No. 10-60891

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUMINANT GENERATION COMPANY, LLC, ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW OF FINAL ACTIONS OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REPLY BRIEF FOR PETITIONER STATE OF TEXAS

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ARGUMENT

I. EPA's Discussion of the Statutory and Regulatory Background Includes Misleading and Irrelevant Assertions.

In its presentation of Statutory and Regulatory Background, EPA's Merits Brief misleads the reader and perpetuates unsupported claims about the regulatory history of Texas's Standard Permits Program and its PCP Standard Permit.

A. The General Preamble Was Not a Basis for Disapproval.

EPA suggests that its 1992 General Preamble was a basis for its disapproval of the Pollution Control Project (PCP) Standard Permit. *See* EPA Br. at 23 (under the heading, "EPA's Actions Disapproving the SPPCP"). This is not supported by the record. EPA mentions the General Preamble only in its proposed rule and there only in connection with its discussion of Texas's major new source review (NSR) state implementaiton plan (SIP) revisions. *See* 74 Fed. Reg. at 48,471. EPA addresses the General Preamble under Section IV of its proposed rule, which is titled, "Do the Submitted SIP Revisions Meet the Major NSR PSD SIP Requirements?" *Id.* This section has nothing to do with EPA's disapproval of Texas's PCP Standard Permit—a minor NSR SIP revision. Section IV addresses elements of Texas's SIP submittal that are not at issue in this case. *See id.*

EPA's discussion of the PCP Standard Permit is found at Section VII of the proposed rule, which is titled "Does the Submitted PCP Standard Permit Meet the Minor NSR SIP Requirements?" 74 Fed. Reg. at 48,475. There is no mention of the General Preamble in Section VII. Indeed, EPA never identified the General Preamble as a basis for its disapproval of the PCP Standard Permit before making the argument in its Merits Brief. *See* EPA Br. at 19. EPA's brief is thus misleading, and its argument about the General Preamble is mere *post hoc* rationalization.

Review of EPA's disapproval is limited to the record. *See Geyen v. Marsh*, 775 F.2d 1303, 1309 (5th Cir. 1985) (review is limited to the record). The Court cannot entertain *post hoc* rationalization. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) (court must disregard *post hoc* rationalization of agency's action). Accordingly, the Court should disregard EPA's argument as it relates to the General Preamble. *See* EPA Br. at 34-35, 37, 40, 49 & 51 (argument relying on General Preamble).[1]

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[1] EPA similarly bases its argument on a "1987 Enforceability Memorandum," which EPA never referenced, much less discussed, in its proposed disapproval, final disapproval, or technical support document ("TSD")—and which EPA never bothered to include in its rulemaking docket. *See* 74 Fed. Reg. 48,467-78; 75 Fed. Reg. 56,424-53; AR 32-13, Res. App. at App. 1-82 (TSD); Docket ID No. EPA-R06-OAR-2006-0133, available at http://www.regulations.gov/#!searchResults;rpp=10;po=0;s=EPA-R06-OAR-2006-0133. Accordingly, the Court should also disregard EPA's argument as it relates to the 1987 Enforceability Memorandum. *See*

B. The Similarity of Sources Was Not a Reason for the Enforceability of the Standard Permits Program.

EPA repeats its claim 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.'" EPA Br. at 27 (quoting 75 Fed. Reg. at 56,444). Repetition does not make it so, and for the reasons set forth in Texas's opening brief, the claim is not credible. Texas Br. at 28.

C. EPA's Assertions About Public Participation Are Incorrect and Irrelevant.

EPA's Statutory and Regulatory Background discussion also leaves the false impression that the PCP Standard Permit was adopted without public notice and comment. Referring to its approval of the Standard Permits Program (and specifically its action with regard to 30 Tex. Admin. Code § 116.601(a)(1)), EPA states: "EPA did not approve the type of standard permit that is adopted under the Texas Government Code (*as opposed to through public notice and comment*), and therefore did not take action on . . . the Standard Permit for Pollution Control Projects . . . ." EPA Br. at 19 (emphasis added); *see also* EPA Br. at 17-18 & n.7 (noting that the PCP Standard Permit was adopted under the Texas Government Code and suggesting that this did not include "public participation").

EPA Br. at 33, 37 & 45 (argument relying on 1987 Enforceability Memorandum).

EPA's suggestion that the PCP Standard Permit was adopted without public participation is both incorrect and irrelevant. To be clear, the Texas Goverment Code (and specifically Chapter 2001, Subchapter B as referenced by section 116.601(a)(1)) *does* require notice and comment. *See* TEX. GOV'T CODE §§ 2001.023 – 2001.029. Moreover, Texas provided appropriate notice and complied with its obligation to consider and respond to comments in its adoption of the PCP Standard Permit. *See* 31 Tex. Reg. 515, 524 & 529-531 (Jan. 27, 2006) (providing responses to comments, including those of EPA, in its adoption of the PCP Standard Permit). Finally, EPA's premise that it did not approve "the type of standard permit that is adopted under the Texas Goverment Code," EPA Br. at 19, is flawed. It appears that EPA *did* approve standard permits adopted under the Texas Government Code, although there are discrepancies in EPA's final notice approving of the Standard Permits Program.[2]

[2] EPA asserts that it did not approve 30 Tex. Admin. Code § 116.601(a)(1) into the SIP. EPA Br. at 17 n.7. But EPA's table at 68 Fed. Reg. 64,549 indicates that § 116.601 is approved. This is consistent with EPA's discussion under the heading, "What Are We Approving?" *See* 68 Fed. Reg. at 64,546 ("We are approving the following Sections in Subchapter F of Chapter 116: section 116.601—Types of Standard Permits . . . ."). However, it is inconsistent with EPA's statement on the following page that EPA is "taking no action today on section 116.601(a)(1)." *Id.* at 64,547. Texas did not note this detail in its opening brief and, consistent with EPA's statements at 68 Fed. Reg. 64,546 & 64,549, indicated that the whole of section 116.601 was SIP approved. *See* Texas Br. at 12. In any event, the issue is not

Nevertheless, and despite EPA devoting a substantial portion of its background section to these issues, *see* EPA Br. at 17-19, and attempting to weave them into its argument, *see* EPA Br. at 52, the entire discussion of the Texas Government Code, of whether section 116.601(a)(1) is approved into the SIP, and of whether the PCP Standard Permit was adopted with public participation simply is not relevant to the issues presented in this case. Moreover, public participation, Texas Government Code provisions, and the SIP-status of section 116.610(a)(1) were not bases for disapproval, nor related to EPA's stated bases. Even if they were, EPA's misreading of the Texas Governement Code renders EPA's conclusions arbitrary. The Court should therefore disregard EPA's assertions related to public participation, the Texas Government Code, and the SIP-status of section 116.610(a)(1).

II. States Are Free to Revise Their State Implementation Plans Unless the Revisions Would Interfere with the National Ambient Air Quality Standards Or Other Requirements of the Act.

EPA argues, hyperbolically, 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

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relevant. The purpose of section 116.601(a) is merely to identify the NSR standard permits. They include those that had been adopted under the notice and comment requirements of the Texas Government Code (section 116.601(a)(1)) and those that will be adopted under the new notice and comment requirements of the Standard Permits Program (section 116.601(a)(2)). *See* 30 TEX. ADMIN. CODE § 116.601(a).

be virtually meaningless." EPA Br. at 32. That is not correct. What Petitioners suggest is that EPA must *apply* section 110(*l*) and disapprove only those SIP revisions that would interfere with the NAAQS or other applicable requirements of the Act. *See, e.g.*, Texas Br. at 20 & 24.

EPA argues that its 1987 Enforceability Memorandum and its 1992 General Preamble[3] are relevant interpretations that limit the states' discretion. EPA Br. at 33-35. However, these guidance documents lack the force of law, do not bind Texas, and do not warrant *Chevron* deference. *See Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 805 (5th Cir. 2010) (quoting *Christensen v. Harris County*, 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."). *See also*, *United States v. Mead*, 533 U.S. 218, 234 (2001) (citing *Christensen*, 529 U.S. at 587.). More importantly—on this record—these documents offer only *post hoc* rationalization. See discussion at pages 1-2 and footnote 1, above. Accordingly, the Court must disregard them. *Burlington Truck Lines, Inc.*, 371 U.S. at 168-69 (court must disregard *post hoc* rationalization of agency's action).

[3] The 1992 General Preamble is a mere proposal, consisting of "preliminary views" that "do not bind the States." *See* 57 Fed. Reg. 13,498 (Apr. 16, 1992).

III. EPA Failed to Apply Section 110(*l*).

EPA claims that it evaluated the PCP Standard Permit against the requirements of the Clean Air Act. *See* EPA Br. at 36-38. But EPA's claims are hollow—there is nothing in the record indicating that EPA actually applied section 110(*l*) or any other provision of the Act or the Part 51 implementing regulations. Indeed, EPA has not disputed, nor even attempted to explain, Texas's charge that the disapproval notice:

(1) does not even suggest that the PCP Standard Permit might interfere with the NAAQS (much less find that it "would interfere");

(2) does not cite a single provision of the Act with which the PCP Standard permit would interfere;

(3) does not even suggest the potential for interference with the any particular provision of the Act; and

(4) does not suggest that that the PCP Standard Permit would interfere with any implementing rule governing approval of minor new source review programs.

See Texas Br. at 21. EPA claims that it was "acting pursuant to the terms of the Clean Air Act and its regulations" and "pursuant to its authority and obligations under the CAA . . . ." EPA Br. at 38. However, the proper exercise of such authority requires some identifiable determination with respect to section 110(*l*)—that is whether the revision interferes with the NAAQS or other requirement of the Act (or the Part 51 implementing regulations). The record offers no such determination. The record shows

that EPA has based its disapproval of the PCP Standard Permit on something other than section 110(*l*) and something other than interference with the NAAQS or other applicable provisions of the Act. *See* Texas Br. at 23-30.

IV. EPA Does Not Tie Its Purported "Similar Source" Requirement to Section 110(a)(2).

EPA proposes that it "properly ties the requirement that the general permits be limited to similar sources to CAA section 110(a)(2) requirements that control measures be enforceable." EPA Br. at 42. To support this proposition, EPA first cites guidance identified in its proposed disapproval notice. But EPA admits that this guidance does not "concern minor NSR general permits regarding pollution control projects." EPA Br. at 42. For that reason alone, the guidance is not relevant. And for the reasons set forth in Texas's opening brief, the guidance is without legal force and lends no support to EPA's purported interpretation of section 110(a)(2). *See* Texas Br. at 33-42.

EPA next cites a provision of the Act's Title V *operating* permit rules that allows permitting authorities to issue a general *operating* permit "covering *numerous similar sources*." EPA Br. at 44 (citing 42 U.S.C. § 7661c(d)). This provision has nothing whatsoever to do with the approval of

of a new source review state implementation plan revision.[4] EPA may have established the relevance of its guidance to Title V, but this does not tie a "similar source" requirement to section 110(a)(2). If anything, that the Act includes an express "similar source" requirement for *operating* permits while it omits such a requirement for *preconstruction* permits (not to mention the omission in EPA's Part 51 implementing rules) indicates that there is no "similar source" requirement for new source review, including PCP Standard Permits.

Notably absent from EPA's argument is any reference to the record that cites to section 110(a)(2), much less one that ties section 110(a)(2) to a "similar source" requirement. In fact, EPA does not make this connection. And EPA's *post hoc* argument that the PCP Standard Permit violates 110(a)(2) because it is not limited to "similar sources" is all the more arbitrary in that EPA ignores the PCP Standard Permit's robust enforcement provisions. *See* Texas Br. at 43-44 (identifying some of the relevant enforcement provisions). EPA makes no finding that the PCP Standard Permit violates section 110(a)(2) and cannot now argue that its application

[4] The new source review program, at Title I of the Act, is a *preconstruction* program for authorization of new construction and modifications. *See* Texas Br. at 5. This is distinct from the Act's Title V *operating* permits program, which regulates operation but not construction or modification. *Compare* 42 U.S.C. §§ 7410 & 7470-7515 (NSR) *with id.* §§ 7661-7661f (Title V).

of a "similar source" requirement somehow properly implicates section 110(a)(2).

EPA next takes aim at Petitioner's arguments that, despite the lack of any such requirement, the PCP Standard Permit does cover "similar sources." EPA Br. at 46. EPA discounts the numerous ways in which covered pollution control projects are similar by labling them as "extrinsic" and suggesting that they are not significant. EPA Br. at 46-48. EPA concludes that "[t]he only *significant* similarity in the sources that could have applied for a SPPCP is the amount of emissions allowed and that a pollution control project is involved." EPA Br. at 48-49 (emphasis added).

But EPA provides no authority, no record citation, and no explanation to indicate how or why, of the many similarities Petitioners identify, these two are the only *significant* measures of similarity. Moreover, EPA does not indicate what, if any, additional measures might be required to establish a "similar source" or why these alone would be insufficient to establish a "similar source." EPA's notion of what consititutes a "similar source" is simply not defined—anywhere. So even if there were a "similar source" requirement, EPA's determination that the PCP Standard Permit fails to meet it would be arbitrary. Indeed EPA's disapproval is arbitrary because it is based on a purported "similar source" requirement that EPA conjures

solely from irrelevant and inappliably authority *and* because it has declared the sources covered by Texas's PCP Standard Permit as not similar while failing to say what would consitute a "similar source."

V. The Executive Director's Narrowly Drawn Discretion Does Not Interfere with the NAAQS or Other Applicable Requirements of the Act.

EPA bases its argument that the Executive Director has too much discretion on: (1) a purported "replicability" requirement derived from its 1992 General Preamble, EPA Br. at 49 & 51; (2) its irrelevant argument that Texas adopted the PCP Standard Permit under the Texas Government Code, EPA Br. at 52; and (3) a preamble to Title V operating permit rules unrelated to new source review, EPA Br. at 53. For reasons discussed above and in Texas's opening brief, the Court should disregard these bases for EPA's conclusion about the Executive Director's discretion. See pages 1-2, (regarding the 1992 General Preamble) and Texas Br. at 29-31 (regarding replicable permit conditions[5]); pages 3-5 (regarding adoption under the Texas Government Code); and pages 8-9 and footnote 4 (regarding Title V operating permits).

[5] EPA does not dispute Texas's assertion that the PCP Standard Permit provides replicable standardized terms. *See* EPA Br. at 53 (admitting that the Program and the PCP Standard Permit "provide some measure of uniformity").

Notably absent from EPA's argument is any reference to the applicable standard for the review of SIP revisions. There is no mention of the requirements of section 110(*l*) or any suggestion that the discretion reserved to the Executive Director would interfere with the NAAQS or another provision of the Act.[6] Indeed the discretion reserved to the Executive Director is limited to prohibiting the use of the PCP Standard Permit where the Executive Director finds a potential for interference with the NAAQS or other health effects concerns. 30 TEX. ADMIN. CODE § 116.617(a)(3)(B).[7] The discretion reserved to the Executive Director is protective of the NAAQS—it does not threaten the NAAQS. *See* Texas Br. at 32.

It is incredible that EPA would argue that the Executive Director's discretion to prohibit projects that could interfere with the NAAQS is "too much discretion." But that is precisely EPA's position. *See* EPA Br. at 49

[6] EPA does argue: "Replicability is a material consideration relief [*sic*] 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." EPA Br. at 53-54. EPA's meaning is not clear. But to the extent EPA would suggests that a "replicability" requirement flows from the Act or the Part 51 implementing regulations, EPA fails to point to any applicable statutory or regulatory provision or to any applicable part of the record that would support this notion.

[7] And contrary to EPA's assertion, *see* EPA Br. at 52, the Executive Director cannot modify the terms of the PCP Standard Permit—the PCP Standard Permit rules can be amended only through notice-and-comment rulemaking. *See* TEX GOV'T CODE §§ 2001.023-2001.029.

(stating that the SPPCP is not approvable becase it affords the Executive Director too much discretion). The PCP Standard Permit satisfies the fundamental requirement for SIP revisions, that they not allow interference with the NAAQS, while EPA's position is at odds with that. Because EPA fails to base its finding regarding the Executive Director's discretion on any applicable statutory or regulatory provision, it has acted arbitrarily, abused its discretion, and acted contrary to the Clean Air Act in disapproving the PCP Standard Permit.

CONCLUSION

For the reasons set forth in Petitioners' briefs, Texas respectfully requests the Court to vacate EPA's disapproval of the Pollution Control Project Standard Permit and remand the matter to EPA for prompt action in accordance with the Court's instructions.

Respectfully submitted,

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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. All parties in this case are represented by counsel consenting to electronic service.

/s/ Jon Niermann
Jon Niermann

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,015 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: July 15, 2011

/s/ Jon Niermann
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