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

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EPA's Approval and Rejection of Affirmative Defenses Upheld

Neither Industry nor Environmental Groups Prevail in Fifth Circuit

By Mike Nasi, Bill Cobb, and Benjamin Rhem

On July 30, 2012, in *Luminant, et al. v. Environmental Protection Agency*, the United States Court of Appeals for the Fifth Circuit upheld the U.S. Environmental Protections Agency's (EPA) final rule which formally approved the portions of Texas' State Implementation Plan (SIP) that provided an affirmative defense for *unplanned* SSM events and disapproved the portions that provided an affirmative defense for *planned* SSM events.[1] The Court's ruling denied petitions for review filed by both environmental and industry groups, regarding the EPA's partial approval and partial disapproval, as the Court determined the EPA did not act arbitrarily or contrary to law.

In January of 2006, the Texas Commission on Environmental Quality (TCEQ) submitted a SIP revision that created an affirmative defense against civil penalties for excess emissions during both planned and unplanned startup, shutdown, and maintenance/malfunction (SSM) events. The provisions in the Texas SIP at issue allow owners or operators to claim an affirmative defense to civil penalties if the owner or operator can prove each of the nine listed criteria, which specifically include: 1) that the periods of unauthorized emissions from SSM activity "could not have been prevented through planning and design;" 2) that the unauthorized emissions from SSM activities "were not part of a recurring pattern;" and 3) that the "unauthorized emissions did not cause to contribute to an exceedance of the [National Ambient Air Quality Standards] NAAQS." Environmental groups argued that approval of the affirmative defense for unplanned SSM events conflicted with the provisions of the Clean Air Act (CAA); likewise, industry groups argued that disapproval of the affirmative defense for planned SSM events was contrary to the law.

Affirmative Defense for Unplanned SSM Events

In upholding the EPA's decision to approve the affirmative defense for unplanned SSM events, the Court noted that the Federal Clean Air Act (CAA) authorizes defenses that "are 'narrowly tailored' to address unavoidable, excess emissions . . . [which] give the states the necessary flexibility to ensure that they remain in compliance . . . while still accounting for unplanned unavoidable events." Furthermore, the court also noted that certain "excessive" emission events are not afforded this affirmative defense, even if they are unplanned. Whether an emission event is considered "excessive" depends on a number of factors, including, frequency, duration, and impact on human health, among others.

Affirmative Defense for Planned SSM Events

In its decision to disapprove the affirmative defense for planned

SSM events, the EPA pointed to "its long standing position . . . that planned maintenance activities are predictable events" and as such, it is not appropriate to provide an affirmative defense for these excess emissions. However, as industry groups argued, planned *maintenance* is only one of the three types of activities which were covered under the affirmative defense. The agency went on to say that it disapproved the affirmative defense for excess emission during planned startup and shutdown because those provisions are not severable from the planned maintenance provisions. The Court agreed with EPA and refused to sever startup and shutdown from maintenance activities.

Furthermore, the Court upheld EPA's argument that due to a "defect" in the regulatory cross-reference, the affirmative defense for planned SSM could be interpreted as not requiring a source to establish all of nine elements of the affirmative defense. Section 101.222(h) of Title 30 of the Texas Administrative Code requires a source to prove all of the elements listed in 101.222(c) to be eligible for the affirmative defense for planned SSM events; however, § 101.222(c) only refers to what is required for unplanned SSM activities. Thus, the Court determined that the criteria in 101.222(c) could not be applied to planned SSM activities.

The Court also rejected several industry arguments that the EPA's final rule was arbitrary and capricious. Interestingly, little was made of the five years it took EPA to finalize its disapproval of the Texas regulations (under the CAA, the EPA is required to review SIP submissions within 18 months of submission). In a recent Fifth Circuit decision regarding Texas Pollution Control Project Standard Permit, also designated as *Luminant, et al. v. Environmental Protection Agency*, the Court scolded the EPA for its long delay in reviewing another one of Texas' SIP revisions. For more information on this decision, click here.

While the EPA disapproved the current provisions for an affirmative defense for planned SSM, the court decision and EPA's rationale for its final rule, conceivably, left open the possibility for Texas to craft an affirmative defense for planned startup and shutdown activities.

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1 Under Texas regulations, these activities are referred to as maintenance, startup, and shutdown (MSS) activities. The EPA's regulations, however, refer to startup, shutdown, and malfunction (SSM) activities. While there is a slight difference between the two sets of regulations, the Court referred to both MSS and SSM collectively as startup, shutdown, and maintenance/malfunction (SSM) activities throughout the course of its opinion.

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