

No. 10-60614

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

STATE OF TEXAS, ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

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

BRIEF FOR PETITIONER STATE OF TEXAS

GREG ABBOTT
Attorney General of Texas

JON NIERMANN
Assistant Attorney General

DANIEL T. HODGE
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 001)
Austin, Texas 78711-2548
Telephone (512) 475-4140

BILL COBB
Deputy Attorney General
for Civil Litigation

COUNSEL FOR THE STATE OF TEXAS

December 6, 2010

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 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. Matthew Paulson, and Samara L. Kline, Kathleen Weir, Adam J. White, Baker Botts, L.L.P.
12. State of Texas
13. Environmental Defense Fund
14. Environmental Integrity Project

/s/ Jon Niermann
JON NIERMANN
Attorney of record for State of Texas

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to FED. R. APP. P. 34(a), Petitioner State of Texas respectfully requests oral argument. Given the complexity of the issues in this case, the State of Texas believes that oral argument will be helpful for the Court.

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GLOSSARY

BACT	Best Available Control Technology
CAA	Clean Air Act or the Act
EPA	U.S. Environmental Protection Agency
EPN	Emission Point Number
LAER	Lowest achievable emission rate
MRR	Monitoring, recordkeeping and reporting
NAAQS	National ambient air quality standards
NSR	New source review
PAL	Plantwide Applicability Limit
PSD	Prevention of significant deterioration of air quality
SIP	State Implementation Plan
TCAA	Texas Clean Air Act
TCEQ	Texas Commission on Environmental Quality
TNRCC	Texas Natural Resource Conservation Commission

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STATEMENT OF JURISDICTION

The United States Environmental Protection Agency (EPA) has jurisdiction under the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q to approve, disapprove or conditionally approve revisions to the Texas state implementation plan (SIP), including revisions submitted by the Texas Commission on Environmental Quality (TCEQ) relating to Texas's Flexible Permits Program (the Program). *See* CAA § 110(k), 42 U.S.C. § 7410(k). The

Act gives this Court jurisdiction to review EPA's final actions with respect to such revisions. *See* CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1).

EPA's final disapproval of Texas's Flexible Permits Program was published on July 15, 2010. 75 Fed. Reg. 41,312 (July 15, 2010). EPA's final actions disapproving the Flexible Permits Program adversely affect the State of Texas (Texas), which, through its Texas Commission on Environmental Quality, is responsible for administering Texas's air quality programs. The State of Texas timely filed its Petition for Review of EPA's disapproval on July 26, 2010. *See* CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (allowing sixty days from the date of publication in the *Federal Register*).

STATEMENT OF THE ISSUES

- I. Is EPA's finding that the Flexible Permits Program is a substitute major new source review program arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law?
- II. Is EPA's finding that the Flexible Permits Program does not meet the requirements of the Clean Air Act for minor new source review state implementation plan revisions arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law?

STATEMENT OF THE CASE

This is a direct appeal by the State of Texas from an EPA final decision disapproving a state implementation plan revision submitted by Texas pursuant to requirements of the Clean Air Act. The revision relates to the Flexible Permits Program, which Texas first promulgated and first

submitted for EPA approval in 1994. EPA did not act on the submittal until compelled by a citizen suit to do so. EPA found that the Program does not satisfy the requirements for a state implementation plan revision under the Act. EPA issued its final rule disapproving the Program in 2010. Texas challenges the disapproval and the findings on which it is based.

STATEMENT OF FACTS

The statutory framework relevant to the Flexible Permits Program and the Program’s background and key provisions are set forth below.¹

I. The Clean Air Act Framework

The Clean Air Act (the Act or CAA) creates a framework for cooperative state and federal programs to prevent and control air pollution. CAA § 101(a)(3), 42 U.S.C. § 7401(a)(3). The Act requires EPA to identify pollutants that endanger the public and to establish maximum permissible concentrations of these pollutants in ambient air. CAA §§ 108-109, 42 U.S.C. §§ 7408-7409. These concentrations are known as the national ambient air quality standards (NAAQS). *Id.* States have “primary responsibility” for determining how to achieve and maintain the NAAQS. CAA §§ 101(a)(4) & 107(a), 42 U.S.C. §§ 7401(a)(4) & 7407(a).

¹ This Brief cites to documents from EPA’s Certified Index to Administrative Record as “Index #___, App.____.” An appendix including these documents will be filed in accordance with Fifth Circuit Rule 30.2(a).

The Act requires each state to submit a state implementation plan (SIP) that specifies the manner in which the state will attain and maintain the national ambient air quality standards. CAA § 107(a), 42 U.S.C. § 7407(a). In practice, although there is a single state implementation plan, the “SIP,” states regularly submit plan revisions addressing various aspects of air quality control. The Act requires that EPA review and either approve or disapprove of states’ implementation plans or plan revisions, in whole or part, within 18 months after they are submitted. CAA §§ 110(k)(1)(B), 110(k)(2) & 110(k)(3), 42 U.S.C. §§ 7410(k)(1)(B), 7410(k)(2) & 7410(k)(3). The approved plan and all of the approved plan revisions comprise the approved state implementation plan.

Among other elements, the Act requires state implementation plans to include provisions regulating the construction and modification of stationary sources of air pollutants. *See, e.g.*, CAA § 110(a)(2)(C), 42 U.S.C. § 7410(a)(2)(C). These provisions are known as new source review (NSR). The Act specifies different requirements depending on the nature of the “new source” and its location. The Act distinguishes between “major” and “minor” new sources and between those areas that have attained the national ambient air quality standards and those that have not. *See, e.g.*, CAA §§ 165(a), 172(c)(5), 42 U.S.C. §§ 7475(a), 7502(c)(5).

A. Major New Source Review

Under the Act, new source review requires pre-construction permitting for all new construction of major sources or major modifications of existing sources. In areas that have attained the national ambient air quality standards, the major new source review program is known as the prevention of significant deterioration (PSD) program. *See, e.g.*, CAA § 160, 42 U.S.C. § 7470. In areas that have not attained the national ambient air quality standards, the major program is known as non-attainment new source review. *See, e.g.*, CAA § 171, 42 U.S.C. § 7501.

As the names suggest, PSD permitting is designed to prevent significant deterioration of air quality in areas that have already achieved the national ambient air quality standards, while non-attainment new source review permitting is designed to assure that the source is compatible with timely attainment of the national ambient air quality standards. Accordingly, non-attainment new source review permitting is more stringent than PSD permitting. For example, PSD permitting requires the application of emission limitations based on “best available control technology” (BACT) for each relevant pollutant, while non-attainment new source review permitting requires the application of limitations based on the more-stringent “lowest achievable emission rate” (LAER) as well as off-plant

emission offsets. *Compare* CAA § 165, 42 U.S.C. § 7475 with CAA § 173, 42 U.S.C. § 7503.

A source is deemed major for purposes of non-attainment new source review if it has a potential to emit a regulated pollutant in excess of 100 tons per year. CAA § 302(j), 42 U.S.C. § 7602(j). For purposes of PSD new source review, the threshold is the same (*i.e.*, 100 tons per year) for sources belonging to certain specified industrial categories and 250 tons per year for all other sources. CAA § 169(1), 42 U.S.C. § 7479(1). A source is deemed major in all areas (PSD and non-attainment) if it has a potential to emit in excess of 10 tons per year of any single Hazardous Air Pollutant or 25 tons per year of all Hazardous Air Pollutants combined. CAA § 112(a)(1), 42 U.S.C. § 7412(a)(1). Modifications are considered major if they exceed certain significance thresholds. *See* 40 C.F.R. § 51.166(b)(23), 30 TEX. ADMIN. CODE § 116.12(18). Sources and modifications that fall below these thresholds are considered minor. Texas has adopted major new source review rules at 30 Tex. Admin. Code Chapter 116, Subchapter B, Division 5, (Nonattainment Review Permits) and Division 6 (Prevention of Significant Deterioration Review).

B. Minor New Source Review

Minor new source review pertains to the construction of new minor sources and to minor modifications of minor sources. The Act's requirements for minor new source review programs are more general than those for major new source review. *See, e.g.*, 74 Fed. Reg. 51,418, 51,421 (Oct. 6, 2009) (EPA observing that "the Act includes no specifics regarding the structure or functioning of minor NSR programs"). For example, the Act does not specify that minor new source review programs require preconstruction permits. Instead, the Act directs only that a minor new source review 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 the national ambient air quality standards are achieved." CAA § 110(a)(2)(C), 42 U.S.C. § 7410(a)(2)(C). This includes enforcement measures. *Id.* EPA's implementing regulations for minor new source review likewise are general in nature. *See* 40 C.F.R. §§ 51.160-51.164; 74 Fed. Reg. at 51,421 (EPA describing its minor new source review rules as being "stated in very general terms"). Thus, SIP-approved minor new source review programs can and do vary widely from state to state. *See* 75 Fed. Reg. 19,468, 19,485 (Apr. 14, 2010) ("We [EPA] agree that states have great flexibility to create their own Minor NSR SIP programs.").

Texas has adopted rules establishing several different minor new source review authorization mechanisms. The mechanisms include general minor new source review permitting codified at 30 Tex. Admin. Code Chapter 116, Subchapter B, Division 1; standard permit rules codified at Chapter 116, Subchapter F; and permits by rule codified at Chapter 106. The general new source review rules create a case-by-case permitting regime, while the rules for standard permits and permits by rule allow for authorization of certain facilities² without a case-by-case review by TCEQ. EPA has approved all three of these minor new source review mechanisms into Texas's state implementation plan.

II. Texas's Flexible Permits Program

Since 1994, Texas's minor new source review program has also included the Flexible Permits Program, which is the subject of this proceeding. TCEQ, then known as the Texas Natural Resource Conservation Commission (TNRCC),³ promulgated rules implementing the Program and submitted those rules for EPA's approval in 1994. TCEQ also submitted Program rule revisions for EPA's approval in 1998, 2000, 2001,

² A "facility" is a discrete or identifiable point of air contaminants. *See* 30 TEX. ADMIN. CODE § 116.10(6)&(17). Texas uses the term as an equivalent to the term "unit" or "emissions unit." "Facility" does not refer to the entirety of a plant such as a refinery or power station, which typically have numerous facilities.

³ For purposes of this brief, TCEQ refers to TCEQ and its predecessor agency, TNRCC.

2002, and 2003. *See* 75 Fed. Reg. at 41,314-15 (summarizing affected rules).

A. Purpose and Background of the Program

Texas's Flexible Permits Program was an effort, growing out of the recommendations of the TCEQ's Task Force 21, to meet Texas's urgent goal of reducing air pollution from "grandfathered" facilities,⁴ as well as to bring greater efficiency to the air permitting process. *See* 19 Tex. Reg. 7334 (1994); *see also* Index #19, App. P, at 1 (TCEQ Comments on EPA's Proposed Disapproval of Flexible Permits Program). The Program encouraged participation by "grandfathered" facilities and greater control of air emissions by offering as an incentive operational flexibility through the use of emission caps. *See* 19 Tex. Reg. at 7334; *see also* Index #19, App. P, at 1. At the time Texas proposed and adopted its Flexible Permits Program, EPA was also entertaining the idea of a more flexible, cap-based permitting regime. *See* Index #72, App. C (EPA Comments on Proposed Flexible Permits Program (Oct. 31, 1994)) ("Many of the recommendations under

⁴ A "grandfathered" facility is one constructed before Texas initiated its air permit program in 1971 and not modified in any way that would require permitting or the modernization of emission controls. *See* TEX HEALTH & SAFETY CODE § 382.0518(g) (excluding facilities existing before 1971 from preconstruction permit requirement). Grandfathered facilities are now virtually extinct under Texas law. In 2001, the Texas Legislature required all grandfathered facilities to either obtain current authorization or shutdown. *See* TEX HEALTH & SAFETY CODE § 382.05181. Grandfathered facilities still exist under federal law outside of Texas.

consideration by [the national NSR reform] subcommittee are similar to the [Flexible Permits Program] revisions under consideration.”).

While EPA encouraged Texas to coordinate its efforts with the national subcommittee, *id.*, Texas did not wait for the federal government to address the air quality problems posed by the numerous grandfathered facilities in Texas. Instead, Texas acted by adopting the Flexible Permits Program in 1994. EPA’s efforts did not come to fruition for another eight years when EPA adopted its Plantwide Applicability Limit (PAL) Program (a cap-based federal major new source review program that differs markedly from Texas’s Flexible Permits Program). 67 Fed. Reg. 80,290 (Dec. 31, 2002). By that time Texas had already significantly reduced the emission of air pollutants from grandfathered facilities, attributable in part to the Flexible Permits Program. *See* Index #17, App. S, at 1-2 (TIP Comments on Proposed Disapproval of Program); *see also* 74 Fed. Reg. at 48,485 (EPA observing that “[t]he Program did result in grandfathered facilities voluntarily imposing emission controls and limiting their emissions using a Flexible Permit.”).

B. Key Provisions of the Flexible Permits Program

A Flexible Permit is a preconstruction permit. It may be used to authorize the construction of a new facility or the modification of an existing

facility. 30 TEX. ADMIN. CODE § 116.710(a). A Flexible Permit may, for any particular pollutant, include an emission cap, multiple individual emission limits, or a combination of a cap and individual emission limits, as specified in the permit application as well as the permit. *See id.* §§ 116.711(13)(D)&(E), 116.715(c)(7). Flexible Permits cannot be used to authorize major new construction or major modifications of existing facilities; such authorizations are obtained through Texas's major new source review rules. *See id.* § 116.711(8)&(9). Although major new source review authorization is distinct from the Program's minor new source review authorization, *id.*, TCEQ's practice is to include both authorizations within the same document.

Emission caps are established by adding the emissions "calculated for each facility based on the application of current Best Available Control Technology [BACT] at expected maximum capacity." 30 TEX. ADMIN. CODE § 116.716(a). BACT is applied "with consideration given to technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility" *Id.* § 116.711(3). The Program also prohibits backsliding on pollution controls. *Id.* ("[T]he existing level of control may not be lessened for any facility."). In addition to establishing emission caps, the applicant must specify the control technology to be used

at each facility, “demonstrate compliance with all emission caps at expected maximum production capacity,” and demonstrate that the facilities under the Flexible Permit will “achieve the performance specified in the flexible permit application.” *Id.* § 116.711(7)&(14). Caps are established and Flexible Permits are issued only through an individual case-by-case permitting process. *See, e.g., id.* § 116.711; *see also* Index #34, App. F, at 3 & 7 (*Flexible Permit Application Guidance*).

Once issued, a Flexible Permit allows the operator to make certain physical and operational changes without amending the permit. *See* 30 TEX. ADMIN. CODE §§ 116.10(9)(E). However, a Flexible Permit does not authorize any change that would result in (1) any increase in actual emissions at facilities not covered by the permit; (2) any emission increase exceeding the limitations specified in the permit; (3) any representation made in the permit application; or (4) any other general or special condition of the Flexible Permit. *Id.* §§ 116.720 & 116.721. An operator may, for example, make changes in throughput or feedstock. *Id.* § 116.721(c).

C. Clarifying Amendments

TCEQ recently proposed but has not yet adopted clarifying amendments to the Flexible Permits Program, including amendments that address concerns expressed by EPA. 35 Tex. Reg. 5729 (July 2, 2010). The

proposed amended rules are not before the Court. The rules that are before this Court are those currently codified at 30 Tex. Admin. Code Chapter 116, Subchapter G.

SUMMARY OF ARGUMENT

EPA's disapproval of Texas's Flexible Permits Program is arbitrary, capricious, in excess of its authority under the federal Clean Air Act, and otherwise not in accordance with the law. EPA's disapproval demonstrates its fundamental misunderstanding of the Program's scope, purpose, and requirements, all of which are designed to protect air quality consistent with the federal Clean Air Act, as well as the Texas Clean Air Act. First, EPA mistakes the Flexible Permits Program—a minor new source review program—for a substitute major new source review program, and, accordingly, disapproves of the Program as a major new source review state implementation plan revision.

EPA commits this error despite TCEQ rules, regulatory history and guidance that unambiguously require applicability determinations for major new source review. Moreover, EPA fails to give proper deference to TCEQ's interpretation of Texas's rules—as the law requires—and instead EPA imposes its own mistaken interpretation. EPA's action is thus arbitrary, capricious, and not in accordance with the law. EPA then

compounds the problem by allowing its mistake to color its consideration of the Flexible Permits Program as a minor new source review program. EPA disapproves of the Program as a minor new source review state implementation plan revision based in part on its conclusion that the Program is a substitute major new source review program.

In addition, EPA exceeds the federal Clean Air Act's requirements for review of minor new source review state implementation plan revisions by imposing its own policy preferences on Texas. It does so by imposing criteria for the approval of state implementation plan revisions that are found nowhere in the Clean Air Act, EPA's regulations for approval of minor new source review program revisions, or even relevant EPA guidance. For example, EPA would require specific and detailed monitoring, recordkeeping, and reporting rules where general rules suffice under the Act, regulations, and guidance.

Finally, EPA bases its disapproval of the Program on complaints that ignore the explicit Program rules. For example, EPA complains that it is difficult for EPA and public to determine which facilities are covered by a Flexible Permit when the rules require such information to be identified in both the Flexible Permit application and the Flexible Permit.

Because EPA: (1) fundamentally misunderstands Texas's Flexible Permits Program, beginning with its erroneous conclusion that the Program could be a substitute major new source review program; (2) imposes its own policy preferences on Texas in violation of the federal Clean Air Act; (3) fails to give proper deference to Texas's interpretation of Texas's rules; and (4) bases its disapproval on complaints that defy the Program's explicit language, EPA's disapproval of the Program is arbitrary, capricious, an abuse of discretion, and not in accordance with the law.

STANDARD OF REVIEW

This Court reviews EPA final action on state implementation plan revisions under the Administrative Procedure Act, which requires reversal if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency action must be set aside if it is in excess of statutory authority. 5 U.S.C. § 706(2)(B)-(C); *see, e.g., Amer. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 294 (5th Cir. 1998).

An action is arbitrary and capricious where:

[T]he 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.

Louisiana Env. Action Network v. EPA, 382 F.3d 575, 582 (5th Cir. 2004) (quoting *Texas Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). 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 v. EPA*, 355 F.3d 817, 824 (5th Cir. 2003).

In considering interpretations of the federal Clean Air Act, this Court would defer to EPA. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). However, this case presents competing interpretations of state law. “EPA is to be accorded no discretion in interpreting state law.” *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 588 (5th Cir. 1981). Instead, 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.” *Id.* (citations and internal quotes omitted).

ARGUMENT

I. EPA’s Disapproval of Texas’s Flexible Permits Program As a Substitute Major New Source Review Revision Is Arbitrary, Capricious and Contrary to Law.

Texas’s Flexible Permits Program is a state minor new source review program. It includes explicit provisions requiring compliance with Texas’s

SIP-approved major new source review rules—both for nonattainment and prevention of significant deterioration review. The Program is not a substitute major new source review state implementation plan revision; rather it is a state minor new source review program that references and leaves wholly intact Texas’s SIP-approved major new source review program. Because the Program requires compliance with Texas’s major new source review rules, the Program cannot be used to circumvent major new source review and applications for Flexible Permits require an evaluation of major new source review applicability.

EPA’s findings to the contrary are implausible, and they betray EPA’s fundamental misunderstanding of the Program. EPA ignores both the plain meaning of the Program rules and Texas’s long-standing interpretation of the Program rules. EPA fails to accord TCEQ appropriate deference in TCEQ’s interpretation of TCEQ rules. And EPA improperly substitutes its own poorly supported interpretation as it makes its thin case for disapproval on the grounds that the Program is a major new source review state implementation plan revision. EPA has thus acted arbitrarily, capriciously, and not in accordance with the law in its disapproval of Texas’s Flexible Permits Program as a substitute major new source review state implementation plan revision.

A. EPA’s Finding That the Flexible Permits Program Does Not Explicitly Require Sources to Comply with Major NSR Rules is Arbitrary and Capricious.

Under Texas’s Flexible Permits Program, any person who would make a change that triggers major new source review *must* comply with Texas’s major new source review requirements. The requirement is express.

The Program rules provide:

(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.

(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 referenced “applicable requirements . . . in this chapter” concerning nonattainment and prevention of significant deterioration review—*i.e.*, concerning major new source review—are Texas’s major new source review rules at 30 Tex. Admin. Code Chapter 116, Subchapter B, Division 5 (Nonattainment Review Permits) and Division 6 (Prevention of Significant Deterioration Review). Thus, the Program is not a substitute major new source review state implementation plan revision; rather it is a state minor new source

review program that references and leaves wholly intact Texas's major new source review program.

But incredibly, EPA finds that section 116.711(8)&(9) “do not explicitly require sources to comply with the Major NSR rules.” 75 Fed. Reg. at 41,319. To be clear, the nonattainment and prevention of significant deterioration review requirements identified in section 116.711(8)&(9) *are* the “Major NSR rules.” Texas has no other major new source review rules. Thus, when Texas commands that “each facility shall comply with all applicable requirements” concerning nonattainment and PSD review, it is explicitly requiring sources to comply with the “Major NSR rules.” EPA's finding to the contrary is simply implausible. It illustrates the profound disconnect between the actual substance of Texas's Flexible Permits Program and the bases EPA expresses to justify its disapproval.

B. EPA's Finding That the Flexible Permits Program is Ambiguous about the Obligations to Comply with Major NSR Rules is Arbitrary and Capricious.

EPA further complains that the Program rules do not “explicitly require a Major NSR applicability determination” or “prohibit circumvention of Major NSR” in a manner “similar” to two of Texas's other minor new source review authorization mechanisms, namely Texas's Standard Permits and Permits by Rule. 75 Fed. Reg. at 41,329. EPA asserts

that this creates “unacceptable ambiguity,” 75 Fed. Reg. at 41,329, or at least a “potential for an unacceptable ambiguity about a permit holder’s obligations to continue to comply with the Major NSR requirements.” 75 Fed. Reg. at 41,319 (emphasis added).

In fact, there is no such ambiguity—or even the potential for ambiguity. Texas’s major new source review rules—*i.e.*, those referenced at section 116.711(8)&(9)—explicitly require any change that constitutes a “major modification” to undergo major new source review. *See* 30 TEX. ADMIN. CODE §§ 116.150(b), 116.151(a), & 116.160(a); *see also* Index #34, App. F, at 4 (*Flexible Permit Application Guidance*) (“The applicant must provide an applicability demonstration with the flexible permit application. * * * Subchapter G does not affect the applicability of Non-attainment or PSD review”). Indeed there is no circumvention of major new source review without a violation of Texas’s major new source review rules.

Any such violation would subject the owner or operator to penalties and injunction under the Texas Clean Air Act. *See* TEX. HEALTH & SAFETY CODE § 382.085 (prohibition against causing, suffering, allowing, or permitting emission in violation of statute or rule); TEX. WATER CODE §§ 7.051 (administrative enforcement), 7.101 (general prohibition against violating statute or rules), 7.105 (enforcement in court), 7.177 (criminal

enforcement of Texas Clean Air Act), 7.179 (criminal penalties for intentionally or knowingly making false representations and failing to file or maintain required records). Such a violation would also subject the owner or operator to enforcement by EPA or the public. *See* CAA § 113, 42 U.S.C. § 7413 (EPA enforcement; criminal penalties); CAA § 304, 42 U.S.C. § 7604 (citizens suits).

Moreover, the provisions in the Flexible Permits Program that require sources to comply with the major new source review rules are nearly identical to those in Texas's SIP-approved general minor new source review program. *Compare* 30 TEX. ADMIN. CODE § 116.111(a)(2)(H)&(I) *with* 116.711(8)&(9). EPA approved the provisions in TCEQ's general minor new source review rules as part of Texas's state implementation plan but now disapproves of nearly identical language as part of the Flexible Permits Program. It is not clear how EPA can find that the language allows "unacceptable ambiguity" when used in its Flexible Permits Program given that EPA has approved of the language as part of the general minor new source review rules. And indeed, EPA did not take issue with these provisions when it commented on TCEQ's proposed Flexible Permits Program. *See* Index #72, App. C (EPA Comments). In fact, EPA's complaint is recently formulated.

EPA argues that the purported ambiguity results from TCEQ treating “*similar* types of NSR programs” inconsistently. 75 Fed. Reg. at 41,319 (emphasis added). EPA explains that “[t]he submitted Program is analogous to other Minor NSR programs (Standard Permits and Permits by Rule) . . . because they too provide a different permit option for facilities.” 75 Fed. Reg. at 41,329. EPA further argues that these programs (*i.e.*, Flexible Permits, Standard Permits, and Permits by Rule) are analogous in that all three “exempt facilities from obtaining a source-specific (*i.e.*, case-by case) permit.” 75 Fed. Reg. at 41,329. It is true that these three programs are alternatives to the general minor new source review authorization mechanism.

However, having in common that they “provide a different permit option” is scant similarity. In fact, the Standard Permits and Permits by Rule authorizations are quite dissimilar from authorizations under the Flexible Permits Program. Standard Permits and Permits by Rule are authorizations claimed by an owner or operator through a registration process.⁵ *See, e.g.*, 30 TEX. ADMIN. CODE §§ 106.6 (Permits by Rule) & 116.611 (Standard Permits). By contrast, authorizations under the Flexible Permits Program—

⁵ In fact, some Permits by Rule can be claimed even without notification to, much less registration with, TCEQ. *See, e.g.*, 30 TEX. ADMIN. CODE §§ 106.141 (Batch Mixers) & 106.221 (Extrusion Presses).

like those under TCEQ's general minor new source review requirements—are issued individually by TCEQ only after the TCEQ reviews and considers each application on a case-by-case basis and determines that the owner or operator will satisfy all Program requirements, including the requirement to comply with major new source review.

It is appropriate that the rules for authorizations that an owner or operator can simply *claim* include explicit instructions regarding applicability determinations and circumvention. But such explicit instructions are entirely unnecessary where TCEQ is charged with scrutinizing a permit application before it grants authorization. This is particularly true in the case of both Texas's general minor new source review rules and its Flexible Permits Program rules where the rules compel compliance with all applicable major new source review rules.

Again, the Flexible Permits Program requires *both* the owner or operator's compliance with the major new source review rules *and* TCEQ's case-by-case review of the permit application *before* TCEQ will grant authorization. Thus, the Program is analogous to Texas's general individual case-by-case minor new source review rules *but not* to the Standard Permits and Permits by Rule programs. Accordingly, the Program's lack of an explicit applicability determination requirement and a circumvention

prohibition “*similar*” to those contained in the rules for Standard Permits and Permits by Rule creates no ambiguity.

Because the compared authorization mechanisms are fundamentally dissimilar in ways related directly to the manner and extent to which TCEQ must guard against circumvention, there is no reason to expect that the TCEQ will use the same language to guard against circumvention. And there is simply no reason for the case-by-case Flexible Permits Program to include the specific language employed in connection with the two registration mechanisms.

EPA’s findings that the Flexible Permits Program rules “do not explicitly require sources to comply with the Major NSR rules” and present the “potential for an unacceptable ambiguity about a permit holder’s obligations to continue to comply with the Major NSR requirements,” 75 Fed. Reg. at 41,319 (emphasis added), run so counter to the explicit requirements of section 116.711(8)&(9) of the Program rules and the major new source review rules that they are arbitrary and capricious.

C. EPA’s Substituting Its Interpretation of the Flexible Permits Program Rules For TCEQ’s Long-Standing Interpretation is Contrary to Law.

Consistent with the plain meaning of the Program’s explicit rules, *i.e.*, 30 Tex. Admin. Code § 116.711(8)&(9), TCEQ has long expressed its intent

that the Flexible Permits Program is submitted as a minor new source review program. Moreover, EPA acknowledges Texas's intent that the Program applies only to minor new source review. 75 Fed. Reg. at 41,313 ("EPA understands that the TCEQ intended for the submitted Program to be a Minor NSR program"); 75 Fed. Reg. at 41,318 ("We [EPA] acknowledge TCEQ's description that it intends to implement the submitted Program in such a manner that [it] does not supersede the duty to comply with the Texas Major NSR SIP."); *see also* 74 Fed. Reg. 48,480, 48,487 (Sept. 23, 2009) (wherein EPA cites half-dozen instances, dating back to 1994, of Texas expressing such intent in "correspondence and other materials").

In addition, EPA acknowledges that companies that have a Flexible Permit understand that they are nevertheless also bound to comply with all applicable major new source review requirements. 75 Fed. Reg. at 41,327 (EPA observing "that companies complying with a Flexible Permit understand the continued obligation to comply with the SIP-approved Major NSR program at all major stationary sources and major modifications."). But despite TCEQ being abundantly clear and consistent for over sixteen years in its interpretation and application of its *own* Program rules, and despite the regulated community's understanding of its obligations under

those rules, EPA now disapproves the Program based upon its recently formulated—and poorly supported—interpretation that a purported potential ambiguity allows for potential circumvention of major new source review.

This is a legally invalid basis for disapproving the Program. EPA must “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.” *Florida Power*, 650 F.2d at 588 (brackets omitted). EPA’s interpretation is owed no deference here. This is particularly true given that Texas’s long-standing interpretation is “consistent with the Clean Air Act,” *id.*, while EPA has only recently chosen an interpretation putting the Program at odds with the Clean Air Act. Moreover, even if there were ambiguity in the Program, this Court’s precedents would compel that it be resolved in favor of TCEQ’s interpretation. *Belt v. EmCare, Inc.*, 444 F.3d 403, 408 (5th Cir. 2006) (“[I]f the regulation is ambiguous, the [promulgating] agency’s interpretation . . . is ‘controlling unless plainly erroneous or inconsistent with the regulation.’”) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1977)).

Texas’s Flexible Permits Program contains explicit provisions requiring compliance with Texas’s major new source review rules. Thus, applications made under the Program require an evaluation of major new source review applicability and the Program cannot be used to circumvent

major new source review. However, EPA ignores both the plain meaning of the Program rules and Texas's long-standing interpretation of the rules. Instead, it improperly substitutes its own poorly reasoned interpretation. Accordingly, EPA's disapproval of the Flexible Permits Program as a substitute major new source review state implementation plan revision is arbitrary, capricious, and contrary to law.

II. EPA's Disapproval of the Flexible Permits Program As a Minor New Source Review Program Is Arbitrary, Capricious, and Contrary to Law.

A. EPA Has Limited Authority Over Minor New Source Review Programs.

Under the Clean Air Act, implementation plans submitted by the states must include minor new source review programs that “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 the national ambient air quality standards are achieved” CAA § 110(a)(2)(C), 42 U.S.C. § 7410(a)(2)(C) (emphasis added). The Act allows for the disapproval of a plan revision only where “the revision would interfere with any applicable requirement concerning attainment and reasonable further progress” with respect to national ambient air quality standards. CAA § 110(l), 42 U.S.C. § 7410(l) (emphasis added). Importantly, by requiring disapproval where the plan revision “would interfere,” the Act does not

contemplate disapproval merely for the speculative possibility of interference.

State implementation plans must also comport with EPA's regulations. But while the regulations that pertain to major new source review state implementation plan revisions are highly prescriptive, those that pertain to minor new source review plan revisions are general in nature—and spare. *Compare, e.g.*, 40 C.F.R. § 51.165 and Part 51, Appendix S (eighty-plus pages of major NSR requirements) *with* 40 C.F.R. §§ 51.160 – 51.164 (not quite two pages of minor NSR requirements). Of the minor new source review plan requirements, EPA cites only to 40 C.F.R. §§ 51.160 and 51.161 as grounds for its disapproval. *See* 75 Fed. Reg. at 41,330 & 41,332. These rules require that the plan include procedures that: (1) enable the state to determine whether the construction or modification of a stationary source will violate the control strategy or interfere with attainment or maintenance of national ambient air quality standards; (2) prevent such violations and interference; (3) require the owner or operator to submit information about the source and related emissions; (4) identify the types of sources subject to the review process; (5) discuss applicable air quality data and modeling; and (6) provide for public comment. 40 C.F.R. §§ 51.160 & 51.161.

EPA notes that the minor new source review program within each state's implementation plan is "designed to ensure that the construction or modification of any stationary source does not interfere with the attainment of the NAAQS." 74 Fed. Reg. at 51,421. And EPA observes that "[a]side from this requirement, which is stated in broad terms, the Act includes no specifics regarding the structure or functioning of minor NSR programs." 74 Fed. Reg. at 51,421 (emphasis added). Nor do EPA's minor new source review rules impose specific requirements. 74 Fed. Reg. at 51,421 ("The implementing regulations, which are found at 40 CFR 51.160 through 51.164, also are stated in very general terms." (emphasis added)). Thus, EPA lacks the authority to impose its preferences regarding the structure or functioning of minor new source review programs on the states. *See* 74 Fed. Reg. at 51,421 ("SIP-approved minor NSR programs can vary quite widely from State to State."); 75 Fed. Reg. at 19,485 ("We [EPA] agree that states have great flexibility to create their own Minor NSR SIP programs."). If EPA wants to be more prescriptive as to the requirements for the review of minor new source review state implementation plan revisions, it should promulgate rules to that effect.

B. EPA’s Disapproval of the Flexible Permits Program As a Minor New Source Review Program Is Arbitrary, Capricious, and Contrary to Law Because It Is Predicated on EPA’s Erroneous Findings That the Program Is Not Clearly Limited to Minor New Source Review and Allows Circumvention.

EPA has acted arbitrarily and capriciously in finding that the Program rules “do not explicitly require sources to comply with the Major NSR rules,” 75 Fed. Reg. at 41,319, when section 116.711(8)&(9) do exactly that. And EPA has acted contrary to law to by supplanting TCEQ’s long-standing interpretation and application of the Program as limited to minor new source review with EPA’s interpretation, based on its recently alleged “ambiguity,” that the Program allows circumvention of major new source review. EPA has failed to accord TCEQ proper deference in the interpretation of its own Program rules. Despite EPA’s arbitrary, capricious, and unlawful disapproval, Texas’s Flexible Permits Program satisfies the requirements for a state minor new source review state implementation plan revision.

EPA predicates its disapproval of the Flexible Permits Program as a minor new source review state implementation plan revision on its erroneous findings that the Program “is not clearly limited only to Minor NSR and it does not prevent circumvention of the Major NSR SIP requirements.” 75 Fed. Reg. at 41,330. As discussed above, EPA is simply incorrect in these findings. The Program rules explicitly compel compliance with all SIP-

approved major new source review requirements, *see* 30 TEX. ADMIN. CODE § 116.711(8)&(9), and circumvention of the requirements subjects an owner or operator to enforcement under state and federal law.

EPA's claim that the Program does not prevent circumvention is all the more astounding given that EPA does not identify a single instance from the Program's sixteen-year history in which any owner or operator used the Program to circumvent major new source review. This is despite EPA's oversight authority for the major new source review rules referenced by section 116.711(8)&(9). *See, e.g.*, CAA §§ 113, 114 & 167, 42 U.S.C. §§ 7413, 7414 & 7477. EPA's claim that the Program "does not prevent circumvention," 75 Fed. Reg. at 41,330, simply does not square with sixteen years of experience. EPA has judged the Program incorrectly even after the facts are in. By repeating and compounding its erroneous conclusion that the Program is not limited to minor new source review and does not prevent circumvention of major new source review in connection with its disapproval of the Program as a minor new source review Program, EPA's disapproval is arbitrary, capricious, and contrary to law.

C. EPA’s Finding that the Flexible Permits Program’s Monitoring, Recordkeeping, and Reporting Requirements Lack Sufficient Detail Is Arbitrary, Capricious, and Contrary to Law.

EPA complains that the Flexible Permits Program “is generic concerning the types of monitoring that is required,” that it lacks sufficiently “detailed MRR [monitoring, recordkeeping and reporting] requirements,” and that “[t]here are no specific up-front methodologies in the Program to be able to determine compliance.” 75 Fed. Reg. at 41,331. EPA finds that this allows the director too much discretion in choosing the monitoring, recordkeeping, and reporting requirements for individual permits. 75 Fed. Reg. at 41,325 (“EPA finds such director discretion provisions are not acceptable for inclusion in SIPs”). EPA argues that “without specialized MRR requirements in the submitted Program, it is difficult for EPA or the public to determine which units are covered by a Flexible Permit, which modifications to non-covered units are covered by a Flexible Permit, whether a covered unit is subject to the emission cap or an individual emission limitation, whether a unit is subject to both the cap and a limitation, or whether a cap or a limitation applies and when it applies.” 75 Fed. Reg. at 41,331. EPA concludes that the Program is therefore unenforceable, does not assure the permit holder’s compliance, and does not prevent interference with the national ambient air quality standards. 75 Fed. Reg. at 41,331.

It is true that TCEQ has chosen to make the Program's monitoring, recordkeeping, and reporting rules more general. This is by design. It works in coordination with requirements for greater specificity in the Flexible Permit application representations, which are binding on the source and which create a robust and enforceable Program. This is Texas's prerogative. There is no legal requirement that the Program contain *specific* or *detailed* monitoring, recordkeeping, and reporting provisions. EPA lacks the authority to impose its preferences on Texas regarding the structure or functioning of the Program. The Clean Air Act reserves such decisions to the States. *See, e.g.*, CAA § 107(a), 42 U.S.C. § 7407(a) (giving the states "primary responsibility" for specifying the manner in which national air quality standards are met); *BCCA Appeal Group*, 355 F.3d at 822 ("[T]he states have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements."); 74 Fed. Reg. at 51,421 (EPA observing that "the Act includes no specifics regarding the structure or functioning of minor NSR programs"). Moreover, several of EPA's observations about the Program simply do not square with the facts. Accordingly, and as detailed below, EPA's disapproval of the Flexible Permits Program based on its complaint that the monitoring, recordkeeping,

and reporting requirements lack sufficient detail is arbitrary, capricious, and contrary to law.

1. EPA's Disapproval of the Same Monitoring, Recordkeeping, and Reporting Requirements It Approved As Part of The General Minor New Source Review Rules is Arbitrary.

EPA disapproves of the Program's monitoring, recordkeeping, and reporting requirements at 30 Tex. Admin. Code §§ 116.711(2) and 116.715(c)(4)-(6). 75 Fed. Reg. at 41,331. These requirements are as follows:

(2) 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. 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).

(4) Sampling requirements. If sampling of stacks or process vents is required, the flexible permit holder shall contact the commission's Office of Compliance and Enforcement prior to sampling to obtain the proper data forms and procedures. All sampling and testing procedures must be approved by the executive director and coordinated with the appropriate regional office of the commission. The flexible permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

Id. § 116.715(c)(4).

(5) Equivalency of methods. It shall be the responsibility of the flexible permit holder to demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring methods proposed as alternatives to methods indicated in the conditions of the flexible permit. Alternative methods shall be applied for in writing and must be reviewed and approved by the executive director prior to their use in fulfilling any requirements of the permit.

Id. § 116.715(c)(5).

(6) 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. Information in the file shall be retained for at least two years following the date that the information or data is obtained.

Id. § 116.715(c)(6). Thus, the monitoring, recordkeeping, and reporting rules give the executive director the discretion to establish appropriate emission measuring requirements and to approve of sampling and testing procedures and methods, and they require the owner or operator to maintain information sufficient to demonstrate “continuous compliance with the emission caps and individual emission limitations.” *Id.*

While these rules are general in nature, the requirements themselves are specified in detail in the permit. Thus, specific and detailed monitoring,

recordkeeping, and reporting requirements are enforceable, they do assure the permit holder's compliance, and they are more than adequate to prevent interference with the national ambient air quality standards. In fact, EPA has approved "the same MRR requirements" into Texas's state implementation plan as part of the general minor new source review rules. *See* 75 Fed. Reg. at 41,331 (admission by EPA that "the submitted Program requires the same MRR requirements . . . as do the SIP rules codified in Subchapter B of Chapter 116"). EPA acted arbitrarily by disapproving the same monitoring, recordkeeping, and reporting rules as part of the Flexible Permits Program that it approved as part of the general minor new source review rules.

2. EPA's Conclusion That the Program's Monitoring, Recordkeeping, and Reporting Requirements Do Not Assure the Permit Holder's Compliance Defies the Program's Clear Language.

EPA's justifications for disapproval of monitoring, recordkeeping, and reporting requirements it once approved are, perhaps inevitably, at odds with the clear language of the requirements. For example, the recordkeeping requirement compels the owner or operator to maintain information sufficient to demonstrate "continuous compliance with the emission caps and individual emission limitations." 30 TEX. ADMIN. CODE § 116.715(c)(6). To the extent there is more than one applicable state or

federal requirement, the Program requires that “the most stringent limit or condition shall govern and be the standard by which compliance shall be demonstrated.” *Id.* § 116.715(c)(10). The recordkeeping requirement is also clear that compliance demonstration information must be made available to “any pollution control program having jurisdiction.” *Id.* § 116.715(c)(6). This includes EPA. Yet, despite the clear and enforceable requirement that owners and operators maintain information that demonstrates continuous compliance, EPA somehow concludes that the program does not assure the permit holder’s compliance. *See* 75 Fed. Reg. at 41,331. Thus, once again, EPA’s interpretation of the Program is at odds with its clear language.

3. EPA’s Characterization of the Flexible Permits Program as Complex and Intricate Is Arbitrary.

EPA justifies its disapproval of monitoring, recordkeeping, and reporting requirements it had once approved, by characterizing the Flexible Permits Program as “complex and intricate.” 75 Fed. Reg. at 41,331. EPA explains that “the underpinnings of the submitted Program are *so complex* that even for a Minor NSR SIP program, there should be more detailed MRR requirements to ensure that the emission cap and/or individual emission limitations in the Flexible Permits are enforceable.” 75 Fed. Reg. at 41,331 (emphasis added). But EPA’s characterization of the Program as being *so complex and intricate* is really a mischaracterization given that the analysis

is relative to the general minor new source review rules in which the same monitoring, recordkeeping, and reporting rules were approved.

EPA offers little description or examination of how the Flexible Permits Program is complex and intricate. But EPA does argue:

A Texas Flexible Permit may apply to hundreds of dissimilar units. These covered emission units can vary in size and type of operations as well as having widely different regulatory requirements and different applicable testing requirements.

74 Fed. Reg. at 48,490. Indeed, “hundreds of dissimilar units” varying in size and type and “having widely different regulatory and . . . testing requirements” sounds “complex and intricate.” It is fair to say that air permitting can be complex.

However, the exact same observation EPA makes with regard to Flexible Permits can be made of permits issued under the SIP-approved general minor new source review rules—which have the same monitoring, recordkeeping, and reporting requirements. The SIP-approved case-by-case minor new source review permits may also apply to hundreds of dissimilar facilities that vary in size and type of operation and are subject to widely different regulatory and testing requirements. EPA’s characterization of the Flexible Permits Program as *so complex and intricate* is simply invalid when made in relation to general minor new source review permits. A cap is nothing more than the sum of individual emission limitations. *See* 30 TEX.

ADMIN. CODE § 116.716(a)(2) (“Each emission cap . . . will be established as follows: (1) emissions will be calculated for each facility . . . ; (2) the calculated emissions will be summed.”). If one can track compliance with 20 individual emission limitations, by mere addition one can track compliance with a cap covering 20 emission points.

4. EPA Lacks Any Legal Authority to Demand Specific and Detailed Monitoring, Recordkeeping, and Reporting Requirements In Place of General Requirements Supported By Specific Permit Conditions.

Even accepting EPA’s invalid proposition that the Flexible Permits Program is “complex and intricate,” there is no legal basis for EPA to demand specific and detailed monitoring, recordkeeping, and reporting requirements. EPA cites *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) for the proposition that “[t]he more intricate a plan, the greater the need for detailed requirements.” 74 Fed. Reg. at 48,490. But EPA’s reading of *New York v. EPA* is incorrect.

New York v. EPA involves challenges to an EPA new source review rulemaking. Among other issues, the court considered the validity of a rule that required recordkeeping only where, among other criteria, the source believes there is a “reasonable possibility” that new source review will be triggered. *See New York*, 413 F.3d at 33. The court found that “EPA acted

arbitrarily and capriciously in determining that sources making changes need not keep records of their emissions if they see no reasonable possibility that these changes constitute modifications for NSR purposes.” *Id.* at 11. This opinion has nothing to do with whether it is appropriate to state monitoring, recordkeeping, and reporting requirements in general or specific terms. Rather, it relates to whether a recordkeeping *exemption* was appropriate. The opinion does not support EPA’s assertion that intricate plans require detailed monitoring, recordkeeping, and reporting requirements. Moreover, it is inapplicable to the Flexible Permits Program, which—far from creating a recordkeeping *exemption*—requires recordkeeping sufficient to show continuous compliance. 30 TEX. ADMIN. CODE § 116.715(c)(6). The Flexible Permits Program actually answers the concerns raised in *New York v. EPA*. See 413 F.3d at 35 (expressing concern about an “absence of data” and lack of “paper trails”).

EPA’s conclusion that the Flexible Permits Program is so complex and intricate as to require specific and detailed monitoring, recordkeeping, and reporting requirements is therefore wrong for two reasons. First, the Program is not so complex and intricate relative to the SIP-approved program that shares its monitoring, reporting, and recordkeeping requirements. And second, there is no legal authority to support the

proposition that complex and intricate Programs require specific and detailed monitoring, recordkeeping, and reporting requirements.

5. EPA’s Insistence on Specific and Detailed Monitoring, Recordkeeping, and Reporting Rules is Impractical and Arbitrary.

Considering practical implications, EPA’s observation about Flexible Permits argues for—not against—general monitoring, recordkeeping, and reporting requirements. Again, EPA observed that a Flexible Permit “may apply to hundreds of dissimilar units” that “can vary in size and type of operations as well as having widely different regulatory requirements and different applicable testing requirements.” 74 Fed. Reg. at 48,490. Creating specific and detailed monitoring, recordkeeping and reporting rules that can account for infinite configurations of hundreds of dissimilar facilities subject to such widely different requirements is simply impractical.

Even if Texas could survey and develop rules that account for the numerous types of facilities and configurations that comprise all existing Flexible Permits, it cannot possibly anticipate every type of facility and every configuration that may later be developed. Moreover, such an exercise is entirely unnecessary. The specific and detailed monitoring, recordkeeping, and reporting requirements necessary for enforceability by their nature require case-by-case review. It is appropriate that such

requirements are developed with a known set of facts through the permitting process rather than with infinite hypotheticals through a rulemaking process. And ultimately, it is impossible to write the executive director's discretion out of the permitting process. EPA itself allows for executive director discretion in the monitoring requirements under its major new source review rules. *See, e.g.*, 40 C.F.R. § 51.165(f)(12)(C) (allowing a source to “employ an alternative monitoring approach . . . if approved by the reviewing authority”). Finally, even with specific and detailed monitoring, recordkeeping, and reporting rules, TCEQ would still have to write Flexible Permits—and their monitoring, recordkeeping, and reporting conditions—case-by-case.

EPA responded to comments about the difficulty of implementing rulemaking “for every type of recordkeeping, monitoring, and tracking requirements that may apply” with merely a curt observation that “any permitting rule will apply to a variety of sources.” 75 Fed. Reg. at 41,325. EPA's response fails to actually consider the comment. EPA's preference, a specialized rule, would involve a significant rulemaking effort that is of dubious benefit. This is particularly true given that owners and operators are bound by the specific monitoring, recordkeeping, and reporting requirements

in their permits. Accordingly, EPA's insistence on specific and detailed monitoring, recordkeeping, and reporting rules is arbitrary.

6. EPA Acted Arbitrarily by Basing Its Disapproval on Unfounded Complaints About the Flexible Permits Program's Monitoring, Recordkeeping, and Reporting Requirements.

EPA alleges a litany of unfounded complaints about the Flexible Permits Program's monitoring, recordkeeping, and reporting requirements. Specifically, EPA alleges that "without specialized MRR requirements . . . it is difficult for EPA or the public to determine [1] which units are covered by a Flexible Permit, [2] which modifications to non-covered units are covered by a Flexible Permit, [3] whether a covered unit is subject to the emission cap or an individual emission limitation, [4] whether a unit is subject to both the cap and a limitation, or [5] whether a cap or a limitation applies and when it applies." 75 Fed. Reg. at 41,331.

It is incredible that EPA would claim that it is difficult to determine "which units are covered by a Flexible Permit" when the Program rules state explicitly that: "A flexible permit covers only those sources of emissions and those air contaminants listed in the table entitled 'Emission Sources, Emissions Caps and Individual Emission Limitations' attached to the Flexible Permit." 30 TEX. ADMIN. CODE § 116.715(c)(7). In fact, it is no more difficult than reviewing the table attached to the permit. The same

exercise answers EPA's concern about the difficulty of determining whether a unit is covered by an emission cap, an individual emission limitation, both a cap and individual limitation, or whether neither applies. This information is also specified in the table. *See id.* ("Flexible permitted sources are limited to the emission limits . . . specified in the table attached to the flexible permit.").

This information is also available in the Flexible Permit application. The Program rules provide that each application shall "identify each source of emissions to be included in the flexible permit and for each source of emissions identify the Emission Point Number (EPN) and the air contaminants emitted." 30 TEX. ADMIN. CODE § 116.711(13)(C). The rules further require that the applicant shall "for each emission cap, identify all associated EPNs" and "for each individual emission limitation, identify the EPN." *Id.* § 116.711(13)(D)&(E). The Program also requires that applications contain "emission rate calculations based on the expected maximum capacity and the proposed control technology" for each cap and each individual emission limitation. *Id.* Finally, emission caps and individual emission limitations apply at all times and Flexible Permits cover modifications only of those units covered by the permit. That the Program's monitoring, recordkeeping, and reporting requirements are not "specialized"

is irrelevant to EPA's complaints. The information EPA deems so difficult to determine is readily available in the permit and the application.

7. EPA Has Acted Contrary to Law by Failing to Defer to Texas's Policy Choices Regarding the Monitoring, Recordkeeping, and Reporting Requirements of the Flexible Permits Program.

While the Clean Air Act supplies the goals and basic requirements of the state implementation plans, "the states have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements." *BCCA Appeal Group v. EPA*, 355 F.3d at 822. Texas's Flexible Permits Program is a valid exercise of its broad authority. Texas has elected to impose monitoring, recordkeeping, and reporting requirements that are articulated in general terms in its rules but specified in detail as appropriate in the case-by-case permitting process. *See* Index #34, App. F, at 6 (*Flexible Permit Application Guidance*) (noting that permit conditions such as monitoring, recordkeeping, and reporting "are developed on a case-by-case basis using representations from the permit application to ensure enforceability").

The Program's monitoring, recordkeeping, and reporting provisions work in coordination with other Program provisions to create a robust and enforceable case-by-case permitting program. To begin with, applications under the Program must include detailed representations about each source

of air contaminants, the type of contaminants emitted, emission rate calculations for each source, and proposed pollution control technologies. 30 TEX. ADMIN. CODE § 116.711(13)&(14). The application must also demonstrate compliance with all emission caps at the expected maximum production capacity, as well as the protection of public health and welfare generally. *Id.* § 116.711(1)&(14). The application must also demonstrate the use of best available control technology and that there will be no backsliding in the level of control. *Id.* § 116.711(3) (“[T]he existing level of control may not be lessened for any facility.”). And the application must demonstrate that facilities permitted under a Flexible Permit “will achieve the performance specified in the flexible permit application.” *Id.* § 116.711(7). These and all other representations made in the Flexible Permit application are binding and enforceable. *Id.* § 116.721(a).

In addition, the Program requires that every Flexible Permit establishes a “pollutant specific emission cap or multiple emission caps and/or individual emission limitations . . . for each air contaminant for all facilities authorized by the flexible permit.” 30 TEX. ADMIN. CODE § 116.715(b). And, every Flexible Permit must include conditions for construction and startup notification, sampling requirements, recordkeeping (“sufficient to demonstrate continuous compliance”), maximum allowable

emission rates, emission cap readjustment, and maintenance of emission controls. *Id.* § 116.715(c). Permits must also require compliance with “the most stringent limit or condition” imposed by any state or federal rule, regulation, or permit. *Id.* § 116.715(c)(10). These conditions are among other binding conditions deemed necessary or appropriate for proper control through the case-by-case permitting process. *See id.* § 116.715(d) (such conditions “may be more restrictive than the requirements of this title”).

Through enforceable application representations and permit conditions, the Flexible Permits Program is robust. Texas has elected to use monitoring, recordkeeping, and reporting rules that are general in nature—this is its prerogative. Just as it does when it issues a general minor new source review permit under the SIP-approved program, it establishes appropriate specific monitoring, recordkeeping, and reporting obligations through the Flexible Permit case-by-case permitting process. EPA has acted contrary to Texas’s “broad authority” under the Clean Air Act, *BCCA Appeal Group*, 355 F.3d at 822, by failing to defer to Texas’s valid choice of permitting methods.

D. EPA's Allegation That the Flexible Permits Program Allows the Elimination of Major New Source Review Permit Conditions Is Not True.

EPA alleges that the Flexible Permits Program can be used to eliminate the conditions of existing major new source review permits. 75 Fed. Reg. at 41,332 (“[T]he submitted Program does not require the retention of the conditions of Major NSR SIP permits upon the issuance of a Flexible Permit”). This is simply not true. First, TCEQ’s general air quality rules prohibit it from eliminating any federal requirement, including any major new source review permit condition. *See* 30 TEX. ADMIN. CODE § 101.221(d) (“The commission will not exempt sources from complying with any federal requirements”). In addition, the Program rules require compliance with all applicable requirements of Texas’s major new source review rules. *Id.* § 116.711(8)&(9). And with regard to the application of control technology, for example, the Program rules provide “that the existing level of control may not be lessened for any facility.” *Id.* § 116.711(3). Thus, the Program does not allow elimination of major new source review permit conditions.

More importantly, TCEQ lacks authority to eliminate any such condition. TCEQ explained in the preamble to its adoption of the Flexible Permits Program: “The [TCEQ] does not have the authority to relieve a

permittee from meeting applicable federal requirements.” 19 Tex. Reg. 9360, 9363 (1994). EPA does not and cannot point to any Program provision that would allow TCEQ to eliminate the terms or conditions of a major new source review permit. Nor does EPA point to any instance in the Program’s sixteen-year history in which EPA has exercised its oversight and enforcement authority to test its theory that the Program has been used to eliminate major new source review permit conditions.

Instead, EPA expresses an uninformed concern that the “regulatory structure of the submitted Program does not ensure that existing Major NSR SIP permits and conditions are retained.” 75 Fed. Reg. at 41,331-32. EPA argues, for instance, that “[t]he regulatory structure of the submitted Program . . . lacks legally enforceable procedures to ensure that both the permit application and the State’s permitting processes . . . clearly identify each covered point of emissions” 75 Fed. Reg. at 41,332. But the Program rules explicitly require that covered points of emission be clearly identified in both the application and the permit.

The Program rules state that each application shall “identify each source of emissions to be included in the flexible permit and for each source of emissions identify the Emission Point Number (EPN) and the air contaminants emitted.” 30 TEX. ADMIN. CODE § 116.711(13)(C). The

Program rules further require that the applicant shall “for each emission cap, identify all associated EPNs” and “for each individual emission limitation, identify the EPN.” *Id.* § 116.711(13)(D)&(E). These application representations are binding conditions. *Id.* § 116.721(a). And the Program rules require that each flexible permit identify all covered “sources of emissions.” *Id.* § 116.715(c)(7). Thus, contrary to EPA’s assertion, the Program’s “regulatory structure” *does* “ensure that both the permit application and the State’s permitting processes clearly identify each covered point of emissions.” EPA’s allegations in support of its disapproval simply do not square with the facts. EPA’s disapproval is, accordingly, arbitrary.

E. EPA’s Finding That the Flexible Permits Program’s Methods for Establishing Emission Caps Are Insufficient Is Arbitrary, Capricious, and Contrary to Law.

EPA complains that the Program “does not describe in sufficient detail the calculation methodologies and underlying technical analyses used to determine a cap.” 75 Fed. Reg. at 41,332. But the Program rules clearly describe the method for establishing emission caps. They provide:

Each emission cap for a specific pollutant will be established as follows: (1) emissions will be calculated for each facility based on application of current Best Available Control Technology at expected maximum capacity; (2) the calculated emissions will be summed.

30 TEX. ADMIN. CODE § 116.716(a). The Program rules further detail the method for applying current BACT:

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 from the facility on a proposed facility, group of facilities, or account basis. Control technology beyond BACT may be used on certain facilities to provide the emission reductions necessary to comply with this requirement on a group of facilities or account basis, provided however, that the existing level of control may not be lessened for any facility.

Id. § 116.711(3). And the Program rules require the owner or operator to “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).

TCEQ guidance provides the agency’s more-detailed interpretation of the Program’s rules regarding the application of BACT. This includes instructions that BACT shall be demonstrated as required under the general minor new source review rules, which EPA has approved. *See* Index #34, App. F, at 3 (*Flexible Permit Application Guidance*) (“The BACT shall be demonstrated for each individual new facility as required by Subchapter B, [30 Tex. Admin. Code § 116.111(a)(2)(C)].”). This is significant because it confirms that the Flexible Permits Program requires emission limits that are

equally as stringent as the existing SIP-approved minor new source review rules.

Nevertheless, EPA complains that the Program lacks “specific, objective, and replicable” criteria for determining the cap. 75 Fed. Reg. at 41,322. This phrase is a reference to EPA’s 1987 guidance regarding EPA review of state implementation plan revisions, particularly the standard for addressing provisions allowing compliance through “bubbles” (which are analogous to caps) or mechanisms involving the executive director’s discretion. *See* Index #43, App.____, at 9 (*U.S. E.P.A., Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency* (Sept. 23, 1987)). EPA’s guidance provides:

If EPA case-by-case approval will not be required, then *specific, objective and replicable criteria* must be set forth for determining whether the new arrangement is truly equivalent *in terms of emission rates and ambient impact*.

Id. (emphasis added). The application of BACT by the same SIP-approved demonstration methods used for general minor new source review permits under Subchapter B ensures that Flexible Permits are equivalent in terms of emission rates and ambient impacts. Thus, the Flexible Permits Program satisfies the standard set forth in EPA’s guidance.

EPA goes beyond its guidance, however, and bases its disapproval on purported standards that lack any authority. For example, it states that the

Program is “unapprovable” because “the public and EPA cannot *independently* calculate an emission cap and reach the same conclusion as the State.” 75 Fed. Reg. at 41,322. There is no such requirement for approvability. Moreover, once BACT is determined for each facility the calculation requires mere addition.

EPA does cite certain particular concerns related to the methods for establishing emission caps, but these concerns do not withstand the plain language in the rules. EPA complains that “[t]he submitted rules are not clear as to how the State does the summation” and that the rules fail to clarify “whether the cap includes the summation of not only the minor stationary sources and minor modifications but also the major stationary sources and major modifications.” 75 Fed. Reg. 41,322. But again, the cap includes the summation of all facilities under the cap, 30 TEX. ADMIN. CODE § 116.716(a), and those facilities are identified—individually, by distinct emission point numbers—in the application, *id.* § 116.711(13)(D)&(E), as well as in the permit. *Id.* § 116.715(c)(7). EPA similarly complains that it is “concerned that it is not clear which facilities are covered by a Flexible Permit.” 75 Fed. Reg. at 41,322. EPA made the same argument in connection with its concerns about the monitoring, recordkeeping, and reporting requirements and the retention of major new source review permit

terms. *See* section II.C.6 and II.D. Again, this complaint does not survive the plain language of 30 Tex. Admin. Code §§ 116.711(13)(D)-(E) & 116.715(c)(7).

Thus, the Program rules specify sufficiently detailed methods for establishing emission caps. EPA's finding to the contrary defies the plain language of EPA's rules, ignores the fact that BACT demonstrations under the Program are made just as they are under the SIP-approved general minor new source review rules, misapplies EPA guidance, and relies on purported standards that have no basis in law. Accordingly, it has acted arbitrarily, capriciously and contrary in law by disapproving the Program based on concerns about the methods for establishing emission caps.

F. EPA Acted Arbitrarily by Basing Its Disapproval of the Flexible Permits Program on Its Comparison to the PAL Program.

In connection with its complaints about calculating emission caps and the monitoring, recordkeeping, and reporting requirements, EPA complains that Texas's Flexible Permits Program does not live up to the federal Plantwide Applicability Limits (PAL) new source review program, a federal cap-based program. EPA writes:

The State did not submit the Flexible Permits Program for consideration by EPA as a PALs NSR SIP revision. Moreover, the submitted Flexible Permits Program does not meet the

minimum requirements contained in the PALs NSR SIP regulations

75 Fed. Reg. at 41,317. But the federal PAL Program did not exist when Texas submitted its Flexible Permits Program for approval. As discussed in section II.A of the Statement of Facts, Texas took the initiative through the Flexible Permits Program to create incentives to address pollution from grandfathered facilities—without waiting for federal leadership.

Moreover, the federal PAL Program is an inappropriate comparison in that it is a major new source review program, which is subject to more stringent requirements for SIP approval than the Flexible Permits Program, a minor new source review program. In addition, while EPA complains about the Flexible Permits Program allowing director discretion in establishing permit terms, *see* 75 Fed. Reg. at 41,325 (“EPA finds such director discretion provisions are not acceptable”), the PAL program allows for such director discretion. *See* 40 C.F.R. § 51.165(f)(12)(C) (allowing “alternative monitoring approach[s] . . . if approved by the reviewing authority”). Accordingly, EPA acted arbitrarily in basing its disapproval of the Flexible Permits Program on its comparison to the PAL Program.

G. TCEQ’s Definition of “Account” Does Not Allow Circumvention of Major New Source Review.

EPA alleges that Texas’s definition of “account” allows circumvention of major new source review. Specifically, EPA claims:

[A]n account could include an entire company site, which could include multiple stationary sources, the submitted SIP revisions may allow a major stationary source to net a significant increase against a decrease occurring outside the stationary source from facilities on the account site that are covered under a Flexible Permit. An account may also allow an emission increase to be determined based on an evaluation of a subset of facilities within a major stationary source.

75 Fed. Reg. at 41,333 (emphasis added). Texas interprets its term “account” such that “a flexible permit cannot cover more than one major stationary source.” Index #19, App. P, at 8 (TCEQ Comments) (emphasis added). Therefore, as Texas interprets and implements the Program, there is no netting across multiple major stationary sources and no circumvention.

Moreover, TCEQ’s interpretation of the term account, as applying to no more than one major stationary source, is supported by Program rules. As discussed above, the rules prohibit circumvention by requiring major new source review wherever it is applicable. 30 TEX. ADMIN. CODE § 116.711(8)&(9); *see also* section I of this Argument. Thus, EPA’s allegation that the term “account” allows for circumvention contradicts the

Program's explicit requirements as well as TCEQ's interpretation of the term "account."

EPA approved of the definition of "account" into Texas's state implementation plan in 2005. 70 Fed. Reg. 16,129 (March 30, 2005). The definition provides:

Account--For those sources required to be permitted under Chapter 122 of this title (relating to Federal Operating Permits 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.

30 TEX. ADMIN. CODE § 101.1(1) (emphasis added). The term "source" is defined as "a point of origin of air contaminants, whether privately or publicly owned or operated." TEX. HEALTH & SAFETY CODE § 382.003(12); 30 TEX. ADMIN. CODE § 116.10(15). "Source" is equivalent to the term "facility," meaning a "discrete piece of equipment or source of air contaminants." Index #19, App. P, at 8 (TCEQ Comments). The term "source" does not refer to a "major stationary source," as that term is used for federal major new source review. See 30 TEX. ADMIN. CODE § 116.12(17).

Finally, even if the definition of "account" were ambiguous in the context of the Flexible Permits Program, which it is not, Texas's reasonable

interpretation is entitled to deference. *Florida Power*, 650 F.2d at 588. This is all the more true given that Texas urges an interpretation consistent with the Clean Air Act, while EPA urges an interpretation that would allow circumvention of major new source review in violation of the Clean Air Act. Because EPA improperly ignores the Program's prohibitions against circumvention, *see* 30 TEX. ADMIN. CODE § 116.711(8)&(9), and fails to defer to Texas's reasonable interpretation of the definition of "account," it has acted arbitrarily in finding that the term "account" allows for circumvention.

H. EPA's Failure to Explain Its Disapproval in Connection with the Program's 16-Year History is Arbitrary and Capricious.

The Clean Air Act requires EPA to review and either approve or disapprove of states' implementation plan revisions within 18 months after they are submitted. CAA § 110(k), 42 U.S.C. § 7410(k). EPA remained in violation of the Act with respect to the Flexible Permits Program for nearly 15 years. EPA now disapproves of the Program while deliberately ignoring Texas's 16-year history of implementing the Program.

In reviewing the Flexible Permits Program, EPA is bound to "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. And in fact, EPA does not hesitate to cite anecdotes about the Program’s implementation. *See* 75 Fed. Reg. at 41,326 (complaining of a refinery’s allegedly inadequate report); *see also* 75 Fed. Reg. at 41,327 (complaining about a Flexible Permit holder presenting too much compliance information during an investigation). EPA claims that these anecdotes “highlight EPA’s concerns” about the Program, but EPA simultaneously disclaims such comments about the Program’s implementation as “irrelevant.” 75 Fed. Reg. at 41,326-27. EPA attempts to have it both ways.

But given that EPA’s long-delayed disapproval has allowed more than ample time to demonstrate that Texas interprets and implements its Flexible Permits Program in a manner that promotes the maintenance and attainment of the national ambient air quality standards, information about the Program’s implementation is very much relevant. Indeed, EPA is bound to both consider relevant implementation information and to explain a rational connection between the information and EPA’s disapproval of the Program. *See BCCA Appeal Group*, 355 F.3d at 824.

For instance, EPA should consider the significant improvement Texas has achieved in air quality since the Flexible Permits Program was implemented. For example, EPA should consider the 50% reduction in NO_x

emissions in the Houston-Galveston area between 1999 and 2005. Index #17, App. S, at 1 (TIP Comments). EPA should also consider the reductions directly attributable to Flexible Permits at particular plants, including a reduction of over 10,000 tons of NO_x per year at a particular power plant and over 15,000 tons of NO_x per year at a particular refinery. Index #19, App. P, at 4-5 (TCEQ Comments). Moreover, EPA is required to explain its disapproval in a manner rationally connected to the improvements in air quality attributable to the Flexible Permits Program.

But despite EPA's receiving the cited information about air quality improvements, and despite its review of "many Flexible Permits issued under [the Program] rules," EPA declares a lack of information. *See* Index #57, App. J, at Enclosure p.1 (Letter from EPA to TCEQ (Mar. 12, 2008)) ("EPA has reviewed . . . many Flexible Permits . . ."). EPA states that it "lacks sufficient information to make a finding that the submitted Program, as a Minor NSR SIP program, will ensure protection of the NAAQS, and noninterference with the Texas SIP control strategies and RFP [reasonable further progress toward achieving the national ambient air quality standards]." 75 Fed. Reg. at 41,332. EPA acts arbitrarily when it simultaneously disregards information about air quality and claims a lack of information about air quality.

EPA should also, for example, explain its concerns about the use of the Flexible Permits Program for circumvention of major new source review in light of information available from the Program's long implementation history. Or perhaps more accurately, EPA should explain its concerns in the absence of information that the Program is implemented in a way that circumvents major new source review. EPA's various hypothetical concerns do not survive its duty to rationally connect available data with its decision to disapprove the Program when those concerns have failed to materialize during the Program's 16 years. EPA's failure to explain its disapproval in connection with the Program's 16-year history is arbitrary and capricious.

CONCLUSION

For the foregoing reasons, EPA's disapproval of Texas's Flexible Permits Program is arbitrary, capricious, an abuse of discretion, and not in accordance with the law. The State of Texas respectfully asks the Court to vacate the disapproval and remand it to EPA for prompt action in accordance with the federal Clean Air Act.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

BILL COBB
Deputy Attorney General
for Civil Litigation

/s/ Jon Niermann
JON NIERMANN
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: 512-475-4140
Facsimile: 512-936-0545
Email: jon.niermann@oag.state.tx.us

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 December 6, 2010. All parties in this case are represented by counsel consenting to electronic service.

Counsel also certifies that on December 6, 2010, the foregoing instrument was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System.

Counsel further certifies that (1) required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Jon Niermann
JON NIERMANN

**CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **12,650** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point type face Times New Roman.

Dated: December 6, 2010

/s/ Jon Niermann
JON NIERMANN