CONSIDERATIONS FOR EPA RECONSIDERATION OF TEXAS MSS SIP CALL

On June 12, 2015, the Environmental Protection Agency ("EPA") published a final rule calling for the revision of the maintenance, startup and shutdown ("MSS") provisions in the Texas State Implementation Plan (the "Texas SIP Call"). The Texas SIP Call marked a reversal of EPA's prior approval of the Texas provisions, which had been upheld by the Fifth Circuit.

On March 15, 2017, the Texas Commission on Environmental Quality ("TCEQ") submitted to EPA a petition for reconsideration of the Texas SIP Call. Texas was the sole petitioner for reconsideration.

On October 16, 2018, EPA Regional Administrator Anne Idsal granted the Texas petition for reconsideration and indicated that she will convene a proceeding to reconsider the Texas SIP Call. Below is a summary of the legal bases for EPA to reconsider and withdraw the Texas SIP Call.

I. The Texas MSS Affirmative Defense is a long-standing and integral component of the State's overall control strategy.

The MSS regulatory regime in 30 TAC Chapter 101 is a key component of the state's clean air strategy. The Chapter 101 regulatory regime has existed, in some form, as far back as the original Texas SIP of 1972. As explained in Texas's petition, "[t]he Texas SIP originally established stringent permit and rule-based emission limits on the basis that unavoidable emissions from MSS and malfunctions could be addressed separately through reporting of emissions, and later by implementing a narrowly-tailored affirmative defense, with EPA approval of these various rules as SIP revisions."[1]

Almost 45 years later, the Chapter 101 regime is currently cross-referenced in many provisions of the Texas Administrative Code.[2] It is not possible to remove or replace these discrete MSS provisions or cross-references from the Texas SIP without dramatically changing the SIP as a whole.

The significant and integral nature of Chapter 101 in Texas's overall control strategy was not understood or recognized in the Texas SIP call, and provides a legal basis for EPA's reconsideration of the Texas SIP Call.

II. Texas has discretion under Section 110 of the Act to adopt an affirmative defense as part of its comprehensive strategy to control emissions

Section 110 of the Clean Air Act ("CAA" or "the Act") requires a state's implementation plan to include "enforceable emission limitations and other control measures, means, or techniques (including economic incentives…) … as may be necessary or appropriate to

[1] Texas Commission on Environmental Quality's Petition for Reconsideration and Request for Administrative Stay, EPA Docket No. EPA-HQ-OAR02012-0322, at 9 (Mar. 15, 2017).
[2] *See, e.g.,* 30 Tex. Admin. Code §§ 117.145(a), 117.245(a), 117.345(a), 117.445(a), 117.1045(a), 117.1145(a), 117.1245(a), 117.1345(a), and 117.3045(a).

meet the requirements of [the Act]."[3] This provision has been interpreted as granting states considerable discretion in choosing the components of their control strategy to comply with the requirements of the Act. Indeed, the U.S. Supreme Court has held that, "[s]o long as the national standards are met, the State may select whatever mix of control devices it desires … and industries with particular economic or technological problems may seek special treatment in the plan itself."[4]

The Act is also clear that the states are responsible for shaping their "program to provide for the enforcement of the measures" in the state's emission control program.[5] Thus, states have authority not only to define the components of their emission control program, but also to define the specific manner in which those measures will be enforced. Indeed, EPA has previously stated that "[t]he CAA does not require that all violations be treated equally – instead the State is granted authority to determine what constitutes a violation, and to distinguish both qualitatively and quantitatively between different types of violations."[6] Notably, nowhere does the Act require that all SIP limitations be expressed in a way that they are enforceable through monetary penalties.

Thus, the Act leaves for Texas the discretion to adopt "other control measure[s]" such as the affirmative defense *and* to establish an enforcement program that limits the available remedies for certain upsets to injunctive relief, *provided* that the state's overall control strategy meets the national standards set under the Act. EPA made just such a finding in its approval of the Texas SIP, including its affirmative defenses, on November 10, 2010.[7]

EPA's 2010 SIP approval determination was upheld by the Fifth Circuit. As the Fifth Circuit in *Luminant* held:

> [t]he EPA submits that the above-mentioned affirmative defense for unplanned SSM events is narrowly tailored to address unavoidable, excess emissions and consistent with the penalty assessment criteria in section 7413(e). Thus, it approved this portion of Texas's SIP revision as being consistent with section 7413 of the Act. We hold this to be a permissible interpretation of section 7413, warranting deference. Accordingly, the EPA acted neither contrary to law nor in excess of its statutory authority when it based its partial approval of the plan on this construction.[8]

Under governing Fifth Circuit precedent, the Texas affirmative defense is consistent with Section 113(e) and is a permissible component of the state's comprehensive control strategy under Section 110(a)(2)(A) of the Act.

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[3] CAA §110(a)(2)(A).
[4] *Union Elec. Co. v. EPA*, 427 U.S. 246, 266 (1976).
[5] CAA §110(a)(2)(C).
[6] Brief of Respondent EPA at 17-18, *Luminant Generation Co., LLC, et al. v. EPA*, No. 10-60934 at 22 (5th Cir., filed July 12, 2011)(*Luminant*).
[7] 75 Fed. Reg. 68,989 (Nov. 10, 2010).
[8] *Luminant Generation Co. v. EPA*, 714 F.3d 841, 853 (5th Cir. 2013) (internal citations removed).

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III. The Texas affirmative defense does not interfere with the district court's jurisdiction to assess penalties under Sections 113(e) or 304(a).

Section 304(a) of the Act states that the district courts "shall have jurisdiction … to enforce an emission standard or limitation … and to apply any appropriate civil penalties" in citizen suits alleging a violation of an emission standard or limitation of the Act. Section 113(e) further provides specific criteria for the court to consider "in determining the amount of any penalty to be assessed."

While these sections of the Act grant the district courts jurisdiction to "apply" or "assess" appropriate penalties for violations of the state's emission control program, these statutory provisions do not represent a grant of jurisdiction to impose a penalty where the state's program for enforcement provides none. As explained in the Texas petition for reconsideration,

> States' authority to create defenses to monetary penalties is consistent with the text of both CAA § 113(e)(l) and § 304(a). Section 304(a), which authorizes citizen suits, allows a court to "apply any appropriate civil penalties" in a citizen suit. Section 113(e)(l) provides how a court should "determin[e] the amount of any penalty to be assessed." Neither addresses how to determine whether monetary penalties are "appropriate," as distinct from the "amount" of penalties if a monetary penalty is appropriate...[9]

As noted above, it is within the state's authority under Section 110 of the Act to shape its enforcement program such that no civil penalties are provided for activities meeting the affirmative defense. Given the absence of any available civil penalty for these activities, there is no opportunity for the court to determine whether to apply a civil penalty and, if so, how much to assess. Thus, the application of the affirmative defense does not interfere with these determinations.

The Fifth Circuit upheld the Texas position in its decision upholding the EPA's approval of the Texas affirmative defense, explaining that the Texas defenses do not "negate the district court's jurisdiction to assess civil penalties using the criteria outlined in section 7413(e), or the state permitting authority's power to recover civil penalties, [but] simply provides a defense, under narrowly defined circumstances, if and when penalties are assessed."[10]

At least two separate district courts have considered the Texas affirmative defense following its approval by the Fifth Circuit in *Luminant*.[11] Neither court found the affirmative defense to be an impediment to its jurisdiction. Instead, these courts interpreted the affirmative defense as a permissible exercise of the state's broad discretion in choosing how to implement its emissions control programs. In other words, the affirmative defense acts as one component of the state's overall control strategy to establish the applicable standard by which the court judges an alleged violation. Understood as such, the courts applied the facts of the case to that standard and,

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[9] Brief of Respondent EPA at 17-18, *Luminant Generation Co., LLC, et al. v. EPA*, No. 10-60934 at 12 (5th Cir., filed July 12, 2011).

[10] *Luminant Generation Co. v. EPA*, 714 F.3d 841, 853 n.9 (5th Cir. 2013)

[11] *Sierra Club v. Energy Future Holdings Corp.*, 2014 WL 2153913, at *12-19 (W.D. Tex. Mar. 2, 2014); *see also Env't Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, 2017 WL 2331679, at *22 (S.D. Tex. Apr. 26, 2017).

where a violation was found, awarded the appropriate relief or penalty as outlined by statute. Accordingly, concerns that the Texas affirmative defense might restrain the district courts' jurisdiction turned out to be unfounded.

IV. The D.C. Circuit's reasoning regarding EPA's Section 112 standard-setting authority does not extend to the Texas Chapter 101 regime.

The Texas SIP Call referenced the D.C. Circuit decision in *NRDC v. EPA*[12] as supporting the reasoning that affirmative defenses to emission standards promulgated pursuant to Section 110 of the Act should generally be considered impermissible.[13] The *NRDC* court held that EPA may not provide an affirmative defense to penalties for violations of standards promulgated under Section 112 of the Act. However, the court explicitly chose not to consider whether an affirmative defense may be part of a state's plan under Section 110.[14] EPA's authority to implement Section 112 standards is meaningfully distinguishable from the states under Section 110. Accordingly, extending the reasoning in *NRDC* to the Texas Chapter 101 regime is inappropriate.

First, unlike Section 110's broad grant of authority to Texas, EPA's implementation of Section 112 is constrained by language calling for EPA to fashion a specific form of emissions standard. Section 112 prescribes a particular level of emission control for any listed source category, and requires use of work practice standards when those emission standards are demonstrated "not feasible." By contrast, Section 110(a)(2)(A) provides states with broad discretion to regulate through "emission limitations" and "other control measures" that the state deems "necessary or appropriate" and, unlike Section 112, does not specify whether or how to regulate sources when a particular "emission limitation" is not feasible. Moreover, regardless of what "emission limitation" means, Congress explicitly provided states discretion to impose them only as "necessary or appropriate" to meet some other applicable requirement of the Act.

Second, Section 110 grants Texas broad authority to craft its program of enforcement, whereas the Act only grants to EPA's Administrator the general authority to "prescribe such regulations as are necessary to carry out his functions under [the Act]."[15] CAA §301(a). Thus, even though the *NRDC* court acknowledged that Section 304(a) does not expressly prohibit the creation of an affirmative defense, the court was unwilling to presume that EPA had such authority given the agency's limited grant of authority under Section 112. As noted above, Section 110 clearly grants to states greater flexibility to adopt "other control measures" and the specific authority to craft "a program to provide for the enforcement of the[se] measures."

Finally, even if the *NRDC* court's reasoning could be applied to Texas, under the doctrine of "intercircuit nonacquiescence" embedded in EPA's Regional Consistency Rule, EPA must respect the Fifth Circuit's interpretation of the Texas affirmative defense in *Luminant*.[16]

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[12] 749 F.3d 1055, 1063 (D.C. Cir. 2014).
[13] 80 Fed. Reg. 33,840 at 33,851 (June 12, 2015).
[14] *NRDC* at 1064, n.2.
[15] CAA §301(a).
[16] 714 F.3d 841 (5th Cir. 2013).

Luminant made clear that the Texas affirmative defenses do not "negate the district court's jurisdiction to assess civil penalties using the criteria outlined in [CAA§ 113(e)]."[17]

Accordingly, the D.C. Circuit's reasoning in *NRDC* is not properly extended to the Texas affirmative defenses embodied in Chapter 101.

[17] *Petition for Reconsideration and Request for Administrative Stay*, *supra* n.17, at 12-13; *see also Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 853, n.9 (5th Cir. 2013).