No. 10-60891

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUMINANT GENERATION CO. LLC, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

REPLY BRIEF OF PETITIONERS LUMINANT GENERATION CO. LLC, OAK GROVE MANAGEMENT CO. LLC, BIG BROWN POWER CO. LLC, LUMINANT MINING CO. LLC, & SANDOW POWER CO. LLC

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[1] All citations to the Texas Administrative Code in this brief are to the versions as submitted to and considered by EPA in the Final Rule, copies of which were included in the Addendum of Statutes, Rules, and Regulations to Luminant's Principal Brief.

GLOSSARY OF TERMS AND ACRONYMS

CAA	Clean Air Act
EPA	U.S. Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
NO_X	Nitrogen oxide
NSPS	New Source Performance Standards
NSR	New Source Review
PCP	Pollution Control Project
Section 110	42 U.S.C. § 7410
SIP	State Implementation Plan
SO_2	Sulfur dioxide
Standard Permit for PCPs	30 Tex. Admin. Code § 116.617
Standard Permit Program	30 Tex. Admin. Code §§ 116.601–.615
TCEQ	Texas Commission on Environmental Quality

ARGUMENT

EPA has moved the target. Instead of defending its stated rationale for disapproval—that Texas's Standard Permit for Pollution Control Projects ("PCPs") does not meet the requirements of other Texas rules—EPA now claims that its action is justified because Texas's Standard Permit for PCPs does not comply with "section 110(a)(2) of the CAA, 42 U.S.C. § 7410(a)(2), and EPA's regulatory requirements contained in 40 C.F.R. §§ 51.160 – .161." Resp't EPA's Merits Br. ("EPA Br.") at 36. This is an entirely new rationale. In the rulemaking record, EPA failed to point to any specific provision in the Clean Air Act or EPA's regulations with which Texas's Standard Permit for PCPs failed to comply, much less these provisions. The Court should not be distracted by EPA's moving target; EPA's action must be reviewed based on the agency's rationale *as stated at the time of its decision*, not by its after-the-fact litigation position.

In any case, EPA's new rationale is infirm. EPA fails to show how its "similar source" and "replicability" tests are in any way contained in the Clean Air Act or federal regulations, nor does EPA explain how such requirements are useful or necessary for developing enforceable standard permits. Contrary to EPA's claims, Texas's Standard Permit for PCPs is enforceable, and it provides the Executive Director no discretion to authorize an emissions increase that would interfere with National Ambient Air Quality Standards ("NAAQS") or go above

Major New Source Review ("NSR") thresholds. Considerable more discretion is provided EPA's Administrator under EPA's own regulations for PCPs and the Georgia Director under a Georgia PCP rule that EPA recently approved. Texas's SIP revision should have been, and must be, approved by EPA.

I. EPA's Post Hoc Rationale for Its Disapproval Should Be Rejected

In its rule disapproving Texas's Standard Permit for PCPs, EPA failed to point to any provision of the Clean Air Act that the proposed permit did not meet. EPA now recasts its disapproval as based on the Clean Air Act and federal regulations. Federal agency action, however, must rise or fall based on the agency's stated rationale at the time of its decision, not on a rationale adopted later for the purpose of litigation. *See Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1060 (5th Cir. 1985) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)) ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency at the time of the rule making.").

When EPA disapproved Texas's Standard Permit for PCPs, it plainly stated its rationale:

> EPA is disapproving the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision *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*."

75 Fed. Reg. 56,424, 56,447 (Sept. 15, 2010) (under the heading—"What are the grounds for disapproving the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision?") (emphasis added). That is, EPA compared the Standard Permit for PCPs to other Texas regulations (the Texas SIP), and not, as it should have, to any federal statutory or regulatory requirements.

EPA has abandoned the rationale provided in its rulemaking and does not defend it in its brief. EPA Br. at 38. Nor does EPA argue that Texas's approach to dealing with PCPs is unreasonable or will harm air quality. Instead, EPA now claims something completely different: That it "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." EPA Br. at 36. Although this newfound rationale is nowhere in the rulemaking record, EPA attempts to cobble together its argument by pointing to various generalized statements in the record. EPA points to generic references to the Clean Air Act and "Minor NSR SIP requirements" in opening sections of its proposed rule, technical support document ("TSD"), and final rule (which covered many other Texas rules that are not at issue here). *See* EPA Br. at 36–37 (citing 74 Fed. Reg. 48,467, 48,469 (Sept. 23, 2009)) (generic reference to "Minor NSR SIP requirements"); Index #2, App. A, at EPA_AR00000039 (generic reference to "the Federal requirements"); 75 Fed. Reg. at 56,424 (general reference to "the

requirements of the CAA"). But even if that hodgepodge of references could conceivably create a rationale, not one of those references mentions as a basis for disapproval either section 110(a)(2) of the Clean Air Act, 42 U.S.C. § 7410(a)(2), or EPA's regulations concerning the Act, 40 C.F.R. §§ 51.160–.161.[2]

In its attempt to find some grounding in the Clean Air Act for its disapproval, EPA also resorts to citing a section of its proposed rule entitled "What are the Requirements for EPA's Review of a Submitted *Major* NSR SIP Revision?" *Id*. at 37 (citing 74 Fed. Reg. at 48,471) (emphasis added). That section of the proposal has no bearing here, because the Texas Standard Permit for PCPs is undisputedly a Minor NSR SIP provision, not a Major one. *See* EPA Br. at 9–10.[3] EPA's discussion of Major NSR in the proposed rule did not, and could

[2] EPA argues that its Technical Support Document ("TSD") shows that its disapproval of the Standard Permit for PCPs was based on 42 U.S.C. § 7410(a)(2) and 40 C.F.R. §§ 51.160–.161. *See* EPA Br. at 37. But, although the TSD includes EPA's conclusion that many aspects of the Standard Permit for PCPs are "approvable" and "meet Federal requirements," and provides specific citations to the federal requirements that are met, the TSD does not do so for the aspects that EPA *found not approvable*. *Id.* at EPA_AR00000111–13. Instead, for the subsections EPA finds objectionable, the TSD states merely, "Please see Section VII in the Federal Register proposal for this action." *Id*. And section VII of the proposal, like the Final Rule itself, does not cite to *any* requirement in section 110 of the Clean Air Act or EPA's implementing regulations that Texas's Standard Permit for PCPs fails to satisfy. 74 Fed. Reg. at 48,475–76. EPA's argument is hopelessly circular.

[3] Thus, EPA cannot rely on a 1992 notice it cites in this section of the proposed rule—which it calls its "General Preamble"—because that notice was only discussed in the context of EPA's action on the Major NSR aspects of the

not, refer to the Standard Permit for PCPs and therefore could not have given the public notice that this rationale would be applied to the Minor NSR Standard Permit for PCPs.[4]

By contrast, EPA's actual rationale at the time of its rulemaking appears in the sections of the proposed and final rules specifically addressing the Standard Permit for PCPs and whether that permit meets Minor NSR requirements. *See* 74 Fed. Reg. at 48,475 ("Does the Submitted PCP Standard Permit Meet the Minor NSR SIP Requirements?"); 75 Fed. Reg. at 56,443 ("The Submitted Minor NSR Standard Permit for Pollution Control Project SIP Revision"); 75 Fed. Reg. at 56,447 ("What are the grounds for disapproving the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision?"). Those sections explain EPA's true rationale for disapproving the Standard Permit for PCPs—namely, its view that "the PCP Standard Permit . . . does not meet the requirements

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Texas submission that are not at issue here. 74 Fed. Reg. at 48,471–72 (citing 57 Fed. Reg. 13,498 (Apr. 16, 1992)). The "General Preamble" does not expressly address Minor NSR SIP revisions and was not cited by EPA in its rationale for disapproving the Standard Permit for PCPs. The Preamble responded to Clean Air Act amendments, particularly those dealing with SIP requirements for major sources in nonattainment areas. *See* 57 Fed. Reg. at 13,498.

[4] Thus, an additional consequence of EPA's failure to articulate its new rationale with any specificity during the rulemaking process is that the public was not afforded the opportunity to provide EPA with meaningful comment on the issue, as required by the Administrative Procedure Act. *See* 5 U.S.C. § 553 (requiring, *inter alia*, public notice of the "legal authority" for the proposed action).

of *the Texas Minor NSR Standard Permits Program*." 75 Fed. Reg. at 56,447 (emphasis added).

Unable to point out references to specific Clean Air Act provisions in the rulemaking record (because there are none), EPA relies on section 110(a)(2) and 40 C.F.R. §§ 51.160–.161 as nothing more than a *post hoc* rationalization of its prior action. And, since agency action must be judged on the basis provided in the rulemaking record, EPA's attempt to recast its rationale for disapproval as based on the Clean Air Act must be rejected. *See, e.g., Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50 ("[T]he court may not accept appellate counsel's *post hoc* rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.") (citations omitted); *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 905 (5th Cir. 1993) ("Our determination of whether the EPA's decision was arbitrary and capricious must be made on the basis of the rationale relied on by the EPA as contained in the administrative record. We will not accept the EPA's post-hoc rationalizations in justification of its decision, nor will we attempt to supply a basis for its decision that is not supported by the administrative record.").

EPA's role, as delineated by Congress, is to review Texas's proposed revision against the federal statutory requirements for SIPs. 42 U.S.C. § 7410(k), (*l*); *see also BCCA Appeal Group v. EPA*, 355 F.3d 817, 826 (5th Cir. 2003) ("EPA

must approve a plan if it meets minimum statutory requirements[.]"); *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 586–87 (5th Cir. 1981). Because EPA did not follow that mandate here, its decision is arbitrary and capricious and should be vacated. *See La. Envtl. Action Network v. EPA*, 382 F.3d 575, 582 (5th Cir. 2004) (holding that agency action is arbitrary and capricious where an agency has "relied on factors which Congress has not intended it to consider").

II. EPA's New Rationale for Its Disapproval Has No Basis in Either the Clean Air Act or Applicable EPA Regulations

In any case, Texas's Standard Permit for PCPs meets the applicable statutory requirements. Thus, even if the Court were to construe EPA's rulemaking record to imply the rationale EPA now argues, EPA's disapproval would remain unlawful. Contrary to EPA's conclusory assertions, Section 110(a)(2) of the Clean Air Act, 42 U.S.C. § 7410(a)(2), and EPA's regulations at 40 C.F.R. §§ 51.160–.161 do not provide a basis for disapproving the Texas Standard Permit for PCPs.[5]

A. EPA attempts to create a "similar source" rule in section 110(a)(2), but that section contains no such requirement

In its final rule, EPA claimed that *the existing Texas SIP* required that standard permits be limited to only "similar sources." 75 Fed. Reg. at 56,444,

[5] Even now, EPA does not contend that the Texas Standard Permit for PCPs "would interfere" with the NAAQS, allowing EPA to disapprove pursuant to section 110(*l*). And for good reason. The Texas rule expressly prohibits the use of the Standard Permit for PCPs for an activity that would have even the potential to cause a violation of the NAAQS. *See* Luminant Principal Br. at 33, 38 (citing 30 Tex. Admin. Code § 116.617(a)(3)(B) and 31 Tex. Reg. 515, 522 (Jan. 27, 2006)).

56,447. In its briefing, EPA does not defend that assertion but instead now claims that it "ties the requirement that general permits be limited to similar sources to CAA section 110(a)(2) requirements that control measures be enforceable." EPA Br. at 42. This argument lacks merit. There is no mention of a "similar source" requirement in the statutory text, in EPA's implementing regulations, or for that matter in any agency guidance interpreting the applicable statutory provisions and regulations. Rather, the "similar source" requirement is simply a requirement that EPA wishes to impose in this particular instance—something EPA does not have the authority to do.

EPA's premise—that it can create new, extra-statutory requirements for SIP revisions so long as they are somehow "tied" to a statutory provision—would reverse the positions of the States and EPA in the Clean Air Act. Under the Act, "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt *whatever mix* of emission limitations it deems best suited to its particular situation." *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) (emphasis added). Thus, if the SIP revision meets the specific requirements in the Clean Air Act, EPA is *required* to approve it and may not substitute its judgment for that of the State. 42 U.S.C. § 7410(k)(3) ("[T]he Administrator *shall* approve [a SIP or SIP revision] as a whole if it meets all of the applicable requirements of

this chapter.") (emphasis added).[6] EPA is attempting to conjure up a "similar source" rule that simply does not exist in the Clean Air Act.

1. Neither the Clean Air Act nor applicable EPA regulations contain a "similar source" rule

Despite EPA's new attempt to rely on section 110(a)(2), that section does not contain a "similar source" rule for Minor NSR standard permits or anything resembling it. Section 110(a)(2) contains thirteen subparagraphs, designated (A) through (M). 42 U.S.C. § 7410(a)(2)(A)–(M). EPA's brief does not identify which of these thirteen subparagraphs contains its "similar source" rule. EPA Br. at 42. That is because none of them does. Nor does EPA identify any specific clause, phrase, or words in one of these subparagraphs that is ambiguous and thus open to reasonable agency interpretation. *See, e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

In the end, EPA is left arguing that the "similar source" rule springs forth from vague notions about "enforceability." EPA Br. at 42. But the Texas Standard

[6] EPA indulges in hyperbole when it argues that "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." EPA Br. at 32. This Court, not Petitioners, has held that "[t]he great flexibility accorded the states under the Clean Air Act is . . . illustrated by the sharply contrasting, narrow role to be played by EPA." *Fla. Power & Light Co.*, 650 F.2d at 587. And EPA itself has previously conceded that "the Act includes no specifics regarding the structure or functioning of minor NSR programs." 74 Fed. Reg. 51,418, 51,421 (Oct. 6, 2009). It is EPA that would upset the federal–state balance in the Clean Air Act by making itself the micro-manager of Texas's Minor NSR SIP.

Permit for PCPs *is* enforceable and meets the enforceability requirements in both the Clean Air Act and EPA's regulations. The statute requires that a SIP "include a program to provide for the enforcement of the [control] measures" contained in the SIP. 42 U.S.C. § 7410(a)(2)(C). Texas's SIP contains such a program, 30 Tex. Admin. Code ch. 101 *et seq.*, and EPA does not argue otherwise. The regulations EPA now cites provide that "[e]ach plan must set forth legally enforceable procedures that enable *the State* or local agency to determine" if construction activity will result in a violation of the SIP or interfere with the NAAQS. 40 C.F.R. § 51.160(a) (emphasis added). The Texas Standard Permit for PCPs expressly contains such legally enforceable procedures, including procedures for air quality determinations, controls, monitoring, recordkeeping, and reporting. Principal Br. of Pet'rs Luminant Generation Co. et al. ("Luminant Principal Br.") at 37.

Indeed, the general oversight, registration, recordkeeping, and enforcement requirements of the general Standard Permit Program, which EPA approved in 2003 as meeting the Clean Air Act, are incorporated wholesale into the Standard Permit for PCPs. 30 Tex. Admin. Code § 116.617(b). Further, as Luminant explained in its opening brief, the Standard Permit for PCPs is limited to a narrow category of uses that *reduce* emissions. Luminant Principal Br. at 36–37. The fact

that these general requirements are applied in a variety of industries simply does not affect the Standard Permit's enforceability, nor does EPA explain how it could.

EPA does not take issue with any of these specific procedures, nor does it allege that Texas is unable or unwilling to enforce them. And EPA does not contest that "the manner in which TCEQ has defined pollution control projects" is "reasonable and practical." 75 Fed. Reg. at 56,446. Laid bare, what EPA really seeks is "case-by-case EPA approval" of each and every use of the Standard Permit for PCPs.[7] EPA Br. at 43. But the statute and the rules do not require case-by-case EPA approval for a permit to be enforceable. Rather, they only require that "the State" have available to it legally enforceable procedures. 40 C.F.R. § 51.160(a). Texas has such procedures. Luminant Principal Br. at 37–42 (discussing monitoring, recordkeeping, and reporting requirements in the Texas regulations). Without any facts or record evidence to the contrary, the Court should assume that Texas will use these procedures. *See City of Seabrook, Texas v. EPA*, 659 F.2d 1349, 1367 (5th Cir. 1981) (rejecting challenge to EPA approval of Texas SIP based on allegation of lack of "enforceable measures" and explaining that "EPA could assume [the] state would implement [its] plan despite absence of detail [and] [i]f the [TCEQ] fails to do so, then either the EPA or a concerned citizen may bring

[7] It is unclear what EPA thinks such a "case-by-case" review would accomplish. After all, EPA concedes that a "significant similarity" among all uses of the Standard Permit for PCPs is "the amount of emissions allowed." EPA Br. at 48–49.

an enforcement action"). If the State does not, EPA can then act to require more. *Id.*; *see also Natural Res. Def. Council v. Jackson*, __ F.3d __, Nos. 09-1405, 10-2123, 2011 WL 2410398, at *4 (7th Cir. June 16, 2011) (affirming EPA approval of Wisconsin SIP revision and explaining that "EPA's decision that Wisconsin may put its plan into practice and find out what happens does not relieve the state" of its obligation to take further action if the "revisions turn[] out to allow more emissions").

2. None of the memos cited by EPA as supporting a "similar source" rule applies to Minor NSR Programs

EPA further points to a jumble of agency memos that it claims establish a "similar source" rule. EPA Br. at 42–46 (pointing to "a number of guidance documents and Federal Register notices that bear on these points"). In the context of a SIP revision, however, non-binding agency memos are no substitute for statutory or actual rule requirements. 42 U.S.C. § 7410(k), (*l*); *see also BCCA Appeal Group*, 355 F.3d at 826 ("EPA must approve a plan if it meets minimum *statutory* requirements . . . .") (emphasis added). And these informal memos, unhinged as they are from any applicable statutory or rule requirements, are not entitled to *Chevron* deference. *See Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 805 (5th Cir. 2010) (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)) ("'Interpretations such as those in opinion letters—like interpretations

contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.'").

More importantly, however, the memos do not even bear on the issue here. Even EPA admits as much: "EPA acknowledges that the cited guidance documents and Federal Register notices do not specifically concern Minor NSR general permits regarding pollution control projects . . . ." EPA Br. at 42. Instead, the memos deal with topics such as Major NSR (Index #13, App. C) and operating permits under Title V of the Clean Air Act (Index #16, App. E). These topics are categorically different permitting activities from Minor NSR construction permitting of PCPs, which is grounded in Title I of the Clean Air Act. Indeed, both Title V of the Act and EPA's Title V regulations contain express "similar source" requirements for general operating permits, in stark contrast to the statute's Minor NSR provisions and EPA's Minor NSR regulations, which do not contain such requirements for construction permits. *See* 42 U.S.C. § 7661c(d) (Title V provision authorizing permitting authority to "issue a general permit covering numerous similar sources"); 40 C.F.R. § 70.6(d)(1) (Title V regulation stating that "[t]he permitting authority may . . . issue a general permit covering numerous similar sources"). Far from aiding EPA in its argument, the fact that Congress included a similar source requirement in Title V of the Clean Air Act for operating permits but did not include such a requirement for Minor NSR construction

permits in Title I is strong evidence that Congress did not intend such a limitation for Minor NSR. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citations omitted). EPA's memos thus serve only to underscore the arbitrary nature of EPA's action in disapproving Texas's Standard Permit for PCPs.

B. EPA cites no statutory or regulatory authority for its argument that Texas's Standard Permit for PCPs is not sufficiently "replicable" because the Executive Director retains too much discretion; at any rate, the Executive Director's discretion is limited

EPA's new argument for a "replicability" rule is even more oblique than its argument for a "similar source" rule. Apart from a concluding general reference to section 110, nowhere in its entire five-page argument in its brief defending its "replicability" requirement does EPA cite to a single provision of the Clean Air Act or federal regulations requiring that standard permits for Minor NSR be "replicable." EPA Br. at 49–54. That is because there is no such requirement.

Finding none, EPA argues simply that "neither Luminant nor Texas can explain away the discretion granted to the Executive Director through 30 TAC § 116.617(a)(3)(B)." EPA Br. at 53. But it is EPA that fails to explain what this so-called "discretion" allows and how it might violate a requirement of the statute. In

point of fact, section 116.617(a)(3)(B) by its plain terms provides for the *disallowance* of a particular use of the Standard Permit for PCPs if such use would potentially exceed the NAAQS or have health effects concerns and those issues are not adequately addressed. 30 Tex. Admin. Code § 116.617(a)(3)(B). This is not, as EPA suggests, the plenary authority to set whatever emissions limit the Executive Director sees fit. Indeed, the use of the Standard Permit for PCPs is elsewhere plainly and definitively limited to activities below Minor NSR emissions thresholds—and the Executive Director has no discretion to allow a use above those established levels. *Id*. § 116.617(b)(1)(C) (incorporating § 116.610(b)). The Executive Director also does not have discretion to allow a use that would violate the NAAQS, which TCEQ has made clear. *See* 31 Tex. Reg. at 522 ("New subsection [116.617](a)(3)(B) states that any collateral emission increase associated with the state pollution control project standard permit ***must not*** *cause or contribute to any exceedance of an NAAQS or cause adverse health effects*.") (emphasis added). Further, in the first instance, the authorized activity must be one that "reduce[s] or maintain[s] currently authorized emissions rates." 30 Tex. Admin. Code § 116.617(a)(1). In other words, on the whole, a Standard Permit for PCPs authorizes emissions *reductions*. Thus, as even EPA is forced to concede, Texas's Standard Permit and associated regulations provide a "measure of

uniformity" and contain "significant similarity in [] the amount of emissions allowed." EPA Br. at 48–49, 53.

Furthermore, the ability of a director to exercise limited discretion within the narrow confines of these restrictions is not per se problematic. After all, EPA's own New Source Performance Standards ("NSPS") regulations contain a provision that gives the Administrator discretion to exempt a PCP that she finds "environmentally beneficial." *See* 40 C.F.R. § 60.14(e)(5). Thus, there is nothing wrong with some degree of discretion on the part of the regulator with respect to authorizing PCPs (which on the whole reduce pollution), and the existence of such discretion does not violate the Clean Air Act, as evidenced by EPA's own PCP rules.

C. EPA's attempt to distinguish its recent approval of Georgia's PCP regulations is spurious

EPA tries to explain away its recent approval of a Georgia SIP revision (found at 75 Fed. Reg. 6,309 (Feb. 9, 2010)) that *exempts* Minor NSR PCPs from construction permitting. EPA Br. at 54 n.12. But its attempt to do so only highlights the arbitrary nature of its disapproval of the Texas SIP revision.

1. The Georgia rule, like Texas's, applies to similar projects

The Georgia rule that EPA recently approved is *not* limited to any particular category of similar sources. *See* Ga. Comp. R. & Regs. 391-3-1-.01(qqqq). EPA concedes that the Georgia rule is limited only by "its applicability to 'similar'

projects," not to similar *sources*. EPA Br. at 54 n.12 (emphasis added). A project (*e.g.*, a low-NOx burner) is not a source (*e.g.*, an electric generating unit). 42 U.S.C. § 7411(a)(3) (defining "stationary source"). The same is true for the Texas PCP program, which is specifically applicable only to a "pollution control project," just like the Georgia rule is applicable only to a "pollution control project."[8] *Compare* 30 Tex. Admin. Code § 116.617(a)(1) *with* Ga. Comp. R. & Regs. 391-3-1-.01(qqqq), 391-3-1-.03(6)(j). The two programs are thus both well defined as to their scope, and EPA does not dispute that Texas's definition is "reasonable and practical." 75 Fed. Reg. at 56,446.

2. The Georgia rule provides the director with more discretion than does the Texas rule

EPA's further attempts to distinguish the Georgia PCP rule are unavailing. EPA's argument that the Georgia rule "allows only a 'gate-keeping' role for the Georgia director" while the Texas rule allows "customization of emissions limits" misses the point entirely and does not show that the approved Georgia revision is somehow more restrictive than the Texas revision, as EPA implies. EPA Br. at 54 n.12. The Georgia rule allows a "gate-keeping" role for the director *because the Georgia rule is an outright exemption* from any and all NSR construction

[8] Contrary to EPA's assertion, EPA Br. at 54 n.12, the Georgia rule does not define and apply to an "environmentally beneficial activity"—it defines and applies to a "pollution control project," just like the Texas Standard Permit. *See* Ga. Comp. R. & Regs. 391-3-1-.01(qqqq) (defining "pollution control project" not "environmentally beneficial activity").

permitting for PCPs. *See* Ga. Comp. R. & Regs. 391-3-1-.03(6)(j) ("Projects listed in subparagraph 391-3-1-.01(qqqq)1. through 8. of these rules are exempt from the requirement to obtain a construction (SIP) permit[.]"). Moreover, the Georgia Director, as part of his enforcement power, has *discretion* whether or not to impose ongoing monitoring and reporting to ensure compliance. *See id.* at 391-3-1-.03(2)(c) ("[T]he Director *may* require the applicant to conduct performance tests and monitoring . . . ."") (emphasis added). The Texas rule, on the other hand, *requires* PCPs to be covered by a Standard Permit with standard terms for ongoing monitoring, reporting, and enforcement. Luminant Principal Br. at 37–42 (citing 30 Tex. Code §§ 116.611(a), 116.615, 116.617(b)(1), 116.617(e)).

Further, as to its emissions limitations, the Texas Standard Permit for PCPs is no more "customized" than the Georgia exemption. The operative emission limitation in both is that the activity not cause any emissions increase above established Minor NSR thresholds. 30 Tex. Admin. Code § 116.617(b)(1)(C) (incorporating § 116.610(b)). The Texas Executive Director has no discretion to authorize emissions above these Minor NSR thresholds using a Standard Permit for PCPs. *Id.* This was EPA's driving rationale for approving the Georgia rules. 75 Fed. Reg. at 6,312. Texas's emissions limitations can deviate from the established Minor NSR thresholds *only to go lower* to prevent interference with the NAAQS or harm to public health. *Id.* § 116.617(a)(3)(B). It is inexplicable why EPA would

object to the Texas Executive Director setting *lower* emissions limitations than those applicable to Georgia PCPs.

In the end, EPA fails to provide a cogent explanation why Texas's more stringent Standard Permit for PCPs does not meet the requirements of section 110 just as the Georgia exemption does; and thus EPA's disparate treatment of the Texas revision is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 57 (internal quotation omitted) ("[I]t is the agency's responsibility . . . to explain its decision. . . . [A]n agency changing its course must supply a reasoned analysis.").

III. The Court Can Order EPA to Approve Texas's Standard Permit for PCPs under the Facts Here Because EPA Has No Discretion to Disapprove the Texas SIP Revision

EPA's assertion that "the Court may not order EPA to take any particular action" is wrong, and the cases it cites for support are inapposite. *See* EPA Br. at 55–56, 57. In *Florida Power and Light* and *Camp v. Pitts*, the Supreme Court's concern was the adequacy of the record for initial review in the court of appeals, not the power of the court to order a particular remedy. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (stating that the reviewing court is not empowered to conduct a *de novo* inquiry but rather is limited to review on the basis of the administrative record alone); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already

in existence, not some new record made initially in the reviewing court."). Here, EPA points to no additional evidence that it would add to the record on remand, so the concerns expressed in those cases are irrelevant.

The *Federal Power Commission* case cited by EPA, *see* EPA Br. at 56, encourages remand to the Federal Power Commission because of its specific, congressionally authorized role, while acknowledging that remand is sometimes "inappropriate." *See Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20–21 (1952) (noting that the Commission's role is to exercise its "judgment [as to what] will be best adapted to a comprehensive plan"). Here, in contrast, Congress has vested in the State, not EPA, the judgment to decide what pollution control measures are best-suited to achieve air quality standards, and EPA's only role is to review the State's choices in its SIP against federal statutory requirements. *See Train*, 421 U.S. at 79.

EPA also cites a recent Fifth Circuit decision, *see* EPA Br. at 56, in which this Court held that a district court should have, after correcting an "error of law," remanded to the agency for a factual determination that was "within the agency's authority"—specifically, the calculation of the monetary amount of a refund that would involve "additional fact-finding and data collection." *Lion Health Servs. v. Sebelius*, 635 F.3d 693, 703–04 (5th Cir. 2011). Here, there is nothing for EPA to

calculate or any additional data to collect; EPA has made an error of law, the correction of which is well within this Court's jurisdiction and discretion.

EPA further mischaracterizes Luminant's argument as to the appropriate remedy when it says "Luminant claims that the duty *is to act* on the SIP revision request." EPA Br. at 56 (emphasis added). To the contrary, Luminant claims that EPA's duty here is *to approve* the SIP revision under the mandatory language in the statute. Thus, the present case is not "similar" to the *Southern Utah Wilderness Alliance* case, as EPA contends (EPA Br. at 56), because that case involved a claim "for BLM's failure to act to protect public lands."[9] *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 60 (2004)). Here, the statutory criteria for approval are met: EPA has not determined that the revision "would interfere" with the NAAQS, and, should the Court agree with Luminant that section 110(a)(2) cannot justify disapproval either, there will be no basis for EPA to disapprove. Because the statutory criteria for approval are met, EPA *must* approve the revision. 42 U.S.C. § 7410(k); *see also BCCA Appeal Group*, 355 F.3d at 826; *Fla. Power & Light Co.*, 650 F.2d at 587; *Ohio Envtl. Council v. EPA*, 593 F.2d 24, 29 (6th Cir. 1979). And the Court is empowered to compel EPA's approval. *See* 5 U.S.C. § 706(1); *S.*

[9] Moreover, the facts here are not similar to *Southern Utah Wilderness Alliance*. In that case, the Court found that the statute at issue "leaves BLM a great deal of discretion in deciding how to achieve" nonimpairment of wilderness areas. 542 U.S. at 66. That is not the case with SIP approvals under the Clean Air Act, which provides specific criteria and a mandatory duty for EPA to approve if those criteria are met. *See* 42 U.S.C. § 7410(k).

Utah Wilderness Alliance, 542 U.S. at 64 (emphasis added) (holding that 5 U.S.C. § 706(1) applies where "an agency failed to take a *discrete* agency action that it is *required to take*") (emphasis added); *Fla. Power & Light Co.*, 650 F.2d at 590 (internal quotation omitted) ("In hearing a petition for review, a court of appeals may exercise equitable powers in its choice of a remedy, as long as the court remains within the bounds of statute and does not intrude into the administrative province.").

CONCLUSION

For all these reasons and those stated in Luminant's Principal Brief, the Court should set aside and hold unlawful EPA's disapproval of Texas's Standard Permit for PCPs and further compel EPA to approve Texas's SIP revision with an effective date of no later than August 1, 2007.

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CERTIFICATE OF SERVICE

I hereby certify 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 15th day of July, 2011. Any other counsel of record will be served by first class U.S. mail on this same day.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,662 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

July 15, 2011

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