection is based, in essence, on the Agency's preference for a different drafting style, instead of the standards Congress provided in the CAA," and thus, "EPA's decision disturbs the cooperative federalism that the CAA envisions." The Court brilliantly encapsulated the folly of EPA's contention that Texas was required to expressly prohibit Major NSR circumvention, noting, "a state's 'broad responsibility regarding the means' to achieve better air quality would be hollow indeed if the state were not even responsible for its own sentence structure."

EPA further argued that Texas' monitoring, recordkeeping, and reporting requirements were inadequate because they provided the Executive Director of the Texas Commission on Environmental Quality excessive discretion to determine such requirements on a case-by-case basis. EPA posited that these regulations were contrary to EPA's policy of disfavoring director discretion. The Court noted that "EPA's insistence on some undefined limit on a director's discretion is, like the Agency's insistence on a particular drafting style, based on a standard that the CAA does not empower the EPA to enforce." Indeed, the Court remarked that EPA recently approved a Georgia SIP recognizing state director's discretion and allowing the director to completely exempt minor sources from monitoring, recordkeeping, and reporting requirements altogether. Such inconsistency, in the Court's opinion, "tends not only to undercut the assertion of a policy against director discretion, but also to give the appearance that the EPA invented this policy for the sole purpose of disapproving Texas' proposal."

EPA's final argument supporting the disapproval of the Flex Permit Program was the program's supposed lack of objective and replicable methods for establishing emission caps. In disassembling EPA's final argument, the Court first noted that replicability is not a standard for disapproving a SIP revision under the CAA, but stated that even if it were, independent entities could easily calculate emissions cap information from "the permit itself," and that EPA's contrary contention was simply "unfounded." The Court was thus forced to conclude, "it is clear that Congress had a specific vision when enacting the Clean Air Act: The Federal and State governments were to work together, with assigned statutory duties and responsibilities, to achieve better air quality. The EPA's final rule disapproving Texas Flexible Permit Program transgresses the CAA's delineated boundaries of this cooperative relationship."

Outcome

While this decision represents a decisive victory for both Texas and Industry Petitioners against unwarranted federal intrusion into the state permitting process, EPA's wrongful disapproval and corresponding threats, combined with its unfathomable delay (still unexplained after 18 years), forced the State of Texas and regulated entities into a de-flexing process. Thus, most, if not all flex permit holders have amended their flex permits and are operating pursuant to other SIP-approved permits. Moreover, TCEQ had already revised its regulations to address many of EPA's concerns. Nevertheless, today's victory remands Texas' Flexible Permit Program to EPA for further consideration, opening up the possibility of re-flexing in the near future.

If you have any questions regarding this e-Alert, please contact **Bill Cobb** at 512.236.2326 or **bcobb@jw.com**. On behalf of the State of Texas, Mr. Cobb argued this appeal before the Fifth Circuit.

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