Comments of Luminant

EPA's Proposed Partial Approval and Partial Disapproval of Revisions to Texas's State Implementation Plan Related to Application and Permitting Procedures for Grandfathered and Electing Electric Generating Facilities

75 Fed. Reg. 64,235 (October 19, 2010)

Luminant

Submitted to U.S. Environmental Protection Agency

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EXECUTIVE SUMMARY

On October 19, 2010, EPA proposed to partially approve and partially disapprove revisions to Texas's State Implementation Plan ("SIP") submitted by the Texas Commission on Environmental Quality ("TCEQ") on January 3, 2000, and July 31, 2002. *See* 75 Fed. Reg. 64,235 (Oct. 19, 2010). Below is a summary of Luminant's comments on EPA's proposed partial approval and partial disapproval.

- EPA's proposed disapproval of 30 Tex. Admin. Code § 116.911(a)(2) is not supported and is an arbitrary change in EPA's position on Pollution Control Project ("PCP") Standard Permits ("SP") in Texas.

- EPA's disapproval of 30 Tex. Admin. Code § 116.911(a)(2) is contrary to Clean Air Act ("CAA") § 110(*l*)'s requirement that EPA approve a SIP revision unless it makes a determination that "the revision would interfere with any applicable requirement concerning attainment and reasonable further progress" in light of EPA's acknowledgement that collateral CO emissions from PCP SPs does not threaten attainment of the National Ambient Air Quality Standards ("NAAQS").

- EPA's reliance on *New York v. EPA* to support its disapproval of 30 Tex. Admin. Code § 116.911(a)(2) is not appropriate because the Texas PCP SP is not an exemption, is subject to notice and comment, and subjects the recipient to a CO limit.

- EPA should follow its established position that PCP SPs are acceptable under the CAA.

- EPA incorrectly concludes that its prior disapproval of 30 Tex. Admin. Code § 116.617 necessitates disapproval of 30 Tex. Admin. Code § 116.911(a)(2). Rather, EPA must independently justify its disapproval of these provisions relating to the Texas Senate Bill No. 7 ("SB7") permitting program.

- EPA's disapproval of 30 Tex. Admin. Code § 116.911(a)(2) would affect only sources that have already obtained PCP SPs under SB7 and therefore would have only a retroactive effect, which EPA described as an "inequitable" result in *New York v. EPA.*

- The plants identified by EPA in its Technical Support Document are not in retroactive violation of *New York v. EPA.* The D.C. Circuit's decision did not address any retroactive application, a person cannot "violate" a court decision like *New York I,* and EPA has not demonstrated that Luminant's plants would have exceeded major modification thresholds.

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on
EPA's Proposed Partial Approval and Partial Disapproval of Revisions to Texas's State Implementation Plan Related to Application and Permitting Procedures for Grandfathered and Electing Electric Generating Facilities

75 Fed. Reg. 64,235 (October 19, 2010)

Docket ID No. EPA-R06-OAR-2005-TX-0031

Luminant[1] submits these comments on the U.S. Environmental Protection Agency's ("EPA") proposed rule to partially approve and partially disapprove revisions of the Texas State Implementation Plan ("SIP") submitted by the Texas Commission on Environmental Quality ("TCEQ") related to application and permitting procedures for grandfathered and electing electric generating facilities ("EGFs"). 75 Fed. Reg. 64,235 (Oct. 19, 2010) ("proposed approval" or "proposed disapproval"). Luminant is specifically concerned with EPA's proposed disapproval of 30 Tex. Admin. Code § 116.911(a)(2), which requires EGFs proposing to use new control methods to comply with certain requirements of the Texas Standard Permit ("SP") for Pollution Control Projects ("PCP") in order to be granted an electric generating facility permit under Texas Senate Bill No. 7 ("SB7" or "Senate Bill 7"). *See id.* at 64,237 (citing 30 Tex. Admin. Code § 116.617). Luminant's specific comments are provided below.[2]

I. Background

A. Grandfathered Facilities and Texas Senate Bill 7

In 1971, the State of Texas began permitting new and modified sources of air emissions under Texas's New Source Review ("NSR") state implementation program. Texas's first major

[1] As used herein, "Luminant" refers collectively to Luminant Generation Company LLC and Big Brown Power Company LLC.

[2] Further, Luminant is a member of and adopts and supports the comments filed by The Association of Electric Companies of Texas and the Gulf Coast Lignite Coalition.

clean air law grandfathered existing plants and plants under construction from the requirement to obtain NSR air permits. In 1999, the Texas State Legislature passed SB7, which amended the Texas Utilities Code ("TUC") and, among other things, required the TCEQ to establish a program to implement the requirements of TUC § 39.264. That provision required EGFs that existed on January 1, 1999 (and were previously grandfathered) to apply for a new permit (referred to herein as an "SB7 permit") covering emissions of NO_x and SO_2. EGFs that were not grandfathered could elect to obtain an SB7 permit to participate in the emissions banking and allowance trading program established by SB7. Applications for SB7 permits were due by September 1, 2000.

To implement the requirements of TUC § 39.264, TCEQ adopted rules in January 2000. These rules consisted of (1) a new 30 Tex. Admin. Code Chapter 101, Subchapter H, Division 2 implementing the mass cap and trade requirements of SB7, and (2) a new 30 Tex. Admin. Code Chapter 116, Subchapter I implementing the SB7 permitting program. TCEQ's revisions to 30 Tex. Admin. Code Chapter 116 established "an allowance and permitting program for regulating grandfathered EGFs." 75 Fed. Reg. at 64,237. Chapter 116, Subchapter I set out the requirements for EGFs to apply for SB7 permits. One portion of that subchapter, § 116.911(a)(2), requires an SB7 permit applicant to comply with certain requirements of Texas's SP for PCPs in 30 Tex. Admin. Code § 116.617. TCEQ submitted these rules to EPA as revisions to the SIP on January 3, 2000. In June 2002, TCEQ adopted amendments to its 30 Tex. Admin. Code Chapter 116 air permitting rules, including Subchapter I. TCEQ submitted these rules to EPA as revisions to the SIP on July 31, 2002.

B. Texas's Standard Permit Program and Standard Permit for Pollution Control Projects

Texas's SP for PCPs (30 Tex. Admin. Code § 116.617) was originally submitted by TCEQ for approval by EPA on December 9, 2002, with its general regulations for SPs. *See* 68 Fed. Reg. 64,543, 64,547 (Nov. 14, 2003). The general SP regulations were approved by EPA in 2003 as meeting the Minor NSR SIP requirements; however, at that time, EPA did not approve Texas's proposed SP for PCP, 30 Tex. Admin. Code § 116.617. *Id.* TCEQ submitted a new revision to its PCP SP on February 1, 2006, to limit the PCP SP for purposes of Minor NSR. EPA published a final rule disapproving this version of the PCP SP on September 15, 2010. 75 Fed. Reg. 56,424 (Sept. 15, 2010). EPA concluded that the PCP SP did "not meet the requirements of the Texas Minor NSR Standard Permits Program," because "[i]t does not apply to similar sources," and therefore "lacks the requisite replicable standardized permit terms specifying how the Director's discretion is to be implemented for the case-by-case determinations." *Id.* at 56,447.[3]

C. EPA's Proposed Action on Texas's SIP Revisions Related to Application Procedures for Grandfathered and Electing EGFs

On October 19, 2010, EPA proposed to partially approve and partially disapprove revisions to portions of Texas's SIP implementing SB7 and the EGF permitting program. 75 Fed. Reg. 64,235 (Oct. 19, 2010). EPA proposed to approve all of TCEQ's January 3, 2000 submittal except for 30 Tex. Admin. Code § 116.911(a)(2). As grounds for its proposed

[3] Several parties, including Luminant, have filed petitions for review with the U.S. Court of Appeals for the Fifth Circuit Court seeking to set aside EPA's September 15, 2010 Final Rule disapproving revisions to portions of Texas's SIP, including the PCP SP. *See* Petition for Review, *Texas v. U.S. Envtl. Protection Agency*, No. 10-60891 (5th Cir. Nov. 12, 2010); Petition for Review, *Luminant Generation Co. v. U.S. Envtl. Protection Agency*, No. 10-60891 (5th Cir. Nov. 12, 2010); Petition for Review, *Tex. Ass'n of Bus., Tex. Ass'n of Mfrs., Tex. Oil and Gas Ass'n, Chamber of Commerce of U.S. of Am. v. U.S. Envtl. Protection Agency*, No. 10-60891 (5th Cir. Nov. 12, 2010).

disapproval of 30 Tex. Admin. Code § 116.911(a)(2), EPA cites only its recent disapproval of 30 Tex. Admin. Code § 116.617 and the decision of the U.S. Court of Appeals for the D.C. Circuit in *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) ("*New York I*"). EPA also declined to take action on TCEQ's revisions to Chapter 101, Subchapter H, relating to the Emissions Banking and Trading Allowance ("EBTA") program, stating that it would consider those provisions in a separate rulemaking. On November 16, 2010, EPA took direct final action to approve the EBTA program, explaining that EPA has determined that these changes to the SIP comply with the Clean Air Act ("CAA") and EPA regulations and are consistent with EPA policies. Furthermore, EPA determined that the EBTA will improve air quality. *See* 75 Fed. Reg. 69,884 (Nov. 16, 2010).

II. Luminant's Interest in EPA's Proposed Disapproval of 30 Tex. Admin. Code § 116.911(a)(2)

Luminant is the largest competitive power generation company in Texas. It operates lignite mines and generates electricity with 12 solid fuel-fired units, 35 natural gas-fired units, and 2 nuclear units. Luminant has units that were grandfathered from Texas's NSR SIP program in 1971 and that obtained SB7 permits and were required by 30 Tex. Admin. Code § 116.911(a)(2) to comply with the requirements in 30 Tex. Admin. Code § 116.617. Luminant also has units that elected to obtain SB7 permits in order to participate in the EBTA program under SB7 and also complied with 30 Tex. Admin. Code § 116.617. These include units for which low NO_x burners were proposed as new control methods to meet the new emission limits set forth in the SB7. Such units were required by 30 Tex. Admin. Code § 116.911(a)(2) to meet the requirements in 30 Tex. Admin. Code § 116.617 for collateral CO increases resulting from the operation of low NO_x burners. In the proposed rule, EPA identifies by name two facilities where collateral CO emissions increases, occurring only as a result of installing new NO_x

controls, were alleged to be above the Prevention of Significant Deterioration ("PSD") significance levels. *See* Technical Support Document C at 2. The facilities identified were Luminant's[4] Big Brown Steam Electric Station (for low NO_x burners and over-fired air on Units 1 and 2) and Stryker Creek Steam Electric Station (for low NO_x burners and separated over-fired air on Unit 2). Thus, Luminant has a direct interest in this rulemaking. Although EPA acknowledges that Luminant obtained these permits prior to the D.C. Circuit's decision in *New York I*, EPA contends that Luminant is nevertheless "in violation retroactively of the court decision." *Id.* Luminant strongly disagrees with EPA's assessment of these two facilities and their compliance status and also disagrees with EPA's proposal to disapprove 30 Tex. Admin. Code § 116.911(a)(2).

III. Luminant's Comments on EPA's Partial Approval and Partial Disapproval of Texas's SIP Revisions Related to Application and Permitting Procedures for Grandfathered and Electing EGFs

Luminant's comments on EPA's October 19, 2010 proposal relate primarily to EPA's proposal to disapprove 30 Tex. Admin. Code § 116.911(a)(2)—the section that requires grandfathered and electing EGFs to comply with certain requirements of 30 Tex. Admin. Code § 116.617. EPA's proposed disapproval is not supported by the CAA or by caselaw. Moreover, the effect of EPA's disapproval would be to unfairly and arbitrarily apply permitting requirements *retroactively* to sources that appropriately met SB7 requirements and installed new pollution control equipment to reduce emissions. EPA agrees that there would be no benefit to air quality in Texas resulting from its disapproval of this section. *See* 75 Fed. Reg. at 64,238 ("EPA believes that all of the resultant collateral CO increases across the State of Texas

[4] The permits originally issued to Texas Electric Company and TXU Generation Company were transferred to Luminant Generation Company LLC. Big Brown Power Company LLC is the owner of Big Brown Steam Electric Station and Luminant Generation Company LLC is the owner of Stryker Creek Steam Electric Station.

(including those from the two plants) do not interfere with attainment or maintenance of the NAAQS for CO, *et al.*, nor cause or contribute to increase in PSD increments, much less a violation of any NAAQS."). In fact, as noted above, EPA has determined that the EBTA associated with SB7 permitting will improve air quality. *See* 75 Fed. Reg. 69,884 (Nov. 16, 2010).

A. EPA's Proposed Disapproval of 30 Tex. Admin. Code § 116.911(a)(2)

In response to SB7, TCEQ adopted Chapter 116, Subchapter I, which implements the applicability and permitting requirements for grandfathered and electing EGFs, and submitted these SIP revisions to EPA on January 3, 2000.[5] Subchapter I requires the owner or operator of a grandfathered EGF to apply for a permit to operate—the SB7 permit. *See* 30 Tex. Admin. Code § 116.910. Section 116.911 requires owners or operators of grandfathered or electing coal-fired EGFs to "submit an application to authorize [NO_x] emissions and, if applicable, [SO_2] and [PM] emissions." 30 Tex. Admin Code § 116.911(a). In order for an owner or operator to have received an SB7 permit, it had to submit information to TCEQ to demonstrate that all of the following were satisfied:

1) propose monitoring and reporting for the measurement of emissions and demonstration of performance consistent with § 116.914;

2) if the applicant proposes the use of new control methods these must comply with the requirements in § 116.617(1), (3), (4)(A), and (B) and (5)—(9) (relating to Standard Permit for Pollution Control Projects);

3) when required, provide computerized air dispersion modeling and/or ambient monitoring where there is an increase in emissions to determine the air quality impacts from controls proposed in section (2); and

4) for coal-fired grandfathered and electing EGFs, demonstrate that it meets the opacity limitations of §111.111.

[5] These revisions were adopted by TCEQ on December 16, 1999.

See 30 Tex. Admin. Code § 116.911(a)(1)—(4). An application for an SB7 permit must have been submitted by September 1, 2000. *See id.* § 116.911(c). Thus, as EPA recognized in its Technical Support Document, "[t]his subsection regards only *initial* applications." Technical Support Document A at 9 (emphasis added).

EPA has proposed to disapprove 30 Tex. Admin. Code § 116.911(a)(2) because of its requirement for SB7 permit applicants to comply with the requirements in 30 Tex. Admin. Code § 116.617(1), (3), (4)(A), and (B) and (5) - (9) relating to the SP for PCPs. 75 Fed. Reg. at 64,237. EPA's proposed disapproval in this instance is based on its disapproval of the Texas PCP SP program on September 15, 2010, and on the D.C. Circuit's decision in *New York I* vacating EPA's PCP *exclusion* for Major NSR requirements. *Id.* at 64,238. However, disapproval of 30 Tex. Admin. Code § 116.911(a)(2) at this time would have only the effect of retroactively removing a *permitting* procedure and authorization relied upon by sources when they applied for SB7 permits over ten years ago and *reduced* emissions. This would unjustly call into question these properly obtained emission reduction permits and has no prospective application. EPA's proposal to disapprove 30 Tex. Admin. Code § 116.911(a)(2) is not required by the decision in *New York I* and is not supported by CAA § 110(*l*); therefore, EPA should instead approve 30 Tex. Admin. Code § 116.911(a)(2) along with the other revisions it has proposed to approve.

1. EPA's proposal to disapprove 30 Tex. Admin. Code § 116.911(a)(2) is contrary to Clean Air Act Section 110(*l*).

Under CAA § 110(*l*), EPA may disapprove a SIP revision only if it determines the revision would "interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement." 42 U.S.C. § 7410(*l*). The courts, including the U.S. Supreme Court and the U.S. Court of Appeals for the Fifth Circuit, have

further elaborated on the standards for EPA review of proposed SIP revisions. As the Fifth Circuit explained:

> [The CAA] *requires* the Agency to "approve any revision of an implementation plan" if it "determines that it meets the requirements" of § 110(a)(2). On its face, this provision applies to *any* revision, without regard either to its breadth of applicability, or to whether it is to be effective before or after the attainment date; rather, Agency approval is subject only to the condition that the revised plan satisfy the general requirements applicable to original implementation plans. Far from evincing congressional intent that the Agency assume control of a State's emission limitations mix once its initial plan is approved, the revision section is to all appearances the mechanism by which the States may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards.

Fla. Power & Light Co. v. Costle, 650 F.2d 579, 587 (5th Cir. Unit B June 1981) (quoting *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 80 (1975)) (alteration and emphasis in original). As the court further explained: "Under the [CAA], therefore, states may provide for 'ameliorative revisions' of an established pollution control scheme as long as national clean air standards are not compromised." *Id.* (citing *Train*, 421 U.S. at 98).

Texas's choice to achieve emissions reductions through SB7 permits and to require permit applicants to comply with requirements in 30 Tex. Admin. Code § 116.617 when proposing to install pollution control equipment more than satisfies the court's test for mandatory approval. For one thing, 30 Tex. Admin. Code § 116.911(a)(2) is part of a larger permitting scheme to reduce emissions of SO_2, and NO_x. That Texas initiative has been extremely successful. With respect to NO_x emissions from electric generating facilities, Texas now ranks among the cleanest in nation. The NO_x emission rate from Texas electric generating facilities is now 11th cleanest in the U.S., which is the result of a 64% reduction in NO_x tons per year emissions from 1997 through 2009. *See* EPA Acid Rain Database 2010. Moreover, any collateral increases in other pollutants resulting from the installation of pollution control

equipment (such as increases in CO after the installation of low NO_x burners) are demonstrably and admittedly not interfering with attainment of air quality standards. In fact, EPA itself has affirmatively found that 30 Tex. Admin. Code § 116.911(a)(2) is protective of NAAQS and that such standards have not been compromised in the ten years that the provision has been implemented in Texas. 75 Fed. Reg. at 64,238. As EPA stated, it "believes that all of the resultant collateral CO increases across the State of Texas (including those from the two plants [that obtained a PCP SP rather than a Major NSR permit]) **do not interfere with attainment or maintenance of the NAAQS for CO***, et al.,* **nor cause or contribute to increase in PSD increments, much less a violation of any NAAQS.**" *Id.* (emphasis added). Moreover, as EPA recognizes, Texas has revised its PCP SP program so that it prospectively only applies to Minor NSR and therefore could not be construed to run afoul of federal statutory NSR requirements. 75 Fed. Reg. at 56,444. EPA's proposal to disapprove 30 Tex. Admin. Code § 116.911(a)(2) is therefore contrary to the CAA, and any action to disapprove that section would step outside the "narrow role to be played by EPA" in the SIP revision process. *Fla. Power & Light Co.*, 650 F.2d at 587.

2. EPA over-reads the D.C. Circuit's opinion in *New York I* to require disapproval of 30 Tex. Admin. Code § 116.911(a)(2).

EPA is improperly relying on the D.C. Circuit's decision in *New York I* to support its disapproval of 30 Tex. Admin. Code § 116.911(a)(2). 75 Fed. Reg. at 64,238 (citing *New York v. EPA,* 413 F.3d 3 (D.C. Cir. 2005)). That case has nothing to do with PCP permits and requirements to meet emission limits like those contained in Texas's SB7 permits. In *New York I,* the D.C. Circuit was considering EPA's definition of "modification" in its NSR regulations, specifically, a 2002 rule that entirely exempted "environmentally beneficial" PCPs from NSR "by excluding them from the definition of 'modification.'" *New York I,* 413 F.3d at

40. The Court held that "EPA lacks authority to create PCP *exemptions* from NSR." *Id.* at 41 (emphasis added).

The D.C. Circuit's decision on EPA's 2002 rule does not apply to the requirement in 30 Tex. Admin. Code § 116.911(a)(2) nor to Texas's PCP SPs in general. Unlike the federal PCP exclusion that was vacated by the D.C. Circuit, the Texas PCP SP is not an exclusion—it is a permitting requirement, subject to notice and comment, that imposes emissions limitations. This type of permit program was not considered, much less invalidated, by the D.C. Circuit. Despite this fundamental difference, in light of *New York I*, Texas submitted a revised version of 30 Tex. Admin. Code § 116.617 on February 1, 2006, for EPA approval to prospectively limit the use of the State's PCP SP to Minor NSR. *See* 75 Fed. Reg. at 56,444. Thus, for at least two reasons, the D.C. Circuit's decision in *New York I* relating to PCP *exclusions* for *Major* NSR is irrelevant to a decision on a PCP standard *permit* for *Minor* NSR.

Accordingly, even after *New York I*, EPA has not interpreted or applied the decision to its actions or permits under the Texas SIP. For example, EPA has repeatedly reviewed PCP emission limits established pursuant to 30 Tex. Admin. Code § 116.911(a)(2) as part of its Title V permit review process in Texas and, even after the *New York I* decision, has never, to Luminant's knowledge, concluded that such limits were not proper or were illegal. EPA's decision to suddenly apply *New York I* retroactively to the Texas SIP is contrary to the agency's established practice post-*New York I*.

3. EPA's disapproval of 30 Tex. Admin. Code § 116.617 does not justify or require disapproval of 30 Tex. Admin. Code § 116.911(a)(2).

The only reason other than the *New York I* decision that EPA gives for its proposal to disapprove 30 Tex. Admin. Code § 116.911(a)(2) is that EPA has recently disapproved 30 Tex. Admin. Code § 116.617. Luminant believes EPA's action in disapproving 30 Tex. Admin.

Code § 116.617 was contrary to law in its own right and has filed a petition for review with the U.S. Court of Appeals for the Fifth Circuit seeking to set aside that action. That final rule suffers from many of the same flaws as EPA's proposal here—there is simply nothing about Texas's PCP SP or the requirements in the SP that interferes with attainment of air quality standards or runs afoul of the NSR provisions of the Act. Moreover, 30 Tex. Admin. Code § 116.911(a)(2) does not simply incorporate by reference 30 Tex. Admin. Code § 116.617, as EPA suggests. Instead, the SB7 permit rules, which EPA is otherwise proposing to approve, require a permit applicant "to comply with the requirements" of those certain cited provisions of 30 Tex. Admin. Code § 116.617. 30 Tex. Admin. Code § 116.911(a)(2). The obligation thus originates from the SB7 permit rules, and EPA has an independent obligation to justify its disapproval of the substance of those requirements in this rulemaking and not simply rely on a prior one that did not involve the SB7 permit program.

4. EPA is wrong that Luminant's units are "in violation retroactively of the court decision" in *New York I*.

In its Technical Support Document, EPA baldly asserts that Luminant's units that "obtained their PCP SP before the court decision [*in New York I*] was issued" "are in violation retroactively of the court decision." Technical Support Document C at 2. EPA is flat wrong about this, and there is no support in the law or the facts for such a statement.

First, the D.C. Circuit expressly stated that its decision did not decide the retroactive effect of its decision. In denying EPA's request for clarification as to any retroactive effect of the ruling on the PCP provision, the D.C. Circuit explained that "no specific retroactive application of the provision is before the court." *See* Order on Rehearing, *New York v. EPA*, No. 02-1387 (D.C. Cir. Dec. 9, 2005). Instead of respecting the court's ruling in this regard, EPA takes it upon it itself to presume that the decision has some retroactive application. The court did

not say that. EPA's decision to disapprove 30 Tex. Admin. Code § 116.911(a)(2) and to attempt to do so retroactively to *state* permits that have already been issued is directly contrary to the D.C. Circuit's ruling on rehearing and is not supportable.

EPA's action is also contrary to its own position with respect to retroactive application of the ruling. EPA itself recognized the inequity in applying the court's decision retroactively: "It would be inequitable to penalize sources that voluntarily installed environmentally beneficial pollution control equipment based on their good-faith reliance on EPA's regulations and guidance." EPA's Petition for Rehearing or Petition for Rehearing *En Banc* and Request for Clarification at 14, *New York v. EPA*, No. 02-1387 (D.C. Cir. Aug. 8, 2005). EPA's Request for Clarification of the court's decision sought to "ensure that all sources that [had] relied on the PCP exclusion are treated equally." *Id*. at n.5. Further, EPA urged that "the vacatur should not be applied to permitting decisions that are no longer subject to review." *Id*. (citing *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995)). Nothing in the D.C. Circuit's decision prevents EPA from carrying out this previously-adopted policy on how to apply the decision, and, in fact, the court's Order on Rehearing leaves that avenue plainly open to the agency.

Second, a person cannot "violate" a court decision like *New York I*. The court decision interprets and applies statutory law—it does not create new legal requirements that could be "violated."

Third, the allegation that Luminant's two units should have obtained a Major NSR permit for increases in CO emissions following the installation of pollution control equipment is not supported by the facts in the record. EPA has not addressed whether or not Luminant could have claimed some other exclusion, *i.e.*, routine maintenance, repair, or replacement, or whether Luminant could have utilized the netting provisions if needed. EPA has not offered sufficient

data in the record to support its suggestion that Luminant's plants violated Major NSR requirements when installing pollution control equipment.

B. EPA's Proposed Approval of Texas's January 2000 and July 2003 SIP Revisions

Luminant supports EPA's proposed approval of the balance of TCEQ's January 3, 2000 and July 31, 2002 submittals. Additionally, Luminant supports EPA's November 16, 2010 direct final rule to approve the EBTA program.

IV. Conclusion

EPA's proposal should be revised to approve all of the revisions to the Texas SIP submitted to EPA on January 3, 2000, and July 31, 2002. A decision by EPA to disapprove 30 Tex. Admin. Code § 116.911(a)(2) would be unsupported by the record, arbitrary and capricious, and contrary to law. At a minimum, EPA should clarify that its action on § 116.911(a)(2) applies prospectively only and does not affect existing permits issued under the SB7 program.

Any replies or correspondence related to these comments should be sent to William A. Moore, General Counsel, Luminant, 500 N. Akard Street, Dallas, Texas 75201, or faxed to (214) 875-9478, attention William A. Moore.