No. 10-60614

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, ET AL.,

Petitioners

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent

On Petition For Review Of Final Action
Of The United States Environmental Protection Agency

BRIEF FOR PETITIONERS TEXAS OIL & GAS ASSOCIATION, TEXAS ASSOCIATION OF MANUFACTURERS, BCCA APPEAL GROUP, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION, TEXAS ASSOCIATION OF BUSINESS, TEXAS CHEMICAL COUNCIL, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Samara L. Kline
BAKER BOTTS L.L.P.
2001 Ross Avenue
Dallas, TX 75201-2980
(214) 953-6825
samara.kline@bakerbotts.com

Matthew G. Paulson
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard, Suite 1500
Austin, TX 78701-4078

Counsel continued on next page

December 3, 2010

Kathleen Weir
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995

Adam J. White
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, DC 20004-2400

Counsel for Texas Oil & Gas Association, Texas Association of Manufacturers, BCCA Appeal Group, American Chemistry Council, American Petroleum Institute, National Association of Manufacturers, National Petrochemical and Refiners Association, Texas Association of Business, Texas Chemical Council, and Chamber of Commerce of the United States of America

Robin S. Conrad
National Chamber Litigation
Center, Inc.
1615 H Street NW
Washington, DC 20062
(202) 463-5337

Of Counsel for Chamber of Commerce of the United States of America

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described by Fifth Circuit Rule 28.2 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. Texas Oil & Gas Association
2. Texas Association of Manufacturers
3. BCCA Appeal Group
4. American Chemistry Council
5. American Petroleum Institute
6. National Association of Manufacturers
7. National Petrochemical And Refiners Association
8. Texas Association of Business
9. Texas Chemical Council
10. Chamber of Commerce of The United States of America
11. Samara L. Kline, Van Beckwith, Matthew G. Paulson, Kathleen Weir, and Adam J. White, Baker Botts L.L.P., Attorneys for Petitioners
12. Robin Conrad, National Chamber Litigation Center, Inc., of counsel to Petitioner Chamber of Commerce of the United States of America
13. Environmental Defense Fund (intervenor)
14. Environmental Integrity Project (intervenor)

/s/ Samara L. Kline
Samara L. Kline
Baker Botts L.L.P.

Counsel for Texas Oil & Gas Association, Texas Association of Manufacturers, BCCA Appeal Group, American Chemistry Council, American Petroleum Institute, National Association of Manufacturers, National Petrochemical and Refiners Association, Texas Association of Business, Texas Chemical Council, and Chamber of Commerce of the United States of America

REQUEST FOR ORAL ARGUMENT

Affected Industry Petitioners request oral argument, which will enhance the Court's understanding of the administrative record and the legal issues that the case presents. Petitioners seek review of EPA's disapproval of a Texas air permitting program 16 years after the State implemented the program and submitted it for federal approval. A lengthy regulatory history and the division of state and federal responsibility under the Clean Air Act are relevant to understanding the issues presented. The subject matter of the case is specialized, but the ramifications of the Court's decision will be widespread, which further underscores the value of conducting oral argument.

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STATEMENT OF JURISDICTION

The U.S. Environmental Protection Agency ("EPA") has the obligation to approve, disapprove, or conditionally approve revisions to state plans that implement federal air quality standards promulgated under the Clean Air Act ("the Act"). 42 U.S.C. § 7410(k). This Court has jurisdiction to review EPA's final action. *Id*. § 7607(b)(1).

On July 15, 2010, EPA published its final action disapproving a revision to the Texas State Implementation Plan relating to Texas's Flexible Permits Program. Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Flexible Permits; Final Rule, 75 Fed. Reg. 41,312 (July 15, 2010) ("Disapproval").

The Texas Oil & Gas Association, the Texas Association of Manufacturers, the BCCA Appeal Group, the American Chemistry Council, the American Petroleum Institute, the National Association of Manufacturers, the National Petrochemical and Refiners Association, the Texas Association of Business, the Texas Chemical Council, and the Chamber of Commerce of the United States of America ("Affected Industry Petitioners") filed timely petitions for review on August 5, August 12, and September 13, 2010. *See* 42 U.S.C. § 7607(b)(1) (setting 60-day deadline for petitions). Petitioner State of Texas timely filed a petition for review on July 26, 2010.

STATEMENT OF THE ISSUES

In 1994, Texas promulgated rules regarding an air permitting program and submitted them to EPA for approval. For the next 15 years, EPA took no formal action on the submitted program. During the same period, the state operated under the program by issuing permits, which were incorporated into federal operating permits that EPA reviewed without objection. Almost 16 years after the program was submitted, and in disregard of an 18-month statutory deadline for acting, EPA disapproved the program. EPA's Disapproval rests on "concerns" that EPA did not raise in comments to the 1994 Texas rulemaking or for more than a decade thereafter. EPA's Disapproval relies on its purported "legal interpretations" of state law that are contrary to the State's interpretation. EPA's Disapproval criticizes provisions of the program identical to provisions of other programs that EPA *has* approved. EPA's Disapproval speculates, without substantiation, about how the program might someday be operated, but expressly considers "irrelevant" the terms of any of the 140 permits actually issued under the program, and expressly disregards the 16-year history of Texas air quality improvements since the program began.

The issues presented are: Is EPA's belated Disapproval an abuse of discretion? Is it arbitrary and capricious? Does it exceed the scope of authority given EPA under the Clean Air Act?

STATEMENT OF THE CASE

The Affected Industry Petitioners seek review of EPA's disapproval of the Flexible Permits Program. Pursuant to the Clean Air Act, Texas submitted this air-quality-permitting program in 1994 for approval as a revision to its state implementation plan. Despite a statutory requirement that EPA act on such submittals within 18 months, EPA first proposed disapproving the Program in September 2009. 74 Fed. Reg. 48,480 (Sept. 23, 2009). After receiving comments from, among others, the State and Affected Industry Petitioners, EPA issued the Disapproval on July 15, 2010. 75 Fed. Reg. 41,312 (July 15, 2010). Affected Industry Petitioners and the State of Texas timely petitioned for review.

As demonstrated below, the bases for EPA's Disapproval lack statutory or regulatory foundation and are unsupported by the administrative record. Accordingly, this Court should vacate EPA's Disapproval.

STATEMENT OF FACTS

To understand the issues presented, it helps to know the regulatory context in which Texas implemented the Flexible Permits Program and submitted it for approval in 1994, and developments since that time. The relevant legal framework, and the facts specific to the Program, are summarized below.[1]

I. The Federal Clean Air Act.

A. The Clean Air Act Divides Responsibility Between Federal And State Government.

The Clean Air Act "establishes a comprehensive program for controlling and improving the nation's air quality through state and federal regulation." *BCCA Appeal Group v. EPA*, 355 F.3d 817, 821-22 (5th Cir. 2003). The Act embraces "cooperative federalism" by allocating authority between the federal government and the States. *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001). "EPA is responsible for, among other things, identifying air pollutants that endanger the public health and welfare and formulating National Ambient Air Quality Standards ('NAAQS') that specify the maximum permissible concentrations of those pollutants in the ambient air." *BCCA Appeal Group*, 355 F.3d at 822 (citing 42 U.S.C. §§ 7408-7409). The Clean Air Act reserves to the *states*, however, "the

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[1] An Addendum of relevant regulatory materials is attached. This Brief also cites documents listed in EPA's certified index of record materials (cited as "Index # __, App. __"). An appendix of these materials will be filed separately in accordance with 5th Cir. R. 30.2(a).

primary responsibility" for ensuring that national air quality standards are met. *Id.* (citing 42 U.S.C. § 7407(a)).

The states are given responsibility to formulate and administer state implementation plans, or "SIPs." *See id.* at 821-22. A state's SIP must include, "among other things, 'enforceable emission limitations and other control measures, means, or techniques . . . as may be necessary or appropriate' to meet" the applicable NAAQS; "'appropriate devices, methods, systems, and procedures' to 'monitor, compile, and analyze data on ambient air quality;'" and an enforcement program. *See id.* at 822 (summarizing 42 U.S.C. § 7410(a)(2)).

Once a state has adopted a SIP following public notice and comment, it must submit the SIP to EPA for review and approval. 42 U.S.C. § 7410(a)(1). If the SIP meets the requirements of the Clean Air Act, EPA must approve it. *Id.* § 7410(k)(3); *see also BCCA Appeal Group*, 355 F.3d at 822. Likewise, states may adopt SIP revisions and submit them to EPA for approval. 42 U.S.C. § 7410(*l*).

EPA is required to review and approve or disapprove SIP revisions within 18 months of submittal. *Id.* § 7410(k)(1)-(2). Texas's original SIP was proposed in January 1972 and approved four months later. 37 Fed. Reg. 10,842, 10,895-98 (May 31, 1972). Since then, EPA has approved several Texas SIP revisions,

including plans that drove sustained air quality improvements in Dallas/Fort Worth, Houston/Galveston/Brazoria, El Paso and Beaumont/Port Arthur.[2]

In sum, the Clean Air Act "supplies the goals and basic requirements of [SIPs], but *the states have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements*." *BCCA Appeal Group*, 355 F.3d at 822 (citing *Union Elec. Co. v. EPA*, 427 U.S. 246, 266 (1976)) (emphasis added).

B. The Act Distinguishes Between Major And Minor Sources In Connection With New Source Review.

The Flexible Permits Program is one of several state New Source Review ("NSR") programs in Texas. Under the Clean Air Act, NSR programs govern "new sources" of pollution generated by new construction or by modification of existing sources. *See* 42 U.S.C. § 7410(a)(2)(C). The Act's specifications for NSR programs vary, depending on whether the new source is a "major" or "minor" source; on whether the new source results from a "major" or "minor" modification to existing operations; and on where the new source is located. *Compare id.* §§ 7470-7503 (major) to *id.* § 7410(a)(2)(c) (minor). With respect to location, and for each ambient air standard, EPA has designated areas of the country as either

[2] *See* 74 Fed. Reg. 1903 (Jan. 14, 2009); 66 Fed. Reg. 57,160 (Nov. 14, 2001); 74 Fed. Reg. 2387 (Jan. 15, 2009); 75 Fed. Reg. 64,675 (Oct. 20, 2010).

"attainment," meaning that the area has attained the standard, or "nonattainment," meaning that the area does not meet the standard.

Requirements are more detailed for major sources than for minor ones, and more stringent for major sources in nonattainment areas than in areas that already meet the national air quality standards. *See La. Envtl. Action Network v. EPA*, 382 F.3d 575, 578 (5th Cir. 2004). In attainment areas, Major NSR requirements focus on prevention of significant deterioration, or PSD (for "Prevention of Significant Deterioration") review.[3] *See* 42 U.S.C. §§ 7470-7479.

By contrast, the Act's requirements are minimal with respect to a *Minor* NSR program, which sets limits for minor sources and modifications in both attainment and nonattainment areas. The Act simply directs that states provide for "regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved." *Id*. § 7410(a)(2)(C). The Act requires disapproval only of a Minor NSR SIP revision that "would interfere" with the state's ability to

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[3] A source is "major" for purposes of the PSD program if its potential to emit a regulated pollutant exceeds or would exceed 250 tons per year, or 100 tons per year in the case of certain specified industrial categories. 42 U.S.C. § 7479(1). A source is "major" for purposes of the nonattainment NSR program if its potential to emit a regulated pollutant exceeds or would exceed a graduated range of tons per year thresholds based on the area's severity classification, from 25 tons per year up to 100 tons per year. *See* 42 U.S.C. § 7602(j). Minor NSR programs regulate new sources or modifications whose potential to emit a particular pollutant is less than these thresholds.

comply with the national air quality standards. *Id*. § 7410(*l*). EPA has recognized that "approved minor NSR programs can vary quite widely from State to State" because "the Act includes no specifics regarding the structure or functioning of minor NSR programs." 74 Fed. Reg. 51,418, 51,421 (Oct. 6, 2009).

In sum, the Clean Air Act generally, and NSR specifically, are "intended to create an overarching federal role in air pollution control policy . . . but that overarching role is in setting standards, not in implementation." *Michigan*, 268 F.3d at 1083. The Act preserves states' discretion to meet national air quality standards by planning and executing permitting programs that are tailored to a state's particular circumstances.

C. Congress And EPA Have Promoted Operational Flexibility In Permitting Under The Clean Air Act.

Texas's adoption of the Flexible Permits Program followed a string of EPA and Congressional directives, described below, that encouraged use of flexible permitting to achieve air quality standards.

EPA first endorsed flexible permitting concepts by adopting a "plantwide definition of 'source'" for Major NSR in both attainment and nonattainment areas. 46 Fed. Reg. 50,766, 50,768 (Oct. 14, 1981). Under this definition, NSR would be triggered only when a modification within a permitted facility resulted in a plant-wide, not equipment-specific, increase in air emissions. *See id.* at 50,766-67; *see also* 46 Fed. Reg. 16,280 (Mar. 12, 1981) (proposed rule). EPA observed that the

prior definition of "source" had "discourag[ed] replacement of older, dirtier processes with new cleaner ones," because facilities chose to retain older, inefficient equipment (thereby avoiding NSR by making no "modification") rather than apply for a permit amendment and undergo costly administrative burdens to make a modification, even one resulting in decreased plant emissions. *See* 46 Fed. Reg. at 50,766. The lack of a plant-wide "bubble" policy "thereby acted as a disincentive to new investment and modernization and retarded progress toward clean air." *Id.* The Supreme Court affirmed EPA's policy. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984).

EPA's "bubble" policy foreshadowed Congress's endorsement of operational flexibility embodied in Title V in the Clean Air Act Amendments of 1990. Pub. L. No. 101-549, § 501, 104 Stat. 2399, 2635 (1990) (codified at 42 U.S.C. §§ 7661-7661f). "Title V requires major stationary sources of air pollution, such as factories, to receive operating permits incorporating [Clean Air Act] requirements and establishes a procedure for federal authorization of state-run Title V permit programs." *Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 453 (5th Cir. 2003) (citing 42 U.S.C. §§ 7661-7661f). A Title V permit is a "source-specific bible for [Clean Air Act] compliance." *Id*. (quoting *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996)). "Title V permits do not impose additional requirements on

sources but, to facilitate compliance, consolidate all applicable requirements in a single document." *Id.* (citing 42 U.S.C. § 7661a(a)).

In Title V, Congress expressly envisioned a regulatory framework that encourages operational flexibility within permitted allowable emission rates. The Act requires state Title V programs to contain "[p]rovisions to allow changes within a permitted facility . . . without requiring a permit revision, if," *inter alia*, "the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions *or in terms of total emissions*)." 42 U.S.C. § 7661a(b)(10) (emphasis added). EPA regulations promulgated under Title V likewise encourage operational flexibility, including the trading of emissions increases and decreases in a facility under a federally enforceable emissions cap. 57 Fed. Reg. 32,250 (July 21, 1992).

II. Texas Promulgates The Flexible Permits Program In 1994.

As federal regulators recognized the need for operational flexibility in Major NSR permitting, by 1994, Texas also had a particular need for a Minor NSR program that would allow for such flexibility. Unlike most other states, Texas's then-existing Minor NSR program was so constricting that it too discouraged modernization changes affecting minor sources; compared to other states, Texas's Minor NSR program was recognized by EPA as "a very stringent one." 60 Fed.

Reg. 30,037, 30,039 (June 7, 1995). EPA described various unique features of Texas's regulatory scheme for minor NSR:

> The Texas program requires authorization prior to the construction of any new facility or the modification of an existing facility. The term "facility" is broadly defined to include any "point of origin" of air contaminants, so there is no opportunity for a source to "net out'" of minor NSR. Moreover, Texas mandates best available control technology (BACT) as the emission control technology which applies to all minor NSR changes. Texas further subjects each minor NSR permit and permit amendment to a health effects evaluation which considers the cumulative effect of the proposed action, together with other air contaminant sources, on ambient air quality.

Id. Not only did every minor modification require permitting, but the Texas Minor NSR program also provided for public notice of a permit action and allowed any citizen to request a full evidentiary hearing. *Id*. In short, any operational change that an operator wished to make—even one that would improve pollution control—required a burdensome administrative process.

A. The Flexible Permits Program Introduces Operational Flexibility And Incentivizes Permitting Of Grandfathered Facilities.

Texas promulgated the Flexible Permits Program in 1994, responding both to federal endorsement of operational flexibility and the State's particular need to offer a flexible alternative to traditional source-by-source permitting. The Program rules are codified in the Texas Administrative Code in Title 30, Chapter 116, Subchapter G. The Texas Legislature incorporated the Program into the Texas Clean Air Act in 1995. *See* TEX. HEALTH & SAFETY CODE ANN. § 382.003(9)(F).

Flexible permits are an alternative, voluntary permitting option "designed to exchange operational flexibility for emission reductions with the final goal being a well-controlled facility." 19 Tex. Reg. 7334, 7334 (Sept. 20, 1994).

That "exchange" is a central feature of the Program. The Program relieves flexible permit holders from having to file a permit application for every operational or physical change to existing equipment, but mandates "environmental benefits . . . includ[ing] the permitting of grandfathered units, substantial emission reductions from the installation of controls, and an overall evaluation of emission impacts." Index #13, App. D, at 8 (TCEQ submittal, p. 4 of 38). Before the Flexible Permits Program was promulgated, under Texas's EPA-approved SIP and federal law, a "grandfathered" source (one constructed before 1971 and not modified) was not required to undertake emissions reductions, absent a modification that triggered NSR. *See* 74 Fed. Reg. at 48,485 & n.3 (Sept. 23, 2009). The Flexible Permits Program "provide[d] a mechanism for placing controls on grandfathered" facilities. *Id.* at 48,485. When the Program was first promulgated, the State anticipated that it would result in "a reduction in emissions of all categories of pollutants and a reduction in the cost of doing business in the State of Texas." 19 Tex. Reg. at 7335.

In instructional Guidance accompanying the Program rules, the Texas Commission on Environmental Quality ("TCEQ")[4] explained that the Program also was designed to "allow[] an operator more flexibility in managing their operations by establishing a facility emissions cap."[5] TCEQ elaborated:

> [TCEQ] feels that more flexibility could be afforded to well controlled facilities. Some existing sources could become well controlled by adding additional controls and/or modifying operating procedures resulting in emission reductions. Industry would benefit from increased flexibility and authorization to make process changes in response to market opportunities. The state would benefit from the increased number of facilities permitted with lower overall emissions rates and improved control.

Id. EPA later acknowledged that "[t]he Program did result in grandfathered facilities voluntarily imposing emissions controls and limiting their emissions using a Flexible Permit." 74 Fed. Reg. at 48,485.

Following a public hearing and comment period,[6] Governor Ann Richards formally submitted the Flexible Permits Program to EPA on November 29, 1994, and requested its approval as a revision to Texas's SIP.[7] Despite the eighteen-

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[4] As used herein, "TCEQ" refers to both the Texas Commission on Environmental Quality and its predecessor agencies, including the Texas Natural Resource Conservation Commission, which promulgated the Flexible Permits Program.

[5] *Flexible Air Permit Application Guidance: Subchapter G* at 1 (Jan. 2001) ("TCEQ Guidance"), *available at* Index #34, App. F.

[6] *See* Index #13, App. D.

[7] *Id.*; *see also* 75 Fed. Reg. at 41,312.

month statutory review deadline, 42 U.S.C. § 7410(k)(1)-(2), Texas's proposal languished before EPA for fifteen years.[8]

B. Key Features Of The Flexible Permits Program.

1. Mandatory Components Of A Flexible Permit Application.

An applicant for a flexible permit must complete a written application requiring, among other things, identification of:

- "each air contaminant for which an emission cap is desired,"
- "each facility to be included in the flexible permit,"
- "each source of emissions to be included in the flexible permit," and
- "for each source of emissions . . . the Emissions Point Number (EPN) [*i.e.*, the location at which air contaminants enter the atmosphere] and the air contaminants emitted."

30 TEX. ADMIN. CODE § 116.711(13)(A), (B), (C). For each EPN, the application must provide calculations of emissions rates "based on the expected maximum capacity and the proposed control technology." *Id.* § 116.711(13)(D).

The application also must identify the applicable "emission cap" for each pollutant. *Id.* § 116.711(13). The cap for each pollutant is established by summing the emissions "calculated for each facility based on application of current Best Available Control Technology ["BACT"] at expected maximum capacity[.]" *Id.* § 116.716(a); *see also id.* § 116.711(3) ("proposed facility, group of facilities, or

[8] In that time, Texas submitted several revisions to EPA, *see* 75 Fed. Reg. at 41,312-13; 30 TEX. ADMIN. CODE §§ 116.710-116.760, which are not pertinent to this appeal except where noted.

account will utilize BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions . . . .”). The program prohibits “backsliding;” the existing level of control “may not be lessened for any facility” under the flexible permit. *Id.* § 116.711(3).

Having identified the applicable emissions cap, the applicant must “specify the control technology proposed for each unit to meet the emissions cap” and “demonstrate compliance with all emission caps at expected maximum production capacity.” *Id.* § 116.711(14); *see also id.* § 116.711(13)(D)-(E) (requiring applicant to identify, for each emission cap and for each individual emission limitation, “all associated EPNs and provide emission rate calculations based on the expected maximum capacity and the proposed control technology”). The applicant must demonstrate that the facility, group of facilities, or account “will achieve the performance specified in the flexible permit application.” *Id.* § 116.711(7).

2. Mandatory Components Of A Flexible Permit.

The Flexible Permits Program couples application requirements with equally strict requirements on the permit itself. For “each air contaminant and all facilities authorized” by the permit, a pollutant-specific emissions cap and/or an individual emissions limitation “shall be established.” *Id.* § 116.715(b). The permit “shall specify” the implementation schedule for additional controls required to meet the

emissions cap. *Id.* § 116.717. The permit covers only those sources expressly listed in a table included in the permit (commonly known as a "MAERT"—*i.e.*, Maximum Allowable Emissions Rate Table), and sources under the permit are limited to the emissions limits specified in the MAERT and other specific permit conditions. *Id.* § 116.715(c)(7). Only one flexible permit can be issued to any one site, and a single permit may not cover sources at more than one site. *Id.* § 116.710.

Facilities covered by the permit "shall not be operated" unless "all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations." *Id.* § 116.715(c)(9). The facility cannot commence operations without first notifying TCEQ. *Id.* § 116.715(c)(3). Once in operation, all sampling and testing procedures must be approved by and coordinated with TCEQ. *Id.* § 116.715(c)(4). At all times, the facility must maintain "at the plant site," to be "made available at the request of [TCEQ] personnel," a "copy of the flexible permit along with information and data sufficient to demonstrate continuous compliance with the emission caps and individual emission limitations[.]" *Id.* § 116.715(c)(6). As a result of these requirements, each flexible permit contains emission caps and requires demonstration of continuous compliance with those caps.

Once a flexible permit has issued, an operator can make certain operational changes without requiring a permit amendment, so long as the emissions do not exceed the limitations specified in the permit. *See id.* §§ 116.10(9)(E), 116.710(a), 116.718, 116.720. For example, an operator can make changes in throughput or feedstock, so long as there is no change in the method of emissions control or emissions character, and no significant increase in emissions. *Id.* § 116.721(c).

3. The Program Preserves Other Legal Requirements.

Issuance of a flexible permit does not affect other law or regulations applicable to sources covered by the permit. In particular, the Program expressly preserves applicability of Major NSR to qualifying new construction or modification, regardless of receipt of a flexible permit. Specifically, the Program provides that if the permitted facility is located in a nonattainment area for federal NSR purposes, "each facility shall comply with all applicable requirements . . . concerning nonattainment review." *Id.* § 116.711(8). Similarly, if the permitted facility is located in an attainment area, then it "shall comply with all applicable requirements . . . concerning PSD review." *Id.* § 116.711(9). Further, if more than one state or federal rule, regulation, or flexible permit condition is triggered by a facility, "then the most stringent limit or condition shall govern and be the standard by which compliance shall be demonstrated." *Id.* § 116.715(c)(10).

III. Texas Implements The Flexible Permits Program With EPA's Awareness And Involvement.

Despite the eighteen-month statutory deadline for EPA to review and approve Texas's proposal, EPA took no formal action on the proposed SIP revision for fifteen years. During that time, Texas implemented the Flexible Permits Program under state law, issuing or amending approximately 140 flexible permits.[9] The permits have been used to upgrade emissions controls and increase operational flexibility in a wide variety of industrial operations, from power plants and refineries to plants manufacturing adhesives, fiberglass swimming pools and tires.[10] In interactions with Texas, EPA acknowledged existing flexible permits by endorsing Title V permits that incorporated flexible permit requirements, reviewing flexible permits in connection with related PSD (*i.e.*, Major NSR) permits, and recognizing flexible permits in federally enforceable consent decrees.[11]

A. EPA Insisted That Texas's Title V Program Incorporate As "Applicable Requirements" Minor NSR Permits, Such As Flexible Permits.

Title V of the Clean Air Act requires states to promulgate a Title V permit program to be approved by EPA. *See* 42 U.S.C. § 7661a(b). Texas initially

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[9] Index #70, App. I, at 1-5 (service list for EPA letter to flexible permit holders).

[10] *Id*.

[11] Index #69, App. H, at 7 (Letter from TCEQ to EPA (Aug. 30, 2007)) ("there have been numerous flexible permits over the years that have triggered federal review").

withheld Minor NSR permits (including flexible permits) from incorporation into federally-enforceable Title V permits. In the late 1990s, however, as a condition to approving Texas's Title V program, EPA insisted that Texas revise the definition of "applicable requirement" in its Title V program to include the terms and conditions of *all* Chapter 116 preconstruction permits, including flexible permits. 61 Fed. Reg. 32,693, 32,694 (June 25, 1996).[12] TCEQ did so. 26 Tex. Reg. 3747, 3792 (May 25, 2001).[13] As a result, flexible permits were required to be incorporated into Title V permits (the "bible" of federal compliance), which are federally enforceable. EPA defended its approval of the Texas Title V program in this Court, which affirmed. *Pub. Citizen*, 343 F.3d at 459-60. Flexible permit holders thus received, without EPA objection, initial Title V site-wide permits that integrated flexible permits as federally-enforceable "applicable requirements."

B. After Texas Implements The Flexible Permits Program, EPA Continues To Endorse And Encourage Flexible Permitting.

As Texas merged its flexible permits into Title V operating permits, EPA continued to develop federal regulations promoting flexible permitting. In 1996, EPA proposed to establish Plantwide Applicability Limit ("PAL") permits that

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[12] In granting interim approval of the Texas Title V program in 1996, EPA stated that "for full program approval, the State [Title V] program must provide permits that include all MNSR [minor NSR] permits." 61 Fed. Reg. at 32,694.

[13] EPA concluded that "Texas has properly addressed MNSR as an applicable requirement." 66 Fed. Reg. 51,895, 51,897 (Oct. 11, 2001); *see also* 66 Fed. Reg. 63,318, 63,321-22 (Dec. 6, 2001) (EPA final rule approving Texas Title V program).

would cap emissions across an entire plant and allow operators flexibility to modify operations within the cap so long as the total emissions cap was not exceeded. 61 Fed. Reg. 38,250, 38,264 (July 23, 1996). EPA finalized that rule in 2002. 67 Fed. Reg. 80,186, 80,206 (Dec. 31, 2002).

Also in 2002, EPA completed a report regarding its Flexible Permit Implementation Review ("Review"), an in-depth analysis of six specific flexible permits issued by various state environmental agencies between 1993 and 2000.[14] The purpose of the Review included determining "whether the flexible permits work as envisioned, providing the desired operational performance improvements and environmental protection" and "[a]ssess[ing] the level of environmental benefit achieved under flexible permits."[15] The Review produced a ringing endorsement of flexible permitting from both EPA and the six state environmental authorities that participated in the Review. The Review concluded that flexible permits facilitated reductions in pollution, were at least as easy to enforce as conventional permits, resulted in increased information sharing between permit

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[14] *See* EPA, *Evaluation of Implementation Experience with Innovative Air Permits, Results of the U.S. EPA Flexible Permit Implementation Review* ("Review") (2002), *available at* Index #17, App. S, at Exh. 5. EPA's Review analyzed permitted sites including a 3M tape plant in Minnesota, automobile assembly plants in Delaware and Tennessee, a semiconductor fabrication plant in Oregon, and a printing and publishing operation in Oklahoma. *See id*. at 14-15.

[15] *Id*. at 9.

holder and enforcement authorities, and enhanced permit holders' ability to compete effectively.[16]

In 2009, EPA expressly acknowledged the environmental benefits of flexible permits by publishing its Flexible Air Permitting rule. 74 Fed. Reg. 51,418 (Oct. 6, 2009). EPA revised its regulations governing state Title V operating permit programs "to promote flexible air permitting . . . approaches that provide greater operational flexibility . . . ." *Id*. at 51,418.

IV. Sixteen Years After Texas Promulgates The Flexible Permits Program, EPA Rejects It.

Although EPA had touted the benefits of flexible permitting for many years, and Texas had demonstrated significant air quality improvement during implementation of the Flexible Permits Program, in 2006 correspondence to TCEQ, EPA raised a "concern" regarding interaction between the Program and Major NSR requirements.[17] TCEQ responded unequivocally:

> [T]he flexible permit is an alternative to the traditional minor New Source Review (NSR) authorization mechanism . . . and is not the mechanism that is used to determine federal NSR applicability ([PSD] and/or nonattainment).
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> We . . . do not agree that our rules can be interpreted to provide an exemption to major new source review applicability. § 116.711(8) and (9). . . . The flexible permit rules do not exempt permit holders from

[16] *Id*. at 14, 20-21, 24-25, 31-32, 36.

[17] *See* Index #63, App. G, at 1 (Letter from EPA to TCEQ (Apr. 11, 2006)).

> complying with federal NSR requirements. All applicable requirements concerning Nonattainment review and PSD review must be complied with.
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> Flexible permits should not be considered as a shield to federal permitting requirements, and the applicability steps and requirements contained in 40 CFR § 52.21(a)(2)(iv)(a)-(d) and (f) are applicable to flexible permits.[18]

Dialogue between the two agencies continued.[19]

On September 29, 2009, EPA issued a notice proposing to disapprove Texas's Flexible Permits Program. 74 Fed. Reg. at 48,480. The State of Texas and the Affected Industry Petitioners, among others, timely filed responsive comments. *See* Index #19, App. P (TCEQ Comments); Index #18, App. O (BCCA Appeal Group Comments); Index #20, App. Q (Texas Oil & Gas Ass'n

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[18] Index #69, App. H, at 1, 6, 11 (Letter from TCEQ to EPA (Aug. 30, 2007)).

[19] In September 2007, EPA wrote to all flexible permit holders, for the first time insisting that "EPA has not approved the Texas flexible permit rules and, consequently, Texas issued flexible permits are not federally-approved and are not federally-enforceable." Index #70, App. I, Frequently Asked Questions at 1 EPA advised that permit holders should "review their previously issued SIP permits" and to the extent those were modified by flexible permits, EPA would "assess its enforcement options on a case-by-case basis." *Id*. at 2. In March 2008, fourteen years after Texas implemented the Program, EPA transmitted 15 pages of "comments on the measures necessary for Federal approval" of the Program. Index #57, App. J (Letter from EPA to TCEQ).

Comments); Index #22, App. R (Texas Chemical Council Comments).[20] On July 15, 2010, EPA issued the Disapproval. 75 Fed. Reg. at 41,312.

The Disapproval occupies more than 20 pages in the *Federal Register*, but essentially boils down to three chief complaints. First, based on its "legal interpretation" of state Program rules, EPA finds "the potential for an unacceptable ambiguity" regarding whether a flexible permit holder can use the Program to circumvent Major NSR requirements. *Id.* at 41,319. While acknowledging that Texas "intended for the [Flexible Permits] Program to be a Minor NSR program," *id.* at 41,313, EPA judges it as a Major NSR program. *Id*. at 41,319. EPA cites no Texas provision exempting flexible permit holders from applicable Major NSR requirements; EPA merely concludes that Texas's laws are "ambiguous" on that point. *Id.* at 41,318.

Second, EPA disapproves the Program's use of general requirements for monitoring, recordkeeping, and reporting ("MRR"). EPA asserts that because the Program is an "intricate" one, Texas is required to specify particular MRR

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[20] Nine months later, TCEQ also formally proposed clarifications to the Program, to resolve any purported ambiguities. *See*, *e.g.*, 35 Tex. Reg. 5729 (July 2, 2010). TCEQ reiterated that the existing "flexible permit program rules, as adopted and implemented, are fully approvable as revisions to the SIP." *Id.* at 5730. It proposed the clarifying amendments solely "to remove any doubt that EPA might have, and to reaffirm the commission's position that the rules for the flexible permit program are at least as stringent as the commission's SIP-approved minor NSR permitting program." *Id.*

methodologies in the Program rules rather that in special conditions of permits issued under the Program. EPA concludes that the Program vests TCEQ with too much discretion. *Id.* at 41,313, 41,317.

Finally, EPA asserts that it "lacks sufficient information" to determine that the Program "will not interfere" with attainment and maintenance of air quality standards. *Id*. at 41,313. At the same time, EPA disregards the 16-year history of permitting under the Program and substantial improvements in air quality during that time. *Id*. at 41,318, 41,322, 41,325.

In response, the Affected Industry Petitioners timely petitioned for review in this Court. The State of Texas also timely petitioned for review.

SUMMARY OF ARGUMENT

This Court should vacate EPA's Disapproval of Texas's Flexible Permits Program for the following related reasons.

First, EPA's action is arbitrary and beyond its authority because it judged the Program by the wrong standard and substituted its interpretation of Texas law for that of the State. TCEQ submitted the Program as a revision to the State's Minor NSR program. No provision of the Program purports to alter in any way Major NSR requirements. To the contrary, the Program regulations and TCEQ's consistent, unequivocal interpretation of those regulations provide that the Program operates in parallel with, and cannot be used to circumvent, separately applicable

Major NSR requirements. Based solely on EPA's "legal interpretation" that the Program is "potentially" "ambiguous," however, EPA disregarded the State's interpretation of its own law, treated the Program as if it were a revision to Texas's Major NSR program, and evaluated the Program under standards undisputedly applicable only to Major NSR programs. Even if Texas's regulations were ambiguous on this point (which they are not), as a matter of law EPA must defer to the interpretation of the agency that promulgated and enforces the regulations. This is particularly true here, where all parties—EPA, the State of Texas, and Affected Industry Petitioners—agree that to use a flexible permit to circumvent Major NSR would violate both state and federal law, that Texas never intended that the Program allow such circumvention, and that EPA has numerous enforcement tools to address such a violation were it to occur.

Second, EPA's action in disapproving the Program under Minor NSR requirements is also arbitrary. It incorporates the same unfounded legal interpretation of the state Program rules that is discussed above. In addition, EPA *disapproved* in the Flexible Permits Program the same provisions regarding monitoring, recordkeeping and reporting that it *approved* in other Texas Minor NSR programs. Moreover, both before and after the Flexible Permits Program began, Congress and EPA encouraged states to employ the kind of flexible permitting embodied in the Program. EPA reversed course without any

explanation at all, let alone a reasonable one. In doing so, EPA overstepped the boundary on federal authority under the Clean Air Act by attempting to impose its own blueprint rather than deferring to a State's choice of implementation methods. This is evident in many of EPA's criticisms of the Program, including those related to monitoring and compliance, enforceability, the delineation of emissions caps, and the definition of the term "account." EPA's statutory and regulatory authority does not extend to disapproving the Program on the grounds articulated in the Disapproval.

Third, it is undisputed that EPA violated the 18-month statutory deadline by which the Act requires EPA to respond to requests for approval of SIP revisions. EPA's extraordinary 15-year delay is reason alone to vacate the Disapproval, but coupled with EPA's assertion that Disapproval is required because EPA "lacks sufficient evidence," EPA's decision is facially arbitrary and capricious. In fact, EPA reviewed many of the more than 140 flexible permits that have been issued under the Program since 1994, but intentionally disregarded them for purposes of the Disapproval. Likewise, EPA improperly discounted the substantial and demonstrable air quality improvements that Texas has achieved during operation of the Program.

STANDARD OF REVIEW

EPA's action must be set aside if it is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law," or if it exceeds the agency's statutory authority. 5 U.S.C. § 706(2). An action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *La. Envtl. Action Network*, 382 F.3d at 582 (citation omitted). The agency must "examine the relevant data and articulate[] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *BCCA Appeal Group*, 355 F.3d at 824.

This case does not present competing interpretations of a federal statute requiring deference to a federal agency, unlike in *Chevron*, 467 U.S. 837. Instead, EPA's Disapproval rests on "legal interpretation" of *state* regulations. As this Court previously emphasized, "EPA is to be accorded no discretion in interpreting state law." *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 588 (5th Cir. 1981).

Instead, EPA and the courts should defer to state interpretations that are consistent with the Clean Air Act. *Id.* [21]

ARGUMENT

I. EPA Acted Arbitrarily And Beyond Its Authority By Applying Major NSR Requirements To Texas's Request To Revise A Minor NSR Program.

"EPA's role in approving air pollution control plans is limited." *BCCA Appeal Group*, 355 F.3d at 826. "EPA must approve a plan if it meets minimum statutory requirements." *Id*. (citing 42 U.S.C. § 7410(k)(3)). EPA's limited role reflects Congress's demarcation of state and federal authority in the Clean Air Act.

States have the "primary responsibility" for developing their implementation plans. 42 U.S.C. § 7407(a). EPA "is relegated by the Act to a secondary role," the objective of which is to determine whether the ultimate effect of a state's choice is compliance with national ambient air standards. *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975). "[S]o long as the ultimate effect of a State's choice of emission limitations [complies] with the national standards for ambient

[21] Courts defer to EPA's statutory interpretations only when Congress has charged EPA with exclusive administration of the federal statutes in question. *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649-50 (1990). EPA receives no deference interpreting Texas's statutes, which by definition are not committed to EPA's exclusive administration. Similarly, courts "generally do not accord deference to an agency's interpretation of regulations promulgated by *another* agency that retains authority to administer the regulations." *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 600 (D.C. Cir. 1997) (emphasis added); *see also Inst. for Tech. Dev. v. Brown*, 63 F.3d 445, 450 (5th Cir. 1995).

air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation," and EPA has "no authority to question the wisdom of a State's choices . . . ." *Id.*[22] In short, EPA may not "run roughshod" over a state's prerogatives. *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984).

EPA's errors in rejecting the Texas Flexible Permits Program are not rooted in competing interpretations of federal law, for which the Court might defer to EPA's interpretive authority. Nor do EPA's errors involve disputes over facts or scientific methods, for which the Court might defer to EPA's expertise. EPA erred in its "legal interpretation" (75 Fed. Reg. at 41,319) of *Texas* law. These errors are evident by comparing the Disapproval to the plain language of the Texas Flexible Permits Program provisions and TCEQ's consistent and unequivocal interpretation of those provisions. The Court owes EPA no deference here. *Fla. Power & Light*, 650 F.2d at 588.

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[22] *See also Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 470 (2001) ("It is to the States that the CAA assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources."); *accord Union Elec. Co. v. EPA*, 427 U.S. 246, 267 (1976) ("[T]he State has virtually absolute power in allocating emission limitations so long as the national standards are met . . . ."); *CleanCOALition v. TXU Power*, 536 F.3d 469, 472 n.3 (5th Cir. 2008); *BCCA Appeal Group*, 355 F.3d at 822.

A. EPA Improperly Substituted Its Unsupported Legal Interpretation Of Texas Law For Texas's Interpretation.

The threshold question presented is whether EPA properly judged the Flexible Permits Program as a Major NSR program rather than a Minor NSR program. EPA acknowledges that Texas "intended for the submitted Program to be a *Minor* NSR Program." 75 Fed. Reg. at 41,313 (emphasis added). EPA acknowledges that "TCEQ . . . has always considered the Flexible Permits Program to be a Minor NSR program." 75 Fed. Reg. at 41,318. EPA nonetheless argues that the regulations create the "potential" for "ambiguity" regarding whether a flexible permit holder must comply with Major NSR requirements and whether the Flexible Permits Program could be used to circumvent those requirements. 75 Fed. Reg. at 41,319. EPA therefore judged the Program under a standard undisputedly applicable only to Major NSR programs. Even if there were such an ambiguity, the rules of deference require it to be resolved in favor of *Texas*'s interpretation of the regulation, not *EPA*'s interpretation.

As this Court has emphasized, EPA "should defer to the state's interpretation of the terms of its air pollution control plan when said interpretation is consistent with the Clean Air Act." *Fla. Power & Light*, 650 F.2d at 588 (citation omitted); *see also Virginia v. EPA*, 108 F.3d 1397, 1408 (D.C. Cir. 1997) (citing *Fla. Power & Light* with approval in the plan implementation development context). In *Florida Power & Light*, the Court considered whether EPA properly

incorporated a two-year variance limitation into Florida's implementation plan on grounds that, without it, the SIP would not be enforceable under Florida law. Florida disagreed with EPA's interpretation of Florida law, arguing that the variance limitation was legally unnecessary. In siding with the State, this Court explained:

> EPA has thus entangled itself in a matter beyond its proper concern . . . and has done so in the face of well-founded state objections. ***This is clearly an abuse of discretion; it is agency action beyond the Congressional mandate.*** It serves, furthermore, to usurp state initiative in the environmental realm, and thus to disrupt the balance of state and federal responsibilities that undergird the efficacy of the Clean Air Act.

Fla. Power & Light, 650 F.2d at 589 (citations omitted; emphasis added); *see also United States v. Gen. Motors Corp*., 702 F. Supp. 133, 138 (N.D. Tex. 1988); *United States v. Interlake, Inc*., 432 F. Supp. 985, 987 (N.D. Ill. 1977).[23]

Deference to TCEQ's interpretation of its Program also accords with fundamental rules of regulatory and statutory interpretation. In interpreting a regulation, federal courts defer to the agency that promulgated the regulation. If the regulation is ambiguous, then the promulgating agency's interpretation is

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[23] This Court's decision in *American Cyanamid Co. v. EPA*, 810 F.2d 493 (5th Cir. 1987), is not at odds with *Florida Power & Light*. *American Cyanamid* did not arise from EPA review of a SIP. It instead involved an administrative enforcement action brought by EPA against a company; the State of Louisiana was not a party. Even there, however, the Court put the enforcement action on hold until EPA disposed of a then-pending plan revision aimed at providing American Cyanamid relief. *Id*. at 502.

"controlling unless plainly erroneous or inconsistent with the regulation." *Belt v. EmCare, Inc.*, 444 F.3d 403, 408 (5th Cir. 2006) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

B. There Is No Ambiguity—The Flexible Permits Program Does Not Affect Parallel Major NSR Requirements, Which Remain Applicable.

Here, there is no ambiguity. The Flexible Permits Program explicitly prohibits circumvention of Major NSR rules. In particular, Section 116.711 of the Program provides that a flexible permit does not supplant applicable requirements for Major NSR, *i.e.*, those requirements applicable to construction or modification of major sources, whether in attainment or nonattainment areas. Section 116.711 requires as follows:

> (8) Nonattainment review. If the proposed facility, group of facilities, or account is located in a nonattainment area, ***each facility shall comply with all applicable requirements concerning nonattainment review*** in this chapter.
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> (9) Prevention of Significant Deterioration (PSD) review. If the proposed facility, group of facilities, or account is located in an attainment area, ***each facility shall comply with all applicable requirements in this chapter concerning PSD review***.

30 TEX. ADMIN. CODE § 116.711(8), (9) (emphasis added). The plain language of these provisions leaves the Major NSR programs wholly intact; flexible permit holders also must comply with Major NSR program requirements. To the extent

that a major source is covered under a flexible permit, it also must independently satisfy Major NSR requirements.

TCEQ could not have spoken more plainly or more consistently on this point. When EPA first questioned the relationship between the Flexible Permits Program and Major NSR in 2006 correspondence, TCEQ responded that "the flexible permits [*sic*] is an alternative to the traditional minor New Source Review (NSR) authorization mechanism . . . and is not the mechanism that is used to determine federal NSR applicability." Index #69, App. H, at 1. TCEQ continued, "**[*w*]*e . . . do not agree that our rules can be interpreted to provide an exemption to major new source review applicability***." *Id*. at 6 (emphasis added). Consistently, the TCEQ Guidance states that "Subchapter G [Flexible Permits Program] does not affect the applicability of Non-attainment or PSD review." Index #34, App. F, at 4 (TCEQ Guidance).

TCEQ's comments on EPA's proposed disapproval reiterated that the Program is a Minor NSR program, that "[t]he federal NSR review is conducted parallel to the Minor NSR Review," and that "TCEQ does not allow applicants to use flexible permits as a way to circumvent [federal NSR] permitting requirements." Index #19, App. L, at 1-2. TCEQ's comments are unequivocal:

> TCEQ did not intend for the Program to, and the application review process does not, circumvent federal requirements. . . . The federal NSR review is conducted parallel to the Minor NSR review. TCEQ does not allow applicants to use flexible permits as a way to

> circumvent FNSR [federal new source review] permitting requirements.
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> If the project is determined to be a major modification, the appropriate FNSR review is triggered.

Id. at 1, 2, 4.

EPA rejects Texas's interpretation of the plain language of its own program, however, based on EPA's unsubstantiated "legal interpretation." 75 Fed. Reg. at 41,319. EPA finds a "*potential* for an unacceptable *ambiguity* about a permit holder's obligations to continue to comply with the Major NSR requirements." *Id.* at 41,318-19 (emphasis added). Similarly, EPA insists that the Program is not "clearly" limited to Minor NSR and thereby "potentially" allows new major construction or modification to occur without a Major NSR permit. *Id*. at 41,313. EPA therefore grounds its Disapproval in part on the conclusion that the Program fails to meet "requirements for a substitute *Major* NSR SIP revision." *Id*. at 41,312 (emphasis added). Much of EPA's Disapproval thus consists of judging the Flexible Permits program against requirements that do not apply to Minor NSR programs.

EPA's action is arbitrary and unreasonable, especially where Texas interprets and has implemented the plain language of the Program for 16 years as "not supersed[ing] the duty to comply with the Texas Major NSR SIP." *Id*. at 41,318. This interpretation is consistent with the Clean Air Act. In contrast, EPA

points to no provision of the Program rules that would affirmatively *allow* circumvention of Major NSR, but labors to find ambiguity and produces an interpretation at odds with state law and inconsistent with the Clean Air Act. Under this Court's precedent, EPA's substitution of its interpretation of Texas law for that of the State is arbitrary and requires that the Disapproval be vacated.

C. EPA's Disapproval Is Arbitrary Because EPA Approved Texas Regulatory Provisions Identical To Those It Now Considers "Potentially Ambiguous."

EPA's Disapproval is not only contrary to law, but also inconsistent with EPA's approval of identical language. The language in Section 116.711 preserving Major NSR requirements replicates identical language in Texas's EPA-approved, general Minor NSR program, which is found in Section 116.111. Here are the two side-by-side:

EPA Approved	EPA Disapproved
Nonattainment review. If the proposed facility is located in a nonattainment area, it shall comply with all applicable requirements in this chapter concerning nonattainment review. 30 TEX. ADMIN. CODE § 116.111(a)(2)(H).	Nonattainment review. If the proposed facility, group of facilities, or account is located in a nonattainment area, each facility shall comply with all applicable requirements concerning nonattainment review in this chapter. 30 TEX. ADMIN. CODE § 116.711(8).
Prevention of Significant Deterioration (PSD) review. If the proposed facility is located in an attainment area, it shall comply with all applicable requirements in this chapter concerning PSD review. 30 TEX. ADMIN. CODE § 116.111(a)(2)(I).	Prevention of Significant Deterioration (PSD) review. If the proposed facility, group of facilities, or account is located in an attainment area, each facility shall comply with all applicable requirements in this chapter concerning PSD review. 30 TEX. ADMIN. CODE § 116.711(9).

Texas had no reason to expect that EPA would approve language in one Minor NSR program but disapprove the same language in another.[24] And, for a decade and a half, EPA gave no indication that it understood the same language differently. EPA's unexplained departure from its own precedent is arbitrary and capricious. *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203, 208 (5th Cir. 2001) ("a departure from past agency precedents requires at least a reasoned explanation of why this is done.") (citation omitted).

EPA's newly minted "legal interpretation" of state law is also groundless. EPA did not support its interpretation with any example from the sixteen-year history of the Flexible Permits Program in which anyone actually used the Program to circumvent Major NSR. Nor did EPA cite any statutory provision or regulation

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[24] The Disapproval points to provisions of two other Texas Minor NSR programs, which EPA contends "explicitly require a Major NSR applicability determination." 75 Fed. Reg. at 41,318. Neither of these programs, however, even suggests that the Flexible Permits Program can be used to avoid Major NSR requirements, and neither calls for more than the flexible permit rules do. The Permits-by-Rule Program, which was not adopted until two years after the Flexible Permits Program, provides that major sources "cannot qualify for a permit by rule under this chapter." 30 TEX. ADMIN. CODE § 106.4(a)(2), (3). The standard permit rule says that major sources are "subject to the requirements of §116.110 of this title (relating to Applicability) rather than this subchapter." *Id.* § 116.610(b). Neither expressly requires by regulation a negative major NSR applicability determination, as EPA says they do. In any event, TCEQ Guidance issued in connection with the Flexible Permits Program confirms that an applicant for a flexible permit "must provide an applicability demonstration with the flexible permit application" to show that nonattainment and PSD review are inapplicable. Index #34, App. F, at 4 (TCEQ Guidance).

suggesting that the Program could legitimately be used to replace Major NSR review. EPA's disapproval rests on a purely speculative "potential" that someone might try to use the Program illegally, in a manner that TCEQ never intended. The Act does not authorize EPA to invalidate a 16-year program based on a leap of imagination. "[S]peculation is an inadequate replacement for the agency's duty to undertake an examination of the relevant data and reasoned analysis[.]" *Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1269 (D.C. Cir. 1994).

II. EPA Acted Arbitrarily And Beyond Its Authority By Disapproving The Flexible Permits Program As A Minor NSR Program Revision.

EPA portrayed the Program as a Major NSR revision because there is no legitimate basis for disapproving it under the proper standard, that applicable to Minor NSR programs. Although EPA also disapproved the Program as failing Minor NSR requirements, that portion of the Disapproval is most notable for the paucity of citation to regulatory or statutory support for EPA's opinions. This deficiency highlights that EPA's criticism of the Program goes far beyond its limited statutory and regulatory authority over Minor NSR.

EPA's asserted bases for disapproval exceed the Minor NSR requirements, which are minimal, and the Clean Air Act's boundary on federal authority. The Disapproval effectively mandates a federal blueprint for SIP revisions. And it does so in a vacuum, without any evidence that EPA's blueprint is preferable to the State's for improving air quality in Texas. The Disapproval thus significantly and

impermissibly reallocates the division of responsibility established in the Clean Air Act.

A. EPA's Regulatory Authority Over Minor NSR Programs Is Limited.

With respect to Minor NSR programs, the Clean Air Act directs that a state program "provide for the . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved . . . ." 42 U.S.C. § 7410(a)(2)(C). Significantly, the Act allows disapproval of a revision only where it "*would* interfere"—not "may interfere" or "could conceivably interfere"—with the state's ability to comply with the national air quality standards. *Id*. § 7410(*l*) (emphasis added).

EPA regulations reflect marked distinctions between Major and Minor NSR programs. *See* 40 C.F.R. pt. 51, subpt. I. While Major NSR regulations span 85 pages in the *Code of Federal Regulations*, *see* 40 CFR §§ 51.165-166; pt. 51 app. S, Minor NSR regulations fill only two pages. *See* 40 C.F.R. §§ 51.160-51.164. EPA has recognized that "approved minor NSR programs can vary quite widely from State to State" because "the Act includes no specifics regarding the structure or functioning of minor NSR programs." 74 Fed. Reg. 51,418, 51,421 (Oct. 6, 2009).

EPA describes its own implementing regulations for minor NSR as being "stated in very general terms." *Id*. These implementing regulations basically require that minor NSR programs (i) enable the state to determine whether the construction or modification of a source would interfere with the approved control strategy or attainment and maintenance of the relevant national air quality standards; (ii) prohibit any such activity that lacks approval from the state; (iii) define the sources subject to the review process; and (iv) establish an application process requiring a description of the proposed project and a demonstration that it would not interfere with an approved control strategy or timely attainment and maintenance of the relevant NAAQS. 40 C.F.R. §§ 51.160-51.164; *see also* 74 Fed. Reg. at 51,421 (recognizing that Minor NSR is governed by these regulations, which "are stated in very general terms").

B. EPA Arbitrarily Rejected The Program Based On Its Unsupported "Legal Interpretation" Of State Law.

EPA's first ground for disapproving the Program as a Minor NSR revision is a repeat of the theory that, despite the provisions discussed in Part I above, the Program does not "clearly" prohibit use of the Program to circumvent Major NSR requirements. 75 Fed. Reg. at 41313. EPA concedes, however, that "such specific language is not ordinarily a minimum NSR SIP program element[.]" *Id*. at 41,319.

Even if it were a requirement, as detailed above, the Program *does* expressly state that flexible permit holders remain subject to the independent Major NSR

requirements. 30 TEX. ADMIN. CODE § 116.711(8)-(9). EPA's contrary interpretation is implausible, particularly when regulated sources *agree* with TCEQ that the Flexible Permits Program does not supplant Major NSR requirements. *See* Index #18, App. O, at 7 (BCCA Appeal Group Comments). EPA has no authority to substitute its legal interpretation for that of the State on this point, and this Court must defer to Texas's interpretation of its own law. *Fla. Power & Light*, 650 F.2d at 588.

In addition, EPA's hypothetical concern ignores sixteen years of flexible permit experience, all parties' agreement that Major NSR requirements are not changed by flexible permits, and EPA's independent tools to enforce Major NSR requirements. The Court cannot validate an agency decision based on a purported risk of speculative harm, when the record demonstrates no evidence that the risk actually exists. *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1005 (D.C. Cir. 1997) (agency's use of a model is arbitrary if that model "bears no rational relationship to the reality it purports to represent" (quotation marks, citations, emphasis omitted)). Even when an agency lacks a track record for comparison to its prediction, it must monitor whether the future actually brings the circumstances that the agency predicted. "[T]he courts remain open if the [agency] is slothful or unwilling to undertake appropriate reconsideration and fine tuning in the light of experience." *W. Coal Traffic League v. United States*, 719 F.2d 772, 780 (5th Cir. 1983); *see*

also Columbia Falls Alum. Co. v. EPA, 139 F.3d 914, 923 (D.C. Cir. 1998) (holding EPA cannot continue to rely on a model after all available evidence demonstrates that the model does not achieve its predicted results); *cf. In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968) ("we may expect that, as the Commission's experience . . . lengthens, it will treat these important questions more precisely and efficaciously").

Here, EPA speculated about how the Program *might be* implemented, as if there were no history of how it actually *has been* implemented. And, as detailed above in part I, the Flexible Permits Program expressly precludes the risk about which EPA is speculating. Sixteen years and more than 140 flexible permits after Texas created the Program, however, EPA studiously avoids reconciling its belated hypothesis to the facts. EPA expressly refused to consider any of the actual flexible permits that have been issued during the past 16 years. 75 Fed. Reg. at 41,322, 41,325.

Not only is there no record to support EPA's view that it is "potentially ambiguous" whether the Program could be used to circumvent Major NSR, but no one contests that using the Program that way would be illegal. Moreover, EPA has a variety of tools to redress such a violation were it to occur. Even where a state issues a permit pursuant to an EPA-approved SIP, for example, EPA has authority to prevent violation of Major NSR requirements. *See Alaska Dep't of Envtl.*

Conservation v. EPA, 540 U.S. 461, 484 (2004) (citing 42 U.S.C. §§ 7413(a)(5), 7577) (holding that EPA could block new construction that state agency permitted pursuant to approved SIP where EPA found state agency's BACT determination violated Major NSR).

Disapproving a 16-year old program based on speculation, unsupported by any evidence, that Texas's Program might be used in an unintended manner to violate Major NSR requirements, is both arbitrary and outside EPA's discretion. This is especially true when EPA has independent authority to remedy any such violation were it to occur.

C. By Insisting That Texas's Regulations Include "Specific Monitoring Approaches" Rather Than General Standards That Are Enforced Through Specific Permit Conditions, EPA Acted Arbitrarily And Beyond Its Authority.

One of EPA's central criticisms of the Flexible Permits Program is that it is "generic," rather than "specific" concerning "the types of monitoring that is required." 75 Fed. Reg. at 41,313. EPA insists that the Program is "intricate" and therefore must include "specific upfront methodologies . . . to be able to determine compliance." *Id*. at 41,313, 41,324. The agency contends that the Program lacks "adequate recordkeeping, reporting, testing, and monitoring requirements" to assure compliance and enforceability. *Id.* at 41,322; *see generally id.* at 41,322-27.

As detailed below, however, the monitoring and recordkeeping provisions in the Flexible Permits Program are identical to Minor NSR provisions that EPA

approved in Texas's SIP. EPA has no statutory or regulatory authority to impose its additional structural program preferences on Texas, especially absent any proof that EPA's method would result in improved air quality in the state. Instead, the Clean Air Act requires EPA to defer to the State's choice of methods to implement its Program.

1. The "Director Discretion" Provisions In The Flexible Permits Program Are Substantively Identical To EPA-Approved Language.

EPA's Disapproval isolates these two provisions of the Flexible Permits Program regulations relating to monitoring and recordkeeping:

> Measurement of emissions. The proposed facility, group of facilities, or account will have provisions for measuring the emission of air contaminants as determined by the executive director [TCEQ]. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Natural Resource Conservation Commission Sampling Procedures Manual." 30 TEX. ADMIN. CODE § 116.711(2).
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> Recordkeeping. A copy of the flexible permit along with information and data sufficient to demonstrate continuous compliance with the emission caps and individual emission limitations contained in the flexible permit shall be maintained in a file at the plant site and made available at the request of personnel from the commission or any air pollution control program having jurisdiction. . . . Additional recordkeeping requirements may be specified in special conditions attached to the flexible permit. 30 TEX. ADMIN. CODE § 116.715(c)(6).

EPA describes these as "director discretion provisions" that "are not acceptable for inclusion in SIPs." 75 Fed. Reg. at 41,325. This is another example

of the agency arbitrarily and inconsistently approving regulations in one instance but disapproving nearly identical language in another.

In other Minor NSR provisions of Texas's approved SIP, EPA approved substantively identical language:

> Measurement of emissions. The proposed facility will have provisions for measuring the emission of significant air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms. . . . 30 TEX. ADMIN. CODE § 116.111(a)(2)(B).
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> ****
>
> Recordkeeping. The permit holder shall: (i) maintain a copy of the permit along with records containing the information and data sufficient to demonstrate compliance with the permit, including production records and operating hours; . . . [and] (iv) comply with any additional recordkeeping requirements specified in special conditions attached to the permit . . . . 30 TEX. ADMIN. CODE § 116.115(b)(2)(E).[25]

Moreover, EPA comments on Texas's proposed rulemaking for the Flexible Permits Program did not raise the criticisms on which the Disapproval is now based. In particular, EPA did not complain that the Flexible Permits Program afforded excessive "director discretion" when EPA commented on Texas's proposed rulemaking in October 1994;[26] nor did EPA raise this concern four years later, when EPA commented on various changes to Texas air quality regulations,

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[25] EPA approved those provisions at 72 Fed. Reg. 49,198 (Aug. 28, 2007), and 68 Fed. Reg. 64,543 (Nov. 14, 2003), respectively.

[26] *See* Index #72, App. C (EPA Comments on Proposed Regulation (Oct. 31, 1994)).

including the Flexible Permits Program;[27] or when Texas proposed other Program amendments in 2000, 2001, 2002, and 2003.[28]

2. The Clean Air Act Requires Deference To State Implementation Methods.

There is no statutory or regulatory authority for EPA's insistence that Texas specify in its *regulations* particular methods of monitoring, reporting and recordkeeping. Neither the Clean Air Act nor federal regulations prohibit states from instead requiring in regulations that permit holders generally maintain records to demonstrate compliance and specifying in permit conditions particular monitoring and recordkeeping requirements tailored to the particular equipment and pollutants covered by the permit.[29] Further, "EPA may not . . . condition approval of a state's implementation plan on the state's adoption of a particular control measure." *Virginia*, 108 F.3d at 1415.

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[27] *See* 23 Tex. Reg. 6977 (July 3, 1998) (Texas's proposed changes); Index #67, App. E (EPA Comments on Proposed Revisions to Regulations).

[28] *See* Index #63, App. G (Apr. 11, 2006); Index #57, App. J (Mar. 12, 2008); Index #61, App. N (Oct. 27, 2008).

[29] In rejecting the Program's MRR provisions, EPA relies on its 1992 General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990. *See* 75 Fed. Reg. at 41,325 (citing 57 Fed. Reg. 13,498, 13,567 (Apr. 16, 1992)). This pronouncement does not state that the "clear, unambiguous, and measurable requirements" required of a SIP cannot be satisfied by a SIP's requirement that the *permits* define such measures with specificity. To the contrary, the General Preamble expressly recognizes that just as an effective Title V permit "affords significant operational flexibility," the ideal SIP is "one where *operating permits* ultimately assume *primary responsibility for implementation and enforcement.*" 57 Fed. Reg. 13,498, 13,568 (emphasis added).

Texas has determined, pursuant to its Court-recognized "broad authority to determine the methods and particular control strategies that [it] will use to achieve the statutory requirements," *BCCA Appeal Group*, 355 F.3d at 822, that the most effective means for promoting MRR and enforceability throughout the program is to tailor permit provisions to meet specific characteristics of each permitted facility. That is a policy judgment to which EPA should defer. *Id.*; *see also Union Elec. Co.*, 427 U.S. at 266 ("So long as the national standards are met, the state may select whatever mix of control devices it desires").

TCEQ repeatedly has articulated the basis for this policy choice. Because of the size and breadth of the Texas economy, air permits are issued to a wide variety of industrial operations and regulate a wide variety of equipment. To further specify particular methods of monitoring and recordkeeping in regulations, as opposed to specifying them in particular permit conditions, would constrain TCEQ's ability to tailor permit conditions to particular industries and equipment. TCEQ explained this in 2007 correspondence to EPA:

> Considering the wide variety of industrial source types which can request, and have received, a flexible permit, specific and detailed monitoring, testing, and record keeping requirements in rule language could limit the TCEQ's ability to adequately implement these requirements. This is particularly true for sources where different or additional requirements may be necessary to ensure compliance with permitting limits and requirements.[30]

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[30] Index #69, App. H at 9-10.

The same explanation appears in TCEQ's technical guidance, which advises that flexible permits "will be issued with general and special conditions." TCEQ Guidance at 6, Index #34, App. F. "The applicant must propose how emissions will be measured. This can include stack sampling, ambient monitoring, continuous emissions monitors, leak detection and repair programs for fugitive emissions, predictive or parametric emission monitors, and recordkeeping." *Id*. at 2. The permit conditions "are developed on a case-by-case basis using representations from the permit application to ensure enforceability and outline specific requirements and/or implementation schedules." *Id*. at 6. As TCEQ's comments in response to EPA's proposed disapproval reiterated, "[c]onsidering the wide variety of industrial source types, specific and detailed monitoring, testing, and record keeping requirements are carefully drafted to ensure TCEQ's ability to adequately implement these requirements." Index #19, App. P, at 3.

The Program's MRR regulations work in harmony with other Program provisions. For example, permit applications must painstakingly detail the contaminants for which a cap is desired, the sources of emissions for those contaminants, emissions rate calculations for each source, and proposed control technology. 30 TEX. ADMIN. CODE § 116.711. The Program specifically requires the use of BACT and provides that "the existing level of control may not be lessened for any facility." *Id*. § 116.711(3). The applicant must "demonstrate

compliance with all emission caps at expected maximum production capacity." *Id*. § 116.711(14). The permit itself specifies emissions limits for the covered sources and contaminants. *Id*. § 116.715(b), (c)(7). And the Program rules require that the sources proposed to be covered by the flexible permit "will achieve the performance specified" in the application. *Id*. § 116.711(7).

No statutory or regulatory authority supports EPA's assertion that Texas's Flexible Permits Program must meet heightened standards of specificity merely because EPA views the Program as "intricate." 75 Fed. Reg. at 41,324. The state has primary authority to "select whatever mix of control devices it desires," so long as its preferred "mix" promotes federal air quality standards. *Union Elec. Co.*, 427 U.S. at 266. Texas's Flexible Permits Program responds to the particular circumstances of the State's industrial diversity by affording TCEQ discretion, within comprehensive general requirements, to tailor permitting to the wide variety of emissions sources that it regulates. The Act delegates that decision to the State, not EPA. EPA identifies no authority for its inconsistent treatment of Texas's various Minor NSR programs. There is no "intricate program" test in the Clean Air Act or federal regulations for Minor NSR. Creating such a test here is arbitrary.

D. EPA's Unsubstantiated "Concerns" Regarding Enforceability Of The Program Are Not A Legitimate Basis For Disapproval.

EPA bases its Disapproval on purported "concerns" regarding enforceability of the Program. Despite 15 years of flexible permits, however, EPA does not substantiate its "concerns" with any specific circumstance in which a flexible permit proved to be unenforceable. In fact, the Program requirements address enforceability.

For example, EPA says it is "concerned that it is not clear which facilities are covered by a Flexible Permit." 75 Fed. Reg. at 41,322. The Program regulations, however, specify that an application must "identify each facility to be included in the flexible permit." 30 TEX. ADMIN. CODE § 116.711(13)(B). The permit itself covers only sources listed in a table that is part of the permit. *Id.* § 116.715(c)(7).

Relatedly, EPA questions the Program's means for determining "how the source or the State will calculate an emission cap; determine the coverage of a Flexible Permit; [and] establish individual emissions limitations for each site." 75 Fed. Reg. at 41,322. Each facility's permit application, however, must establish the emissions cap by summing the emissions "calculated for each facility based on application of current Best Available Control Technology ["BACT"] at expected maximum capacity[.]" 30 TEX. ADMIN. CODE § 116.716(a); *see also id.* § 116.711(3) ("The proposed facility, group of facilities, or account will utilize

BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions").

Having identified the applicable emissions cap, the applicant must "specify the control technology proposed for each unit to meet the emission cap" and "demonstrate compliance with all emission caps at expected maximum production capacity." *Id.* § 116.711(14); *see also id.* § 116.711(13)(D)-(E) (requiring applicant to identify, for each emission cap and for each individual emission limitation, "all associated EPNs and provide emission rate calculations based on the expected maximum capacity and the proposed control technology"). The cap may not be less stringent than previously applicable limits on the covered facilities, but it may be *more* stringent. *Id.* § 116.711.

EPA expresses "concern" over "how one can determine if the emitted emissions are meeting the Flexible Permit's emission limitations." 75 Fed. Reg. at 41,324. But the Program requires that, to obtain a permit, an applicant must demonstrate the control methods that will achieve compliance with the permit's emissions cap. Once a permit is issued, the holder must maintain information and data "sufficient to demonstrate continuous compliance" with the permit caps and limits. 30 TEX. ADMIN. CODE § 116.715. The permit specifies conditions of monitoring and recordkeeping tailored to the operator, the pollutant, and the source. *Id.* § 116.715(c)(5)-(6), (9)-(10). Despite more than a decade of reviewing

and commenting on flexible permits in the Title V and Major NSR context, EPA points to no example of a permit that was unenforceable for lack of sufficient monitoring and recordkeeping provisions.

EPA's speculation about enforceability of the Flexible Permits Program also contradicts EPA's actual findings in its national Flexible Permit Implementation Review. After years investigating implementation of flexible permits in numerous types of plants in six different states, EPA found that flexible permits consistently were enforceable and that "conducting inspections of sources with flexible permits is comparable to conducting inspections of sources with conventional permits."[31] State permitting authorities indicated that in some cases, "the flexible permits resulted in less difficult or time-consuming inspections . . . [due to] reduced need to verify compliance with numerous requirements for specific equipment or activities that are commonly included in conventional permits. . . . Inspectors were able to direct attention to ensuring compliance with plant-wide emissions limits."[32] All six permitting authorities that EPA studied said that flexible permitting "enhanced information sharing between the companies and permitting authorities"

[31] Review, *supra* n.14, at 20-21.
[32] *Id*.

and "enhanced their overall understanding of company activities and emissions as compared to conventional permitting approaches."[33]

E. The Definition Of "Account" Does Not Enable A Stationary Source To Avoid Major NSR.

EPA criticizes the Program's use of the term "account," which EPA describes as a "broad term[]" that "can encompass more than one stationary source." 75 Fed. Reg. at 41,327-28. EPA hypothesizes that a flexible permit holder could avoid Major NSR for one stationary source by "netting" an emissions increase against another major stationary source's decreases, on a single "account" site. 74 Fed. Reg. at 48,489.

In reaching that conclusion, EPA rejects Texas's contrary interpretation of the Program, 75 Fed. Reg. at 41,327-28, notwithstanding the fact that Texas is entitled to deference in its interpretation of the SIP. *Fla. Power & Light*, 650 F.2d at 588. EPA's objection relies on the false assumption that a flexible permit can be used to avoid Major NSR. As detailed above, the Program expressly prohibits this.

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[33] *Id*. at 32. Plant-wide emissions reporting under flexible permits provided "more comprehensive and easy-to-understand information on actual environmental performance" than conventional permits. *Id*. at 35-36. This was true regardless whether more frequent emissions reporting was required. *Id*. at 36. EPA reviewed permits under which permit holders were, as in the Texas Flexible Permits Program, required to maintain current emissions calculations onsite to demonstrate compliance with the established plant-wide emissions caps and to make these emissions calculations available upon request. *Id*. This was preferable to conventional permitting approaches, which typically required only preparation of an annual emissions inventory. *Id*. at 36.

30 TEX. ADMIN. CODE § 116.711(8), (9). Because major sources or modifications are subject to Major NSR, the definition of "account" does not immunize them from such review.

EPA is also acting arbitrarily in raising this issue now, having approved the "account" definition in 2005. 70 Fed. Reg. 16,129 (March 30, 2005). A traditional permit under the prior-approved rules can also be issued to a single "account." EPA, however, did not raise its "account" concern in prior approval actions on Texas's Major NSR rules. *See, e.g.*, 75 Fed. Reg. 55,978 (Sept. 15, 2010) (approving revision to BACT definition for Texas's PSD program); 74 Fed. Reg. 11,851 (Mar. 20, 2009) (approving various definitions for Texas's nonattainment NSR program).

EPA's belated complaint is also unsupported by the Program provisions. A flexible permit can cover a "facility, group of facilities, or *account*." 30 TEX. ADMIN. CODE § 116.711(1) (emphasis added). An "account," in an EPA-approved provision, is defined as: "For those sources required to be permitted under Chapter 122 of this title (relating to [the Title V] Program), all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions." *Id*. § 101.1(1).

EPA's objection is based on the theoretical concern that this "account" definition (which tracks EPA's Title V "site" definition) does not expressly foreclose a single permit from covering multiple major stationary sources. EPA goes on to speculate that, if the only constraint were the "account" definition, a permittee could conceivably net emissions across multiple sites as a way to avoid Major NSR.

But the "account" definition is not used in the Texas Major NSR rules governing netting. The Texas Major NSR rules expressly use the federal term, "major stationary source," 30 TEX. ADMIN. CODE 116.12(17), to govern Major NSR determinations in both attainment areas and nonattainment areas. *See id.* § 116.150(c)(1) (nonattainment); *id*. § 116.160(b) (attainment); *see also id.* § 115.711(8)-(9) (requiring "each facility" to comply with Major NSR). Accordingly, a permittee who tried to avoid Major NSR by relying on the "account" definition to net across multiple "major stationary sources" would violate the SIP-approved Texas Major NSR rules. In its comments, Texas stated this interpretation succinctly. Index #19, App. P, at 7-8 (TCEQ Comments).

EPA rejects Texas's legal interpretation of its own EPA-approved rules on the basis that the term "account" is "broad" enough "to encompass more than one major stationary source." 75 Fed. Reg. at 41,327. If EPA were correct, and the Program's terms were ambiguous, the necessary result would be to defer to

Texas's reasonable interpretation. *Fla. Power & Light*, 650 F.2d at 588. By EPA's own admission, Texas's interpretation of its rules avoids the scenario EPA conjures. *See* Index #19, App. P, at 7-8 (TCEQ Comments); 75 Fed. Reg. at 41,327 ("We are pleased to learn that the State does not intend to allow a Flexible Permit to cover multiple stationary sources and that companies complying with a Flexible Permit understand the continued obligation to comply with the SIP-approved Major NSR program").

III. EPA's 16-Year Delay Highlights That Its Disapproval Is Arbitrary And Exceeds Its Authority.

A. EPA Claims That It "Lacks Sufficient Information," But Disregarded Available Data.

EPA is required to approve or disapprove a SIP revision within 18 months of its submission. 42 U.S.C. § 7410(k). Here, EPA missed its statutory deadline by some 15 years. Despite more than a decade of permitting under the Program, however, and despite the demonstrated success of several EPA-approved Texas attainment plans, the Disapproval asserts that EPA "lacks sufficient information to determine" that the Program "will not interfere with any applicable requirement concerning attainment and reasonable further progress (RFP), or any other requirement of the Act." 75 Fed. Reg. at 41,313.

EPA cites no statutory or regulatory authority for disapproving a 16-year-old program based on a purported lack of information, particularly when EPA had

access to a wealth of data showing that the program has been successful. EPA explicitly refused to consider any actual data regarding flexible permits that TCEQ has issued since 1994, but the agency has reviewed many such permits. *See* 75 Fed. Reg. at 41,322, 41,325.[34] For instance, EPA says that the Program is "not legally sufficient even if the State is issuing individual Flexible Permits with special conditions requiring MRR." 75 Fed. Reg. at 41,325.

Had EPA considered it, there also is ample evidence that since the Flexible Permits Program was implemented, the State has shown strong, sustained improvement in air quality measurements.[35] The applicable data demonstrate that stationary sources, the subject of the Flexible Permits Program, contributed more substantial emissions reductions than any other category during the period of most dramatic air quality improvements.[36] Further, since 1994, Texas repeatedly has submitted attainment demonstrations, along with comprehensive emissions control

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[34] *See also* Index #57, App. J, at Enclosure p.1 (Letter from EPA to TCEQ (Mar. 12, 2008) ("EPA has reviewed the Texas Flexible Permit Program State Implementation Plan (SIP) revision and many Flexible Permits issued under those rules.").

[35] *See* Index #18, App. O, at 1-2; Index #19, App. P, at 4-5. In the Houston-Galveston area, for example, during 1999-2005, emissions of oxides decreased 50 percent. *See* Index #18, App. O, at 1.

[36] *Id.* at 2.

strategies, that EPA has approved. These approved plans incorporate improvements achieved through flexible permitting.[37]

Given EPA's extraordinary delay, and EPA's intentional disregard of a wealth of available data, the Disapproval is arbitrary and capricious, and beyond EPA's authority under the Clean Air Act.

B. EPA Judged The Flexible Permits Program Against Other Programs That Did Not Exist When The Flexible Permits Program Was Promulgated.

Other manifestations of EPA's delay also reflect the arbitrariness of its decision. Ironically, having waited so long to rule, EPA complains that the Flexible Permits Program does not incorporate language from other federal programs that *did not even exist* when the Program was implemented and submitted for approval. For example, EPA compares the Program to the 2002 federal PAL program.[38] *See* 75 Fed. Reg. at 41,317; 67 Fed. Reg. 80,186 (Dec. 31, 2002) (promulgation of PAL). Likewise, EPA compares the Flexible Permits Program to the Flexible Air Permit Rule, which EPA did not promulgate until 2009, 15 years after the Flexible Permits Program began. 75 Fed. Reg. at 41,317-18. Even if these programs were applicable here (which they are not), it would

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[37] 75 Fed. Reg. 64,674 (Oct. 20, 2010); 74 Fed. Reg. 2,387 (Jan. 15, 2009); 74 Fed. Reg. 1,903 (Jan. 14, 2009); 66 Fed. Reg. 57,160 (Nov. 14, 2001).

[38] In any event, the Flexible Permits program is not governed by the rules for PALs, which is a *Major* NSR program. 67 Fed. Reg. 80,186 (Dec. 31, 2002).

have been impossible for Texas to look to them for guidance because they did not exist when TCEQ wrote and implemented Flexible Permits Program.

In effect, having promoted flexible permitting for decades, and having approved in other Texas programs the same language now criticized in the Flexible Permits Program, EPA is taking advantage of its extraordinary delay to retroactively disapprove a state Minor NSR program that has been operating successfully for many years. EPA offers no explanation for its abrupt change of course—let alone a reasonable one. Nor does EPA attempt to justify reaching back into history to change the rules retroactively. "[W]here an agency makes a change with retroactive effect, the reviewing court must also determine whether application of the new policy . . . is so unfair as to be arbitrary and capricious." *Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998). While retroactivity is not unlawful *per se*, "such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corp*., 332 U.S. 194, 203 (1947).

In this case, the equitable balance weighs heavily against retroactive change. First, EPA's actions negate statutory rights. The Clean Air Act required EPA to render a decision in *eighteen months*, not *sixteen years*. And the Flexible Permit Program rights and responsibilities are enacted into Texas law. Second, throughout its delay, EPA consistently endorsed and encouraged flexible

permitting, both by developing national programs and in specific interactions with TCEQ and Texas flexible permit holders. Third, the language of Texas's Flexible Permits Program mirrors provisions that EPA approved in other Texas Minor NSR programs. And fourth, flexible permit holders, including those among the Affected Industry Petitioners, have adjusted industrial operations according to Program requirements and shouldered the corresponding administrative burdens. The reliance interest is thus reasonable and significant.

In contrast, EPA offered no statutory or regulatory interest to support the retroactive nature of the Disapproval. As explained throughout this Brief, the Disapproval is contrary to the Clean Air Act's allocation of responsibility between federal and state government and improperly substitutes EPA's interpretation of Texas regulations for that of the TCEQ. It is indisputable that the Flexible Permits Program is more stringent than the approved SIP, in that it brings grandfathered facilities under permit and implements BACT to set emissions limits for facilities covered by a flexible permit. The only evidence in the administrative record is that the Flexible Permits Program has contributed to sustained and demonstrable *improvement* in Texas's air quality.[39] EPA points to nothing in the record indicating that EPA's retroactive policymaking is necessary to protect or would result in improved air quality.

[39] *See*, *e.g.*, Index #18, App. O, at 1-2 (BCCA Appeal Group Comments); Index #19, App. P, at 4-5 (TCEQ Comments at 4-5).

A decision unsupported by substantial evidence in the agency record is arbitrary and capricious, and must be overturned. *See BCCA Appeal Group*, 355 F.3d at 824, 834. An agency action is also arbitrary and capricious when the agency "entirely failed to consider an important aspect of the problem . . . ." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In addition to all the problems in EPA's reasoning discussed above, the Disapproval failed to consider more than a decade of reliance on EPA's express and tacit encouragement of the Flexible Permits Program. To invalidate the Program after all this time, without citing a shred of empirical data, is beyond EPA's authority and a violation of due process.

CONCLUSION

For the above-stated reasons, the Affected Industry Petitioners respectfully request that this Court vacate EPA's Disapproval of the Flexible Permits Program and remand for further agency proceedings in accordance with the Court's opinion. Given EPA's disregard for the SIP-review deadlines mandated in 42 U.S.C. § 7410(k), the remand should be accompanied by instructions that EPA conduct any further proceedings promptly and without delay.

Respectfully submitted,

/s/ Samara L. Kline

Samara L. Kline
BAKER BOTTS L.L.P.
2001 Ross Avenue
Dallas, Texas 75201-2980
(214) 953-6825

Matthew G. Paulson
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Suite 1500
Austin, Texas 78701-4078
(512) 322-2500

Adam J. White
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, DC 20004-2400
(202) 639-7700

Kathleen Weir
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana
Houston, Texas 77002-4995
(713) 229-1243

Counsel for Affected Industry Petitioners

Robin S. Conrad
National Chamber Litigation
Center, Inc.
1615 H Street NW
Washington, DC 20062
(202) 463-5337

Of Counsel for Chamber of Commerce of the United States of America

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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 3d day of December, 2010. All parties in this case are represented by counsel consenting to electronic service.

/s/ Adam J. White
Adam J. White