BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

In re Avenal Power Center, LLC	)	PSD Appeal No. PSD 11-02
PSD Permit No. SJ 08-01	)	

PERMITTEE'S RESPONSE TO PETITIONS FOR REVIEW OF EPA'S DECISION TO GRANT THE AVENAL ENERGY PROJECT A PSD PERMIT

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INTRODUCTION

Four groups and one individual have filed petitions asking the Environmental Appeals Board ("EAB" or the "Board") to review a Prevention of Significant Deterioration ("PSD") permit issued for a 600-megawatt natural gas-fired power plant known as the Avenal Power Center. In their petitions and in this Response, this plant is referred to variously as "APC," the "Avenal Project," or "Avenal."[1] As the permitting record shows, Avenal will be a state-of-the-art combined cycle natural-gas fired plant, and none of the Petitioners (or anyone else) has ever suggested that there are any additional pollution controls that could be used to further reduce emissions from the plant or that any of the limits or other conditions in the final permit are improper.

The Petitioners focus most of their attention on the argument that U.S. Environmental Protection Agency ("EPA") should have required Avenal to meet new permitting requirements that were not even proposed until well after the date by which EPA was required, under Section 165(c) of the Clean Air Act ("CAA"), to take final action on Avenal's PSD permit. This issue, however, has already been resolved in a related proceeding before the U.S. District Court for the District of Columbia and is not properly before the Board. This same Court has also issued an order requiring EPA to take final agency action on Avenal's permit by August 27, 2011.

In any event, the permitting record shows that EPA has gone out its way to ensure that the Avenal permit and the permitting process comply with the CAA, all applicable regulations and guidance documents, and the decisions of this Board. In fact, after the Board's recent decision in *In re Shell Gulf of Mexico Inc. and Shell Offshore Inc.*, OCS Appeal Nos. 10-01 to 10-04, slip op. at 74 (EAB Dec. 30, 2010), 15 E.A.D. __ ("*Shell II*"), the Agency reopened the

[1] The permittee is the Avenal Power Center, LLC, but is usually referred to simply as Avenal. Although the plant and the permittee are both referred to as "Avenal," the meaning is always clear from the context in which the name is used.

public comment period to ensure that it complied with the Board's guidance on addressing concerns about environmental justice. None of the petitions shows that that the permitting authority has based any permit condition on a clearly erroneous finding of fact or conclusion of law or that there are other issues related to the Avenal permit that warrant review. Thus, we urge the Board to deny the petitions for review and allow the permit to become final agency action before the August 27th deadline established by the D.C. District Court.

FACTUAL BACKGROUND

I. HISTORY OF AVENAL'S PERMIT

EPA has stipulated to the accuracy of the following dates and events in federal court. *See generally* Joint Stipulations ("Jt. Stips."), Jt. Stmt. re Case Mgmt. and Scheduling, Ex. 1, *Avenal Power Center, LLC v. EPA*, 10cv383 (D.D.C. June 30, 2010) (attached hereto as Exhibit A). One of the petitions includes a significant error in discussing the permitting and regulatory timeline in this case, so we ask the Board to evaluate the issues in light of the actual dates and events set forth below. [2]

In August 2007, Avenal first contacted EPA Region 9 about developing a major stationary source, the Avenal Energy Project, a 600 megawatt natural gas-fired power plant to be built in California. *Id.* ¶¶ 1-3. In February 2008, Avenal submitted its PSD permit application for the Project to EPA. *Id.* ¶ 4. On March 19, 2008, EPA notified Avenal that its PSD permit application was complete. *Id.* ¶ 5. EPA has admitted that it was statutorily bound by Section 165(c) of the CAA to issue a final decision on Avenal's application by March 19, 2009—one

[2] The Petition that Earthjustice filed on behalf of the Sierra Club and the Center for Biological Diversity (the "Sierra Club Petition") states that Avenal's permit application was submitted in February 2009. Sierra Club Petition 2. In fact, the application was submitted in February 2008 and, after the applicant provided additional information, was found to be complete the following month. Based on this error, Sierra Club asserts that the new 1-hour NO2 standard was published "less than a year after EPA had found APC's permit application to be complete." Sierra Club Petition 3. In fact, the 1-hour NO2 standard was not even *proposed* until more than a year after Avenal's application was accepted as complete.

year after finding that Avenal's application was complete. *Id.* ¶ 7; Corrected 2d McCarthy Decl. ¶ 6, *Avenal*, 10cv383 (D.D.C. Feb. 4, 2011) (attached hereto as Exhibit B). EPA, however, failed to meet that deadline. Jt. Stips. ¶ 8.

In June 2009—three months after the deadline for issuing a *final* permit—EPA issued a *draft* permit for public comment. *Id.* ¶ 10. Along with the draft permit, the Agency issued a document stating that Avenal met all its statutory requirements under the CAA, including a demonstration that the proposed project would not cause or contribute to a violation of any NAAQS. *Id*. Only then, on June 16, 2009, did EPA give the required notice to the public of the required 30-day public comment period. *Id*. EPA actually extended the comment period by an additional 90 days beyond the 30 days provided under EPA's regulations. *See id*. In addition, EPA scheduled a public information meeting, a public hearing and yet another supplemental public hearing on Avenal's draft permit. *Id*. Following the close of the extended public comment period on October 15, 2009, EPA still took no steps to render a decision on Avenal's permit. *Id.* ¶¶ 10-11.

II. LITIGATION BACKGROUND

On December 21, 2009, following EPA's failure to grant or deny Avenal's permit application after the close of the extended comment period, and in accordance with Section 304(b)(2) of the CAA, 42 U.S.C. § 7604(b)(2) (2006), Avenal notified EPA of its intent to file an action in federal court for EPA's failure to meet its statutory obligations under Section 165(c) of the CAA. Compl., Ex. B, *Avenal*, 10cv383 (D.D.C. March 9, 2010) (attached hereto as Exhibit C). After waiting the required 60 days and having received no resolution on the issuance of a permit decision from EPA, Avenal filed suit in the U.S. District Court for the District of Columbia on March 9, 2010.

In its May 18, 2010 Answer, EPA conceded that it had violated Section 165(c) but offered two reasons for its continuing failure to render a decision of Avenal's permit. Answer, *Avenal*, 10cv383 (D.D.C. May 18, 2010) (attached hereto as Exhibit D). The first concerned the pendency of a final Biological Opinion by the U.S. Fish and Wildlife Service ("USFWS"), which was issued shortly thereafter, thereby mooting that issue. Answer, Defenses ¶¶ 1-2. The remaining reason that EPA offered for its "inability" to issue Avenal's permit was a new permitting requirement relating to nitrogen dioxide (the "1-hour NO2 Standard"), which EPA had issued just weeks before. *Id*. ¶ 2. This standard had come into effect on April 12, 2010—more than a year after EPA was required to make a final decision on Avenal's permit and more than a month after Avenal filed the federal court action. *Id*. In fact, EPA had not even *proposed* this new standard until after it was legally required to make a final decision on Avenal's permit. Jt. Stips. ¶ 10. Moreover, EPA did not even suggest until May 2010 that Avenal or any other applicant with a pending PSD permit application would need to demonstrate compliance with the new NO2 Standard in order to obtain a permit. *See* Mem. in Supp. Pl.'s Mot. J. on Pleadings 11-13, *Avenal*, 10cv383 (D.D.C. August 25, 2010) (attached hereto as Exhibit E), Pl.'s Opp. to Defs.' Cross-Mot. Summ. J. 8, *Avenal*, 10cv383 (D.D.C. Oct. 8, 2010) (attached hereto as Exhibit F). Despite the litigation and its frustration with this process, Avenal continued to work with EPA to show that the proposed Project would meet the new NO2 Standard, but these efforts were unsuccessful despite the fact that Avenal submitted two separate modeling studies, based on EPA's pre-existing modeling guidance, which showed that the Project would not cause or contribute to a violation of the new 1-hour NO2 Standard. *See* Mem. in Supp. Pl.'s Mot. J. on Pleadings 13-14.

In August and September 2010, the parties filed dispositive motions, which were fully briefed by the end of October 2010. *See* Mem. in Supp. Pl.'s Mot. J. on Pleadings; Defs.' Cross-Mot. Summ. J., *Avenal*, 10cv383 (D.D.C. Sept. 17, 2010) (attached hereto as Exhibit G). In its pleadings, Avenal argued that EPA's position regarding the new 1-hour NO2 Standard was unlawful under Section 165(c) of the CAA and the relevant case law and was clearly contrary to congressional intent. *See* Mem. in Supp. Pl.'s Mot. J. on Pleadings 11-16, 20-21. Avenal also noted that EPA's position had the potential to create a never-ending permitting process, as a permit applicant might go through the required process to meet one new requirement and then, before the final permit is issued, be forced to go back through the process again to meet another new requirement, and so on. *Id*. at 26.

In its September 17, 2010 dispositive motion, EPA asserted that it interpreted the CAA and EPA regulations to preclude EPA from issuing a PSD permit to Avenal until Avenal could demonstrate, to EPA's satisfaction, that Avenal would meet the new 1-hour NO2 standard. *See* Defs.' Cross-Mot. Summ. J., Jordan Decl. ¶ 14 and Ex. 5, *Avenal*, 10cv383 (D.D.C. Sept. 17, 2010) (attached hereto as Exhibit H). In that motion, EPA also informed the Court that, based on new information submitted by Avenal regarding the new NO2 Standard, the Agency could decide Avenal's permit by December 31, 2010. *Id.* ¶ 21. On November 30, 2010, however, EPA notified the Court that its own proposed December 31 deadline was "no longer attainable." *See generally* Defs.' Notice to Court re Timing of EPA Action Anticipated in Defs.' Cross-Mot. for Summ. J., *Avenal*, 10cv383 (D.D.C. Nov. 30, 2010) (attached hereto as Exhibit I). On January 7, 2011, following the conclusion of the parties' agreed-upon stay to explore settlement options, EPA notified the Court that it was not possible for EPA to render a decision on Avenal's permit

before May 27, 2011. *See* Defs.' Notice to Court and Supplemental Decl. re Remedy ¶ 5, *Avenal*, 10cv383 (D.D.C. Jan. 7, 2011) (attached hereto as Exhibit J).

Then, on January 31, 2011, EPA submitted a declaration to the federal court in which it changed its position on the need for Avenal to demonstrate compliance with the new NO2 Standard and other new permitting requirements relating to SO2 and GHGs that were not issued until well after the Agency's deadline for making a final decision on Avenal's permit. Rather than litigate over this issue, the Agency informed the Court that it would "grandfather" Avenal's permit application:

> EPA has determined that it is appropriate, under certain narrow circumstances, to grandfather certain PSD applications from the requirement to demonstrate that the proposed facility will not cause or contribute to a violation of the hourly NO2 standard. In addition, EPA believes the factors that justify such an approach for the hourly NO2 standard also provide a basis not to subject these same permit applications to additional permitting requirements that have taken effect during the period of time these permit applications have been pending and permit applicants have been seeking to compile the additional information necessary to demonstrate that the source will not cause or contribute to a violation of the hourly NO2 standard. *The PSD permit application submitted by Avenal in 2008 is among those PSD permit applications that EPA believes it is appropriate to grandfather from these additional requirements, particularly in light of EPA's statutory obligation to grant or deny a complete PSD permit application within one year and other circumstances present in this case***.**

Corrected 2d McCarthy Decl. ¶ 6 (emphasis added).

In light of this concession on what had been the primary focus of the case, Judge Richard J. Leon requested additional briefings and oral argument on the appropriate remedy for EPA's admitted violations of Section 165(c). *See generally* Notice, *Avenal*, 10cv383 (D.D.C. Feb. 3, 2011) (attached hereto as Exhibit K). As discussed below, when the Court issued its Order and Opinion on May 26, 2011, the Judge made it clear that he was relying, in part, on EPA's concession that Avenal would not need to demonstrate compliance with new permitting requirements that were adopted after the date on which EPA was legally required to issue its

permit decision. *See Avenal*, 10cv383 (D.D.C. May 26, 2011) (memorandum opinion) ("May 26 Opinion") (attached hereto as Exhibit L). The Court noted that EPA's actions during Avenal's permitting process were inconsistent with Congressional intent and that EPA's delays over the past three years were unreasonable. *Id.* In its order, the Court required EPA to take final agency action on Avenal's permit no later than August 27, 2011.

STANDARD OF REVIEW

The procedures for an appeal from a PSD permitting decision are set forth in 40 C.F.R. § 124.19. Under those procedures, "the Board first considers whether the petitioner has met threshold pleading requirements such as timeliness, standing, and issue preservation." *Russell City Energy Center*, PSD Appeal Nos. 10-01 to 10-05, 10-12, 10-13, slip op. at 12 (EAB No. 18, 2010), 15 E.A.D. __. If the petitioner satisfies those requirements, "the Board then evaluates the petition on its merits to determine if review is warranted." *Id.* at 13.

To obtain review from the Board, the petitioner bears the burden of demonstrating "that the permitting authority based the permit condition in question on a clearly erroneous finding of fact or conclusion of law or involves an important matter of policy or an exercise of discretion that warrants review." *Id.* at 13-14. The petitioner "must raise objections to the permit and *explain why* the permit issuer's previous response to those objections is clearly erroneous or otherwise warrants review." *Id.* at 14.

The Board's review authority "should be only sparingly exercised" and "most permit conditions should be finally determined at the [permit issuer's] level." *Id.* (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)). The Board's review is also limited only to "issues that relate to explicit requirements of the PSD regulations or the CAA's PSD provisions or that are 'otherwise linked to the federal PSD program.'" *In re Prairie State Generating Company, LLC*, 13 E.A.D.

1, 43 (EAB 2006) (quoting *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 162 (EAB 1999) ("*Knauf I*")).

ARGUMENT

The Board should deny the petitions for review because none of the Petitioners have shown that any permit condition is based on a clearly erroneous finding of fact or conclusion of law or that the permit otherwise warrants review. To the contrary, EPA and Avenal have satisfied every statutory and regulatory prerequisite to approval of the permit. EPA has properly interpreted the CAA, particularly Section 165, in deciding which standards apply to Avenal's permit, and EPA has appropriately applied that interpretation to Avenal's permit considering the significant delay that Avenal has faced during the permitting process. EPA has also satisfied the other requirements that form the basis for Petitioners' challenges in this matter. Avenal has worked tirelessly to provide the information necessary to receive its permit, even as it found it necessary to proceed with litigation, and has now waited more than three years since EPA deemed its permit application to be complete.

I. THE SO-CALLED "GRANDFATHERING" ISSUE—WHETHER AVENAL MUST DEMONSTRATE COMPLIANCE WITH THE NEW 1-HOUR NO2 AND SO2 STANDARDS AND GHG PERMITTING REQUIREMENTS—IS NOT PROPERLY BEFORE THE BOARD IN THIS CASE.

The Petitioners focus most of their attention on the "grandfathering" issue—EPA's decision not to require Avenal to meet new permitting requirements (regarding the new 1-hour NO2 and SO2 standards and greenhouse gases) that were not even proposed until well after the date by which EPA was required, under Section 165(c) of the CAA, to take final action on Avenal's PSD permit. As discussed below, however, this issue has already been resolved in a related proceeding before the U.S. District Court for the District of Columbia and is not properly before the Board. Petitioners are asking the Board to overturn a decision that has already been

made by EPA in a proceeding before a federal district court. The Board, by regulation, has authority to review certain decisions made by various subordinate EPA officials (usually Regional Administrators), but it does not have authority to review decisions already made by EPA. Petitioners may have the opportunity to appeal EPA's decision to "grandfather" the Avenal Project to the appropriate federal court, but this issue is not properly before the EAB in this case (although the Board may be called upon to review grandfathering issues in subsequent permit appeals).

As noted above, when Avenal brought its deadline suit to compel EPA to take final action on its permit, EPA admitted that it had violated its statutory duty to grant or deny the permit within one year. Answer. The Agency simply argued that the Court, in determining the appropriate remedy for EPA's admitted violation, had to allow sufficient time for Avenal to demonstrate compliance with the new 1-hour NO2 Standard. Defs.' Cross-Mot. Summ. J. 20-21. Even though Avenal had already provided the Agency with two separate modeling studies showing that the proposed project would not cause or contribute to any violation of the new 1-hour standard, and even though Avenal continued to work with EPA to provide additional information and analysis regarding the new standard, Avenal also took the position that it was illegal for EPA to compel a permit applicant to meet a standard that had not even been proposed by the time that EPA was legally required to make its final decision on the permit. Mem. in Supp. Pl.'s Mot. J. on Pleadings 14-16.

Initially, EPA argued that, under the CAA, a permit applicant was required to meet any requirement that had become effective before the final permit was issued. Defs.' Cross-Mot. Summ. J. 18-19. The Agency later altered its position somewhat, arguing that a permit applicant was required to meet any new requirement that had become effective before the final permit was

issued, *unless* EPA had formally promulgated a "grandfathering" provision to exempt pending permit applications from the new requirement. Corrected 2d McCarthy Decl. ¶ 6.

EPA also argued that the District Court did not have jurisdiction to decide whether or not Avenal had to demonstrate compliance with the new NO2 standard and that the Court could do no more than set a deadline for final action. Defs.' Cross-Mot. Summ. J. 14-15. The judge, however, informed the parties that he had to decide whether Avenal was required to meet the new NO2 standard in order to set an appropriate deadline. He later scheduled a status conference with the parties to discuss a schedule for completing the litigation. Notice, *Avenal*, 10cv383 (D.D.C. Jan. 25, 2011) (attached hereto as Exhibit M).

The evening before the status conference, the U.S. Department of Justice, on behalf of EPA, submitted to the Court a sworn statement from Regina McCarthy, the EPA Assistant Administrator for Air and Radiation ("OAR"). In relevant part, this declaration states as follows:

> *EPA has determined* that it is appropriate, under certain narrow circumstances, to grandfather certain PSD applications from the requirement to demonstrate that the proposed facility will not cause or contribute to a violation of the hourly NO2 standard. In addition, EPA believes the factors that justify such an approach for the hourly NO2 standard also provide a basis not to subject these same permit applications to additional permitting requirements that have taken effect during the period of time these permit applications have been pending and permit applicants have been seeking to compile the additional information necessary to demonstrate that the source will not cause or contribute to a violation of the hourly NO2 standard. *The PSD permit application submitted by Avenal in 2008 is among those PSD permit applications that EPA believes it is appropriate to grandfather from these additional requirements, particularly in light of EPA's statutory obligation to grant or deny a complete PSD permit application within one year and other circumstances present in this case***.**

Corrected 2d McCarthy Decl. ¶ 6 (emphasis added).

This declaration completely abandoned the position that EPA had previously taken on the grandfathering issue and resolved what had been the key issue in the case. The District Court Judge noted this fact in his May 26 Opinion:

> [T]he N02 Standard had gone into effect on April 12, 2010, and plaintiff, therefore, argued that the EPA could no longer withhold its decision on plaintiffs permit because of this new requirement. *See* PI. Mot. 1. on Pleadings at 11. Ultimately, the EPA conceded this point as well.
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> . . .
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> Indeed, on February 4, 2011, in a declaration by Regina McCarthy, Assistant Administrator of the EPA's Office of Air and Radiation, the EPA *reversed* its position on the N02 Standard and announced that "[t]he PSD permit application submitted by Avenal in 2008 is among those PSD permit applications that EPA believes it is appropriate to grandfather from these additional [N02 Standard] requirements, particularly in light of EPA's statutory obligation to grant or deny a complete PSD permit application within one year . . . ." Corr. 2d Decl. of Regional McCarthy ("McCarthy Decl.") ¶6.

May 26 Opinion, slip op. at 3-4. Clearly, the District Court relied on the Agency's sworn statement that it could remedy its violation by grandfathering Avenal's permit application. Although the court's final Order simply established a deadline for final agency action on the permit, the timing of the deadline was based on EPA's sworn declaration that Avenal would not be required to meet the new permitting requirements related to the new 1-hour NO2 and SO2 standards and greenhouse gases.

The Department of Justice submitted the affidavit on behalf of the Environmental Protection Agency—not simply OAR or Region 9 or any other component of EPA—and the Board does not have authority to review a key representation that EPA has made to a federal court. Clearly, no government agency can make a sworn representation to a federal court in a specific case and then reverse itself in that same case. Yet this is what Petitioners are asking the Board to do. This is not to say that Petitioners have no avenue to appeal. If they choose, they may have the opportunity to appeal EPA's decision to "grandfather" the Avenal Project to the appropriate federal court, but this issue is not properly before the Board in this case.

The D.C. Circuit has explained that "an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding." *General Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002). That court has concluded, for example, that an EPA directive in a press release was binding on EPA because it contained "clear and unequivocal language, which reflects an obvious change in established agency practice." *Croplife America v. EPA*, 329 F.3d 876, 881 (D.C. Cir. 2003). The court has also concluded that an EPA document is binding on EPA when the "agency acts as if [it] is controlling in the field, . . . treats the document in the same manner as it treats a legislative rule, [or] leads private parties . . . to believe that [they must] comply with [its] terms." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

The sworn declaration submitted to the District Court is binding on EPA. It was submitted under penalty of perjury by EPA's Assistant Administrator of the Office of Air and Radiation and states that her office "is responsible for the development of [NAAQS] and the development of regulations, policy, and guidance associated with the [PSD] permitting program." Corrected 2d McCarthy Decl. ¶ 1-2. It includes clear and unequivocal language establishing EPA's decision not to apply the new standards to Avenal's permit application, stating that "EPA has determined" that this decision is appropriate and that "EPA believes" that there is a basis for the decision. *Id.* ¶ 6. Since submitting this declaration to the District Court, EPA has applied the declaration as its official interpretation of the CAA concerning Avenal's permit application. *See, e.g.*, Supplemental Statement of Basis at 2-4 (May 11, 2011) ("SSB"); Response to Comments at 53-82 (May 2011) ("RTC"). The affidavit both appears on its face to bind the agency, and EPA has applied it in a way that indicates that it is binding. It therefore binds EPA.

Because the affidavit is binding on EPA, it is therefore also binding on this Board. It is a well-established principle that an agency must follow its own rules, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), and the Board is undoubtedly a component of EPA, *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 795 (EAB 1995), *aff'd*, 81 F.3d 1371 (5th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997). Accordingly,

> if the agency is bound by both its legislative and nonlegislative rules then the administrative judges should be also. Although independent, they are part of the agency for the purpose of determining the law that applies to them. *Only the courts, as part of the judicial branch, are not bound by nonlegislative rules.* Orderly, uniform and predictable decisionmaking also supports the idea that administrative judges should not be allowed to deviate from nonlegislative rules any more than other officials of the agency.

32 Fed. Prac. & Proc. Judicial Review § 8165 (1st ed.) (emphasis added). The Supreme Court has applied this principle to an agency tasked with adjudicating matters under a statute even where a different agency performs rulemaking under the same statute. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) (holding that Occupational Safety and Health Review Commission must defer to statutory interpretation by Secretary of Labor).

Like the tribunal in *Martin*, this Board cannot now establish a interpretation of the relevant statute different than the one clearly established by the Administrator. Instead, the Board may only consider whether the conditions in Avenal's permit are proper considering EPA's binding determination that it will not apply the new standards to the permit.

II. THE AVENAL PERMIT COMPLIES WITH SECTION 165 OF THE CLEAN AIR ACT.

Section 165 of the CAA is clear and unambiguous. Petitioners seek to create smoke where no fire exists by claiming that Avenal's permit must be denied because Avenal has not met the preconstruction requirements under Section 165(a). Their argument is based on a

fundamental misreading of Section 165 that would create the potential for a never-ending permitting process. It is contrary to both the plain language and legislative intent of Section 165.

A. Avenal and EPA satisfied the clear and unambiguous requirements of Section 165.

EPA's regulations set forth the procedures for EPA's actions after it receives a complete PSD permit application. Under 40 C.F.R. Part 124: (1) EPA must decide within 30 days whether a PSD application is complete, 40 C.F.R. § 124.3(c); (2) then it must prepare a statement of basis, an air quality analysis, and a draft permit, *id.* § 124.7; (3) then it must publish a formal notice to advise interested parties that the documents are available for public comment, *id.* § 124.10; (4) it must also conduct a public hearing if anyone requests such a hearing, *id.* § 124.11; and (5) finally, when the Agency issues the final permit, it must also respond to the comments submitted during the public comment period, *id.* § 124.17.

The record clearly shows that Avenal and EPA have accomplished all the above requirements. In March 2008, EPA determined that Avenal had submitted a complete application and, in issuing a draft permit in June 2009, EPA concluded that Avenal had met the requirements of Section 165(a):

> EPA is proposing to issue a PSD permit to the Avenal Power Center, LLC for the Avenal Energy Project. ***We believe that the proposed project will comply with PSD requirements including the installation and operation of BACT, and will not cause or contribute to a violation of the NAAQS, or of any PSD increment.*** We have made this determination based on the information supplied by the applicant, our review of the analyses contained in the permit application, and other relevant information contained in the administrative record for this proposed action.

Statement of Basis at 30 (June 2009) ("2009 SB") (emphasis added). From June to October 2009, the draft permit and EPA's conclusions were the subject of public notice and comment, and EPA issued its Supplemental Statement of Basis regarding its proposed issuance of Avenal's permit on March 4, 2011.

1. Section 165(a) does not require a permitee to demonstrate compliance with standards immediately before construction begins or immediately before a final permit is issued.

Section 165(a) is both clear and unambiguous. It states, in relevant part:

> No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—
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> . . .
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> (3) the owner or operator of such facility demonstrates, as required pursuant to section 7410 (j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any
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> (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year,
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> (B) national ambient air quality standard in any air quality control region, or
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> (C) any other applicable emission standard or standard of performance under this chapter; . . . .

42 U.S.C. § 7475(a).

The text of Section 165(a) is clear. It only requires applicants to "demonstrate" compliance with the standards listed. Contrary to Petitioners' assertions, Section 165(a) does not specify the time at which the applicant must demonstrate compliance, leaving that determination to the agency's discretion.[3] Indeed, Section 165(a) refers to 42 U.S.C. § 7410(j), which only requires the permittee to show compliance "to the satisfaction of the permitting authority." There is nothing in Section 110(j) or any regulations issued thereunder to suggest that an applicant has

[3] The Board has acknowledged that EPA has discretion "to interpret what 'all applicable standards in effect' means to a particular source being permitted." *In re Vulcan Construction Materials, LP*, PSD Appeal No. 10-11, slip op. at 39 n.41 (EAB Mar. 2, 2011), 15 E.A.D. __ (quoting *In re Shell Gulf of Mexico, Inc. & Shell Offshore, Inc.*, OCS Appeal Nos. 10-01 to 10-04 slip op. at 24 (EAB Feb. 10, 2011) (Order on Motions for Reconsideration and/or Clarification)). Petitioner Simpson cites *Vulcan Construction* for the proposition that EPA must apply the new standards to Avenal's permit. Simpson Petition 10. Simpson fails to acknowledge that the Board in that decision referred to "all *applicable* standards," not "all standards," and recognized that EPA has authority to determine what standards are "applicable." *Vulcan Construction*, slip op. at 39 n.41.

to demonstrate compliance more than once—a demonstration that Avenal made, and EPA accepted, as part of its initial permit application.[4]

Petitioner Sierra Club and Center for Race, Poverty & the Environment ("CRPE") both seek to misconstrue the language of Section 165(a) to add a requirement that an applicant must demonstrate such compliance *immediately* before construction begins. Sierra Club Petition 12-13; CRPE Petition 8-9. The statute requires no such thing. Under Sierra Club and CRPE's absurd interpretation, a permittee would be required to show compliance with the listed standards as late as the day that construction begins. If that were what Section 165(a) required—and it does not—then permittees might never be able to begin construction on new facilities, as they could be required to perpetually show compliance with new standards. Sierra Club and CRPE wish for this tribunal to read a new requirement into Section 165(a) that is simply not there.

Furthermore, statutory language, cannot be read in a vacuum and instead must be harmonized with other provisions within the same statutory scheme. As Sierra Club states in its petition, "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" Sierra Club Petition 9 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). When read in conjunction with Section 165(c), which is discussed in more detail below, Section 165(a) would be illogical if it required a permittee to demonstrate compliance with standards promulgated more than one year after EPA receives a "completed" application because Section 165(c) requires EPA to render a decision on the application within a year of receiving a completed application. 42 U.S.C. § 7475(c). Section 165(a) must be read in a consistent way

[4] Sierra Club argues that CO2 has been subject to regulation under the PSD program since 1993. Sierra Club Petition 31. This allegation is flatly contradicted by EPA's controlling decision on that issue, as stated by EPA in the Federal Register in April 2010. *See* 75 Fed. Reg. 17004 (April 2, 1010) (reconsideration decision confirming previous EPA decision that CO2 was not subject to regulation under the PSD program). Sierra Club admits that it is currently challenging that decision in federal court. Sierra Club Petition 33.

with Section 165(c), which balances protection of the environment with avoidance of bureaucratic delay.

Sierra Club and CRPE attempt to use the Supreme Court's decision in *General Motors Corp. v. United States*, 496 U.S. 530 (1990), to support their interpretations of Section 165. Sierra Club Petition 11-12; CRPE Petition 9. *General Motors*, however, has no relevance as to whether EPA can apply standards to a permittee well after the statutory deadline by which EPA was required to give the permittee a decision on its permit application. *General Motors* stands for the proposition that a provision in an existing State Implementation Plan ("SIP") remains applicable, and is therefore enforceable by EPA, even if a state has proposed to revise that provision but EPA has not yet acted on it. 496 U.S. at 490. The Supreme Court reached this conclusion specifically because Congress did not set forth a deadline by which EPA must act on a proposed SIP revision. *Id.* The Court did not, despite Sierra Club's contention, reject any contention regarding a "conflict" in the statute, but instead only interpreted statutory language in which there was no conflict, concluding that the plain language of the statute neither established a deadline by which EPA was required to act on the proposed SIP revision nor prevented EPA from enforcing an existing and valid regulation. In the present case, to the contrary, EPA has a clear statutory obligation to act within a given time period and cannot nullify that obligation by applying a new obligation created after the statutory deadline passed. Furthermore, unlike in *General Motors*, no one in the present case contends that EPA cannot apply any regulations; instead, the issue is only which set of regulations applies.

Petitioners also repeatedly ignore that one of the stated purposes of the PSD program is "to insure that economic growth will occur" in concert with protecting the environment. 42 U.S.C. § 7470(3); *see also* 70 Fed. Reg. 5952, 5987-88 (Oct. 12, 2005) (stating EPA's view that

this provision calls for a balancing of economic growth and protection of air quality). In particular, CRPE argues that EPA improperly considered the delay regarding Avenal's permit when it considered the emissions from the proposed facility and that EPA improperly used an equitable approach in its decision regarding Avenal's permit. CRPE Petition 14, 17. These claims are disproven by the fact that Section 160 lists multiple purposes of the PSD program, which necessarily requires an equitable approach, as well as EPA's stated view that Section 160(3) calls for a balancing of economic growth and protection of air quality.[5] EPA appropriately considered the environmental impact of the Project and balanced that concern against the harm of further delay, taking into account the fact that the CAA was not intended to halt economic growth.

Sierra Club also argues ineffectively that an exemption contained in the Clean Air Act Amendments of 1977 somehow proves that Congress foreclosed EPA's decision not to apply new regulations to Avenal's permit in 2011. Sierra Club Petition 15-16. First, there is no exemption being created here. As explained above, Section 165(a) does not require compliance with standards after the permittee submits its complete application, so no exemption is necessary in the present case. Indeed, Congress would have had no need to create an additional exemption for situations such as this one because it created an affirmative obligation for EPA to issue permits within one year, thereby obviating any need for an additional exemption. Second, while Sierra Club cites cases that stand for the unremarkable proposition that additional exemptions to a general prohibition should not be read into a statute when Congress has provided exemptions to that prohibition, Sierra Club does not point to any exemptions like the one they allege is

[5] The balancing performed by EPA is especially salient here, where the project at issue "will provide a degree of economic benefits and electricity reliability to the local area." Cal. Energy Comm'n, Final Comm'n Decision—Avenal Energy (08-AFC-01), Comm'n Adoption Order 1, CEC-800-2009-006-CMF (Dec. 2009). Where the main interest may be commercial, courts have nonetheless recognized that the commercial activity may contribute to the benefit of the public welfare. *See In re Barr Laboratories, Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991).

necessary here. Sierra Club Petition 15. Sierra Club only points to Section 168(b) of the CAA, Sierra Club Petition 15, which exempted facilities from new PSD regulations if construction on those facilities began on a date prior to when the PSD regulations went into effect. 42 U.S.C. § 7478(b). There is nothing to suggest that an exemption concerning the application of an entirely new regulatory scheme in 1977 is similar to EPA's decision not to impose standards promulgated in 2011 on a facility for which a permit decision has been due since 2009.

Similarly, there is no support for Sierra Club's assertion that EPA itself rejected the interpretation of Section 165(a) at issue in this appeal when it enacted Part 124. Sierra Club cites 1980 Federal Register notice that was part of EPA's effort to implement the new PSD program created by Congress in 1977, claiming that this notice shows that EPA chose not to exempt permits based on the date of their completed application. Sierra Club Petition 14-15. The full Federal Register section that Sierra Club cites for this proposition, however, shows that EPA only chose not to exempt from its new PSD regulations all projects with applications that were complete as of the date of the final rule, concluding that such a standard would exempt too many projects. 45 Fed. Reg. 52,676, 52,682-52,683 (August 7, 1980). As with Section 168(b), this exemption concerned a completely different situation than the one at issue here. Furthermore, EPA did not completely reject grandfathering in 1980: in the same section of the Federal Register, EPA defended the grandfather provisions that it had proposed, stating that those provisions were appropriate to avoid "substantial" and "excessive" delays on entities seeking to build facilities. *Id.* These provisions show that EPA was specifically concerned about striking the proper balance between economic growth and bureaucratic delay, addressing the issues that were present when the new regulations were enacted in 1980. This balancing approach is entirely consistent with EPA's present interpretation of Section 165(a).

2. Even if Section 165(a) is ambiguous, EPA's reasonable interpretation should be upheld.

Even if the Board views Section 165(a) as ambiguous, EPA's interpretation of the statutory language of the section is due deference. The *Chevron* doctrine requires deference to an agency's interpretation of ambiguous statutory language. *See Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). EPA's interpretation regarding the appropriate standard applicable to Avenal's permit is undoubtedly reasonable given the facts surrounding its permit process over the past three years, particularly because Avenal timely met all its requirements under the CAA.

a. Case law supports EPA's interpretation of Section 165(a).

EPA's decision not to impose the new 1-hour NO2 and SO2 standards an greenhouse gas requirements on Avenal finds ample support in case law. In *Alabama v. EPA*, the Fifth Circuit refused to apply a new EPA guideline to an ongoing permit proceeding and in doing so, stated, "ongoing proceedings should not be interrupted when proposed regulations become final" because "[a] contrary rule would create havoc in EPA's permit development procedures." 557 F.2d 1101, 1110 (5th Cir. 1977). The Supreme Court's decision in *Mitchell v. Overman*, 103 U.S. 62 (1880), also supports the general principle that a tribunal should not prejudice a party due to the tribunal's delay in acting. Sierra Club makes much of the fact that EPA is not a court, Sierra Club 23-24, but this is a meaningless distinction. EPA undoubtedly has the authority to change its procedures consistent with existing law, and the question here is whether it is appropriate to do so under these circumstances. The rationale behind the principle of *actus curiae neminem gravabit* applies as equally to prejudicial delay by an administrative agency as it does to prejudicial delay by a court—and there can be no reasonable dispute here that excessive administrative delays have resulted in prejudice to Avenal and would result in further prejudice

to Avenal if the new standards are applied to Avenal's permit.[6] Furthermore, *Application of Martini*, shows that application of this principle is perfectly acceptable in regard to "administrative inaction," where application of the principle is consistent with the Agency's statutory obligations, 184 F. Supp. 395, 401-02 (S.D.N.Y. 1960), such as EPA's in the present case. *See also Fassilis v. Esperdy*, 301 F.3d 429 (2d Cir. 1962) (acknowledging that application of *actus curiae neminem gravabit* is sound in "situations involving prejudicial delays in the administrative proceedings").[7]

Petitioners' reliance on *Ziffrin v. United States*, 318 U.S. 73 (1943), does not support their cause. In *Ziffrin*, Congress had changed a *statute* during the pendency of an administrative proceeding. The agency could not apply the now-invalid law because "[o]therwise the administrative body would issue orders contrary to the existing legislation." *Id.* at 78. The present case is very different. Here, EPA is exercising its discretion to interpret existing law and apply its regulations consistent with Congress' stated intent. EPA is not ignoring any legal requirement, statutory or otherwise. Indeed, under the circumstances of Avenal's permit application, any interpretation other than the one EPA has chosen would be unacceptable

[6] CRPE contends that the fact that EPA "did not cause delay beyond the statutory deadline for agency action" means that EPA has not justified its decision not to apply new standards to Avenal's permit. CRPE Petition 15-16. As a matter of fact, CRPE is incorrect. As discussed above, EPA's own actions were a major factor in the delay Avenal has faced. Nonetheless, there is no reason to separate the prejudice to Avenal caused by EPA's delay or by other government agencies; the prejudice to the applicant is the same whether EPA or another agency is responsible for the delay. Nor is it correct that EPA would have been required to deny Avenal's permit application if USFWS had not issued its final biological opinion within one year. The CAA does not give EPA authority to deny a permit on the grounds that another governmental agency has failed to provide necessary information.

CRPE also contends that EPA should have applied the new standards because "application of the 'new' modeling techniques" was possible. CRPE Petition 16. Whether or not the modeling technique was possible, the fact remains that it would add significantly more time to a process that has already extended years beyond EPA's statutory deadline for granting or denying Avenal's permit. This fact provides additional justification for EPA's action here.

[7] Sierra Club contends that Avenal has not been denied any right due to the administrative delay in this case. Sierra Club Petition 28. That is untrue. Avenal has been denied its right, under Section 165(c) to a permit decision within one year of the date that its application was deemed complete. Sierra Club's citation to *American Corn Grower Association v. EPA*, 291 F.3d 1, 12 (D.C. Cir. 2002), is disingenuous, as the quoted language concerns the *issuance* of a permit, not a decision on a permit application.

because it would violate the one-year deadline set forth in Section 165(c). As Sierra Club states in its petition, "[a]n administrative agency is 'a creature of statute'" and "'has no constitutional or common law existence or authority, but only those authorities conferred by Congress.'" Sierra Club Petition 24 (quoting *Soriano v. United States*, 494 F.2d 681, 683 (9th Cir. 1974) and *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)).

Finally, the District Court for the District of Columbia specifically upheld EPA's right to use its regulations to accomplish its statutory obligations and the will of Congress:

> It is axiomatic that an act of Congress that is patently clear and unambiguous—such as this requirement in the CAA—cannot be overridden by a regulatory process created for the convenience of an Administrator, no matter how much notice and comment preceded its creation. *See Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Ernst* & *Ernst* v. *Hochfelder*, 425 U. S. 185, 213-14 (1978) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." (internal quotations omitted)). . . . To the extent that a regulatory process frustrates or renders meaningless a Congressional statutory mandate, it must yield to Congress's will. *See Ernst* & *Ernst v. Hochfelder*, 425 U. S. at 213-14; *Fed. Maritime Com. v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973); *see also Southland Royalty Co. v. Fed. Energy Admin.*,512 F. Supp. 436, 446 (N.D. Tex. 1980)."

May 26 Opinion, slip op. at 5-6.

EPA's decision not to apply new standards to Avenal's permit is necessary to remedy its statutory violations under the CAA and to accomplish "will of Congress as expressed by the statute." *Id.*

b. The One-Year Deadline of Section 165(c) Supports EPA's Decision.

As mentioned above, Section 165(c) of the CAA sets forth a clear one-year deadline for EPA to issue a decision on completed PSD permit applications. *See* 42 U.S.C. § 7475(c). This

requirement further supports EPA's decision not to apply to Avenal's permit requirements proposed more than one year after the permit application was complete.

Section 165(c) states, in full: "Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies *shall be granted or denied* not later than one year after the date of filing of such completed application" (emphasis added). As Sierra Club states in its petition, "[a] statute should be construed so that so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." Sierra Club Petition 12 (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal quotation and citation omitted)). When Section 165(c) is given its full effect, EPA's and Avenal's requirements could hardly be clearer: (1) a permittee must submit a completed permit application, which Avenal did in March 2008; and (2) EPA must make a final decision on the ermit within the next year, which EPA failed to do for more than *three years*.

The legislative history and purpose of Section 165(c) shows that Congress created this one-year deadline precisely to avoid the type of bureaucratic delay that Avenal has faced in this case. As the Senate Committee on Public Works Report stated:

> Inherent in any review-and-permit process is the opportunity for delay. The Committee does not intend that the permit process to prevent significant deterioration [PSD] should become a vehicle for inaction and delay. To the contrary, the States and Federal agencies must do all that is feasible to move quickly and responsibly on permit applications and those studies necessary to judge the impact of an application. *Nothing could be more detrimental to the intent of this section and the integrity of this Act than to have the process encumbered by bureaucratic delay.*

S. Rep. No. 94-717, at 23 (1976) (emphasis added). As the Ninth Circuit has explained, "Congress attempted to avoid excessive bureaucratic contention by requiring EPA to make a decision on all PSD permit applications within one year." *Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1446 (9th Cir. 1984).

The District Court for the District of Columbia has agreed with this interpretation of Section 165(c). *See* May 26 Opinion. In its Opinion regarding the litigation relating to Avenal's PSD permit, the Court held:

> It is axiomatic that an act of Congress that is patently clear and unambiguous—such as this requirement in the CAA—cannot be overridden by a regulatory process created for the convenience of an Administrator, no matter how much notice and comment preceded its creation.

Id., slip op. at 6 (citing *Chevron*, 467 U.S. at 842-43). Accordingly, the District Court ordered EPA to render a final decision by August 27, 2011. *See* May 26 Opinion.

III. THE CIRCUMSTANCES OF AVENAL'S PERMIT APPLICATION SUPPORT EPA'S DECISION REGARDING THE PERMIT.

As the record of Avenal's permit clearly shows, more than three years have passed since Avenal submitted a completed PSD permit application. "[E]xcessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decision-making into future plans." *Cutler v. Hayes*, 818 F.2d 879, 896-97 (D.C. Cir. 1987) (quoting *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983)). Again, it is important to note here that Petitioner Sierra Club relied on an inaccurate timeline that claims Avenal first submitted its PSD application in February 2009—a full year after its application was actually submitted—to argue that no delay occurred in Avenal's permitting process. Sierra Club Petition, 3 and 9.

EPA has admitted that its actions (or inaction) violated Section 165(c) of the CAA. And, under anyone's definition, including Judge Leon's of the District Court for the District of Columbia, EPA's actions caused an excessive delay in deciding Avenal's permit. *See* May 26 Opinion, slip op. at 2-3. Thus, as the facts, law, and regulations detailed above show, the circumstances surrounding Avenal's permit certainly support EPA's decision not to apply new standards to the permit.

A. Avenal timely met all the statutory requirements of Sections 165(a) and 165(c) of the Clean Air Act.

In the federal litigation, EPA stipulated to facts that clearly show Avenal timely met all the necessary requirements under the CAA and continued to timely respond to all EPA's follow-on questions and inquires:

- EPA deemed Avenal's permit complete in March 2008, a month after it was submitted.
- Between March 2008 and March 2009, EPA requested additional information, and Avenal timely and completely responded to each and every request, including lowering the Project's CO limit to 2.0 ppm to address any possible EPA concerns. *See* Joint Stips. ¶ 6.
- Months after the parties' November 17, 2008 meeting regarding the status of Avenal's PSD permit, EPA imposed yet another request for an additional impact analysis in February 2009—Avenal provided the additional analysis two weeks later, on March 11, 2009. *See* Joint Stips. ¶ 6.
- In June 2009, EPA issued a draft permit along with its Statement of Basis because it had found that Avenal had met all the necessary requirements under the Act. *See* Joint Stips. ¶ 10.
- Between June and October 2009, Avenal and the public participated in a 120 days—90 days more than statutorily required—of public comments, hearings and meetings. *See id.*
- In May 2010, following the institution of this action on March 9, 2010, EPA informs Avenal that it must now meet the new 1 hour national ambient air quality standard for NO2 before receiving its permit. *See id.*
- Between May and September 2010, and despite the ongoing litigation and Avenal's objections to the applicability of the standard to Avenal's completed application, Avenal's continued to work with EPA to meet the new NO2 standard. *See* Joint Stips. ¶ 10; Pl.'s Mot. J. Pleadings 13-14, Exs. H and M.

Thus, when EPA deemed Avenal's permit application "complete" in March 2008, Avenal had a right to obtain a permit decision from EPA within one year. By June 2009, EPA had issued a draft permit along with its Statement of Basis and Purpose that Avenal's PSD

application demonstrated compliance with all applicable PSD requirements, and since EPA has also confirmed that there were no comments during the public review process that would change that demonstration, Avenal was—and still is—entitled to receive an affirmative decision, to wit, a PSD permit consistent with the current permitting record. *See* Pl.'s Mot. J. Pleadings, 8-11.

In June of 2009, EPA issued a formal "Statement of Basis" that concluded as follows:

> EPA is proposing to issue a PSD permit to the Avenal Power Center, LLC for the Avenal Energy Project. ***We believe that the proposed project will comply with PSD requirements including the installation and operation of BACT, and will not cause or contribute to a violation of the NAAQS, or of any PSD increment.*** We have made this determination based on the information supplied by the applicant, our review of the analyses contained in the permit application, and other relevant information contained in the administrative record for this proposed action.

2009 SB at 30; *see also* Pl.'s Mot. J. Pleadings, 10 (emphasis added). No comments were filed to dispute these findings in any material way.

As stated in the federal litigation and the current brief, the facts over the past three years do not illustrate EPA's asserted good faith efforts. *See generally* Jt. Stips. (detailing Avenal's permit process since August 2007). First, EPA plainly failed to grant or deny Avenal's permit by March 2009, as the one-year deadline of Section 165(c) requires. *Id.* at ¶ 8. Second, EPA failed to render a decision after issuing a draft permit in June 2009 and offering the public an additional three months beyond the statutory requirements for comments. *Id.* at ¶ 10. Third, after Avenal filed the federal action in March 2010, EPA imposed new requirements—neither promulgated nor implemented during the statutory period—on Avenal's permit. Defs.' Cross-Mot. Summ. J. 9. Fourth, after Avenal contested this imposition for nearly a year, EPA finally backtracked on these new "requirements." Corrected 2d. McCarthy Decl. ¶ 6; May 26 Opinion.

B. NO2 standard proposed and implemented after the statutory deadline.

EPA did not even propose its new NO2 standards until well after the date that Avenal's permit should have been issued; the proposed and final rules establishing the new NO2 standard gave no indication that the new standard would be applied to pending permit applications; and EPA only raised the issue with Avenal *after Avenal had filed suit against the Agency*. *See* Pl.'s Mot. J. Pleadings 11-14. This is not "reasonable" treatment of an applicant that, according to EPA, has submitted a complete application. Nevertheless, Avenal worked with EPA to meet the new NO2 standards. During August and September 2010, Avenal provided modeling and testing regarding the NO2 Standard. *See* Defs.' Cross-Mot. Summ. J., Jordan Decl. ¶ 17 and Ex. 5.

IV. EPA WAS NOT REQUIRED TO ENGAGE IN ADDITIONAL NOTICE AND COMMENT REGARDING ITS DECISION NOT TO APPLY NEW STANDARDS TO AVENAL'S PERMIT.

On April 1, 2010, the so-called Page Memorandum, an internal EPA memorandum, was issued to the Agency's Regional Air Division Directors and Deputies. Memorandum from Stephen D. Page, EPA Office of Air Quality Planning and Standards, Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards (Apr. 1, 2010) ("Page Memorandum"). It was this document that, for the first time, stated that EPA would require applicants with pending permits to show that they would meet the new NO2 standard—a position that appeared to be inconsistent with a statement in the preamble to EPA's final rule establishing the new NO2 standard.

Although EPA did publish lengthy and detailed Federal Register notices proposing and then finalizing the new 1-hour NO2 standard, there was nothing in these notices to suggest that this new standard would somehow apply retroactively to permit applications submitted years before. *See* 74 Fed. Reg. 34404 (July 15, 2009); 75 Fed. Reg. 6474 (Feb. 9, 2010). In fact, in responding to comments about the potential implications of the new standard for Clean Air Act

permits, the Agency suggested that the new standard would only apply to companies applying for such permits in the future

> The EPA acknowledges that a decision to promulgate a new short-term NO2 NAAQS will clearly have implications for the air permitting process. The full extent of how a new short-term NO2 NAAQS will affect the NSR process will need to be carefully evaluated. First, major new and modified sources *applying for NSR/PSD* permits *will initially be required* to demonstrate that their proposed emissions increases of NOX will not cause or contribute to a violation of either the annual or 1- hour NO2 NAAQS.

75 Fed. Reg. at 6525 (emphasis added). It thus appeared that, consistent with EPA's past practice, the new standard would only be relevant to facilities "applying for" Clean Air Act permits in the future, not to companies such as Avenal that had already applied for such permits in the past.

Not only did the Page Memorandum appear to be inconsistent with the preamble to the final rule, but it was also issued almost a month after Avenal filed its complaint in federal court. Among other things, it states the following:

> [U]nder certain circumstances EPA has previously allowed proposed new major sources and major modifications that have submitted a complete PSD permit application before the effective date of new requirements under the PSD regulations, but have not yet received a final and effective PSD permit, to continue relying on information already in the application rather than immediately having to amend applications to demonstrate compliance with the new PSD requirements.

Page Memorandum at 3.[8]

Although the Page Memorandum was an internal EPA document signed by a mid-level official that did not go through public notice and comment and was inconsistent with language published in the Federal Register, Petitioners argue that it is binding on EPA unless and until the Agency goes through APA notice-and-comment rulemaking to revise it. This argument,

[8] EPA has also previously stated that it has "the authority under section 301(a)(1) to exempt [certain] projects in order to phase-in new requirements on a reasonable schedule." 45 FR 52676, 52683 n.5 (Aug. 7, 1980).

however, contains a number of flaws. For several independent reasons, EPA was not required to undertake notice-and-comment rulemaking to implement its decision not to apply the new standard Avenal's permit.

Most obviously, the Page Memorandum is simply an internal EPA document from a mid-level Agency official that never went though any type of public process. It is certainly not binding on the Agency or any private practices. *Cf. Catawba County v. EPA*, 571 F.3d 20, 33-35 (D.C. Cir. 2009) (concluding that guidance memorandum was not binding on EPA where it preserved agency's discretion and had not been applied in binding manner). Moreover, as is clear from the McCarthy Declaration, EPA has properly concluded that Avenal's permit qualifies for the very exception stated in the above statement from the Page Memorandum. SSB at 4; Corrected 2d McCarthy Decl. ¶ 6. The Page Memorandum also notes that, in at least two cases, EPA has specifically adopted "grandfathering" provisions to make it clear that pending permit applications would not need to meet new permitting requirements. Page Memorandum at 2-3.

Furthermore, the record in this case fails to show that EPA has actually changed its position. The position taken in the Page Memorandum was actually inconsistent with EPA's past practices regarding the applicability of new standards to pending permit applications. In fact, although the Page Memorandum asserts that EPA has consistently required pending permit applicant to demonstrate compliance with new NAAQS, it does not cite anything that supports this assertion. *Cf. In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, slip op. at 50-51 (EAB Nov. 13, 2008), 14 E.A.D. __ (concluding that memorandum was "weak reed" to support historical interpretation because it did not provide "legal support or reasoned analysis" for position). To the contrary, the Page Memorandum states that there are times when grandfathering is appropriate. Like the memoranda at issue in *Deseret Power*, the Page

Memorandum is, "at best, weak authorit[y] upon which to anchor the . . . conclusion that" EPA's authority was "constrained by an historical Agency interpretation." *Id.* at 53. At the very least, EPA's 15-month old interpretation from the Page Memorandum has not created any "substantial and justifiable reliance on a well-established agency interpretation." *MetWest Inc. v. Sec. of Labor*, 560 F.3d 506, 511 (D.C. Cir. 2009).

In addition, EPA's decision to "grandfather" Avenal was, in fact, submitted to public notice and comment, as discussed in detail below. After EPA submitted the Corrected Second McCarthy Declaration to the district court, it held a 40-day public comment period, during which it posted notices regarding the permitting decision in numerous public venues and received numerous comments, both written and during a public meeting. RTC at 9-10. Petitioners assert that EPA was required to submit its decision to further public participation, CRPE Petition 19, Sierra Club Petition 39-41, but there are no requirements in 40 C.F.R. Part 124 stating that EPA must do more than it has done. Agencies are not required to submit every decision to notice-and-comment rulemaking under the Administrative Procedure Act, *SEC v. Chenery Corp.*, 332 U.S. 194, 199- 203 (1947), and the particular circumstances of Avenal's permit certainly call for the case-specific decision that EPA has chosen here, which is fully consistent with EPA's regulations.

Even if EPA's decision to grandfather Avenal is viewed as a change in the Agency's policy, EPA's decision to revisit a previous policy should be given the full deference accorded to an agency's statutory interpretation under *Chevron*. As the Supreme Court explained in 2009, an agency may change its position if it "show[s] that there are good reasons for the new policy." *FCC. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). The Court rejected circuit court decisions asserting that a different standard of review applies when an agency changes its

position, explaining that the agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." *Id.* The Court also rejected any contrary reading of its previous case law. *Id.* at 1810-11 (citing *Motor Vehicle Mfrs Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). Petitioners' argument that EPA has reached a different decision in the past is of no moment. EPA has met the requirements detailed in *Fox Television* in regard to its decision not to apply new standards to Avenal's permit in this case, and therefore EPA must be given deference for that decision to change its position.

V. ENVIRONMENTAL JUSTICE CONCERNS

Petitioners inaccurately assert that EPA improperly handled the environmental justice issues relating to the Avenal Project. Sierra Club Petition 35-39; CRPE Petition 25-34; Greenaction Petition 1. "EPA defines environmental justice as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies. EPA has this goal for all communities and persons." RTC at 12. Over the past three years, EPA, Avenal, and the public have thoroughly reviewed, examined, tested and opined on this issue. At the end of the day, the Avenal project meets all the necessary standards under the law and in relation to the population surrounding the Avenal Project.

A. The Extensive Public Comment Period Was Designed to Provide Fair Treatment and Meaningful Involvement of the Community Surrounding the Avenal Project.

Avenal's permitting record clearly shows that all necessary and appropriate measures were taken to ensure that the minority population that lives and works in the vicinity of the proposed Project was able to fully participate in the public comment process:

> EPA defines meaningful involvement to mean that 1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health, 2) the public's contribution can influence our decision, 3) the concerns of all participants involved will be considered in our decision-making process and 4) the decision makers seek out and facilitate the involvement of those potentially affected.

RTC at 12. EPA performed extensive outreach in the Avenal community to facilitate robust and active participation by the community in achieving these objectives.

As previously noted, Avenal's initial comment period, which began in June 2009 and ended in October 2009, lasted some 120 days—90 days more than required under EPA's regulations. *See* 40 C.F.R. 124.10. The notices associated with the comment period, including the notices for public meetings and hearings, were published in Spanish and English.[9] *See* Notice of Filing of Certified Index to the Administrative Record, In re Avenal Power Center, LLC, PSD Permit No. SJ 08-01, July 6, 2011, ("Avenal's Certified Record") Documents 5, 16, 17, 89, 93, 94, 141, 142, 147, 148 and index references 112, 113, 118, 119, 123-125, and 127-129 (attached hereto as Exhibit N). In addition, hearing materials (*e.g.*, summary of proposed permit, hearing agenda, and directions on how to comment) translators were provided at every hearing and meeting to help facilitate all questions and concerns from the local community. *See* Avenal's Certified Record, index references 130-137. "In particular, the public information

[9] Only EPA's initial public notice, dated June 16, 2009, was not simultaneously published in English and Spanish. *See* Notice of Filing of Certified Index to the Administrative Record, In re Avenal Power Center, LLC, PSD Permit No. SJ 08-01, Document 0002.

meeting held on September 30, 2009, in Avenal, California was specifically intended to provide potentially affected parties with information about the proposed permit and about how to participate in the public comment process." RTC at 12. EPA included three public hearings in Avenal's permitting process to provide the community and all interested parties "ample time to prepare their comments and flexibility to submit their comments in a variety of ways." RTC at 12.

EPA also published its Supplemental Statement of Basis and its Response to Comments in Spanish and English and provided a summary of its initial Statement of Basis at its September 2009 public hearing. *See* Avenal's Certified Record, Documents 131, 89, 144. This same format was followed for Avenal's most recent public comment period as well. "This enhanced outreach and public comment process goes well beyond the regulatory requirements set forth in 40 CFR Part 124 for PSD permit proceedings, and it clearly demonstrates an effort on EPA's part to seek out and facilitate the involvement of communities in the decision making process." RTC at 12.

B. Pursuant to Environmental Justice Standards, the Avenal Project Meets the Required NAAQS.

Avenal's permitting record shows that it has met all the required NAAQS during the statutory period when EPA was required to render a decision on the permit—a fact EPA has conceded. *See* 2009 SB at 30; SSB at 6; RTC 3. "In the context of PSD permit challenges, the Region correctly states that the Board has accepted compliance with the NAAQS as sufficient to demonstrate that emissions from a proposed facility will not have disproportionately high and adverse human health or environmental effects on a minority or low-income population." *Shell II* at 71 (citing *In re Knauf Fiber Glass, GmbH*, 9 E.A.D 1, 15-17 (EAB 2000) ("*Knauf II*") and *In re Sutter Power Plant*, 8 E.A.D. 680, 692 (EAB 1999)). Petitioners minimize Avenal's clear

permitting record to claim, for a hodgepodge of reasons, that Avenal has not met the applicable NAAQS. Petitioners' allegations fall short given Avenal's record and EPA extensive analysis on this point. *See* Sierra Club Petition 37-39; CRPE Petition 31-32.

In its June 2009 Statement of Basis and March 2011 Supplemental Statement of Basis, EPA clearly determined that Avenal had met all necessary NAAQS. *See* 2009 SB at 30, SSB at 13. In March, EPA

> determined that the proposed facility's projected emissions will not cause or contribute to a violation of the applicable NAAQS, and are, in fact, well below the NAAQS. Indeed, EPA estimated that the projected emissions would be very low—i.e., less than 6% of the applicable NAAQS. Using that information for its environmental justice analysis, EPA has determined that compliance with the applicable NAAQS is indeed sufficient to satisfy the Executive Order as to those regulated pollutants.

SSB at 13 (citing Exec. Order 12898, 59 Fed. Reg. 7,629 (Feb. 16, 1994)). In making this determination, EPA thoroughly explained its reasons for grandfathering Avenal's permit and the additional tests and analyses conducted. *See* SSB 2-6; RTC 8-9 and 53-65.

Petitioners claim, among other things, that EPA's environmental justice analysis is improper because EPA did not include Avenal's 1-hour NO2 modeling data as part of its analysis. *See* CRPE Petition 31. This claim is hollow. Petitioners are well aware that the permitting record for Avenal, which is available to the public online, includes Avenal's 1-hour NO2 modeling studies. See Avenal's Certified Record, Documents 45-47, 53, 54, 77, 78, 80-83, 120, 121, 197. While EPA did not ultimately rely on these submissions because of its decision to grandfather the permit application, they show, based on then-existing modeling guidance and modeling protocols approved by number of California Air Districts, that Avenal will not cause or contribute to any violation of the 1-hour NO2 standard. Although EPA properly decided that Avenal was not required to demonstrate compliance with the 1-hour standard, the record shows

that Avenal would meet this standard, as well as all the NAAQS that were in place as of the date on which EPA was statutorily required to make a final decision on the permit.

C. EPA Environmental Justice Analysis Extends Beyond the NAAQS.

EPA's additional environmental justice analyses, which extend beyond the NAAQS, were reasonable and necessary under the circumstances here and under the relevant case law. *Shell II*, slip op. at 63 n.71. In deciding to grandfather Avenal's permit, EPA did not lose sight of its obligations to conduct an appropriate and thorough environmental justice analysis in accordance with the 1994 Executive Order and this Board's decision in *Shell II*. "EPA has recognized that compliance with the applicable NAAQS is emblematic of achieving a level of public health protection that demonstrates that EPA's issuance of a PSD permit for a proposed facility will not have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations." SSB at 12 (citing *Shell II*, slip op. at 74; *In re Shell Offshore Inc.*, 13 E.A.D. 357, 404-5 (EAB 2007) ("*Shell I*"); *Knauf II*, 9 E.A.D at 15-17; *In re AES Puerto Rico*, L.P., 8 E.A.D. 324, 351 (EAB 1999); Exec. Order 12898).

Petitioner Sierra Club asserts that "[i]n conducting its environmental justice analysis, however, EPA limits its examination of impacts from the project to the effect that such emissions will have on the applicable NAAQS." Sierra Club Petition 36. This is simply untrue. EPA's March 2011 Supplemental Statement of Basis specifically states that its environmental justice analysis goes beyond the NAAQS: "In light of the Agency's proposed determination that it should grandfather this permit application from the 1-hour NO2 NAAQS, EPA's environmental justice analysis considers 'other appropriate considerations' that extend beyond the impacts of the pollutants and NAAQS for those pollutants that are addressed in the PSD permit." SSB at 13-14.

In describing its reasons for grandfathering Avenal's permit, EPA also described the purpose and details of the additional analysis it undertook to satisfy the environmental justice analysis under Executive Order 12898: "EPA examined short-term NO2 concentrations—even though EPA proposed, and has ultimately decided, not to apply the new one-hour NO2 NAAQS to this permit application . . ." RTC at 86. This analysis included an assessment of all the best available data relating to nearby population centers analogous to the Avenal Project. *See* RTC at 7, 83, 87-89, 97. Not surprisingly, Petitioners still find fault with this analysis because "there is no reasonable basis for concluding that Kettleman City or the other communities in the vicinity of the proposed project would not be disproportionately impacted by NO2 emission from the plan." CRPE Petition 33. EPA, however, cannot, and is not required to engage in a perpetual pursuit to prove a negative. EPA has explained its methodology, its testing, its reasoning, and its decision and concluded that, "EPA does not read the Executive Order to call for EPA to draw a specific conclusion regarding compliance with the 1-hour NO2 NAAQS or that we reach a definitive determination that the Project will not result in disproportionate adverse impacts with respect to short-term NOx emissions." RTC at 87.

In addition to the short-term NOx analysis, EPA went further to consider:

> [T]he environmental conditions of greatest significance in this region and the range of actions EPA and state and local government agencies are currently taking to reduce the risks these conditions pose to health and welfare in these communities . . .To the extent such [significant harmful environmental] conditions already exist, EPA believes they are more effectively addressed through other actions EPA and state and local agencies are taking outside the context of this permit application. EPA has met with community representatives regarding a number of those concerns, outside the context of EPA's PSD permitting action for the Project, and a number of EPA Program Offices have focused resources on following up appropriately on the community concerns raised by the commenters, as described below.

RTC at 83-84. EPA's Response to Comments goes on to describe in detail the numerous and various efforts EPA and the State have in engaged in to affect the environmental conditions that presently exist in the region. *See* RTC at 84-86.

EPA also noted other, related analyses and considerations in describing its full analysis of the environmental justice issues. "EPA is not relying on the CEC's environmental justice analysis as the basis for our own Environmental Justice Analysis but rather has provided a brief discussion of that analysis in EPA's own analysis for informational purposes."[10] EPA also responds in detail as to its reasons for not fully addressing nonattainment pollutants—EPA explains the complexity of the issue, the appropriate forum for such issues and the statutory basis for inapplicability to PSD permits. "Nevertheless, EPA has considered in the context of our Environmental Justice Analysis for this permit the nonattainment conditions in the local area and strategies in place to achieve attainment with the PM2.5 and ozone NAAQS in the San Joaquin Valley." *See* RTC at 94.

EPA's environmental justice methodology and analysis here not only meet the objectives of Executive Order 12898 but also satisfy the type of approach contemplated by this Board. In issuing its decision to reject the Region's environmental justice analysis in *Shell II*, the Board stated: "The record reflects the Regions' singular focus on demonstrating compliance with a NAAQS standard that the Administrator had deemed no longer protective of public heath [sic],

[10] Petitioners CRPE and Greenaction also cite a 2009 Title VI Civil Rights Complaint as another source of EPA's alleged failure to address the disproportionate impact on the communities surrounding the project. CRPE Petition 40; Greenaction Petition 1-2. Petitioner CRPE even argues that this complaint must be resolved prior to issuing Avenal's permit. CRPE Petition 40. This issue, however, is not ripe and cannot, under EPA regulations, be considered in conjunction with the decision on Avenal's permit. In an August 6, 2010 letter, EPA's Office of Civil Rights wrote that while it had accepted the allegations for investigation, it is holding its investigation of certain allegations (*i.e.*, intentional discrimination against Avenal and Kettleman City residents of color and Spanish-speakers, additional adverse health impacts on residents of color of Avenal and Kettleman City) "in abeyance because it is not ripe for review while EPA is still considering the PSD permit application." SSB at 14-15; *see also* Letter from EPA's Office of Civil Rights to Greenaction, Re Partial Acceptance and Referral of Administrative Compliant (August 6, 2010) (attached hereto as Exhibit O).

and the Region offers no other information or evidence in the record that it considered anything beyond compliance with the NAAQS in preparing the environmental justice analysis that appears in the Chukchi Response to Comments." *Shell II*, slip op. at 75. The type of limited analysis that the Board faulted in *Shell II* is not present here—EPA has specifically analyzed a variety of environmental issues both relating to and extending well beyond the NAAQS.

D. Concerns about Cumulative and Disproportionate Impact on Protected Groups in the Area Were Adequately Assessed in EPA's Analysis.

EPA's impact analysis met its legislative and policy requirements by examining all relevant facts, available data, and the extensive public discussions and comments on the impact of the Project. Petitioners' assertions that EPA failed to adequately address cumulative impacts on protected groups are without merit. Sierra Club Petition 35-38; CRPE Petition 34-38. "EPA reads the language in the Executive Order directing federal agencies to identify and address impacts 'as appropriate,' and '[t]o the greatest extent practicable and permitted by law.'" RTC at 83 (citing Exec. Order 12898 ("[E]ach Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."))

First, it is important to remember that the Avenal Project would be constructed more than six miles from the nearest population center and that Avenal agreed to a reduction in the Project's overall emissions early on in the permitting process—both factors reduce the overall impact on the surrounding communities. *See generally*, Avenal's Certified Record, Document 167. Second, the public's extensive participation during the comment period allowed for various considerations to be thoroughly examined and discussed. Third, an analysis of the best available

data relating to the Project showed the environmental justice concerns did not justify denial of Avenal's permit.

The alternatives and considerations discussed during the 2009 and 2011 comment periods afforded EPA with ample information about impact concerns. In its May 2011 Response to Comments, EPA stated,

> Moreover, the opportunity for the public to comment on "alternatives" and "other appropriate considerations" under section 165(a)(2) of the CAA provides EPA with a basis for incorporating environmental justice considerations into PSD permitting decisions in appropriate circumstances. *See, e.g.*, EPA General Counsel Gary Guzy Memorandum: "EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May be Addressed in Permitting." (Dec. 1, 2000).

RTC at 83. And while EPA acknowledged that the surrounding communities face a number of existing environmental concerns, EPA disagreed with some commenters' claims that the Project would significantly increase those issues. *See* RTC at 83-84.

This conclusion was also supported by EPA's analysis of the best available data relating to the Project:

> In implementing Executive Order 12898, EPA believes it is appropriate for the Agency to consider the best available data that are germane in light of the scope and nature of the action before us in analyzing whether there may be disproportionate adverse impacts on minority communities and low-income communities. *See, e.g., In re Shell Gulf of Mexico, Inc. and Shell Offshore, Inc.*, OCS Appeal Nos. 10-1 to 10-4, slip op. at 80, fn. 87 (EAB December 30, 2010) ("*Shell II*") (" . . . the permit issuer must endeavor to include and analyze in its environmental justice analysis available data that are germane to the environmental justice issue raised during the comment period.")

RTC at 83. In that analysis, and after reviewing all the related comments, EPA concluded no disproportionate adverse impacts on minority communities and low-income communities would result from the Project:

> EPA's judgment is that, despite some uncertainties and limitations in available data, emissions from this source are unlikely to add significant environmental harm to the local communities. EPA has not identified disproportionate

> adverse impacts on minority communities and low-income communities from the Project that should affect issuance of this permit. To the extent environmental concerns already exist, EPA believes they are more effectively addressed through other actions EPA and State and local agencies are taking outside the context of this permit application. As discussed below, EPA and the State have taken numerous actions to respond to the communities' concerns about the environmental challenges and burdens they currently face.

RTC at 5. This conclusion is also supported by the Executive Order and relevant case law on the subject.

E. EPA's Analysis Deserves Deference Under Executive Order 12898 and *Shell.*

EPA's environmental justice analysis, its explanation thereof, and its response to related comments deserves deference here. Not surprisingly, Petitioners argue that deference to EPA's decision is not appropriate because, among other things, they assert that this Board is the final decisionmaker for the Agency. CRPE Petition 29. This assertion is not supported by Executive Order 12898 or the Board's decision in *Shell II*. Both the Board and the Executive Order contemplate deference to the Agency's determination in certain circumstances: "The Board relies on and defers to the Agency's cumulative expertise when upholding a permit issuer's environmental justice analysis based on a proposed facility's compliance with the relevant NAAQS in a PSD appeal." *Shell II*, slip op. 74; *see also* Exec. Order 12898, § 1-101.

Under the circumstances here, and as detailed above, EPA's judgment deserves deference:

> EPA reads the language in the Executive Order directing federal agencies to identify and address impacts "as appropriate," and "[t]o the greatest extent practicable and permitted by law," to afford considerable discretion to the Agency in determining how to address any impacts that we may identify. In addition, since this Executive Order references all of the programs, policies and activities of each federal agency to which it applies, EPA may consider how best to respond to the environmental justice concerns raised in public comments within the larger context of all the actions EPA is taking to reduce environmental hazards in the communities potentially affected by emissions from the Project. EPA also believes it is appropriate to consider actions being taken by state and local government agencies to address these concerns.

RTC at 5. In this matter, EPA has (1) provided the public with some 150 days of public comment, including multiple public hearings and meetings, in Spanish and English; (2) released two comprehensive Statements of Basis, in June 2009 and March 2011, containing extensive discussions of its environmental justice analysis; (3) provided hundreds and hundreds of pages of written responses to public comments, also in Spanish and English; (4) provided a detailed explanation for grandfathering Avenal's permit along with its analysis for that decision; and (5) initiated several additional analyses and actions to ensure this project does not have a disproportionate effect on the minority population surrounding the Avenal Project. Thus, despite Petitioners' assertions to the contrary, EPA's environmental justice analysis goes beyond what is required by the relevant internal EPA policies and procedures, Executive Order 12898, and the relevant law on the topic.

VI. PETITIONERS' OTHER ARGUMENTS ARE WITHOUT MERIT AND DO NOT RAISE ISSUES THAT WARRANT REVIEW

A. The Administrator Has Authority to Change a Delegation from a Regional Administrator to an Assistant Administrator Without Going Through Notice and Comment.

The history of the Administrator's delegation of PSD permitting decisions and relevant case law demonstrate that she has the authority to change a delegation of authority from a Regional Administrator to the Assistant Administrator for OAR without going through notice-and-comment rulemaking. As part of her authority in administering the CAA, the Administrator may delegate her authority to make many types of decisions. 42 U.S.C. § 7601(a). In 1977, when Congress enacted the one-year deadline for deciding PSD permits, the authority to issue final PSD permit decisions was solely in the hands of the Administrator. From 1977 to 1980, the Administrator was the only EPA official authorized to make PSD permitting decisions and signed all PSD permits on behalf of EPA. Defs.' Resp. to Pl.'s Brief re EAB 5, *Avenal*, 10cv383

(D.D.C. March 1, 2011) (citing 45 Fed. Reg. at 33,412; 57 Fed. Reg. 5320) (attached hereto as Exhibit P).

In 1980, EPA published a massive rule—occupying an entire issue of the Federal Register—to clarify its internal processes for making many types of decisions, from the imposition of various types of fines and penalties to permitting decisions made under many different statutes. 45 Fed. Reg. at 33,290. This rule, which created Part 124, assumes that Regional Administrators will issue PSD permits, with an appeal to the Administrator available, but it does not explicitly delegate this authority to the Regional Administrator. It was not until 1984 that the Administrator formally delegated to Regional Administrators the authority to make decisions on PSD permit applications submitted to EPA. This delegation was not done through notice-and-comment rulemaking, but through an internal delegation document. EPA Delegations Manual at 7-24 (July 25, 1984).

The EAB was subsequently created in 1992 with delegated authority to hear, among other things, appeals concerning PSD permitting decisions. *See* 57 Fed. Reg. 5320 (Feb. 13, 1992). Similar to the delegation of authority to the Regional Administrators, the Administrator delegated authority to the Board without going through any type of notice-and-comment process, but simply by publishing a notice in the Federal Register. The notice states:

> The establishment of the Board is being accomplished by the Administrator through internal Agency action. The purpose of the rule promulgated herein is only to make technical changes to the rules of practice governing Agency permit and penalty decisions to bring such rules into conformity with the Administrator's action.

57 Fed. Reg. at 5320. The notice further states:

> All of the changes made in this notice affect only Agency practice and procedure. None of the changes are [sic] substantive in nature. Accordingly, the Agency may take final action approving these rule changes without first providing for notice and comment.

Id. at 5322. In court filings, EPA has acknowledged that the creation of the Board "did not alter the rights of parties." Defs.' Resp. to Pl.'s Brief re EAB 5, n.3.

Because delegations of authority only affect Agency practice and procedure and are not substantive in nature, the Administrator retains authority to withdraw or change any of these delegations without going through notice-and-comment rulemaking. The 1984 delegation of authority from the Administrator to the Regional Administrator was made without notice-and-comment rulemaking, and nothing in that delegation or Part 124 suggests that the Administrator intended to give up her authority to re-delegate that authority. *Id.*; *see also* 40 C.F.R. pt 124 (describing permit decision-making); 40 C.F.R. § 52.21(q) (stating that procedures in 40 C.F.R. Part 124 apply to PSD permits).

In addition, relevant case law also supports the Administrator's ability to delegate and redelegate her authority: "It is well established that the head of an agency retains the authority to make final decisions for the agency even if he or she delegates the authority to make these decisions to his or her subordinates" and that "the fact that a subordinate was authorized to take certain actions does not deprive his superiors of their authority to make final decisions for the agency in certain cases." *Heggestad v. U.S. Dept. of Justice*, 182 F. Supp. 2d 1, 9-10 (D.D.C. 2000); *see also Morrow v. Clayton*, 326 F.2d 36, 45-46 (10th Cir. 1963) (concluding that "the fact that a subordinate was authorized to take certain actions does not deprive his superiors of their authority to make final decisions for the agency in certain cases"). If a superior officer retains the authority to make decisions despite having delegated that authority to a subordinate, then surely she retains the authority to delegate that authority to another individual as well. The court in *United States v. Gonzales & Gonzales Bonds and Insurance Agency*, similarly concluded that the Secretary of the Department of Homeland Security could delegate her authority without

submitting it to notice and comment because such a change was made pursuant to the Secretary's statutory authority to delegate her authority and because the delegation was merely procedural. 728 F. Supp. 2d 1077, 1084-85 (N.D. Cal 2010). The re-delegation of authority from the Regional Administrator to the Assistant Administrator for OAR, made pursuant to the Administrator's statutory authority to delegate her authority, is similarly procedural and therefore need not be submitted to notice-and-comment rulemaking. Finally, the D.C. Circuit has concluded that an agency may redelegate decisionmaking authority to a different individual when—as in the present case—the modified procedures cause no prejudice to the complaining party. *Fried v. Hinson*, 78 F.3d 688, 690-91 (D.C. 1996).

Petitioners have not identified any prejudice caused by the Administrator's delegation of authority in this case. Indeed, Petitioners cannot identify any prejudice, as the delegation to the Assistant Administrator works no substantive changes to the procedures applicable to PSD permitting decisions and instead only changes the identity of the individual making the first-level decision on such permits. Nor do they cite anything to support their assertion that this type of procedural change cannot be made without notice-and-comment rulemaking.

B. The Permitting Authority Properly Rejected Comments Urging Her to Compel Avenal to Construct Under a Minor Source Permit.

Petitioners argue that EPA should have rejected the PSD permit because Avenal has also applied for and received a minor source permit from the San Joaquin Air Quality District that would limit annual emissions of NO2 and CO so as to avoid the necessity for a PSD permit. Sierra Club Petition 34-35. They assert that EPA has not fully complied with CAA Sections 160(5), 165(a)(2) and 169(3) because it failed to consider this alternative, which would lower total emissions. *Id.* at 34. They based this assertion on CAA Sections 165(a)(2) and 169(3), which provide that a permitting decision should consider "the air quality impact of [the] source,

alternatives thereto, . . . and other appropriate considerations." *Id.* (quoting 42 U.S.C. § 7475(a)(2)).

Their argument, however, flies in the face of the EAB's decisions on this issue, as EPA explained in its response to comments:

> The proposed permit and supporting documentation describe in detail all aspects of the proposed plant, its design and its control equipment, its costs and its environmental impacts, the amount of power it will generate, and many other features. This comment [urging the Agency to reject the PSD permit in favor of a minor source permit], on the other hand, does little more than identify one potential alternative in a few words, and provides only the very general argument that the alternative would "lower emissions" as compared with the proposed Project.

The Board has made it clear that, in a case such as this one, EPA does not have any obligation to consider such an alternative. The Board has specifically stated:

> [T]he PSD permit issuer … is not required to perform an independent analysis of alternatives…. [I]n the PSD context the extent of the permitting authority's consideration and analysis of alternatives need be no broader than the analysis supplied in public comments. [Internal quotation marks and citations deleted.] This conclusion flows naturally from our conclusion that Congress did not require the PSD permit issuer to undertake an independent investigation of alternatives. Indeed, more generally, the permitting regulations do not require the permit issuer's response to public comments "to be of the same length or level of detail as the comment." *In re NE Hub Partners*, 7 E.A.D. 561, 583 (EAB 1998). Instead, "[t]he response to comments document must demonstrate that all *significant* comments were considered." *Id.*; *see also* 40 C.F.R. § 124.17(a)(2).

In re Prairie State Generating Company, PSD Appeal No. 05-05, 13 E.A.D. 1, 30 (EAB 2006) (emphasis added). The Board went on to explain that administrative imperatives are a key reason why the permitting authority is not required to undertake an independent evaluation of alternatives:

> These limits on the permit issuer's obligation to consider alternatives are particularly important where…a rigorous and robust analysis would be time-consuming and burdensome for the permit issuer. In this context, the permit issuer must be granted considerable latitude in exercising its discretion to determine how best to apply scarce administrative resources.

Id. at 33.

In this case, given Petitioners' stated concerns about the 1-hour NO2 standard, it is puzzling that they would see a minor source as a preferable alternative. As EPA noted in its response to comments, the plant that would be constructed under a minor source permit

> is essentially the same as the Project for which the applicant is seeking a major source PSD permit from EPA, except that the minor source permit includes *annual* emission limits for NOx and CO that would have the potential to result in some additional limitation on annual operations of the facility to ensure that the major source thresholds are not exceeded. While the annual emissions of the facility may be lower as a result of fewer hours of operation and/or a reduction in the average load factor on an annual basis, we note that the equipment emitting NOx from the minor source project would have the same permitted hourly emission rates as the major source project subject to PSD review.

RTC at 100. Thus, Petitioners' preferred alternative would have the same impact on 1-hour concentrations as the PSD permit to which they so adamantly object. Petitioners did not even make a serious attempt to explain why a minor source project would be a preferable alternative to the major source project, and EPA properly declined to deny the PSD permit based on this basis.

C. Nothing About the Permitting Process Violates the Equal Protection and Due Process Clauses of the Constitution.

CRPE argues that EPA's decision on Avenal's permit violates the equal protection component of the Due Process Clause of the U.S. Constitution because EPA has treated "similarly situated [permit] applicants" differently.[11] CRPE Petition 21. CRPE also contends that the Avenal permit violates the equal protection rights of local Latino residents near the Facility. CRPE Petition 22. As an initial matter, these claims fail because "PSD permitting involve a "vast array of subjective, individualized assessments" and therefore "clearly fall within

[11] CRPE refers to both the Due Process Clause and "equal protection" interchangeably, presumably relying on the Supreme Court's decision in *Bolling v. Sharpe*, which confirmed that the Due Process Clause of the Fifth Amendment includes an equal protection component that applies to the federal government. 347 U.S. 497, 499 (1954).

the category of government actions that the Supreme Court has concluded do not trigger equal protection concerns." *In re Desert Rock*, PSD Appeal Nos. 08-03 to 08-06, slip op. at 30 (EAB Sept. 24, 2009), 14 E.A.D. __ (quoting *Engquist v. Oregon Dept. of Agric.*, 128 S. Ct. 2146, 2154 (2008)).

Even if PSD permitting decisions did trigger equal protection concerns, CRPE's claims would fail. As to the rights of similarly situated permit applicants, CRPE has not met its burden of demonstrating that EPA is treating similarly situated applicants differently, providing no evidence refuting EPA's statement that EPA "intend[s] to enable similarly situated permit applications to receive the same treatment as Avenal." RTC at 72. As EPA has explained, it intends to consider the circumstances of similarly situated applicants when those applications are before it. *Id.* Furthermore, permit applicants are not a suspect class and EPA would therefore need only show that its decision to treat them differently "bears a rational relationship to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Under this review, the government's decision would be acceptable unless it is "so unrelated to the achievement of any combination of legitimate purposes that [the tribunal] can only conclude that the [government's] actions were irrational." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000). Considering the unique circumstances of Avenal's permit application process, as outlined above and in both EPA's Statements of Basis and EPA's Response to Comments, there would undoubtedly be ample justification for treating other permit applicants differently, thereby satisfying this low bar.

CRPE's equal protection claim similarly fails as to Latino residents near the Project. As CRPE has not demonstrated that EPA is treating similarly situated facilities different than it is treating the Project, CRPE also has not shown that EPA is treating any individuals near the Project differently than any individuals near other facilities. Furthermore, and finally, a party

bringing an equal protection claim "must prove that the decisionmakers in *his* case acted with discriminatory purpose." *McClesky v. Kemp*, 481 US 279, 292 (1987). CRPE has presented absolutely no evidence demonstrating that EPA has any discriminatory purpose as to Latino residents near the Project.

D. EPA Properly Followed All Procedural Requirements.

The public participation process in regard to Avenal's permit was extensive, including a 122-day public comment period in 2009 and a second 40-day public comment period in 2011. RTC at 9. During these comment periods, EPA held one informational hearing and three formal public hearings. *Id.* EPA also published notices about the public comment periods in a variety of English and Spanish newspapers, distributed public notices in a number of ways, and made information widely available. RTC at 10. In light of the extensive public participation provided during Avenal's 3-year permitting process, it is puzzling that Petitioner Simpson raises a number of procedural issues in this case. Not surprisingly, none of them is availing.

His first procedural argument is that a statement contained in three different public notices was "false" and that, therefore, the Agency needs to start the permitting process all over again with better public notices. His finds much fault with a sentence saying that the proposed "Project will not cause or contribute to violations of any of the [NAAQS]." He argues that, because the San Joaquin Valley (where the project will be located), is already nonattainment for certain pollutants, it was misleading to say that the project will not contribute to violations of any NAAQS. In responding to Simpson's comment on this issue in the most recent comment period, EPA points out that, in the context of a PSD permit, the sentence clearly referred to NAAQS for pollutants regulated under the PSD permit. RTC at 34. He claims that the "general public would have no way of decoding this statement" and therefore that EPA has violated a regulation requiring a notice to include a summary of "the activity described in the permit

application or draft permit." Simpson Petition 12. Yet the language he refers to only requires a brief description of the plant itself ("the activity described in the draft permit"), not a fulsome description of the PSD program. In any event, Avenal has already acquired offsets for its projected emissions of nonattainment pollutants (including NO2 because NO2 is a precursor to PM2.5 and ozone), so it has already taken the regulatory steps necessary to avoid "contributing to violations of any NAAQS."

Simpson also argues that, because comments were not recorded during the September 30, 2009 information meeting on Avenal's permit, the permit must be remanded. This argument is equally unavailing. The purpose of that meeting was to provide information about the public participation process. RTC at 10. The relevant regulations do not require such an informational meeting, 40 C.F.R. § 124.12, and EPA subsequently held three formal meetings at which comments were recorded, RTC at 10, thereby both satisfying the regulations and going beyond what they require. In addition, quite unlike the circumstances of *Russell City*, nothing in the present case suggests that there are "serious doubts about the about the adequacy of the . . . procedures for public participation." *In re Russell City*, PSD Appeal No. 08-01, slip op. at 37 (EAB July 29, 2008), 14 E.A.D. __.

Finally, Simpson has not demonstrated that EPA violated the public notice requirements of 40 C.F.R. § 124.12. Section 124.12(c)(1)(ix) only requires EPA to develop a mailing list by

> (A) Including those who request in writing to be on the list; (B) Soliciting persons for 'area lists' from participants in past permit proceedings in that area; and (C) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as Regional and State funded newsletters, environmental bulletins, or State law journals.

The fact that CAlifornians for Renewable Energy ("CARE") apparently did not receive notice does not show that EPA failed to satisfy this requirement. There is no indication that CARE requested to be on the mailing list, and Simpson does not claim that EPA did not solicit lists of

past participants in permit proceedings in the area. *Cf. Russell City*, slip op. at 33-34 (concluding that EPA had not violated 40 C.F.R. § 124.12 when individual was not entitled to notice of permitting action). Nor does Simpson claim that EPA failed to notify the public of the opportunity to be put on such a mailing list, which EPA did through several English and Spanish area newspapers and the Region 9 website. RTC at 9-10; *cf. Russell City*, slip op. at 34 (noting that agency "fell conspicuously short of its general outreach obligations" when, among other things, it published public notices in only one publication). The Agency not only provided legally adequate opportunities for public participation, but went out of its way to provide extensive public notice, to educate interested parties about how to participate in the permitting process, and to provide meaningful opportunities for public participation.

CONCLUSION

Petitioners do not raise any issues that warrant review from this Board. The Board should deny the petitions for review and allow the permit to become final agency action before the August 27th deadline established by the District Court.

Date: July 11, 2011

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I HEREBY CERTIFY that the foregoing *Permittee's Response to Petitions for Review of EPA's Decision to Grant the Avenal Energy Project A PSD Permit* contains 17,159 words, as calculated using Microsoft Word 2010 word processing software.

Date: July 11, 2011

LaShon K. Kell, Esquire

CERTIFICATION OF IDENTICAL PAPER SUBMISSION

I HEREBY CERTIFY that the foregoing *Permittee's Response to Petitions for Review of EPA's Decision to Grant the Avenal Energy Project A PSD Permit*, and accompanying Exhibits, are identical copies of the *Permittee's Response to Petitions for Review of EPA's Decision to Grant the Avenal Energy Project A PSD Permit*, and accompanying Exhibits, electronically filed in this case with the Environmental Appeals Board on July 11, 2011.

Date: July 11, 2011

LaShon K. Kell, Esquire

LIST OF EXHIBITS

A. Joint Stipulations, Joint Statement Regarding Case Mgmt. and Scheduling, Ex. 1, Avenal Power Center, LLC v. EPA, 10cv383 (D.D.C. June 30, 2010).

B. Corrected Second McCarthy Declaration, Avenal, 10cv383 (D.D.C. Feb. 3, 2011).

C. Avenal's Complaint, Ex. B, Avenal, 10cv383 (D.D.C. March 9, 2010).

D. EPA's Answer, Avenal, 10cv383 (D.D.C. May 18, 2010).

E. Memorandum in Support of Plaintiff's Motion for Judgment on the Pleadings, Avenal, 10cv383 (D.D.C. August 25, 2010).

F. Plaintiff's Opposition to Defendants' Cross-Motion for Summary Judgment, Avenal, 10cv383 (D.D.C. Oct. 8, 2010).

G. Defendants' Cross-Motion for Summary Judgment, Avenal, 10cv383 (D.D.C. Sept. 17, 2010).

H. Jordan Declaration, Defendants' Cross-Motion for Summary Judgment, Ex. 5, Avenal, 10cv383 (D.D.C. Sept. 17, 2010).

I. Defendants' Notice to Court Regarding Timing of EPA Action Anticipated in Defendants' Cross-Motion for Summary Judgment, Avenal, 10cv383 (D.D.C. Nov. 30, 2010).

J. Defendants' Notice to Court and Supplemental Declaration Regarding Remedy, Avenal, 10cv383 (D.D.C. Jan. 7, 2011).

K. Notice of Deadlines/Hearings: Additional Briefing, Avenal, 10cv383 (D.D.C. Feb. 3, 2011).

L. Order and Memorandum Opinion, Avenal, 10cv383 (D.D.C. May 26, 2011).

M. Notice of Hearing: Status Conference, Avenal, 10cv383 (D.D.C. Jan. 25, 2011).

N. Notice of Filing of Certified Index to the Administrative Record, In re Avenal Power Center, LLC, PSD Permit No. SJ 08-01 (July 6, 2011).

O. Letter from EPA's Office of Civil Rights to Greenaction Re Partial Acceptance and Referral of Administrative Compliant (August 6, 2010).

P. Defendants' Response to Plaintiff's Brief Regarding EAB, Avenal, 10cv383 (D.D.C. March 1, 2011)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of July 2011, a true and complete copy of the foregoing *Permittee's Response to Petitions for Review of EPA's Decision to Grant the Avenal Energy Project A PSD Permit*, and accompanying Exhibits (as electronically filed with the EPA on July 11, 2011), was served on the following by e-mail and/or by first-class mail, postage prepaid, on the following:

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