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An important Environmental law update from the law firm of Jackson Walker.

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Fifth Circuit Slams Door on EPA Disapproval of Texas' Pollution Control Project Standard Permit Program, Sends Strong Message to EPA for Exceeding its Authority

By **Bill Cobb** and **Mike Nasi**

On March 26, 2012, in *Luminant, et al. v. Environmental Protection Agency*, the United States Court of Appeals for the 5th Circuit issued its first opinion in a trilogy of cases reviewing EPA's delayed disapprovals of revisions to the Minor New Source Review rules in Texas' State Implementation Plan. Marking a significant victory for the State of Texas and the regulated community, and a severe blow to EPA's effort to micro-manage Texas' air program, the Court reversed EPA's Disapproval of the Texas Commission on Environmental Quality's standardized permit as it relates to Pollution Control Projects, finding "EPA overstepped the bounds of its narrow statutory role in the SIP approval process."

In *Luminant*, the 5th Circuit held that EPA's disapproval of Texas' PCP Standard Permit was arbitrary, capricious, and exceeded EPA's statutory authority because EPA "created out of whole cloth" three different and incorrect legal theories to justify its Disapproval. Specifically, the 5th Circuit concluded that EPA improperly reviewed the PCP Standard Permit for compliance with Texas law, because "it is beyond cavil that the EPA may consider only the requirements of the CAA when reviewing SIP submissions"; that EPA's "similar source" requirement was not "warranted by any applicable provision of the Act"; and that EPA's "replicability" requirement was "not a legal standard the Act authorized EPA to enforce."

The Court both opened, and closed, its strongly worded opinion scolding EPA for its failure to review Texas' SIP Revision until three years after the statutorily prescribed deadline (18 months after submission). The Court found EPA's delay particularly offensive "in the context of a cooperative federalism regime that affords sweeping discretion to the states to develop implementation plans and assigns to EPA the narrow task of ensuring that a state plan meets the minimum requirements of the Act." Although not citing EPA's delay as a basis for its reversal, the Court relied on EPA's delay to instruct EPA on remand to "reconsider these regulations and approve or disapprove them most expeditiously."

Although the third SIP review case to be argued (on December 7, 2011), the Court's first opinion in the ultimate trilogy strongly suggests the 5th Circuit will likewise reverse EPA's Disapproval of Texas' Flexible Permits program (argued October 4, 2011) and Qualified Facilities program (argued July 6, 2011), which were heard by different panels of Justices. In each of those delayed Disapprovals (16 years and 14 years, respectively), the EPA similarly rejected

Texas' Minor NSR rule SIP revisions for not complying with Texas law, and for granting TCEQ's Executive Director excessive discretion.

The remand does not directly impact the "non-rule" PCP Standard Permit recently issued by TCEQ on February 9, 2011, but the tone and tenor of the decision bodes well for TCEQ's ability to continue to issue PCP Standard Permits without EPA interference and associated legal uncertainty. TCEQ will continue to issue PCP standard permits, just as they have been doing prior to the decision handed down by the 5th Circuit. The currently effective non-rule standard permit specifically allows facilities that made changes under the standard permit registrations obtained under previous versions of the PCP standard permit to continue to operate under the version of the standard permit that was effective at the time of authorization, so the 5th Circuit decision is more directly legally relevant to those permit holders. Moving forward, all PCP Standard Permittees will renew their PCP authorization, if needed, upon the 10 year anniversary of the original registration using the new non-rule standard permit.

Luminant, et al. v. Environmental Protection Agency is **available here**.

If you have any questions regarding this e-Alert, please contact **Bill Cobb** at 512.236.2326 or **bcobb@jw.com** or **Mike Nasi** at 512.236.2216 or **mnasi@jw.com**. While Deputy Attorney General for the State of Texas, Mr. Cobb argued the Flexible Permits appeal before the 5th Circuit. Mr. Nasi has secured several PCP Standard Permits, as well as other air quality authorizations for members of the regulated community. Both work on regulatory, policy, and litigation matters relating to Texas & EPA air permit programs.

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