No. 10-60891

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUMINANT GENERATION CO. LLC, et al.,

Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

RESPONDENT EPA'S MERITS BRIEF

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REQUEST FOR ORAL ARGUMENT

Respondent, United States Environmental Protection Agency ("EPA") believes that oral argument is likely to assist the Court in the resolution of this matter. Accordingly, EPA requests that oral argument be scheduled.

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JURISDICTION

Jurisdiction exists under 42 U.S.C. § 7607(b)(1). The petitions were timely filed.

ISSUES PRESENTED

1. Whether Respondent EPA's action in disapproving a revision to Texas's Clean Air Act ("CAA" or the "Act") Minor New Source Review ("NSR") State Implementation Plan ("SIP") to include a Standard Permit for Pollution Control Projects ("SPPCP") was arbitrary and capricious where the SPPCP's applicability was not limited to a narrow set of emission sources and where the Texas Commission on Environmental Quality's Executive Director retained discretion to require changes to the terms applicable to individual projects.

STATEMENT OF THE CASE

I. Nature of the Case

This case combines three separate petitions for review. One petition was filed by Luminant Generation Co. LLC, Oak Grove Management Co. LLC, Big Brown Power Co. LLC, Luminant Mining Co. LLC, and Sandow Power Co. LLC (collectively "Luminant"). A second petition was brought by Texas Oil & Gas Association, Texas Association of Manufacturers, Texas Association of Business, and Chamber of Commerce of the United States of America. A third was filed by the State of Texas ("Texas"). The Texas Oil & Gas Association petitioners have

adopted the merits brief filed by Luminant by reference.

Petitioners challenge Respondent EPA's disapproval of Texas's Standard Permit for Pollution Control Projects ("SPPCP"), 30 TAC § 116.617, into Texas's Minor NSR SIP under the Clean Air Act. EPA had previously approved portions of Texas's general Minor New Source Review Standard Permit Program provisions as part of the Texas Minor NSR SIP, but not the provisions addressing the type of standard permit that includes the SPPCP. After the approval of the Texas Minor NSR Standard Permit Program SIP, EPA later disapproved the SPPCP because it was not applicable to a narrow group of homogenous sources and because the requirements of the SPPCP are not "replicable," that is, the Executive Director of the Texas Commission on Environmental Quality retained very broad discretion under the SPPCP to alter the terms of the standard permit in individual cases.

Petitioners also challenge EPA's disapproval of certain provisions of the Texas Standard Permit Program, specifically 30 TAC § 116.610(a) and (b). EPA concedes those claims and consents to a vacatur of the disapproval and to a remand to reconsider its disapproval of those provisions.

II. Statutory and Regulatory Background

A. Clean Air Act Overview

The Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, establishes a comprehensive program for controlling and improving the nation's air quality through a system of shared federal and state responsibility. Under Title I of the Clean Air Act, the EPA Administrator is charged with identifying air pollutants that endanger the public health and welfare and with formulating the National Ambient Air Quality Standards ("NAAQS"), which are nationally applicable standards set by EPA establishing permissible concentrations for six common (or "criteria") air pollutants, such as ozone. 42 U.S.C. §§ 7408-09. *See* 40 C.F.R. pt. 50.

The CAA requires each State to submit for EPA's approval a State Implementation Plan ("SIP") providing for the attainment and maintenance of the NAAQS and meeting the other requirements of the Act. 42 U.S.C. §§ 7410(a)(1), 7410(k). *See generally Train v. NRDC, Inc.*, 421 U.S. 60 (1975). For each pollutant, each State must draft a SIP that specifies emission limitations applicable to sources that pollute in the State and other measures necessary for the attainment, maintenance, and enforcement of the NAAQS. 42 U.S.C. § 7410(a). CAA section 110, 42 U.S.C. § 7410, contemplates that the measures necessary to attain the

NAAQS will be applied to individual sources through the SIP prepared by each State, subject to EPA review and approval. *Id.*

SIP provisions must be enforceable as a practical matter in order for EPA to approve them. 42 U.S.C. § 7410(a)(2)(A). State SIP provisions are only federally enforceable upon their approval by EPA. 42 U.S.C. § 7413. *See General Motors Corp. v. United States*, 496 U.S. 530, 540 (1990) ("There can be little or no doubt that the existing SIP remains the 'applicable implementation plan' even after the State has submitted a proposed revision"); *Duquesne Light Co. v. EPA*, 698 F.2d 456, 468 n.12 (D.C. Cir. 1983) ("With certain enumerated exceptions, states do not have the power to take any action modifying any requirement of their SIPs, without approval from EPA"); *Sierra Club v. TVA*, 430 F.3d 1337, 1346 (11th Cir. 2005) ("If a state wants to add, delete, or otherwise modify any SIP provision, it must submit the proposed change to EPA for approval"). Further, CAA section 116 forbids implementation of any emission limitation that is less stringent than the applicable, approved SIP. 42 U.S.C § 7416.

EPA has issued guidance relating to the interpretation of CAA section 110(a)(2), 42 U.S.C. § 7410(a)(2), which requires that SIPs include enforceable emissions and other control measures as necessary or appropriate to meet the CAA's requirements. "State Implementation Plans; General Preamble for the

Implementation of Title I or the Clean Air Act Amendments of 1990," 57 Fed. Reg. 13,498 (April 16, 1992) ("General Preamble"). It lists four fundamental principles applicable to SIPs and the implementing instruments, including permits: the baseline emissions from the source and its control measure must be *quantifiable*; the measures applicable to a source must be *enforceable*; the measures applicable to a source must be *replicable*; and the source-specific limits must provide for *accountability*.

Any revision to a SIP must meet the requirements of CAA section 110(*l*), 42 U.S.C. § 7410(*l*). Under section 110(*l*), EPA cannot approve a SIP revision if the revision would interfere with any applicable requirement of the CAA regarding attainment of the NAAQS, or reasonable further progress towards attainment, or any other applicable requirement of the Act. *Id.*

Under CAA section 107(d), 42 U.S.C. § 7407(d), for each criteria air pollutant, a State is required to designate areas within its boundaries as either meeting or not meeting the NAAQS for each pollutant. An area that meets the NAAQS for a particular pollutant is classified as an "attainment area;" one that does not is classified as a "nonattainment area." If there is insufficient available information to classify an area, EPA designates it as "unclassifiable." 42 U.S.C. § 7407(d). Because the classification is pollutant-specific, an area may be

designated as "attainment" or "unclassifiable" for one pollutant and "nonattainment" for another.

B. New Source Review SIP Requirements

The CAA also contains specific requirements for the permitting of new and modified sources of air pollution, which is generically referred to as "New Source Review," or "NSR." Generally speaking, these programs may be implemented by a State as part of an approved SIP, or by EPA in certain circumstances. There are three types of NSR, one or more of which can apply at a given source, depending upon whether the source is minor or major, whether the construction or modification causes an increase in emissions for a given pollutant above the significance threshold, and whether the source is located in a nonattainment area for the given pollutant.

1. Major NSR SIP Requirements

For major sources in attainment/unclassifiable areas, the Prevention of Significant Deterioration ("PSD") program, 42 U.S.C. §§ 7470-7492, is intended to give "added protection to air quality in certain parts of the country notwithstanding attainment and maintenance of the NAAQS." *CleanCOALition v. TXU Power*, 536 F.3d 469, 472 (5th Cir. 2008) (internal quotation marks and citations omitted). *See also Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 567-68 (2007) (concerning

PSD program). A PSD permit must be obtained prior to construction or modification[1/] of large pollutant-emitting facilities[2/] often referred to as "major sources," and the applicant is required, among other things, to demonstrate that the proposed new or modified source will not cause a violation of the NAAQS or "PSD increments" (*i.e.*, limits on increases in ambient pollution concentrations over specified area-specific baseline concentrations), *see* 42 U.S.C. §§ 7473, 7475(a)(3) and 7476. The source must also implement the "best available control technology" (or "BACT") to limit emissions of each pollutant regulated under the CAA. 42 U.S.C. § 7475(a)(4); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S 461, 468 (2004).

For nonattainment areas, major sources are subject to the more stringent nonattainment NSR program ("NNSR"), which applies to major new or modified sources of a pollutant for which the area is designated nonattainment. 42 U.S.C. §§ 7502, 7503. The purpose of the NNSR program is to improve air quality in areas

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1/ The Act defines "construction" to include "modification," which "means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. §§ 7411(a)(4), 7479(2)(C).

2/ The Act defines a "major emitting facility" for the PSD program as one that emits either 100 tons per year or 250 tons per year of any pollutant regulated under the Act, depending on the type of facility. *Id.* § 7479(1). *See also* 40 C.F.R. § 51.166(b)(49)(iv).

where it does not meet the applicable NAAQS. *Id*. at §§ 7501-7515. For NNSR, a new or modified source must meet the Lowest Achievable Emission Rate and must obtain sufficient emission reductions from existing sources to offset its increased emissions. *Id*. §§ 7502(c)(5) and 7503.[3/]

2. Minor NSR SIP Requirements

The CAA also includes requirements for other construction and modification activities that occur at stationary sources generally. EPA calls this program "Minor NSR," and it applies to construction and modification of sources that have the potential to emit an NSR-regulated pollutant below the major source thresholds of the PSD and NNSR programs, and to modifications at major stationary sources that fall below the significance level for each NSR-regulated pollutant. Under CAA section 110(a)(2)(C), a State's SIP must provide for the regulation of the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. 42 U.S.C. § 7410(a)(2)(C). Thus, all SIPs must contain Minor NSR programs.

EPA has promulgated regulations specifying the requirements for Minor NSR programs, some of which are discussed below. 40 C.F.R. §§ 51.160-51.164.

[3/] For NNSR, a major source is generally one that emits, or has the potential to emit, 100 tons per year or more of a pollutant for which the area in which it is located is designated non-attainment. 42 U.S.C. § 7602(j); 40 C.F.R. § 51.165(a)(1)(iv).

Each State's SIP must set forth legally enforceable procedures which will allow the State to determine whether the construction or modification of a minor source, or a "minor modification" of an existing major source, will (1) result in a violation of applicable portions of the State's control strategy, or (2) interfere with attainment or maintenance of any NAAQS in the State or in a neighboring State. *Id.* at § 51.160(a). Accordingly, SIPs must require that owners or operators of sources subject to Minor NSR submit applications to the State from which the State can determine whether the construction or modification of the source will result in a violation of the control strategy or interfere with attainment of maintenance of a NAAQS. *Id.* at § 51.160(b). Collectively, the requirements of 40 C.F.R. § 51.160, § 51.161 ("Public availability of information"), and the general criteria of 40 C.F.R. Part 51, Appendix V, apply to SIP revisions. Furthermore, any minor NSR SIP revision is evaluated for the four fundamental SIP principles laid out in the General Preamble (quantifiability, enforceability, replicability, and accountability).

C. The Texas Standard Permit for Pollution Control Projects

1. Background of Minor NSR and Pollution Control Projects

These petitions for review challenge EPA's disapproval of Texas's "State Pollution Control Project Standard Permit" ("SPPCP"), 30 TAC § 116.617, into the Texas State Implementation Plan. The SPPCP would be part of the Texas

Minor NSR SIP provisions if approved by EPA as a SIP revision. The current version of the proposed SPPCP was adopted by the Texas Commission on Environmental Quality ("TCEQ") to be effective February 1, 2006. 31 Tex. Reg. 515 (Jan. 27, 2006). Texas submitted this version of the SPPCP to EPA for approval as a SIP revision on February 1, 2006. EPA proposed to disapprove the SPPCP as part of the Texas Minor NSR SIP on September 23, 2009, 74 Fed. Reg. 48,467, 48,469, and ultimately did so on September 15, 2010. 75 Fed. Reg. 56,424.

The SPPCP was the culmination of a long line of Federal and State statutory and regulatory actions which began with the passage of the Clean Air Act in 1970. When first passed, the Clean Air Act included, among other provisions, a requirement that EPA publish a list of "categories of stationary sources," to be followed by the issuance of regulations "establishing Federal standards of performance for new sources within each category."[4/] 42 U.S.C. § 7411(b)(1). "New sources" were defined as those sources "the construction or modification" of which was begun after the issuance of the standards of performance, also known as

[4/] "Stationary source" is defined as "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(a)(3).

"New Source Performance Standards" ("NSPS").[5/] 42 U.S.C. § 7411(a)(2); 40 C.F.R. Part 60. The purpose was to subject new sources to stricter emission limitations than stationary sources existing as of 1970, in order to improve air quality in the future. Relevant to later developments was the definition of "modification" for purposes of NSPS, which "means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4).

Although preconstruction permitting was required previously under the Act, PSD and the Nonattainment NSR provisions were codified in the 1977 Amendments to the Clean Air. As indicated above, Part C of Subchapter I of the Act relates to Prevention of Significant Deterioration of Air Quality (42 U.S.C. §§ 7470 - 7492), applying to attainment/unclassifiable areas, while Part D relates to New Source Review in areas not in attainment of the NAAQS. 42 U.S.C. §§ 7501 - 7515. The PSD provision states that no "major emitting facility" on which "construction is commenced" after August 1977 may be built except in compliance

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[5/] These standards of performance were to reflect "the degree of emission limitation achievable through the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1).

with PSD requirements. 42 U.S.C. § 7475(a). The definition of "construction" for purposes of the PSD program incorporates the NSPS definition of "modification" quoted above. 42 U.S.C. § 7479(2)(C). Similarly, the Nonattainment NSR provisions required EPA to establish a schedule to require States to submit SIP provisions that "require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area . . . ." 42 U.S.C. § 7502(b)(5). The Nonattainment NSR definition of "modifications" and "modified" also incorporated the NSPS definition of "modification." 42 U.S.C. § 7501(4). This definition of "modification," standing alone, was extremely broad: "Even at first blush, the potential reach of these modification provisions is apparent: the most trivial activities – the replacement of leaky pipes, for example – may trigger the modification provisions if the change results in an increase in the emissions of a facility." *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 905 (7th Cir. 1990) ("*WEPCO*").

In recognition of the breadth of the statutory definition, in the 1970s EPA defined "modification" in the NSPS and NSR regulations to exclude routine maintenance, repair and replacement, increases in the hours of operation or in the production rate (without an accompanying physical change or change in method of operation), and certain types fuel switches. *See* 57 Fed. Reg. 32,314, 32,316 (July

21, 1992). The NSR regulations also provided that preconstruction review was required for sources undertaking a "major modification," that is, a physical change or change in operations "that would result in a significant net emissions increase of any pollutant subject to regulation under the CAA." *Id*.; 40 C.F.R. §§ 52.21(b)(2)(i), 52.24(f)(5).

In the 1990 Amendments to the CAA, Congress enacted Title IV, relating to acid rain. 42 U.S.C. §§ 7651-7651o. The acid rain program required utilities to comply with certain pollution reduction requirements. However, compliance with emissions control requirements sometimes results in collateral emissions increases of a different pollutant. This emissions increase could cause a source to undergo Major NSR review, which would have delayed timely compliance with the acid rain provisions. To avoid such delays, EPA amended its PSD and NNSR regulations in the "WEPCO" rulemaking in 1992 to add certain "pollution control projects" to the list of activities excluded from the definition of physical or operational changes, but only for electric utilities. EPA stated that it was essentially formalizing an existing policy under which it had been excluding individual PCPs from Major NSR where it found such projects to be "environmentally beneficial, taking into account ambient air quality." 57 Fed. Reg. at 32,320. In guidance issued in 1994, EPA stated that "[f]or several years, EPA has had a policy of excluding

certain pollution control projects from the [major] NSR requirements . . . on a case-by-case basis." "Pollution Control Projects and New Source Review (NSR) Applicability," John S. Seitz, Director, OAQPS, July 1, 1994, at 1, Respondent's Appendix ("Res. App.") at App. 189. In offering guidance regarding PCP exclusions, EPA stated that (a) such projects must be environmentally beneficial; (b) where a significant collateral increase in emissions would occur as a result of the PCP, the permitting authority must evaluate any adverse effects on NAAQS, PSD increments, or air quality-related values; (c) sources would be required to obtain a determination from the permitting authority that the proposed project qualifies for an exclusion; and (d) the public had to be given an opportunity to review and comment. *Id*. at 3, Res. App. at App. 191. EPA further pointed out that any such PCP excluded from Major NSR must still comply with all otherwise applicable requirements under the CAA and the SIP, including minor source permitting. *Id.* at 4, Res. App. at App. 192. In fact, since EPA had not yet promulgated regulations governing a generally applicable provision excluding PCPs from Major NSR (except for utilities), sources were to receive case-by-case approval by the State/local authorized permitting authority pursuant to its Minor NSR SIP requirements, unless the source's change fell under an exception to the State/local Minor NSR SIP. *Id*. at 16, Res. App. at App. 204.

In April 1994, the Texas Natural Resource Conservation Commission (now TCEQ) adopted a new Subchapter F to Chapter 116 ("Control of Air Pollution by Permits for New Construction or Modification") of the Texas Administrative Code. 19 Tex. Reg. 3055 (April 22, 1994). The new subchapter added provisions regarding two types of "Standard Permits" (which is the Texas term for "general permit"). Texas stated that "[t]he staff has supported standard permits as a means to reduce the backlog of permit applications that has continued to escalate in recent years. Agency staff resources are limited, and standard permits are designed to provide a streamlined review process for pollution reduction projects and for facility types which have been reviewed and permitted or exempted on a routine basis." *Id*. at 3056. Portions of the new Subchapter F set out applicability requirements and general conditions for standard permits. *Id*. at 3065. That SPPCP included one standard permit for "[i]nstallation of emissions control equipment or implementation of control techniques as required by any state or federal rule, standard, or regulation," and one for voluntary installation of control equipment. If the SPPCP was complied with, "[f]or purposes of compliance with the PSD and nonattainment new source review provisions of [the Clean Air Act] and regulations promulgated thereunder, any increase . . . shall not constitute a physical change or a change in the method of operation." 30 TAC § 116.617(1)(E), (2)(E) (1994

version), 30 Tex. Reg. at 3064-65. TCEQ submitted this new Standard Permit Program, including the new SPPCP, to EPA for approval in 1994, but EPA did not immediately act on the request.[6/]

Meanwhile, in 1996, EPA proposed to extend the WEPCO PCP exclusion by regulation from utilities only to other sources for Major NSR modifications. 61 Fed. Reg. 38,250 (July 23, 1996). In 2002, EPA issued a final rule "that would exclude from major NSR permitting requirements certain work practices and the installation of qualifying pollution control and pollution prevention projects." 67 Fed. Reg. 80,186, 80,232 (December 31, 2002). EPA noted that its PCP final rule "closely paralleled our existing policy memorandum" (of July 1, 1994, described above) which extended the *WEPCO* PCP exclusion in place for utilities to all types of sources. "Pollution control project" was defined as "an activity, set of work practices, or project at an existing emissions unit that reduces emissions of air pollution from the unit." *Id*. The exclusion would be sought when the PCP reduces one pollutant while causing an increase in emissions of a different, "collateral" pollutant. Whether a PCP would be considered environmentally beneficial would be determined by comparison of the pre- and post-change actual emissions of the

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[6/] Texas repealed and adopted a new 30 TAC § 116.617 in 1997 (22 Tex. Reg. 4242 (May 13, 1997)) and amended it in 1998 (23 Tex. Reg. 6972 (July 3, 1998)).

collateral pollutant with the post-change decrease in the primary pollutant. *Id*. The effect of the rule would be to exclude the installation of qualifying PCPs from the definition of "physical or operational change" within the definition of "major modification" in the NSR regulations. *Id*. The regulation set out a list of PCP projects that would be presumed environmentally beneficial; for those not on the list, the source would be required to receive approval from the permitting authority on a case-by-case basis, with public comment. *Id*. at 80235. EPA cautioned that

> Although we fully support and encourage pollution prevention projects and strategies, special care must be taken in evaluating a pollution prevention project for the PCP exclusion. Pollution prevention projects tend to be dependent on site-specific factors and lack an historical record of performance, which proves problematic in deciding whether they are environmentally beneficial when applied universally.

67 Fed. Reg. at 80,235.

On November 14, 2003, EPA approved portions of Texas's Standard Permit Program as part of the Texas NSR SIP. 68 Fed. Reg. 64,543.[7/] The portion of the

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[7/] The provisions approved were § 116.601(a)(2) and (b) – (e), Types of Standard Permits; § 116.602, Issuance of Standard Permits; § 116.603, Public Participation in Issuance of Standard Permits; § 116.604, Duration and Renewal of Registrations to Use Standard Permits; § 116.605, Standard Permit Amendment and Revocation; § 116.606, Delegation; § 116.610, Applicability; § 116.611, Registration to Use a Standard Permit; § 116.614, Standard Permit Fees; and § 116.615, General Conditions. 68 Fed. Reg. at 64,546. EPA did not approve 30 TAC § 116.601(a)(1), providing for the adoption of a standard permit by TCEQ under the Texas Government Code, Chapter 2001, Subchapter B, into 30 TAC §§ 116.617, 116.620, and 116.621. These three sections refer respectively to Standard Permits for Pollution Control Projects, Installation and/or

(continued...)

Standard Permit Program approved by EPA essentially supplies the general provisions of Texas standard permits, and includes standard permits issued by TCEQ after public participation, while the portion *not* approved by EPA includes the particular type of standard permits that would be adopted by TCEQ under the Texas Government Code (such as the SPPCP, 30 TAC § 116.617), which are found in separate sections of Subchapter F. *See* Footnote 7. EPA noted in the proposed approval and in the final action that the Standard Permit Program's provisions provide for a streamlined mechanism for approving the construction of certain sources within categories that contain numerous similar sources. 68 Fed. Reg. 40,865, 40,869 (July 9, 2003); 68 Fed. Reg. 64,543, 64,546 (November 14, 2003). The Standard Permit Program approved by EPA as part of the Texas Minor NSR SIP is not available to a facility or group of facilities undergoing a change constituting a new major source or major modification under the PSD or nonattainment NSR provisions; such facilities would be required to comply with Texas's NSR SIP permitting rules. *Id.* at 64,546. EPA determined that the provisions of the Standard Permit Program it was approving were appropriate for inclusion into the SIP because, among other things, new major sources or

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[7/](...continued)
Modification of Oil and Gas Facilities; and Municipal Solid Waste Landfills.

modifications were required to proceed under the Major NSR permitting regime; sources qualifying for a Standard Permit must comply with all provisions of 42 U.S.C. §§ 7411 (NSPS) and 7412 (hazardous air pollutants); it included requirements such as recordkeeping; and provided for public notice and comment. 68 Fed. Reg. at 64,546-47. However, as discussed above, EPA did not approve the type of standard permit that is adopted by TCEQ under the Texas Government Code (as opposed to through public notice and comment), and therefore did not take action on three standard permits proposed by Texas, including § 116.617, the Standard Permit for Pollution Control Projects, § 116.620 (Installation and/or Modification of Oil and Gas Facilities), and § 116.621 (Municipal Solid Waste Landfills). 68 Fed. Reg. at 64,547.

In 2005, the United States Court of Appeals for the District of Columbia Circuit, in *State of New York v. EPA*, 413 F.3d 3, 40-42 (D.C. Cir. 2005), held that EPA did not have authority under the Clean Air Act to exempt PCPs from the definition of "modification" for purposes of Major NSR, and therefore vacated the 1992 *WEPCO* rule and the 2002 rulemaking that extended the pollution control project exemption from NSR to all major sources.

2. The Standard Permit for Pollution Control Projects

In 2006, Texas amended the SPPCP to limit it to Minor NSR, and submitted it to EPA for approval as a SIP revision. 31 Tex. Reg. 515 (Jan. 27, 2006). 30 TAC § 116.110(a) provides that "before any actual work is begun on the facility, any person who plans to construct any new facility or engage in the modification of any existing facility which may emit air contaminants" must either obtain a permit, or, among other options, satisfy the requirements for a Standard Permit. The minor NSR SPPCP (§116.617) applies to "pollution control projects" undertaken voluntarily or as required by "any governmental standard," that "reduce or maintain currently authorized emission rates for facilities authorized by a permit, standard permit, or permit by rule." § 116.617(a)(1). The SPPCP was no longer available for new major stationary sources or major modifications that would be subject to PSD and Nonattainment requirements. § 116.610(b).

A PCP may include the installation or replacement of emissions control equipment, the implementation of or change to control techniques, or the substitution of compounds used in manufacturing processes. § 116.617(a)(2). The SPPCP will not authorize the use of a control technique for which "the executive director determines there are health effects concerns or the potential to exceed a [NAAQS] criteria pollutant or contaminant that results from an increase in

emissions of any air contaminant until those concerns are addressed by the registrant to the satisfaction of the executive director . . . .” § 116.617(a)(3)(B).

Many PCP projects would qualify for a “notice and go” procedure. If there are “no increases in authorized emissions of any air contaminant” from a replacement PCP project, the registration may be submitted to TCEQ up to thirty days *after* construction or implementation begins. § 116.617(d)(1)(A). If it is a new control device or technique, or there are increases in authorized emissions resulting from the PCP, the registration must be submitted no less than thirty days *before* the commencement of construction or implementation. § 116.617(d)(1)(B). In the latter case, construction or implementation may begin only after either no response from the executive director has been received within thirty days following submission to TCEQ, or the executive director has issued a written acceptance of the registration. § 116. 617(d)(1)(B)(i), (ii). The construction or implementation must begin within 18 months after receiving written acceptance of the registration from the executive director. § 116.617(b)(2).

Pursuant to § 116.617(b)(1)(D), an SPPCP registration must comply with the requirements of § 116.611, which states that a registration must document the basis of emission estimates; quantify all emission increases and decreases; provide sufficient information to show that the project will not constitute an NSR major

new source or major modification; describe efforts to minimize collateral emissions; describe the project and related process; and identify any equipment being installed. § 116.611(a)(1) – (6). Section 116.617 itself states that the SPPCP registration must include a description of the process units affected; a description of the project; identification of affected existing permits or registrations; "quantification and basis of increases and/or decreases associated with the project, including identification of affected existing or proposed emission points, all air contaminants, and hourly and annual emission rates"; a description of proposed monitoring and recordkeeping to show that the project decreases or maintains emission rates; and a description of how the standard permit will be incorporated into existing permits. § 116.617(d)(2)(A) – (F). After installation of the PCP, the owner/operator must operate it in a manner consistent with good industry and engineering practices in a way to minimize emissions of collateral pollutants, and maintain records on site to show compliance with the requirements. § 116.617(e)(1) – (2).

The SPPCP is subject to the "general conditions" of § 116.615, which include protection of public health and welfare, a requirement that the PCP be constructed in accordance with the registration, construction progress and notification provisions, recordkeeping, and compliance with all rules. § 116.615(1)

– (11).

3. EPA's Actions Disapproving the SPPCP

On September 23, 2009, EPA proposed disapproval of the SPPCP submitted by TCEQ on February 1, 2006, "because it does not meet the requirements for a minor NSR SIP revision." 74 Fed. Reg. 48,467.

EPA first noted that "any submitted SIP revision must meet the applicable SIP regulatory requirements and the requirements for SIP elements in section 110 of [CAA], and be consistent with applicable statutory and regulatory requirements." *Id*. at 48,471. Citing EPA's 1992 "General Preamble," EPA identified "four fundamental principles for the relationship between the SIP and any implementing instruments . . .":

> These four principles as applied to the review of a major or minor NSR SIP revision include: (1) The baseline emissions from a permitted source be quantifiable; (2) the NSR program be enforceable by specifying clear, unambiguous, and measurable requirements, including a legal means for ensuring the sources are in compliance with the NSR program, and providing a means to determine compliance; (3) the NSR program's measures be replicable by including sufficient specific and objective provisions so that two independent entities applying the permit program's procedures would obtain the same result; and (4) the major NSR permit program be accountable, including means to track emissions at sources resulting from the issuance of permits and permit amendments.

74 Fed. Reg. at 48,471.

EPA stated that it proposed to disapprove the SPPCP " because it does not

meet the SIP requirements for Minor NSR . . . .” *Id*. at 48,467. In reaching that proposed conclusion, EPA said that a “Standard Permit” under the Texas Standard Permit Program “provides a streamlined mechanism with all permitting requirements for construction and operation of certain sources in categories that contain numerous similar sources,” but is not a “case-by-case minor NSR SIP permit.” *Id*. at 48,476. Therefore, “each minor NSR SIP Standard Permit must contain all terms and conditions on the face of it (combined with the SIP general requirements) and it cannot be used to address site-specific determinations.” *Id*. EPA went on to state that:

> This particular type of minor NSR permit is required to be applicable to narrowly defined categories of emission sources rather than a category of *emission types*. A Standard Permit is a minor NSR permit limited to a particular narrowly defined source category for which the permit is designed to cover and cannot be used to make site-specific determinations that are outside the scope of this type of permit.

Id.; emphasis in original. EPA cited oil and gas facilities, asphalt concrete plants and concrete batch plants as examples of “narrowly defined categories of emission sources.” *Id*. at n. 10. EPA also listed a number of EPA guidance documents and Federal Register notices regarding action on other SIP revisions, indicating that the guidance documents set out specific guidelines, including “(1) General permits apply to a specific and narrow category of sources, (2) For sources electing

coverage under general permits where coverage is not mandatory, provide notice or reporting to the permitting authority . . ., (3) General permits provide specific and technically accurate (verifiable) limits that restrict potential to emit, [and] (4) General permits contain specific compliance requirements . . . ." *Id*., at n. 11.

EPA expressed concern about the overly broad nature of the definition of "pollution control project," which leads to a lack of clarity in determining what type of project might qualify for the permit. *Id*. at 48,476. EPA further noted that "the new PCP Standard Permit is a generic permit that applies to numerous types of pollution control projects, which can be used at *any* source that wants to use a PCP. The definition in this Standard Permit for what is a PCP is overly broad." *Id*. (emphasis in original).

Another concern raised by EPA was that the SPPCP "is designed for case-by-case additional authorization, source-specific review, and source-specific technical determinations." *Id*. EPA said that "[a]n individual Standard Permit must be limited to a single source category, which consists of numerous similar sources that can meet standardized permit conditions." *Id*.

Finally, EPA observed that "[t]here are no replicable conditions in the PCP Standard Permit that specify how the [TCEQ Executive] Director's discretion is to be implemented for the individual determinations. Of particular concern is the

provision that allows for the exercise of the Executive Director's discretion in making case-specific determinations in individual cases in lieu of generic enforceable requirements." *Id.* In addition, EPA stated that the SPPCP was not the appropriate vehicle for case-by-case establishment of recordkeeping and monitoring requirements, "because it requires the Executive Director to make case-by-case determinations and to establish case specific terms and conditions for the construction or modification of each individual PCP that are outside the terms and conditions in the PCP Standard Permit." *Id.*

EPA received numerous comments on its proposed disapproval, including from the BCCA Appeal Group (AR 2073-2488), Texas Industrial Project (AR 2489-2904), Association of Electric Companies of Texas, Inc. (AR 2905-12), the Electric Reliability Coordinating Council (AR 2913-29), Texas Chemical Council (AR 2943-70), TCEQ (AR 2971-79), Texas Association of Business (AR 2983-96), and from the Environmental Clinic, University of Texas at Austin School of Law (AR 3001-3289).

On September 15, 2010, EPA issued its final rule. 75 Fed. Reg. 56,424. Among other actions, the Agency stated that it was "disapproving the submitted Standard Permit (SP) for Pollution Control Projects (PCP) because it does not meet the requirements of the CAA for a minor NSR Standard Permit program." *Id.*

Specifically, EPA noted that "[b]ecause of the lack of replicable standardized permit conditions and the lack of enforceability, the PCP Standard Permit is not the appropriate vehicle for authorizing PCPs." *Id*. at 56,444. EPA explained that it had approved the Texas Standard Permits Program ("SPP") in 2003, finding then that the SPP "was adequate to protect the NAAQS and reasonable further progress (RFP) and was enforceable."[8/] *Id*. at 56,444. EPA said that one of the primary reasons the Standard Permits Program was enforceable was "that these types of Minor NSR permits were to be issued for similar sources." The issuance of a Minor NSR permit for similar sources "eliminates the need for a case-by-case review and evaluation to ensure that the NAAQS and RFP are protected and the permit is enforceable." *Id*.

Another reason EPA found that the Standard Permits Program (as opposed to the SPPCP) was enforceable was that it ensured that the terms and conditions of an individual standard permit would be "replicable." *Id*. "This is a key component

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[8/] EPA stated that it approved the SPP, because, among other things "the submitted rules required the following: (1) No major stationary source or major modification subject to part C or part D of the Act could be issued a standard permit; (2) sources qualifying for a standard permit are required to meet all applicable requirements under section 111 of the Act [42 U.S.C. § 7411] (NSPS), section 112 of the Act [42 U.S.C. § 7412] (NESHAPS and MACT), and the TCEQ rules (this includes the Texas SIP control strategies); (3) sources have to register their emissions with the TCEQ and this registration imposes an enforceable emissions limitation; (4) maintenance of records sufficient to demonstrate compliance with all the permit's conditions; and (5) periodic reporting of the nature and amounts of emissions necessary to determine whether a source is in compliance." 75 Fed. Reg. at 56,444.

for the EPA authorization of a generic preconstruction permit. Replicable methodologies eliminate any director discretion issues." *Id*.

EPA stated that it had approved the Standard Permit Program in 2003 "based on the statutory and regulatory requirements, including section 110 of the Act [42 U.S.C. § 7410], in particular section 110(a)(2)(C), and 40 CFR 51.160, which require EPA to determine that the State has adequate procedures in place in the submitted Program to ensure that construction or modification of sources will not interfere with attainment of" a NAAQS or Reasonable Further Progress. 75 Fed. Reg. at 56,445. When the TCEQ Executive Director retains the authority to exercise discretion in the evaluation of each SPPCP permit holder's impact on air quality, "this undermines EPA's rationale for approving the Texas Standard Permits Program as part of the Texas Minor NSR SIP." *Id.*

EPA said that it "reviews a SIP revision submission for its compliance with the [Clean Air] Act and EPA regulations," citing 42 U.S.C. § 7410(k)(3). *Id*. at 56,447. In summary, EPA stated that it was disapproving the SPPCP because, "as adopted and submitted by Texas to EPA for approval into the Texas Minor NSR SIP, [it] does not meet the requirements of the Texas Minor NSR Standard Permits Program. It does not apply to similar sources. Because it does not apply to similar sources, it lacks the requisite replicable standardized permit terms specifying how

the Director's discretion is to be implemented for the case-by-case determinations." *Id*.

As part of the documentation supporting its final rule, EPA prepared a "Technical Support Document ("TSD"), AR 32-13, Res. App. at App. 1-82. In that document, EPA stated that it had proposed to disapprove the SPPCP, along with other submissions, "as not meeting the Minor NSR SIP requirements . . . . We have evaluated the SIP submissions for whether they meet the Act and 40 CFR Part 51 and are consistent with EPA's interpretation of the relevant provisions. Based upon our evaluation, EPA has concluded that each of the six portions of the SIP revision submittals [including the SPPCP] does not meet the requirements of the Act and 40 CFR Part 51." AR 34-35, Res. App. at App. 3-4.

STANDARD OF REVIEW

In order to prevail on the merits, Petitioners must show that EPA's final action on the SPPCP was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This highly deferential standard presumes the validity of agency actions and upholds them if they satisfy minimum standards of rationality. *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933-34 (5th Cir. 1998); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976) (*en banc*). Although this Court must assure itself that the agency considered

the relevant factors in making the decision, the Court cannot substitute its own judgment for that of the agency. *Texas Oil & Gas Ass'n*, 161 F.3d at 933-34.

Questions of statutory interpretation are governed by the familiar two-step test set forth in *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984). *See Louisiana Envtl. Action Network v. EPA*, 382 F.3d 575, 581-82 (5th Cir. 2004) ("We review the EPA's interpretation of the CAA under the standards set forth in *Chevron . . . .")*. Under the first step, the reviewing court must determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If Congress' intent is clear from the statutory language, the Court must "give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. If, however, the statute is "silent or ambiguous with respect to the specific issue," the Court must decide whether the Agency's interpretation is based on a permissible construction of the statute. *Id*. To uphold EPA's interpretation of the Act, the Court need not find that EPA's interpretation is the only permissible construction that EPA might have adopted, but rather only that EPA's interpretation is reasonable. *Chemical Mfrs. Ass'n v. NRDC, Inc.*, 470 U.S. 116, 125 (1985).

EPA's interpretations of its own regulations are entitled to even greater deference. EPA's interpretation of its own regulations should be given "controlling

weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Public Citizen, Inc. v. EPA*, 343 F.3d 449, 455-56 (5th Cir. 2003).

EPA's factual findings are likewise entitled to substantial deference. *See Arkansas v. Oklahoma*, 503 U.S. 91, 112-13 (1992). EPA's factual determinations should be upheld as long as they are supported by the administrative record, even if there are alternative findings that could also be supported by the record. *Id*.

SUMMARY OF THE ARGUMENT

Petitioners challenge EPA's disapproval of the State of Texas's Standard Permit for Pollution Control Projects, 30 TAC § 116.617 as a SIP revision. As we demonstrate, EPA's disapproval was based on the inconsistency of the SPPCP with section 110 of the Clean Air Act, 42 U.S.C. § 7410, 40 C.F.R. Part 51 regulations regarding Minor NSR SIPs, and long-standing EPA guidance and interpretation. The SPPCP was not approvable as a general permit because it was not sufficiently enforceable, in that it did not apply to sufficiently similar sources. In addition, it was not replicable, because of the discretion given TCEQ's Executive Director to cause changes in the terms of the SPPCP.

Because the present administrative record does not support EPA's disapproval of 30 TAC § 116.610(a) and (b) into the Texas Minor NSR SIP, EPA

consents to vacatur and remand of its disapproval of those provisions.

Finally, in the event that the Court reverses EPA's action in disapproving the SPPCP, the appropriate remedy is remand, not an order of the Court requiring WPA to approve the SPPCP into the Texas Minor NSR SIP.

ARGUMENT

I. THE STATES DO NOT HAVE UNFETTERED DISCRETION WITH RESPECT TO MINOR NSR SIPS

Throughout their briefs, Petitioners suggest that States have virtually unlimited discretion in the design and implementation of minor source programs and that EPA's role in its review of SIPs is so minimal as to be virtually meaningless. However, while the CAA grants the states considerable latitude in developing emissions limitations, *see Train v. NRDC, Inc*., 421 U.S. 60, 79 (1975), it nonetheless subjects the states to strict minimum compliance requirements, adherence with which must be determined by EPA. *Union Elec. Co. v . EPA*, 427 U.S. 246, 256-57 (1976); *Michigan Dept. of Envtl. Quality v. Browner*, 230 F.3d 181, 185 (6th Cir. 2000). Accordingly, EPA may not defer to a State's discretion in determining whether to approve a requested SIP revision. Instead, EPA must first assure that it meets the minimum standards for approval.

As the Petitioners acknowledge, section 110 of the Clean Air Act, 42 U.S.C. § 7410, is the criterion upon which a SIP revision must be judged. Luminant Brf.,

at 24. EPA may not approve a SIP revision if the revision would interfere with any applicable requirement concerning attainment and subsequent maintenance of the NAAQS or any other applicable requirements of the Act. 42 U.S.C. § 7410(*l*). In addition, CAA Section 110(a)(2) requires that each SIP include enforceable emission limitations and other control measures as may be necessary or appropriate to meet applicable CAA requirements and a program to provide for the enforcement of those measures. 42 U.S.C. § 7410(a)(2). Under EPA's implementing regulations, Minor NSR SIPs must include legally enforceable procedures enabling the State to determine whether a modification of a facility would violate a control strategy or interfere with attainment or maintenance of a NAAQS. 40 C.F.R. § 51.160(a), (b).

EPA's interpretation of some of the CAA SIP requirements is relevant here. For example, in 1987, EPA published a memorandum entitled "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency," J. Craig Potter, EPA Assistant Administrator for Air and Radiation, September 23, 1987. AR 1907-17 ("1987 Enforceability Memorandum"), Res. App. at App. 178-88. EPA said that SIP regulations must be clear and enforceable: "SIP revisions should be written clearly, with explicit language to implement their intent." *Id.* at 4, AR 1910, App. 181. The rules must be clear as to whom they apply and include

a description of the types of affected facilities. *Id.* at 7, AR 1913, App. 184. With respect to recordkeeping, SIPs must identify explicitly those records that sources are required to keep to assess compliance, the records must be commensurate with regulatory requirements, and the SIP should specify the reporting formats. *Id.* at 9, AR 1916, App. 187.

In 1992, EPA published the General Preamble. The primary purpose for the General Preamble was to provide the public with advance notice of how EPA generally intended to interpret various requirements and associated issues that have arisen under Title I of the 1990 CAA Amendments. EPA has continued to rely upon it to guide States and help ensure that the States submit approvable NSR SIP revisions. In the General Preamble, EPA set forth fundamental principles that apply to SIPs and control strategies and which features SIPs and permits must include. 57 Fed. Reg. at 13,567-68. EPA's interpretation of CAA section 110(a)(2), 42 U.S.C. 7410(a)(2), as given expression in the General Preamble, requires that SIPs include enforceable emissions limits and other control measures as necessary or appropriate to meet the CAA's requirements. The four fundamental principles applicable to SIPs and the implementing instruments, including permits, include that the baseline emissions from the source and its control measures must be quantifiable; the measures applicable to a source must be enforceable; the

measures applicable to a source must be replicable; and the source-specific limits must provide for accountability.

EPA explained that measures are enforceable when they are "duly adopted, and specify clear, unambiguous, and measurable requirements." 57 Fed. Reg. at 13,568. EPA further stated that in order to be enforceable, a SIP must contain "a legal means for ensuring that the sources are in compliance with the control measures[,] . . . [and a] regulatory limit is not enforceable if, for example, it is impractical to determine compliance with the published limit." *Id.* Another fundamental principle key to the development of effective control strategies is that a measure be replicable. "This means that where a rule contains procedures for changing the rule, interpreting the rule, or determining compliance with the rule, the procedures are sufficiently specific and nonsubjective so that two independent entities applying the procedures would obtain the same result." *Id.* The control strategy must also be accountable. Among other things, this means that the SIP must contain means "to track emission changes at sources and provide for corrective action if emissions reductions are not achieved according to the plan." *Id.* These principles apply to all SIPs and control strategies.

II. EPA BASED ITS DISAPPROVAL OF THE POLLUTION CONTROL PROJECT STANDARD PERMIT ON THE CLEAN AIR ACT AND ASSOCIATED REGULATIONS RATHER THAN ON THE TERMS OF THE STANDARD PERMIT PROGRAM

Both Luminant (Luminant Brf. at 27-31) and Texas (Texas Brf. at 20-23) argue that EPA's final rule must be overturned in part because EPA's analysis was supposedly based upon a finding that the terms of the SPPCP were in conflict with the terms of the SIP-approved Standard Permit Program, as opposed to the requirements of the Clean Air and associated regulations. However, a review of the EPA proposed disapproval, the Technical Support Document, and the final rule all make it evident that EPA's action was based on the requirements of the CAA and regulations, as well as a lengthy and consistent history of EPA's interpretation of CAA requirements. In fact, EPA based its disapproval on the program's failure to comply with section 110(a)(2) of the CAA, 42 U.S.C. § 7410(a)(2), and on EPA's regulatory requirements contained in 40 C.F.R. §§ 51.160 – .161.

Thus, in the proposal, EPA stated that it proposed "to disapprove the [SPPCP] as not meeting the Minor NSR SIP requirements." 74 Fed. Reg. at 48,469. "We have evaluated the SIP submissions for whether they meet the [Clean Air] Act and 40 CFR Part 51, and are consistent with EPA's interpretation of the relevant provisions." *Id*. In addition, "any submitted SIP revision must meet the

applicable SIP regulatory requirements and the requirements for SIP elements in section 110 of the [Clean Air] Act, and be consistent with applicable statutory and regulatory requirements. *Id*. at 48,471. The relevant principles for SIP approvals (*i.e.*, quantification of baseline emissions, enforceability, replicability, and accountability) were derived from the EPA's General Preamble to the NSR regulations, 57 Fed. Reg. 13,498, cited at 74 Fed. Reg. at 48,471-72, and in various guidance documents such as the 1987 Enforceability Memorandum. The guidance documents and Federal Register notices listed in the proposal all relate to EPA's interpretation of various provisions of the Clean Air Act. *Id*. at 48,476, n. 11.

EPA stated in the Technical Support Document that "[w]e have evaluated the SIP submissions for whether they meet the Act and 40 CFR Part 51, and are consistent with EPA's interpretation of the relevant provisions. Based upon our evaluation, EPA has concluded that each of the six portions of the SIP revision submittals [including the SPPCP] does not meet the requirements of the Act and 40 CFR Part 51. Therefore, each portion of the State submittals is not approvable." AR 34-35.

Similarly, in the final rule disapproving the SPPCP as a SIP revision, EPA stated that it was "disapproving the submitted [SPPCP] because it does not meet the requirements of the CAA for a minor NSR Standard Permit program." 75 Fed. Reg. at 56,424. It reiterated that it had approved the Standard Permit Program in

2003 based on the consistency of those general permit provisions with the Clean Air Act.[9] *Id*. at 56,443-44. *See also id.* at 56,445 ("Our approval of the Texas Standard Permit Program as part of the Texas Minor NSR SIP was based on the statutory and regulatory requirements, including Section 110 of the Act, in particular section 110(a)(2)(C) and 40 CFR 51.160 . . . ."). EPA acknowledged that it "reviews a SIP submission for its compliance with the Act and EPA regulations." *Id*. at 56,447.

The final rule does include statements such as "EPA is disapproving the submitted Minor NSR Standard Permit for Pollution Control Project SIP revisions because the PCP Standard Permit, as adopted and submitted by Texas to EPA for approval into the Texas Minor NSR SIP, does not meet the requirements of the Texas Minor NSR Standard Permits Program." *Id*. at 56,447. However, in the context of the entire text of EPA's proposed and final rules, including the plain statements quoted above showing that EPA was acting pursuant to the terms of the Clean Air Act and its regulations, it is evident that the basis for the decision was not inconsistency between the SPP and the SPPCP themselves. Instead, EPA acted pursuant to its authority and obligations under CAA section 110(a) and EPA's implementing regulations.

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[9] *See* 68 Fed. Reg. 40,865, 40,870 (July 9, 2003): "Texas' Standard Permits are approvable as meeting the provisions of 40 CFR Subpart I – Review of New Sources and Modifications . . . ."

III. EPA APPROPRIATELY DETERMINED THAT THE SPPCP WAS NOT APPROVABLE UNDER THE CLEAN AIR ACT

Petitioners wrongly allege that the requirement that standard permits apply to similar sources has no statutory or regulatory basis, and therefore that EPA acted outside the authority of the Clean Air Act in disapproving the SPPCP. In fact, EPA explained that it disapproved the SPPCP because a general permit as part of a Minor SIP should be limited to a narrow group of emission sources and should be replicable and enforceable. These requirements are rooted in the language of the Clean Air Act, associated regulations, and long-standing EPA interpretation.

Section 110(k)(1) of the Clean Air Act, 42 U.S.C. § 7410(k)(1), required EPA to promulgate provisions that a SIP must include before EPA will approve it as meeting the Clean Air Act. The CAA also requires that the State must assure that the emission control strategies will be implemented and enforced as required by Section 110(a)(2) of the Act, 42 U.S.C. § 7410(a)(2).

EPA's regulations relating to Minor NSR SIPs state that "each plan must set forth legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, building, structure, or installation . . . will result in a violation of applicable portions of the control strategy . . . or interfere . . . with attainment or maintenance of a national standard . . . ." 40 C.F.R. § 51.160(a). The SIP must also include "means" by

which the State or local agency "will prevent such construction or modification." 40 C.F.R. § 51.160(b).

As discussed in the proposed disapproval (74 Fed. Reg. at 48,471), EPA's General Preamble set forth a number of fundamental principles to guide EPA's evaluation of various NSR SIP provisions. One of those principles was that of "enforceability." "Measures are enforceable when they are duly adopted, and specify clear, unambiguous and measurable requirements." 57 Fed. Reg. at 13,567. A second principle is that of "accountability." "This means, for example, that source-specific limits should be permanent and must reflect assumptions used in SIP demonstrations." *Id*. In addition, the program's measures must be "replicable," with sufficiently "specific and nonsubjective" provisions such that two independent entities applying the provisions would come to the same result. *Id*.

A. The SPPCP Is Not Approvable Because It Does Not Relate To A Narrow Category Of Emission Sources.

The SPPCP applies to a wide variety of emission sources that propose to undertake pollution control projects. It applies "to pollution control projects undertaken voluntarily or as required by any government standard, that reduce or maintain currently authorized emission rates for facilities authorized by a permit, standard permit, or permit by rule." 30 TAC § 116.617(a)(1). The SPPCP is a

"generic permit that applies to numerous types of pollution control projects, which can be used at *any* source that wants to use a PCP." 74 Fed. Reg. at 48,476 (emphasis in original). For example, a permit might apply to a refinery that adds an incinerator to destroy volatile organic compound emissions, or to a manufacturer that adds a binding agent to a coagulation process to speed up polymerization. In finding that the definition of PCP was overly broad, EPA was concerned that it could be used by any source that claimed it was undertaking a PCP, and that such claims, in the absence of a more delineated definition, should be subject to case-by-case review.

In proposing disapproval of the SIP revision, EPA stated that "[t]his particular type of minor NSR permit is required to be applicable to narrowly defined categories of emission standards rather than a category of emission *types*." *Id.* (emphasis in original). In the final rule, EPA stated that "[t]he issuance of a Minor NSR permit for similar sources eliminates the need for case-by-case review and evaluation to ensure that the NAAQS and [reasonable forward progress] are protected and the permit is enforceable." 75 Fed. Reg. at 56,444. The SPPCP as a control strategy applies to a wide variety of emission sources. Therefore, the SPPCP is not accountable because it does not provide specific limits that eliminate the need for individual permit review.

In response, Petitioners state that federal law does not include a requirement

that general permits be applied to categories of similar sources (Luminant Brf. at 32, 42-43; Texas Brf. at 36-42) and that the SPPCP does apply to "similar sources" in any case (Luminant Brf. at 36-37; Texas Brf. at 25). Neither objection is valid. This is because EPA properly ties the requirement that general permits be limited to similar sources to CAA section 110(a)(2) requirements that control measures be enforceable. Unless the program is enforceable, EPA cannot be assured that the claimed emissions reductions will be achieved in practice.

In the proposed disapproval, EPA again pointed to a number of guidance documents and Federal Register notices that bear on these points. 74 Fed. Reg. at 48,476, n. 11. In the final rulemaking, EPA stated that "[t]he memoranda cited in the proposal were cited for the purpose of providing documentary evidence of how EPA has exercised its discretionary authority when reviewing general permit programs similar to the Texas Standard Permits SIP. They also collectively provide an historical perspective on how EPA has exercised its discretion in reviewing regulatory schemes similar to the submitted PCP Standard Permit." 75 Fed. Reg. at 56,447. EPA acknowledges that the cited guidance documents and Federal Register notices do not specifically concern Minor NSR general permits regarding pollution control projects, but they elucidate principles appropriately considered by EPA in its disapproval.

For example, the importance of the principle of enforceability in the

development of effective SIP control strategies is shown in the guidance document entitled "Approaches to Creating Federally-Enforceable Emissions Limits," John S. Seitz, November 3, 1993, AR 1886-93, Res. App. at App. 170-77. That guidance concerns methods of establishing enforceable emission limits through standardized protocols, and notes that "such protocols could be relied upon to create federally-enforceable limitations on potential to emit if adopted through rulemaking and approved by EPA. Although such an approach is appropriate for only a limited number of source categories, these categories include large numbers of sources, such as dry cleaners, auto body shops, gas stations, printers, and surface coaters." AR 1890, App. 174. This is an example of the utility of limiting the number of sources which may be subject to emission limitations in a general permit. The SPPCP does not have such a limitation. As noted in EPA's proposed disapproval, "the new PCP Standard Permit is a generic permit that applies to numerous types of pollution control projects, which can be used at *any* source . . . ." 74 Fed. Reg. at 48,476 (emphasis in original). This is also in accord with the principle for the SIP and associated implementing measures, including permits, that rules must be replicable. Unless the rules provide for case-by-case EPA approval as SIP revisions, then the rules must contain standardized protocols, *i.e.*, replicable procedures for establishing emission limits.

In "Guidance on Enforceability Requirements for Limiting Potential to Emit

Through SIP and § 112 Rules and General Permits," Kathie A. Stein, Director, Air Enforcement Division, EPA Office of Enforcement and Compliance Assurance, January 25, 1995, AR 1873, Res. App. at App. 157, EPA noted that "[a] general permit is a single permit that establishes terms and conditions that must be complied with by all sources subject to that permit. The establishment of a general permit could provide for emission limitations in a one-time permitting process, and thus avoid the need to issue separate permits for each source."[10/] *Id*., at AR 1874, App. 158. This guidance memorandum references general permits "covering numerous similar sources" established pursuant to Title V of the Clean Air Act, which governs operating permits. AR 1876, App. 160.

Title V provides in part that the "permitting authority may, after notice and opportunity for public hearing, issue a general permit covering *numerous similar sources*." 42 U.S.C. § 7661c(d) (emphasis supplied). The Stein memorandum cites EPA's Federal Register notice setting forth the final rules for the Title V operating permit program:

> In setting criteria for sources to be covered by general permits, States should consider all of the following factors . . . First, categories of

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[10/] This guidance memorandum is concerned with limiting "potential to emit" for sources. Potential to emit ("PTE") of a facility is a concept which has application to whether a source is considered "major" or not for NSR purposes. A "synthetic minor source" is one in which the source has a potential to emit more pollutants than the threshold between major and minor status, but chooses to limit its emissions to an amount below that threshold. The guidance states that "there is no reason that a State or local agency could not submit a general permit program as a SIP submittal aimed at creating synthetic minor sources." AR 1874.

> sources covered by a general permit should be generally homogenous in terms of operations, processes, and emissions. All sources in the category should have essentially similar operations or processes and emit pollutants with similar characteristics. Second, sources should not be subject to case-by-case standards or requirements. For example, it would be inappropriate under a general permit to cover sources requiring case-by-case MACT determinations. Third, sources should be subject to the same or substantially similar requirements governing operation, emissions, monitoring, reporting, or recordkeeping.

57 Fed. Reg. 32,250, 32,278 (July 21, 1992), *cited* by EPA at AR 1876, Res. App. at App. 160. Examples of narrow source categories listed in the Title V notice include degreasers, dry cleaners, small heating systems, sheet fed printers, and volatile organic compound storage tanks. 57 Fed. Reg. at 32,279.

The Stein memorandum stated that "[r]ules and general permits designed to limit potential to emit must be specific as to the emission units or sources covered by the rule or permit. In other words, the rule or permit must clearly identify the category(ies) of sources that qualify for the rule's coverage. The rule must apply to categories of sources that are defined specifically or narrowly enough so that specific limits and compliance monitoring techniques can be identified and achieved by all sources in the categories defined." AR 1879, App. 163. Thus, a rule establishing a general permit "must apply to a specific and narrow category of sources . . . ." AR 1883, App. 167. This is consistent with the 1987 Enforceability Memorandum's concern that SIP rules be clear and enforceable.

These materials demonstrate that EPA has historically found that a general

permit should be applicable to a narrow category of sources. This interpretation is consistent with the basic premise of general permits: that the category of sources permitted is similar enough that rules of general applicability may be fairly applied to those within that category to produce terms and conditions that can be enforced without further individualized action. To the extent that the sources are dissimilar, a general permit is not appropriate. In addition, while the public is entitled to notice and comment regarding the issuance of the general permit itself, *see* 30 TAC § 116.603(b), it is not granted opportunity to comment on each individual application of the general permit. When a general permit applies to sufficiently similar sources, meaningful public participation can be provided on the issuance of that general permit because the emissions limitations, monitoring methods, and compliance obligations may be stated with specificity. Conversely, the PCP Standard Permit program lacks this level of clarity because the appropriate emissions limitations, monitoring, and compliance obligations will necessarily vary because the program is not limited to similar sources.

While first arguing that there is no "similar source" requirement for minor NSR source general permits, Luminant and Texas both claim that if there was such a requirement, the category of Pollution Control Projects would suffice. Luminant states that SPPCPs are limited to a "reasonable and practical" category, that of pollution control projects. Luminant Brf. at 36. Citing various provisions of the

Texas Standard Permit Program and 30 TAC § 116.617, Luminant argues that the PCP Standard Permit cannot be used to completely replace an existing production facility or reconstruction of a production facility; the PCPs permitted by the Standard Permit result in emission reductions; involve limited minor collateral increases in other pollutants; have no adverse health effects or potential to exceed NAAQS; and comply with particular standard limitations from the Standard Permit Program. Luminant Brf. at 36-37. Texas makes a like argument. "Pollution control projects certainly share a likeness in that they are all meant to control pollution. They are uniquely environmentally beneficial." Texas Brf. at 25. Texas also claims that the PCPs subject to the SPPCP are "similar" because they are all minor sources; do not include the replacement or modification of production facilities; and do not include projects that return a non-compliant facility to compliance unless specifically authorized. *Id.* at 25-27. Texas also asserts that because TCEQ stated (31 Tex. Reg. at 545) that the SPPCP was adopted pursuant to V.T.C.A. Health and Safety Code §§ 382.051(b)(3) (authorizing TCEQ to issue "a standard permit for similar facilities") and 382.05195(a) (TCEQ "may issue a standard permit for new or existing similar facilities"), it necessarily determined that pollution control projects covered by the SPPCP are "similar facilities." Texas Brf. at 27.

These arguments do not obscure the fact that the SPPCP may be used at any

source that wants to use a pollution control project. The issue is not whether certain extrinsic limitations may be included within the SPPCP, such as a prohibition on replacing a production facility, or overall limits on the quantity of emissions, but that different types of pollution control projects (which may range from installation of equipment, to production process changes, to changes in materials used) require different types of enforceable controls.[11/] In such a situation, unless limited to similar sources, case-by-case analysis is more appropriate. This is particularly so since the structure of the SPPCP calls essentially for the applicant to determine emission limitations, and, in a major category of activities, allows the project to go forward before submitting a registration.

In summary, EPA has consistently interpreted the Clean Air Act and regulations to require that general permits be limited to "similar sources," because such a limitation is necessary to meet the CAA section 110(a)(2) requirement that control measures be enforceable. The only significant similarity in the sources that

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[11/] For example, individual source categories may include fossil fuel-fired steam electric generation plants, combined cycle gas turbine facilities, refineries, oil and gas production plants, asphalt concrete plants, and batch concrete plants. These types of plants are designed to produce specific products or render specific services, use specific types and amounts of raw materials that must meet industry-defined characteristics necessary to produce a desired product that meets specified industry quality standards, employ specific types or process equipment that is designed to produce a desired product, and that emit different amounts and types of air pollutants requiring different types of emission control techniques to reduce emissions of each pollutant. An example of different types of source categories is found in the NSPS regulations, 40 C.F.R. Part 60, in which EPA has promulgated standards of performance for over 70 different source categories.

could have applied for a SPPCP is the amount of emissions allowed and that a pollution control project is involved. EPA reasonably determined that the SPPCP was not approvable under CAA section 110(a)(2), 42 U.S.C. § 7410(a)(2) or the minor NSR regulatory requirements as a result.

B. The SPPCP Is Not Approvable Because It Affords the Executive Director Too Much Discretion And Is Therefore Not Replicable.

One of the primary principles for approvable NSR SIPs is that of "replicability." "This means that where a rule contains procedures for changing the rule, interpreting the rule, or determining compliance with the rule, the procedures are sufficiently specific and nonsubjective so that two independent entities applying the procedures would obtain the same result." General Preamble, 57 Fed. Reg. at 13,568; 74 Fed. Reg. at 48,471-2 (SPPCP proposed disapproval).

Application of the SPPCP is initiated by the submission of a "registration." 30 TAC §§ 116.611(a), 116.617(d). If there are no increases in authorized emissions of an air pollutant, the registration may be submitted up to thirty days after commencement of the project; otherwise, it must be submitted at least thirty days before commencement. 30 TAC § 116.617(d)(1)(A), (B). The SPPCP is not available if "the executive director determines there are health effects concerns or the potential to exceed a national ambient air quality standard criteria pollutant or contaminant that results from an increase in emissions of any air contaminant until

those concerns are addressed by the registrant to the satisfaction of the executive director . . . .” § 116.617(a)(3)(B).

In its proposed disapproval of the SPPCP, EPA noted that there are no replicable conditions in the SPPCP “that specify how the Director’s discretion is to be implemented for the individual determinations. Of particular concern is the provision that allows for the exercise of the Executive Director’s discretion in making case-specific determinations in individual cases in lieu of generic enforceable requirements. Because EPA approval will not be required in each individual case, specific replicable criteria must be set forth in the Standard Permit establishing equivalent emission rates and ambient impact.” 74 Fed. Reg. at 48,476. The Executive Director’s ability to exercise discretion in evaluating each SPPCP holder’s impact on air quality “undermines EPA’s rationale for approving the Texas Standard Permits Program as part of the Texas Minor NSR SIP. Under the SIP, any case-by-case determination must be made through the vehicle of the case-by-case Minor NSR SIP Permit, not using a Minor NSR SIP Standard Permit as the vehicle.” 75 Fed. Reg. at 56,445. In addition, “[b]ecause of the broad type of source categories covered by the PCP Standard Permit, this Standard Permit lacks replicable standardized permit conditions specifying how the Director’s discretion is to be implemented for the individual determinations, *e.g.*, the air quality determination, the controls, and even the monitoring, recordkeeping, and

reporting." *Id.*, at 56,444. As EPA explained in the General Preamble, replicability is one of the general principles a control measure must observe to assure that planned emissions reductions will actually be achieved. 57 Fed. Reg. at 13,568.

In response, Luminant cites the requirements of the Standard Permit Program and the SPPCP, including registration information requirements set forth in 30 TAC § 116.611 applicable to all Texas Standard Permits, registration requirements specific to PCPs under § 116.617, and general conditions imported into the SPPCP from § 116.615. Luminant Brf. at 37-42. Luminant concludes that the EPA finding that the Executive Director's discretion is too broad, is not accurate, and that without evidence to the contrary, EPA should assume that TCEQ would enforce State regulations. *Id.* at 41-42.

Texas states that even if there is a replicability requirement, the SPPCP satisfies it because it includes many standardized conditions, many incorporated by reference from the SIP-approved Standard Permit Program. Texas Brf. at 30. As examples, Texas cites documentation of actions taken to minimize collateral emissions (30 TAC § 116.617(b)(1)(D), incorporating § 116.611(a)(4)), requirements regarding PCPs that are replacement projects (§ 116.617(c)) and regarding registrations (§ 116.617(d)). In addition, Texas argues that the SPPCP does not allow the Executive Director discretion to make site-specific or case-by-

case determinations. Texas Brf. at 31. It states that the SPPCP only gives the Executive Director discretion to disallow use of the SPPCP on the determination that there is a potential for adverse health effects or interference with NAAQS. "Far from interfering with the NAAQS, this narrowly drawn discretion safeguards compliance with the NAAQS. Accordingly, the PCP Standard Permit does not give the Executive Director too much discretion." *Id*. at 32.

It should be noted first that EPA did not approve the portion of the general provisions in Texas's Standard Permit Program that provides for standard permits to be adopted by TCEQ pursuant to the Texas Government Code, which includes the SPPCP. These types of standard permits adopted under the State's Code include the SPPCP. While the Standard Permit Program's rules and the SPPCP do list certain information to be contained within the registration for a pollution control project standard permit, and there are other general conditions and requirements imported into the SPPCP through the Standard Permit Program, it remains the case that the Executive Director has authority to ultimately modify the terms of the SPPCP by making determinations of "health effects concerns" or "the potential to exceed a [NAAQS] criteria pollutant or contaminant that results from an increase in emissions of any air contaminant." 30 TAC § 116.617(a)(3)(B). If such a determination is made, the SPPCP is not available "until those concerns are addressed by the registrant to the satisfaction of the executive director." *Id*. This

provision does not limit the discretion of the Executive Director to ultimately alter the terms of the SPPCP in individual cases to a narrowly defined set of circumstances. Health effects "concerns" or "potential to exceed" provide a subjective standard and potentially unlimited opportunity for the Executive Director's authority to ultimately cause a change in the terms each pollution control project must meet. As stated in the preamble to the Title V operating permit rules with regard to general permits, "sources should not be subject to case-by-case standards or requirements [and] should be subject to the same or substantially similar requirements governing operation, emissions, monitoring, reporting, or recordkeeping." 57 Fed. Reg. at 32,278. This lack of replicability is particularly important because the very rationale for the existence of general permits, to avoid expense and expenditure of time and administrative resources, is undermined when such discretion is retained. It is also critical because the public is not provided a right to notice or to comment on the application of the SPPCP in particular cases.

EPA does not dispute the existence of provisions in the Standard Permit Program and the SPPCP itself that provide some measure of uniformity. However, neither Luminant nor Texas can explain away the discretion granted to the Executive Director through 30 TAC § 116.617(a)(3)(B). Replicability is a material consideration relief upon by EPA in determining whether the SPPCP is approvable

into the Texas Minor NSR SIP pursuant to the requirements of Section 110 of the Clean Air Act.[12/]

IV. EPA CONSENTS TO VACATUR AND REMAND OF ITS DISAPPROVAL OF 30 TAC § 116.610(a) AND (b)

In its brief, Texas challenges EPA's disapproval of revisions to 30 TAC § 116.610(a) and (b). Texas Brf., at 44-51. That regulation is entitled "Applicability." EPA disapproved the submitted SIP revision in the final rulemaking, 75 Fed. Reg. at 56,427, but concedes that it did not provide a rationale for the disapproval. Because the present administrative record does not provide a basis upon which the Court could uphold EPA's action, EPA, consents to vacatur of its disapproval of 30 TAC § 116.610(a) and (b) and remand to the Agency for reconsideration.

V. IF THE COURT FINDS THAT EPA'S DISAPPROVAL OF THE SPPCP WAS ARBITRARY AND CAPRICIOUS, THE PROPER REMEDY IS REMAND, NOT ORDERING EPA TO APPROVE THE

[12/] In its brief, Luminant notes that EPA recently approved a revision into Georgia's SIP, exempting PCPs from permitting requirements as long as the project is minor. 75 Fed. Reg. 6,309 (February 9, 2010). Luminant Brf., at 34-35. EPA's approval of Georgia's revision is consistent with its disapproval of the Texas SPPCP revision because, unlike the Texas SIP revision, the Georgia revision specifically defined "environmentally beneficial activity" and limited its applicability to "similar" projects that consisted of a selected number of projects specified in the regulation. In addition, the Georgia revision ensures replicability by providing that only in very limited sets of circumstances may enforcement action be taken, specifically only to rebut the presumption that selected projects are environmentally beneficial. Thus, the Georgia SIP revision does not permit the director to make case-specifi determinations regarding emissions limits, but only to determine project eligibility for the PCP exemption. This revision allows only a "gate-keeping" role for the Georgia director, and not customization of emissions limits.

SPPCP

As a remedy, Luminant argues that, pursuant to § 706(1) of the Administrative Procedure Act, the Court should compel EPA to approve 30 TAC § 116.617 and related provisions into the Texas Minor NSR SIP. It also seeks an order of this Court, pursuant to § 553(d) of the Administrative Procedure Act, to issue the requested rule retroactive to an effective date no later than August 1, 2007 (eighteen months after TCEQ last submitted the SPPCP provisions to EPA for approval). Luminant Brf. at 51-55.

Section 706(1) of the APA states in part that "[t]he reviewing court shall – (1) compel agency action unlawfully withheld or unreasonably delayed . . . ." Luminant states that "[c]ompelling EPA to approve is warranted in this case because . . . when applying the correct statutory criteria, EPA has no basis to disapprove," citing *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

Pursuant to the Administrative Procedure Act, the ordinary remedy in the event the agency's action cannot be sustained is remand back to the Agency. As the Supreme Court stated in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985), "If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply

cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *See also Camp v. Pitts*, 411 U.S. 138, 143 (1973) ("If [the agency's] finding is not sustainable on the administrative record made, then [the agency's] decision must be vacated and the matter remanded to [the agency] for further consideration."); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); *Lion Health Services, Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011).

Luminant also misinterprets the *Norton v. Southern Utah Wilderness Alliance* case itself. In that case, the Supreme Court stated that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." 542 U.S. at 64 (emphasis in original). However, the Supreme Court went on to state that "The limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law . . . .Thus, when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but it has no power to specify what the action must be." *Id*. at 65. This is a similar case. Luminant claims that the duty is to act on the SIP revision request. It is undisputed that EPA has done

so; the manner in which it carried out that action is the subject of this petition for review. Section 706(1) of the APA is therefore not a vehicle through which the Court may order EPA to take a particular substantive action.

Since the Court may not order EPA to take any particular action, the Court need not reach Luminant's extraordinary request to make EPA's future action on the SPPCP retroactive.

CONCLUSION

For all these reasons, the Court should deny the Petitions for Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on this 6th day of June, 2011. Any other counsel of record will be served by first class U.S. mail on this same day.

s/ Daniel Pinkston

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. 32(a)(7)(C), the undersigned certifies that this brief is proportionally spaced, uses 14-point type, and contains 13,269 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Daniel Pinkston