

Texas Supreme Court Clarifies 'Best Available Control Technology'

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The Texas Supreme Court clarified the meaning of “available” as used in the statutory definition of “Best Available Control Technology” (BACT) with an opinion in [Port Arthur Community Action Network \(PACAN\) v. Texas Commission on Environmental Quality](#). The decision underscored that “available” means available now, not in the future, making theoretical or speculative future emission-control technology insufficient to demonstrate that a technology is BACT.

The Court addressed a certified question from the Fifth Circuit regarding the interpretation of “best available control technology” (BACT) under Texas law. The certified question arose from a challenge by PACAN to a Texas Commission on Environmental Quality (TCEQ) air permit, in which PACAN claimed that the TCEQ permit did not incorporate BACT. PACAN claimed a technology that better controls emissions had been permitted for a similar facility, and therefore, such technology was BACT. The Fifth Circuit asked the Court the following: “Does the phrase ‘has proven to be operational’ in Texas’s 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?”

The Texas Supreme Court chose neither of the two options presented by the Fifth Circuit and instead chose a third path. The Court noted that the Texas Clean Air Act requires that a permit must be issued if an applicant proposes “at least” BACT, noting that a permit applicant could propose emission controls that are not currently available so long as those controls exceed BACT. Thus, whether a technology was previously permitted is not the end of the BACT inquiry. Instead, the Court focused on the statutory language, which requires that “the proposed facility ... will use at least the best available control technology, consider the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility.” The Court noted that the statutory requirements of “technical practicability” and “economic reasonableness” are “like a lighthouse to which courts, agencies and litigants should look when in doubt about the meaning of BACT under Texas law.” However, the Court also noted that the term BACT, by itself, provides clarification and then turned to the meaning of “available.” The Court found that the plain meaning of available means “currently available” and that technology that may be available in the future is not BACT.

The Court also discussed the definition of BACT adopted by TCEQ in its air permitting rule, which provides that BACT is a control technology that “through experience and research has proven to be operational, obtainable and capable of reducing or eliminating emissions from the facility and is considered technical practical and economically reasonable for the facility.” The Court noted the use of “has proven” and “through experience and research” further elucidates that BACT does not refer to some future or theoretical technology; BACT requires “demonstrated, real-world experience” and not theoretical success.

Implications for Environmental Permitting

This ruling has important implications for businesses seeking environmental permits in Texas. TCEQ must now ensure that proposed pollution control technologies have demonstrated real-world operability and effectiveness. The decision underscores that theoretical or speculative future capabilities are insufficient to meet BACT requirements. While previous permitting of a technology may be relevant to the BACT determination, it is not determinative. This clarification will likely impact the evaluation process for environmental permits, emphasizing the need for proof of a technology's effectiveness and operability.

Please contact one of the attorneys listed at the bottom of this page to determine how this ruling will affect your business or for assistance with air permitting matters.