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Texas v. United States Environmental Protection Agency

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***Texas v. United States Environmental Protection Agency*, 690 F.3d 670, 2012 WL 3264558, 2012 U.S. App. LEXIS 16898 (5th Cir. Aug. 13, 2012).**

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ABSTRACT

In *Texas v. U.S. Environmental Protection Agency*, the Court of Appeals for the Fifth Circuit vacated an Environmental Protection Agency rule disapproving Texas's State Implementation Plan for compliance with National Ambient Air Quality Standards under the Clean Air Act. The court emphasized the importance of the cooperative federalism model embodied in the Clean Air Act, wherein the Environmental Protection Agency sets air quality standards and each state determines how it will meet those standards. The court held that the agency acted arbitrarily and capriciously in disapproving the plan because disapproval was not based on enforceable statutory requirements of the Clean Air Act.

I. INTRODUCTION

The State of Texas and several industry petitioners challenged a 2010 EPA ruling disapproving Texas's 1994 State Implementation Plan ("SIP") revision.[1] The revision proposed a Flexible Permit Program ("Program") as a new feature of the State's Minor New Source Review ("NSR") scheme.[2] Under the Program, a facility could avoid regulatory review for modifications if it obtained a permit providing for a cap on aggregate emissions of the permittee.[3] In its decision, the Fifth Circuit examined the three reasons the EPA articulated for disapproving the SIP: 1) The Program left a potential loophole through which major sources could evade NSR requirements; 2) the

[1] *Texas v. United States Environmental Protection Agency*, 690 F.3d 670, 676 (5th Cir. Aug. 13, 2012).
[2] *Id.*
[3] *Id.*

monitoring, recordkeeping, and reporting (MRR) requirements were inadequate; and 3) the proposed method of calculating emissions under the Program lacked clarity and was not replicable.[4] The Fifth Circuit found the EPA's decision regarding each reason to be arbitrary and capricious and/or in excess of the agency's statutory authority.[5]

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1994, the Texas Commission on Environmental Quality (TCEQ) revised the Minor NSR portion of its SIP for compliance with the emission-control requirements of the Clean Air Act (CAA).[6] The CAA distinguishes major pollution sources from minor pollution sources based on whether facilities emit more than a pre-identified amount of a pollutant.[7] The Program allowed facilities classified under the Minor NSR scheme to obtain pre-construction approval for permits as long as the added emissions would not exceed an aggregate limit.[8]

Between 1994 and 2008, the EPA failed to issue a final decision approving or disapproving the Texas revision.[9] During that time, the TCEQ adopted the Program and began issuing permits.[10] The Texas legislature also incorporated the revision into the Texas Clean Air Act.[11] In 2008, industry groups brought a mandatory duty suit in federal district court to force the EPA to either adopt or reject the Program.[12] The suit resulted in a settlement, with the EPA agreeing to make a final decision on the Program within a

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[4] *Id.* at 677.
[5] *Id.* at 677-686.
[6] *Tex.*, 690 F.3d at 676.
[7] *Id.* at 674-675.
[8] *Id.* at 676.
[9] *Id.*
[10] *Id.* at 674, 676.
[11] *Id.* at 676.
[12] *Tex.*, 690 F.3d at 690.

specified timeline.[13] The EPA issued its final decision disapproving of the Program in 2010.[14]

III. ANALYSIS

Texas brought this case under the judicial review provision of the Administrative Procedures Act. Under the Act, an agency decision must be set aside "if it is arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence on the record taken as a whole" or "if it is in excess of the [agency's] statutory authority."[15] Using the above standard, the Fifth Circuit analyzed the EPA's three main justifications for disapproving the SIP revision using this standard of review.

A. The Potential Major NSR Loophole

The EPA found that the Program, as it was written, might have "allow[ed] major sources to evade Major NSR" requirements because there was no express language in the Program limiting it to Minor NSR.[16] The court held that the EPA had no authority in interpreting the language of a State law. It further held that unless the EPA expressly demonstrated how the SIP "would interfere with any applicable requirement concerning attainment of NAAQS or any other applicable requirement," it had no authority to disapprove of the Program.[17] The court further stated the EPA's interpretation of the law was incorrect because other provisions within the Program required all facilities to comply with all applicable requirements, and Major NSR would still go through the pre-existing channels for approval.[18] Ultimately, the court determined that in disapproving

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[13] *Id.* at 676.
[14] *Id.*
[15] *Id*. at 676-677.
[16] *Id.* at 677.
[17] *Id.* at 677-678.
[18] *Tex.*, 690 F.3d at 678.

the Program based on a perceived Major NSR loophole, the EPA was merely expressing a preference for a certain "drafting style" and not an enforceable standard a state must meet under the CAA.[19] Disapproval based on this criteria was therefore arbitrary and capricious and in excess of the EPA's statutory authority.[20]

B. Inadequate Monitoring, Recordkeeping, and Reporting Requirements

The EPA's second reason for disapproving the Program was the monitoring, record keeping, and recording requirements conferred "too much discretion on the TCEQ Director" and were "too vague and not replicable."[21] The court upheld creating the MRR requirements on a case-by-case basis because each applicant would be required to "propose a workable plan for how emissions would be measured" and "detail the contaminants for which a cap is desired, the sources of emissions for those contaminants, emissions rate calculations . . . and proposed control technology."[22] Emphasizing the cooperative federalism system of enforcement in the CAA, the majority reasoned Texas had the authority to determine control measures so long as they ensured compliance with National Ambient Air Quality Standards ("NAAQS").[23] Therefore, the EPA did not have the authority to disapprove of the revision based on the level of discretion the Director was given to approve a particular control measures chosen.[24]

C. The Emissions Calculations as Unclear or Non-Replicable

The EPA's third basis for disapproval was that it would be "difficult to hold permit holders accountable for complying with their emissions cap" using the Program's

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[19] *Id.* at 679.
[20] *Id*. at 679-680.
[21] *Id.* at 681.
[22] *Id.*
[23] *Id.* at 682-684.
[24] *Tex.*, 690 F.3d at 682-684.

method for calculating emissions because they were "not sufficiently clear and replicable."[25] The court held that since "clarity and replicability" was not a standard enumerated under the CAA, the EPA acted outside of its authority and was arbitrary and capricious in disapproving Texas' SIP on that basis.[26]

IV. CONCLUSION

Throughout the opinion, the majority strongly emphasized the importance of maintaining the cooperative federalism balance written into the CAA. The court was very careful to protect the rights of the State in implementing the CAA standards however state officials determined was appropriate, so long as they comply with federal standards. This was particularly true for decision points where the EPA did not thoroughly explain how the CAA granted authority to disapprove state plans on certain criteria. The outcome of this case might caution future administrators to detail more explicitly the statutory basis for their decisions in the event those decisions might be interpreted to run contrary to the CAA's goal of cooperative federalism.

[25] *Id.* at 684.
[26] *Id.* at 686.