Articles + Publications | February 20, 2025

Texas BACT Is a Fact: The Texas Supreme Court Unpacks the Texas Clean Air Act's BACT Definition

WRITTEN BY

Gerald J. Pels | Gerald D. Higdon | Elizabeth Phillips Corey | Brett A. Miller | Greta T. Carlson

Background

Port Arthur Community Action Network (PACAN) v. Texas Commission on Environmental Quality et al. (Tex. Feb. 14, 2025) presented the Texas Supreme Court with a unique opportunity to provide defined guideposts to understand just what is "best available control technology" or "BACT" for the purposes of Texas air permitting.

The Texas Supreme Court had jurisdiction when asked a certified question by the U.S. Fifth Circuit Court of Appeals, which was hearing an appeal about the permitting of a proposed natural gas liquefaction plant in Port Arthur, TX. After the Texas Commission on Environmental Quality (TCEQ) granted the facility an air permit, its issuance was challenged by PACAN. PACAN argued that the air permit issued by TCEQ did not employ BACT, arguing another similar facility had been permitted with lower emission limits.

The Fifth Circuit presented a certified question of Texas law to the Texas Supreme Court asking whether the phrase "has proven to be operational" as used in Texas' BACT definition: (i) requires an air pollution control method to be operating in a permit already issued by TCEQ or (ii) refers to methods the TCEQ deems to be capable of operating? The Texas Supreme Court provided its interpretation of BACT for Texas law and concluded that the Fifth Circuit's question was not entirely on point! Instead, the court concluded the phrase does not suggest either of the two understandings in the certified question.

The court concluded that nothing in the BACT definition indicates that a pollution control technology's capability of operating in the future has anything to do with the analysis. Instead, BACT is a technology that has already been proven, through experience and research, to be operational, obtainable, and capable of reducing emissions. The Texas Supreme Court rejected the certified question's suggestion that BACT might include methods TCEQ deems to be capable of operating in the future.

The Texas Supreme Court also rejected the other view posed in the certified question — that the BACT inquiry turns on whether a proposed pollution control method is currently operating under a TCEQ permit. The court indicated the issuance of similar permits may be relevant to whether a pollution control method has proven to be operational — but this does not support the notion that a pollution control method is not BACT unless it has previously been permitted by TCEQ.

So how did the Texas Supreme Court reach its conclusions and what does Texas BACT mean?

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Texas BACT

The Texas Supreme Court used a literal common-sense approach to interpret the relevant provisions of the Texas Clean Air Act (TCAA) and attendant regulations. To guide its analysis, the court looked initially at the TCAA's language regarding under what circumstances the TCEQ "shall grant" an air emissions permit and then to the TCEQ's regulatory definition of BACT.

In the TCAA, the legislature provided guideposts to understand the BACT construct. Under the TCAA, the TCEQ "shall grant" an air emissions permit if, among other things, it determines the proposed facility in question "will use *at least* the best available control technology, considering the technical practicability and economic reasonableness" of emissions reduction (emphasis added). The court used the statutory language as a springboard for its analyses, noting that the Texas legislature's language is of key analytical focus, regardless of any implementing regulations.

TCEQ regulations define BACT as a "control method . . . that through experience and research, *has proven* to be operational, obtainable, and capable" of emissions reduction, and which is "considered technically practical and economically reasonable . . . ." (emphasis added). As an initial matter, the court pointed out that any BACT analysis must consider statutory requirements of practicability and economic reasonableness. Thus, what is the "best" control technology for a given facility must consider those factors.

The court analyzed the meaning of key wording in the relevant statutory and regulatory provisions. An important step was to consider the meaning of the concept of "available" as used in "best available control technology." The court did so and ascribed a plain meaning to the term. That is, "available" technology must actually be currently available, regardless of whether previously permitted and regardless of whether potentially available in the future.

The court also reviewed the TCEQ's regulatory BACT definition and understood it to more fully outline the contours of BACT as used in the TCAA. The court said the regulatory BACT definition in essence clarified the statutory text's "everyday meaning." The court concluded that where the rule stated the control technology must be "operational," "obtainable," and capable of emissions reduction or elimination, that it was clarifying the meaning of the statutory mandates that the control technology be "technically practicable," "economically reasonable," and "best available."

Further, the court reviewed other specific wording in the TCEQ's BACT definition. The regulatory definition states that to be the "best," the control technology "through experience and research has proven to be operational and obtainable." Accordingly, the court reasoned BACT must be currently in use, available and has been demonstrated through experience and research to reduce or eliminate emissions. The court concluded that because the definition requires proof through experience and research, BACT cannot consider future capabilities. It looks to technology that "has already been proven." Texas BACT must be based on real-world experience and not methods an agency may deem prospectively capable.

Finally, the court turned to the important question of whether technology permitted for emissions control at a given facility would be determinative of BACT for a subsequent permit application of a like facility. The court concluded that while it may be highly relevant, it cannot be determinative, focusing on the TCEQ's statutory mandate to

issue an air emissions permit where, among other things, the facility "will use *at least* the best available control technology."

Because a permit must be issued where "at least" BACT is utilized, it is possible that emissions limitations could exceed BACT. For that reason, previously permitted control technology should not determine applicable BACT standards at a subsequently permitted facility.

Conclusions and Takeaways

The Texas Supreme Court concluded the Fifth Circuit's question of law required a more nuanced analysis. The concept of "proven to be operational" can neither be tied to a previously issued permit, and in all events, cannot be technology the TCEQ deems to be capable of operating in the future. For purposes of Texas law, touchstones for BACT include:

- "***Available***" means available now, regardless of whether permitted at another site;
- The control technology "***has proven*** to be operational, obtainable, and capable" of emissions reduction, means it must have proven to have been demonstrated in the real world, not a technology the TCEQ believes may operate in the future;
- BACT need not have been permitted before;
- BACT at a previously permitted site is relevant, but not determinative of BACT at a subsequent like site;
- And of course, BACT must be ***economically reasonable*** and ***technically practicable***.

The Texas Supreme Court's decision should allow for heightened site-specific flexibility in permitting decisions and also mitigate the likelihood that little-used control technologies could be proposed for use at a facility, whether by agency personnel or protesters in a contested permit challenge. Control technologies used at previously permitted facilities will be relevant to the BACT inquiry, but not determinative.

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