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Fifth Circuit Smacks Down EPA's Disapproval of Texas' Flexible Air Permitting Program

By: Gerald J. Pels, Elizabeth E. Mack, Gerald D. (Jerry) Higdon, M. Benjamin Cowan, and Julia C. Rinne

In a very important case for Texas industry, the Fifth Circuit vacated an Environmental Protection Agency ("EPA") rule disapproving Texas' Flexible Permit Program (the "Flexible Permit Program"). Click here for case filing. The Court found that EPA acted arbitrarily and capriciously and in excess of its statutory authority. The August 13, 2012, decision represents a key moment in the ongoing dispute between EPA and Texas relating to the Flexible Permit Program's provisions authorizing facilities to obtain permits that establish facility-wide emissions caps. Under the Flexible Permit Program, facility modifications are authorized without additional regulatory review if the emissions increase does not exceed an aggregate limit specified in the permit.

Background

The Flexible Permit Program provisions have been in effect since 1994 when the State of Texas submitted the Flexible Permit Program to the EPA as a revision to Texas' State Implementation Plan ("SIP") and as a new component to the State's Minor New Source Review ("NSR") program. Despite the Clean Air Act's ("CAA") mandate that EPA either approve or disapprove of a SIP revision within 18 months of submission, EPA did not issue final disapproval of the Flexible Permit Program until July 15, 2010, nearly 16 years after its submittal. Click here for Final Rule. During this time, Texas businesses developed and operated plants in conformity with and in reliance on these rules. As a result of EPA's disapproval, facilities with a flexible permit have been faced with potential fines or other enforcement actions.

EPA said its disapproval of the Flexible Permit Program was based on three arguments. First, EPA argued that the Flexible Permit Program potentially allowed major sources to evade Major NSR program requirements. Second, EPA argued that the Flexible Permit Program's monitoring, recordkeeping, and reporting ("MRR") requirements conferred too much discretion on the Executive Director of the Texas Commission on Environmental Quality ("TCEQ") and were vague. Finally, EPA argued that the Flexible Permit Program's methodology for calculating emissions caps was not sufficiently clear and replicable, making it difficult for permit holders to be held accountable for complying with their emissions cap.

The Fifth Circuit concluded that EPA's action was arbitrary and capricious because EPA's rationale was not based upon any relevant CAA requirements. Under CAA § 110(*l*), EPA cannot approve a SIP revision if it would interfere with any applicable requirement concerning attainment of National Ambient Air Quality Standards ("NAAQS") or any other applicable CAA requirement. 42 U.S.C. § 7410(*l*). Here, the Court found that EPA based its decision on demands for language and program features that have no basis in the CAA or its implementing regulations.

Potential Evasion of Major NSR Program Requirements

EPA argued that Texas' Flexible Permit Program includes no express provision clearly prohibiting the use of the Flexible Permit Program to circumvent Major NSR requirements. That is, EPA believed Texas' provisions could potentially allow a plant to modify, remove, or install equipment without being subject to Agency review and approval. The Fifth Circuit rejected this argument, noting that the Flexible Permit Program affirmatively requires compliance with Major NSR because it expressly requires compliance with "Non-Attainment Review" and "Prevention of Significant Deterioration Review," two primary components of Major NSR. EPA argued that negative statements prohibiting major sources from avoiding Major NSR are required by EPA's Proposed Policy

regarding SIPs. In response, the Fifth Circuit pointed to EPA's failure to cite this policy in its final disapproval of the Flexible Permit Program and concluded that EPA's rejection was "based, in essence, on the Agency's preference for a different drafting style, instead of the standards Congress provided in the CAA." Implicit in the Court's decision is a recognition that EPA cannot rely on its own policy document which has not been subject to public notice and comment to disapprove a State program. Because EPA did not provide any evidence demonstrating that the Flexible Permit Program would interfere with NAAQS or any other applicable CAA requirement, the Court concluded that EPA's reasoning was arbitrary and capricious and in excess of its statutory authority.

Inadequacy of MRR Requirements

The Fifth Circuit also rejected EPA's arguments relating to the Flexible Permit Program's MRR provisions, finding that EPA's insistence on limiting a director's discretion is similar to EPA's insistence on a particular drafting style, which the CAA does not empower the EPA to enforce. The Court pointed out that EPA did not disapprove of the Flexible Permit Program's MRR requirements in 1994 or in previous amendments and that EPA approved nearly identical MRR requirements in other Texas air emissions programs. Furthermore, the Fifth Circuit rejected EPA's contention that the Agency now has a policy disfavoring State rules conferring broad discretion on an agency director. The Court noted that EPA did not cite this new policy in its proposed rule or final disapproval of the Flexible Permit Program and pointed out that "other recent EPA action tends not only to undercut the assertion of a policy against director discretion, but also to give the appearance that EPA invented this policy for the sole purpose of disapproving Texas' proposal." As an example, the Court explained that, months before EPA's disapproval of Texas' Flexible Permit Program, EPA approved a Georgia SIP that not only recognized a State director's discretion, but also permitted the director to exempt minor sources from MRR requirements entirely. The Court also concluded that replicability is not an independent authoritative standard. In discussing replicability, the Court found that EPA's characterization of the Flexible Permit Program as vastly more complex than any other permitting scheme is "overstated."

Inadequacy of Methodology for Calculating Emissions Caps

In rejecting EPA's argument that the methodology for calculating emissions caps is inadequate, the Fifth Circuit noted that a facility remains in compliance so long as the aggregate sum of its emissions for a particular contaminant is less than the total output of all of the sources under the permit. Each permit, or the documentation attached to the permit, explicitly describes the sources, contaminants, and corresponding caps that it covers. Because EPA provided no insight into how the emissions caps interfere with NAAQs or another applicable CAA requirement, the Court concluded that EPA's reasoning was arbitrary and capricious and in excess of its statutory authority.

Conclusion

While much of the focus of the Fifth Circuit's decision to vacate EPA's disapproval of Texas' Flexible Permit Program is based upon EPA's failure to tie its rationale to independent standards set forth by Congress in the CAA, the Court also pointed out that EPA's reasoning interferes with the cooperative federalism contemplated by the CAA and its implementing regulations. The Fifth Circuit emphasized that States enjoy a measure of discretion in determining the methods and particular control strategies they will use to achieve the statutory requirements. The Court found that EPA's final rule disapproving Texas' Flexible Permit Program "transgresses the CAA's delineated boundaries of this cooperative relationship."

While the Fifth Circuit's decision does not reinstate the Flexible Permit Program, it is an important first step toward eliminating uncertainty in Texas air permitting matters for certain plants. EPA must now reconsider the validity of Texas' Flexible Permit Program rules, taking into account this holding. There is a reasonable possibility that the Flexible Permit Program may finally be validated.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

Gerald J. Pels | T: 713-226-1402 | gpels@lockelord.com
Elizabeth E. Mack | T: 214-740-8598 | emack@lockelord.com
Gerald D. (Jerry) Higdon | T: 713-238-3709 | jhigdon@lockelord.com
M. Benjamin Cowan | T: 713-226-1339 | bcowan@lockelord.com
Julia C. Rinne | T: 713-226-1236 | jrinne@lockelord.com