



Environmental Defense and Sierra Club File "Citizen Petition" Challenging PSD Program
Beveridge & Diamond, P.C., 2008
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On January 17, 2008, Environmental Defense and the Sierra Club filed a "Citizen Petition for Action Pursuant to the Clean Air Act Regarding the Construction of New Sources in Texas" challenging the State of Texas' Prevention of Significant Deterioration ("PSD") permitting program. The petitioners allege the TCEQ's PSD program violates Texas' State Implementation Plan ("SIP") and the Clean Air Act ("CAA"). The Petition does not challenge the TCEQ's action on individual permits. It instead seeks to undermine the entire PSD program. As alleged in the petition, "the State's failings are not simply the product of poor individual permitting decisions. These errors are repeated in permit after permit and reflect a statewide policy of ignoring the CAA and Texas SIP."

The petitioners allege that the State's PSD permitting program is deficient in numerous respects. The petitioners cite to the following:

- (1) The State fails to use the correct definition of BACT;
- (2) The TCEQ's use of its three tier guidance (setting out TCEQ's approach to conducting BACT determinations) circumvents the required BACT determinations;
- (3) In making BACT determinations, TCEQ fails to take into account all available production processes or available methods, systems, and techniques;
- (4) The TCEQ fails to take into account cumulative air quality impacts from new sources;
- (5) The TCEQ is failing to consult properly with federal land managers;
- (6) The TCEQ is failing to follow the pre-application monitoring requirements; and
- (7) The State fails to enforce the terms and conditions of its construction permits.

Environmental Defense and the Sierra Club filed the petition pursuant to CAA Section 113(a)(5). That section of the Act provides that "[w]henver, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the Act relating to the construction of new sources or the modification of existing sources, the Administrator may--

- (A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies,
- (B) issue an administrative penalty order in accordance with subsection (d), or
- (C) bring a civil action under subsection (b)."

The environmental groups seek an EPA order finding the State has failed to comply with State SIP and CAA requirements in implementing and enforcing its PSD program. They ask the EPA to institute certain "compliance incentives" under the CAA, including prohibiting the construction of new sources in Texas, withholding State highway funds, and implementing



reduction of offsets from other pollution sources in the State. The CAA does not provide a mechanism for responding to a petition filed under Section 113(a)(5). Neither the EPA nor the TCEQ has indicated how they will respond.