UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AVENAL POWER CENTER, LLC, **Plaintiff,** **v.** **U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,** **Defendants.**	**Case No. 10-cv-00383 (RJL)** **(Hon. Richard J. Leon)**

JOINT STATEMENT REGARDING CASE MANAGEMENT AND SCHEDULING

Plaintiff Avenal Power Center, LLC ("Avenal") and Defendants U.S. Environmental Protection Agency ("EPA") and EPA Administrator, Lisa P. Jackson, hereby submit the following Joint Statement pursuant to the Court's April 6, 2010 Case Management Order, Federal Rule of Civil Procedure 26(f) and Local Civil Rule 16.3. As required by Local Rule 16.3(c), the parties discussed the following matters during their June 16, 2010 Rule 26(f) Conference:

1. **Whether The Case Is Likely To Be Disposed Of By Dispositive Motion; And Whether, If A Dispositive Motion Has Already Been Filed, The Parties Should Recommend To The Court That Discovery Or Other Matters Should Await A Decision On The Motion.**

On March 9, 2010, Avenal initiated this action against EPA and its Administrator for EPA's failure to render a decision on Avenal's Clean Air Act permit application within the statutory time frame and thereafter. EPA filed its Answer on May 18, 2010 and admitted that it had not taken final action on Avenal's permit application. At this time, neither party has filed a dispositive motion. Plaintiff may file such a motion but has not yet made a decision. Plaintiff has committed to informing Defendants as soon as a decision is made on whether to file a dispositive motion.

Defendants are also considering filing a dispositive motion, and will notify Plaintiff of their decision as soon as one is made. If such a filing is made by either party, the parties will make any recommendations they may have regarding the possibility of staying discovery or other matters pending a decision on such a motion.

2. The Date By Which Any Other Parties Shall Be Joined Or The Pleadings Amended, And Whether Some Or All The Factual And Legal Issues Can Be Agreed Upon Or Narrowed.

At this time, the parties do not anticipate joining additional parties; nor are they aware of any third parties that have expressed an intention to intervene in this matter.

The parties have agreed upon certain factual and legal issues; those Stipulations are attached to this Statement as Exhibit 1.

3. Whether The Case Should Be Assigned To A Magistrate Judge For All Purposes, Including Trial.

The parties jointly agree that this matter should not be assigned to a Magistrate Judge.

4. Whether There Is A Realistic Possibility Of Settling The Case.

The parties remain open to settlement, and discussions are ongoing. However, discussions have been unsuccessful thus far.

5. Whether The Case Could Benefit From The Court's Alternative Dispute Resolution (ADR) Procedures (Or Some Other Form Of ADR); What Related Steps Should Be Taken To Facilitate Such ADR; And Whether Counsel Have Discussed ADR And Their Response To This Provision With Their Clients.

The parties jointly agree that this matter is not appropriate for ADR.

6. Whether The Case Can Be Resolved By Summary Judgment Or Motion To Dismiss; Dates For Filing Dispositive Motions And/Or Cross-Motions, Oppositions, And Replies; And Proposed Dates For A Decision On The Motions.

As noted in Section 1 above, both parties may file dispositive motions in this matter. Plaintiff has informed Defendants that, if it decides to file a dispositive motion before discovery

is commenced, it will attempt to file before the initial status conference. Defendants believe that the case can appropriately be decided based on dispositive motions.

7. Whether The Parties Should Stipulate To Dispense With The Initial Disclosures Required By Rule 26(A)(1), F.R.Civ.P., And If Not, What If Any Changes Should Be Made In The Scope, Form Or Timing Of Those Disclosures.

Plaintiff intends to file its Initial Disclosures, in accordance with Rule 26(a), by Wednesday, June 30, 2010. Defendants believe initial disclosures are not appropriate in this action, and therefore object to such disclosures. Defendants also believe that no discovery is necessary to resolve this matter. Plaintiff does not agree with Defendants' position on initial disclosures or discovery.

Defendants believe that the only questions remaining in the suit are legal questions, and questions as to remedy. With regard to remedy, Defendants intend to support any proposed remedy with declarations from EPA staff with knowledge of what work needs to be completed before EPA can grant or deny the permit application at issue, and how much time and resources will be needed to do so. Should the Court deem discovery necessary, such discovery should be limited to written discovery on that topic, or to depositions pursuant to FRCP 56(f) of any affiants relied upon in a dispositive motion. Defendants will provide Plaintiff a list of EPA staff whose declarations may support Defendants' proposed remedy on June 30, 2010. Defendants note that an incomplete administrative record regarding Avenal's PSD permit process is available on EPA's online docket, which can be found at: http://www.regulations.gov/search/Regs/home.html#docketDetail?R=EPA-R09-OAR-2009-0438.

Plaintiff does not agree with Defendants' aforementioned, proposed limitations on the scope of potential discovery.

8. The Anticipated Extent Of Discovery, How Long Discovery Should Take, What Limits Should Be Placed On Discovery; Whether A Protective Order Is Appropriate; And A Date For The Completion Of All Discovery, Including Answers To Interrogatories, Document Production, Requests For Admissions, And Depositions.

As noted in the section above, Defendants object to providing any discovery in this matter and intend to challenge Plaintiff's requests for discovery. The parties were unable to find any common ground on this point. Plaintiff, therefore, informed Defendants that it would propose its own discovery schedule to the Court; Defendants did not object.

Plaintiff desires to avoid any further delay and therefore requests an expedited discovery schedule. Plaintiff proposes that the parties complete all aspects of discovery within 6 months of the initial status conference. Plaintiff plans to seek discovery relating to, but not necessarily limited exclusively to, its permit application (in the works since 2007) and EPA's policies and procedures for evaluating and making decisions on such permits. Accordingly, during the discovery period, Plaintiff intends to propound discovery requests, including interrogatories, document requests, and requests for admissions. It also intends to notice and conduct depositions of a small number of fact witnesses.

Given Defendants' position on discovery, the parties did not discuss the preservation of discoverable information. Plaintiff desires to understand EPA's policy on preservation and destruction of electronically-stored information and hardcopy documents. Moreover, Plaintiff desires to understand whether EPA headquarters' policy differs in any way from its regional offices' policies. Plaintiff has suspended its preservation/destruction policies during the pendency of this litigation and directed all relevant personnel to gather and retain all germane information.

Plaintiff does not anticipate the need to file a protective order in this matter. Defendants, however, intend to seek a protective order that will protect it from producing any discovery in this matter.

9. Whether The Requirement Of Exchange Of Expert Witness Reports And Information Pursuant To Rule 26(A)(2), F.R.Civ.P., Should Be Modified, And Whether And When Depositions Of Experts Should Occur.

Defendants do not intend to use an expert in their defense. At this time, Plaintiff is not certain of whether it intends to use an expert in this matter. If and when it does so decide, Plaintiff will inform Defendants, attempt to work with Defendants to jointly establish an appropriate schedule for expert discovery that will not exceed the discovery deadline, and abide by the requirements of Federal Rule 26(a)(2).

10. In Class Actions, Appropriate Procedures For Dealing With Rule 23, F.R.Civ.P. Proceedings, Including The Need For Discovery And The Timing Thereof, Dates For Filing A Rule 23 Motion, And Opposition And Reply, And For Oral Argument And/Or An Evidentiary Hearing On The Motion And A Proposed Date For Decision.

This category is not applicable to the present action.

11. Whether The Trial And/Or Discovery Should Be Bifurcated Or Managed In Phases, And A Specific Proposal For Such Bifurcation.

Defendants believe neither discovery nor a trial are necessary or appropriate to resolve this matter. Plaintiff does not believe that a trial or discovery should be bifurcated.

12. The Date For The Pretrial Conference (Understanding That A Trial Will Take Place 30 To 60 Days Thereafter).

As noted above, Defendants do not believe a trial is necessary to resolve this matter, and therefore do not believe a pretrial conference is necessary. Plaintiff believes that the pretrial conference should be scheduled within two months of the close of discovery—approximately

February 2011 if Plaintiff's proposed discovery schedule is adopted by the Court, discovery begins in July 2010, and providing the parties do not file dispositive motions in this matter.

13. Whether The Court Should Set A Firm Trial Date At The First Scheduling Conference Or Should Provide That A Trial Date Will Be Set At The Pretrial Conference From 30 To 60 Days After That Conference.

As noted above, Defendants do not believe a trial is necessary to resolve this matter. Plaintiff believes, based on its proposals in Sections 8 and 12 above, that the trial date in this matter should be set for sometime in March 2011.

14. Such Other Matters That The Parties Believe May Be Appropriate For Inclusion In A Scheduling Order.

The parties do not have any additional requests or suggestions for inclusion in the Scheduling Order.

Date: June 30, 2010

BRACEWELL & GIULIANI LLP

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Date: June 30, 2010

U.S. DEPARTMENT OF JUSTICE

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EXHIBIT 1

PLAINTIFF AVENAL'S AND DEFENDANTS EPA'S and LISA JACKSON'S JOINT STIPULATIONS OF FACT AND STATUTORY BASIS OF CLAIMS AND DEFENSES

The parties hereby submit their joint statement of facts and statutory basis of the claims and defenses in this matter. The citations noted in these stipulations, including the references to the Complaint and Answer, are for the Court's reference.

1. Avenal is the developer of the proposed Avenal Energy Project ("AEP" or the "Project"), a 600 megawatt natural gas-fired power plant. (Compl. ¶¶ 2, 10.)

2. Avenal has proposed that the Project, a major stationary source, be constructed in an area that has been designated attainment for certain National Ambient Air Quality Standards. (Compl. ¶ 18; Answer ¶ 18.)

3. Avenal first contacted the EPA in August 2007 in regards to the application process for securing a Prevention of Significant Deterioration ("PSD") permit for the Project. (Compl. ¶¶ 2, 19; Answer ¶¶ 2, 19.)

4. Avenal submitted its initial PSD permit application for the Project to the EPA in February 2008. (Compl. ¶¶ 5, 20; Answer ¶ 5, 20.)

5. On March 19, 2008, the EPA notified Avenal, by letter, that its PSD permit application was complete. (Compl. ¶¶ 5, 21; Answer ¶5, 21.)

6. Following Avenal's February 2008 submission of its PSD permit application, EPA requested and received additional information from Avenal, and EPA, the U.S. Fish and Wildlife Service ("USFWS"), and Avenal also exchanged information regarding Section 7 of the Endangered Species Act ("ESA"), including, but not limited to:

03/07/2008	EPA provides initial and preliminary observations of information in the PSD application.

03/13/2008	Avenal provides its response to EPA's 03/07/08 observations of information in the PSD application.
03/14/2008	EPA requests additional information from Avenal.
03/17/2008	Avenal provides its response to EPA's 3/17/08 request.
03/19/2008	EPA deems Avenal's PSD permit application complete.
03/31/2008	EPA requests additional information from Avenal.
04/10/2008	Avenal provides its response to EPA's 3/31/08 request.
05/12/2008	Avenal submits to EPA its Biological Assessment and request for USFWS formal consultation.
06/06/2008	EPA requests additional information regarding AEP's startup/shutdown.
07/10/2008	EPA requests initiation of formal ESA consultation with USFWS.
08/15/2008	Avenal provides EPA with a copy of its correspondence with USFWS regarding its migratory buffer request.
09/08/2008	USFWS requests additional information from EPA regarding ESA consultation.
10/01/2008	Avenal submits to EPA information to respond to USFWS's September 8, 2008 letter to EPA.
10/22/2008	EPA provides additional information requested by USFWS.
10/28/2008	Avenal notifies that it has reduced its CO limit to 2.0 ppm to address EPA concerns.
11/17/2008	Avenal and EPA have a permit status meeting in San Francisco.
02/23/2009	EPA requests an additional impacts analysis.
03/11/2009	Avenal submits the requested additional impacts analysis.

7. EPA and its Administrator are statutorily bound by the provisions of the Clean Air Act ("CAA").

8. EPA/Administrator did not issue a final decision on Avenal's PSD application by March 19, 2009. (Compl. ¶ 22; Answer ¶ 22.)

9. Section 165(c) of the CAA requires EPA/Administrator to grant or deny a PSD permit within one year of receiving a complete application for such a permit. In relevant part, Section 165(c) states that: "Any completed permit application under [the PSD program] 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." 42 U.S.C. § 7475. (*See* Compl. ¶¶ 3, 6, 15, 17, 22, 28.)

10. Since March 19, 2009, the following actions have occurred that relate to Avenal's PSD permit application:

06/16/2009	EPA issues its proposed permit and Statement of Basis and Ambient Air Quality Impact Report stating that Avenal meets the required CAA standards.
06/16/2009	EPA publishes its first public notice proposing to issue Avenal a PSD permit and requesting public comments by July 16, 2010.
07/01/2009	USFWS issues its draft Biological Opinion under ESA Section 7.
06/17/2009 - 10/15/2009	EPA receives public comments from dozens of organizations and individuals regarding Avenal's PSD permit.
07/14/2009	Avenal provides comments to EPA regarding the draft Biological Opinion under ESA Section 7.
07/15/2009	Avenal submits comments to EPA on its proposed PSD permit.
07/15/2009	EPA proposes new 1-hour national ambient air quality standard for NO2.
07/22/2009	EPA and Avenal discuss Avenal's comments on the draft Biological Opinion.
08/27/2009	EPA publishes a second public notice announcing public information meeting and public hearing and providing notification of extension of comment period until October 15, 2009.
09/11/2009	EPA publishes a third public notice announcing an additional public hearing.
09/30/2009	EPA holds a public information meeting regarding Avenal's PSD permit.
10/01/2009	EPA holds a public hearing regarding Avenal's PSD

	permit.
10/15/2009	EPA holds a supplemental public hearing regarding Avenal's PSD permit.
10/15/2009	EPA's public comment period on Avenal's PSD permit closes.
10/22/2009	EPA provides USFWS initial comments on the draft Biological Opinion.
12/23/2009	USFWS, EPA and Avenal have a teleconference meeting to discuss comments on USFWS draft Biological Opinion.
02/09/2010	Federal Register publication announcing EPA's final 1-hour national ambient air quality standard for NO2.
02/23/2010	EPA and Avenal meet to discuss status of PSD permitting action.
04/01/2010	EPA issues a memorandum from Steve Page, Director, Office of Air Quality Planning and Analysis, entitled "Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards."
04/12/2010	Effective date of new 1-hour national ambient air quality standard for NO2.
05/05/2010	EPA discusses with Avenal its position that information demonstrating compliance with new 1-hour NO2 standard must be submitted by Avenal.
05/11/2010	Avenal provides a response to issues discussed at the 05/05/2010 conference call with EPA regarding the proposed permit, including its response to EPA's position on the new 1-hour standard.
05/14/2010	Avenal provides supplemental air quality impact analysis for NO2 dated 5/13/2010.
06/15/2010	EPA provides its response to Avenal's supplemental NO2 submittal and requests additional information.
06/28/2010	Avenal provides additional information regarding the NO2 analysis in response to EPA's 6/15/2010 letter.

11. To date, EPA/Administrator has yet to take final action to grant or deny Avenal's PSD permit application. (Compl. ¶ 22; Answer ¶ 22.)

12. Section 304(b)(2) of the CAA allows Avenal to bring a citizen suit for EPA/Administrator's failure to fulfill its non-discretionary statutory duties and states, in relevant

part, that: "No action may be commenced . . .under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator." 42 U.S.C. § 7604(b)(2). (*See* Compl. ¶¶ 24-26.)

13. On December 21, 2009, Avenal provided the EPA with notice of its intent to file the present action. (Compl. ¶ 25; Answer ¶ 25.)

14. Section 304(a) of the CAA allows this Court to compel EPA's Administrator to perform her non-discretionary duties and states, in relevant part, that: "Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. . . . The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed." 42 U.S.C. § 7604(a). (*See* Compl. ¶¶ 1, 11, 12, 23, 30.)

15. Section 7 of the ESA and its implementing regulations at 50 C.F.R. Part 402 require that "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency [] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary [] to be critical . ." and impose other related statutory and regulatory requirements. (*See* Answer, Defense ¶ 1.)

16. Section 165(a)(3) of the Clean Air Act, 42 U.S.C. § 7475(a)(3), states that "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 – . . . [] (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 (a) maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or performance standard or standard of performance under this chapter." EPA's implementing regulations impose related regulatory requirements. (*See* Answer, Defense ¶ 2.)

17. EPA promulgated a new 1-hour national ambient air quality standard for nitrogen dioxide, effective April 12, 2010. 75 Fed. Reg. 6474 (Feb. 9, 2010). (*See* Answer, Defense ¶ 2.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June 20100, a true and complete copy of the foregoing *Joint Statement Regarding Case Management and Scheduling* was served by the Court's electronic filing system on registered electronic filing participants or by first class mail, postage pre-paid on non-registered electronic filing participants:

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Lisa P. Jackson, Administrator (EPA)

/s/ LaShon K. Kell
LaShon K. Kell, Esq. (DC Bar #483465)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AVENAL POWER CENTER, LLC Plaintiff, v. U.S. ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, in her capacity as Administrator of the U.S. Environmental Protection Agency Defendants.	)	Case No.: 1:10-cv-00383-RJL (Hon. Richard J. Leon)

CORRECTED SECOND DECLARATION OF REGINA MCCARTHY

I, Regina McCarthy, declare under penalty of perjury under the laws of the United States of America that the following is true and correct to the best of my knowledge, information and belief, and is based on my own personal knowledge or on information contained in the records of the United States Environmental Protection Agency (EPA) or supplied to me by EPA employees.

1. I am the Assistant Administrator of the Office of Air and Radiation in EPA, a position I have held since June 2009. The Office of Air and Radiation (OAR) is the EPA office that develops national programs, technical policies, and regulations for controlling air pollution. OAR's assignments include the protection of public health and welfare, pollution prevention and energy efficiency, air quality, industrial air pollution, pollution from vehicles and engines, acid rain, stratospheric ozone depletion, and climate change.

2. OAR is responsible for development of National Ambient Air Quality Standards and the development and implementation of regulations, policy, and guidance associated with the Prevention of Significant Deterioration ("PSD") permitting program.

3. Prior to joining EPA, I served as the Commissioner of the Connecticut Department of Environmental Protection. I have worked at both the state and local levels on critical environmental issues, and helped coordinate policies on economic growth, energy, transportation and the environment. I have a B.A. in Social Anthropology from the University of Massachusetts at Boston and a joint M.S. in Environmental Health Engineering and Planning and Policy from Tufts University.

4. On February 9, 2010, EPA issued a National Ambient Air Quality Standard (NAAQS) for hourly concentrations of nitrogen oxides ("hourly NO2 standard").

5. In a prior declaration, I testified that applicants seeking PSD permits to construct stationary sources of air pollution have experienced unforeseen challenges with the preparation and review of information to predict the impact of proposed sources on hourly NO2 concentrations. This gave rise to an EPA policy review that has now proceeded to the point that the agency can more specifically explain how it intends to move forward with action on the PSD permit application submitted by Avenal Power Center ("Avenal"). See paragraphs 5-8, Declaration of Regina McCarthy (January 7, 2011).

6. As part of this policy review, 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. EPA will propose to extend similar relief to other permit applicants that can show they are similarly situated. This determination represents a change in the position EPA has taken in this matter and in previous interpretive statements issued by EPA, including statements cited by EPA to support its Cross Motion for Summary Judgment in this litigation.

7. Because this change in position requires that EPA modify or narrow previous interpretations of EPA regulations and the position EPA has taken in public statements to this court regarding this permit, the Agency reads applicable regulations and case law to require that the EPA provide the public with an opportunity to comment on this proposed action before the Agency can issue a final decision on the pending permit application that exempts Avenal from these additional requirements.

8. EPA intends to issue a supplemental public notice that will request comment on EPA's proposal to approve Avenal's application without requiring a demonstration that this source will not cause a violation of the hourly NO2 standard. In addition, this notice will also request comment on EPA's proposal not to require this source to meet emissions limitations for greenhouse gases or to demonstrate that the proposed source will not cause or contribute to a violation of the National Ambient Air Quality Standards for hourly concentrations of sulfur dioxide which became effective on August 23, 2010. The notice will also inform interested persons of the opportunity to provide comments on these subjects at a public hearing.

9. As a result of a recent ruling by the EPA Environmental Appeals Board, EPA has also determined that it is necessary to supplement its analysis of whether minority and low income communities may be disproportionately affected by emissions of NO2 from the Avenal facility. *See, In re: Shell Gulf of Mexico, Inc. and Shell Offshore, Inc.*, OCS Appeal Nos. 10-1 to 10-4, Slip. Op. at 63-81 (EAB December 30, 2010). A copy of this decision may be obtained at

<http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/OCS+Permit+Appeals+(CAA)?OpenView>.

10. EPA is in the process of drafting a supplemental statement of basis to explain its justification for exempting Avenal from these additional requirements described above and to provide a supplemental analysis concerning disproportionate impacts to minority and low income communities. EPA requires an additional 3 weeks to complete this document.

11. Once the document described in paragraph 10 is completed, EPA requires an additional 3 weeks to complete and arrange for publication and direct mail distribution of the public notice. This time is necessary to translate the public notice into Spanish, book the public hearing venue and court reporter to transcribe the hearing, provide advanced copies of the public notice to newspapers for publication, and complete the procurement processes for such services. From the date this notice is published and distributed, EPA will require approximately 5 weeks to complete the public comment and hearing process, in order to allow the 33 days for public comment required by 40 CFR 124.10(b) and 124.20(d) and several additional days for completion of the public hearing. EPA is required to hold a public hearing if requested by any interested person, to provide 33 days notice of such a hearing, and to keep the public comment period open until the hearing concludes. 40 CFR 124.12; 40 CFR 124.10(b)(2); 124.20(d). EPA anticipates based on prior public comments on this permit that a public hearing will be requested. Thus, to expedite the public comment process as much as possible, EPA will provide public notice of the hearing at the same time as public notice of the supplemental statement of basis. In light of the scope of the issues addressed in the supplemental statement of basis, public interest in such matters, and volume of public comments EPA expects to receive, once the comment period ends, EPA will require an additional 6 weeks to consider public comments, prepare responses thereto, and issue a final permit decision in accordance with 40 CFR 124.15.

12. A least four EPA career staff persons and several additional supervisors already familiar with the subject matter are assigned to prepare and review these actions by EPA. The career staff preparing initial drafts of the necessary documents include an Environmental Engineer and Air Permits Manager in EPA's Region 9 office and staff attorneys from both the Region 9 Office of Regional Counsel and the Office of General Counsel at headquarters. At least 5 additional staff and supervisors in Region 9, the headquarters Office of Air and Radiation, and the Office of General Counsel will need to review and approve these actions. The timetable described above cannot be expedited by reassigning additional EPA staff because the time required for such persons to obtain the necessary familiarity with the technical and factual background on this permit application and the issues it presents (and already-assigned staff to train such persons) would offset any benefit from having more manpower involved.

13. After consideration of public comments the Agency may receive in response to this public notice, EPA will be able to issue a final permit decision in accordance with 40 CFR 124.15 on this permit application by May 27, 2011, as I have previously testified.

Executed this 4th st day of February, 2011.

Regina McCarthy

Assistant Administrator
Office of Air and Radiation
United States EPA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AVENAL POWER CENTER, LLC
ONE ALLEN CENTER, LEVEL 31
500 DALLAS STREET
HOUSTON, TX 77002

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY
1200 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, DC 20004

and

LISA P. JACKSON, ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY
1200 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, DC 20004

Defendants.

Case: 1:10-cv-00383
Assigned To : Leon, Richard J.
Assign. Date : 3/9/2010
Description: Admn Agency Review

ORIGINAL COMPLAINT

Plaintiff Avenal Power Center, LLC ("Avenal" or the "Company"), by and through its attorneys, files this complaint against the United States Environmental Protection Agency and Lisa P. Jackson, Administrator of the United States Environmental Protection Agency (the "Administrator") (collectively, "Defendants" or "EPA") and alleges and says as follows:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AVENAL POWER CENTER, LLC ONE ALLEN CENTER, LEVEL 31 500 DALLAS STREET HOUSTON, TX 77002 Plaintiff, v. U.S. ENVIRONMENTAL PROTECTION AGENCY 1200 PENNSYLVANIA AVENUE, N.W. WASHINGTON, DC 20004 and LISA P. JACKSON, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY 1200 PENNSYLVANIA AVENUE, N.W. WASHINGTON, DC 20004 Defendants.	)	CIVIL ACTION NO. _____

ORIGINAL COMPLAINT

Plaintiff Avenal Power Center, LLC ("Avenal" or the "Company"), by and through its attorneys, files this complaint against the United States Environmental Protection Agency and Lisa P. Jackson, Administrator of the United States Environmental Protection Agency (the "Administrator") (collectively, "Defendants" or "EPA") and alleges and says as follows:

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NATURE OF THE ACTION

1. This is a citizen suit to enforce the Clean Air Act ("CAA" or "the Act"), brought under section 304(a)(2) of the CAA, 42 U.S.C. § 7604(a)(2), against the Defendants for their failure to perform a mandatory duty required by the Act.

2. Since August 2007, the Company (and its predecessor, Federal Power Avenal, LLC) has been working with EPA to secure the necessary approvals to construct a state-of-the-art 600 megawatt natural gas-fired power plant, known as the Avenal Energy Project (the "Project").

3. Under the Act, construction on the Project cannot begin until EPA issues a "Prevention of Significant Deterioration" ("PSD") permit, to ensure, among other things, that the Project will not violate any air quality standards and will have the "best available control technology" to control certain air emissions. 42 U.S.C. §§ 7470-7492.

4. The permit conditions imposed by the San Joaquin Valley Air Pollution Control District and already accepted by the Company are sufficient to ensure that the Project meets all the requirements of the Clean Air Act. In fact, the Project will be among the cleanest power plants in the world.

5. The initial PSD permit application for the Project was submitted to EPA in February 2008, and EPA notified the Company by letter dated March 19, 2008, that the PSD permit application was complete.

6. Under Section 165(c) of the CAA, 42 U.S.C. § 7475(c), EPA is required to take final action on a PSD permit application within one year of receiving the complete application. By law, Defendants should have granted or denied the PSD permit for the Project no later than March 19, 2009.

7. Despite repeated requests from the Company asking Defendants to take final action on the PSD permit application, Defendants have disregarded and continue to disregard their statutory duty to act on the PSD permit application.

8. Defendants' failure to comply with their mandatory duty has had, and will continue to have, substantial adverse economic impacts on the Company.

THE PARTIES

9. Defendants are the United States Environmental Protection Agency and Lisa P. Jackson, Administrator of the United States Environmental Protection Agency. Both are located and have their principal place of business at 1200 Pennsylvania Avenue N.W., Washington, DC 20004. Pursuant to Federal Rule of Civil Procedure 4(i) and 42 U.S.C. § 7604(c)(3), EPA may be served with process by delivering a copy of the summons and complaint via registered or certified mail to the United States attorney for the district in which this action is brought, to the Attorney General of the United States, and to the EPA Administrator.

10. The Company, Avenal Power Center, LLC, is the developer of the Project. The Company is a "person" within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e).

JURISDICTION AND VENUE

11. This Court has jurisdiction over the subject matter of this action pursuant to section 304(a) of the Act, 42 U.S.C. § 7604(a), and 28 U.S.C. § 1331.

12. Venue is proper in this Court pursuant to section 304(a) and 28 U.S.C. § 1391(e).

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BACKGROUND

A. Statutory and Regulatory Background

13. The Act creates a detailed and comprehensive legal framework designed to protect and enhance the quality of the nation's air while at the same time allowing for economic development.

14. Part C of Title I of the Act, 42 U.S.C. §§ 7470-7492, sets forth permitting requirements for power plants and other major industrial facilities to be built in areas that already meet federal air quality standards for clean air. These requirements are designed to protect public health and welfare and to ensure that economic growth will occur in a manner consistent with the preservation of existing clean air resources. These provisions are generally referred to as the PSD program.

15. As set forth in Section 165, 42 U.S.C. § 7475, and 40 C.F.R. § 52.21, any person proposing to construct a major stationary source in an attainment area must first obtain a PSD permit.

16. Under the PSD program, a "major stationary source" is defined to include fossil fuel-fired steam electric plants of more than 250 million British thermal units (Btu) per hour heat input which emit or have the potential to emit one hundred tons per year or more of any regulated air pollutant. 40 C.F.R. § 52.21(b)(1)(i)(a).

17. Section 165(c) of the Act states:

> Any completed permit application under [the PSD program] 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.

42 U.S.C. § 7475(c). Section 165(c) establishes a clear, nondiscretionary duty on EPA to take final action on a PSD permit application within twelve months after receiving a complete permit application.

B. The Project's PSD Permit Application

18. The Project is a major stationary source that the Company has proposed to construct in an area designated as attaining the National Ambient Air Quality Standards.

19. Since August 2007, the Company has been working with EPA to secure a PSD permit for the Project.

20. The PSD permit application for the Project was submitted to EPA in February 2008.

21. EPA issued a letter finding the application to be complete on March 19, 2008. A true and correct copy of this letter is attached to this Complaint as Exhibit A and incorporated by reference herein.

22. Under Section 165(c) of the Act, 42 U.S.C. § 7475(c), Defendants were required to take final action on the PSD permit application for the Project no later than March 19, 2009. Defendants have disregarded their nondiscretionary duty and still have not taken final action on the permit, even though the statutory deadline for such action was almost a year ago.

NOTICE

23. Section 304(a)(2) of the Act, 42 U.S.C. § 7604(a)(2), provides that:

> Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

24. Section 304(b)(2) of the Act, 42 U.S.C. § 7604(b)(2), provides that "no action may be commenced . . . under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator."

25. Plaintiff gave actual notice to Defendants of its intent to file this civil action in a letter addressed to the Administrator dated December 21, 2009 (the "Notice Letter"). A true and correct copy of the Notice Letter is attached to this Complaint as Exhibit B and is incorporated by reference herein. This Notice Letter satisfies the pre-suit notice requirement of section 304(b) of the Act, 42 U.S.C. § 7604(b).

26. The 60-day period required by section 304(b) of the Act, 42 U.S.C. § 7604(b), between issuance of the Notice Letter and commencement of this civil action expired on February 22, 2010.

CLAIM FOR FAILURE TO PERFORM NONDISCRETIONARY DUTY

27. Paragraphs 1 through 26 are realleged and incorporated herein by reference.

28. Defendants have failed to perform their nondiscretionary duty under section 165(c) of the Act, 42 U.S.C. § 7475(c), to either grant or deny the completed PSD permit application for the Project not later than one year after the date of filing of such completed PSD permit application.

29. Absent an appropriate order of this Court, Defendants will continue to disregard this statutory duty and not render a decision on the PSD permit for the Project.

30. As provided in sections 304(a) and (d) of the Act, 42 U.S.C. § 7604(a) and (d), Defendants' failure to perform their nondiscretionary duty subjects them to injunctive relief, costs, and attorneys' fees for this action that this Court determines appropriate.

///

PRAYER FOR RELIEF

WHEREFORE, the Company requests that this Court:

1. Order Defendants to immediately grant or deny the PSD permit application for the Project as required by the CAA;

2. Order Defendants to take other appropriate actions to remedy, mitigate, and offset the harm to Plaintiff caused by Defendants' disregard of their statutory duty;

3. Award Plaintiff its attorneys' fees and costs of this action; and

4. Grant such other relief as the Court deems just and proper.

Dated: March 8, 2010

Respectfully submitted,

BRACEWELL & GIULIANI LLP

Jeffrey R. Holmstead
D.C. Bar No. 457974
Bracewell & Giuliani LLP
2000 K St., NW, Suite 500
Washington, DC 20006-1872
Telephone: (202) 828-5852
Telecopier: (202) 857-4812
jeff.holmstead@bgllp.com

EXHIBIT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

March 19, 2008

Mr. Stuart Zisman
Avenal Power Center, LLC
500 Dallas Street, Level 31
Houston, TX 77002

Subject: Prevention of Significant Deterioration Application No. 08-SJ-01
Avenal Power Center, LLC
Avenal Energy Project, Avenal, California

Dear Mr. Zisman:

This letter is in response to Avenal Power Center, LLC's application for a Prevention of Significant Deterioration (PSD) Permit for the Avenal Power Center, LLC's Avenal Energy Project. The application was submitted with the letter of transmittal dated February 15, 2008 and received by this office on February 20, 2008. Additional application copies also were provided on March 3, 2008. The application is for the construction and operation of a 600 MW combined-cycle electric power generating plant and ancillary facilities. The proposed project will be located between the San Luis Canal (California Aqueduct) and the Avenal Cutoff Road, six miles northeast of the City of Avenal in Kings County, California.

After our review of the above application, as well as follow-up information submitted per our request and received on March 14, 2008 and March 17, 2008, we have determined that the PSD permit application is administratively complete as of March 19, 2008. A preliminary determination, which will include an Ambient Air Quality Impact Report (AAQIR) and draft permit, is being developed. However, it is possible that we will need clarifying information on one or more parts of the application before we can issue a draft permit.

This notification of administrative completeness does not imply that the EPA agrees with any analyses, conclusions or positions contained in the application. Also, if you should request a suspension in the processing of the application, or submit new information indicating a significant change in the project design, ambient impact or emissions, this determination of administrative completeness may be revised.

Upon issuance of the preliminary determination, we will publish a public notice of our intent to issue the permit. The comment period specified in the notice shall be at least 30 days.

Please be advised that, at any time, anyone may have full access to the application materials and other information you provide to us in connection with this permit action. Therefore, we are informing you of your rights to claim business confidentiality under 40 CFR 2, Subpart B for any part of or all of the information you provide us. If you do not make a claim of confidentiality for any of this material within 15 days of the date you receive this letter you will have waived your right to do so. The facility name and address may not be claimed as confidential.

If you wish to claim confidentiality, you must substantiate your claim. Your substantiation must address the points enumerated in the attachment to this letter, in accordance with 40 CFR 2.204(e).

If you have any questions concerning the review of your application, please contact Shirley F. Rivera, Environmental Engineer, of my staff at (415) 972-3966. For questions regarding confidentiality claims, please contact Ann Lyons at (415) 972-3883. For air quality modeling questions, please contact Carol Bohnenkamp at (415) 947-4130.

Sincerely,

Gerardo Rios
Chief, Permits Office

Attachment

cc: Jim Rexroad, Avenal Power Center, LLC
Robert Fletcher, California Air Resource Board
Christopher Meyer, California Energy Commission
Derek Fukuda, San Joaquin Valley APCD
Dave Warner, San Joaquin Valley APCD
Eric Walther, Sierra Research

Distribution of copies:

Jim Rexroad
Avenal Power Center, LLC
500 Dallas Street, Level 31
Houston, TX 77002

Robert Fletcher, Division Chief
Stationary Source Division
California Air Resources Board
1001 "I" Street
P.O. Box 2815
Sacramento, CA 95812

Christopher Meyer, Project Manager
California Energy Commission
1516 9th Street, MS-15
Sacramento, CA 95814

Derek Fukuda, Air Quality Engineer
San Joaquin Valley APCD
1990 E. Gettysburg Ave.
Fresno, CA 93726

Dave Warner, Director, Permit Services
San Joaquin Valley APCD
1990 E. Gettysburg Ave.
Fresno, CA 93726

Eric Walther
Sierra Research
1801 J Street
Sacramento, CA 95814

ATTACHMENT

INSTRUCTIONS FOR CLAIMING CONFIDENTIALITY

A. Pursuant to 40 CFR 2.204(e), your claim must address these points:

i. The portions of the information alleged to be entitled to confidential treatment;

ii. The period of time for which confidential treatment is desired by the business (e.g., until the occurrence of a specific event, or permanently);

iii. The purpose for which the information was furnished to EPA and the appropriate date of submission, if known;

iv. Whether a business confidentiality claim accompanied the information when it was received by EPA;

v. Measures taken by you to guard against the undesired disclosure of the information to others;

vi. The extent to which the information has been disclosed to others and the precautions taken in connection therewith;

vii. Pertinent confidentiality determinations, if any, by EPA or other Federal agencies, and a copy of any such determination or reference to it, if available;

viii. Whether you assert that disclosure of this information would be likely to result in substantial harmful effects on your business's competitive position, and if so, what those harmful effects would be, why they should be viewed as substantial; and an explanation of the casual relationship between disclosure and such harmful effect, and

ix. Whether you assert that the information is voluntarily submitted information and if so, whether any disclosure of the information would tend to lessen the availability to EPA of similar information in the future. "Voluntarily submitted information" is defined in 40 CFR Section 2.201(i) as business information in EPA's possession.

a) The submission of which EPA has no statutory or contractual authority to require; and

b) The submission of which was not prescribed by statute or regulation as a condition of obtaining some benefit (or avoiding some disadvantage)

under a regulatory program of general applicability, including such regulatory programs as permit, licensing, registration, or certification programs, but excluding programs concerned solely or primarily with the award or administration by EPA of contracts or grants.

B. We will disclose information covered by your claim only to the extent provided for in 40 CFR Part 2, Subpart B Confidentiality of Business Information. Please address your claim and substantiation of confidentiality to the staff person mentioned in the letter at EPA Region 9 (AIR-3), 75 Hawthorne Street, San Francisco, CA 94105.

EXHIBIT B

BRACEWELL
&GIULIANI

Texas
New York
Washington, DC
Connecticut
Dubai
Kazakhstan
London

Jeffrey R. Holmstead
Partner

202.828.5852 Office
202.857.4812 Fax

jeff.holmstead@bgllp.com

Bracewell & Giuliani LLP
2000 K Street NW
Suite 500
Washington, DC
20006-1872

December 21, 2009

By Messenger and Electronic Mail

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Notice of Intent to Sue EPA for Its Failure to Act on Avenal PSD Permit as required by the Clean Air Act

Dear Ms. Jackson:

I am writing on behalf of Avenal Power Center, LLC ("Avenal Power"), the applicant for a Prevention of Significant Deterioration (PSD) permit for the proposed Avenal Energy Project ("Avenal") (permit number SJ 08-01). In accordance with section 304 of the Clean Air Act, 42 U.S.C. §7604(a)(2), this letter shall serve as formal notice of Avenal Power's intent to file suit against the U.S. Environmental Protection Agency (EPA) for EPA's failure to perform its mandatory duty under the Clean Air Act to issue the PSD permit for Avenal in a timely fashion.

Section 165(c) of the Clean Air Act requires EPA to take final action on a PSD permit within 12 months after receiving a complete permit application. 42 U.S.C. §7475(c). Avenal Power submitted its permit application on February 15, 2008, and EPA notified Avenal Power that its PSD permit application was complete on March 19, 2008. Thus, by statute, EPA should have taken final action on the Avenal permit more than 9 months ago.

Section 304 of the Clean Air Act authorizes civil actions against the Administrator to compel him or her to perform any act or duty that is not discretionary under the Clean Air Act. 42 U.S.C. §7604(a)(2). The Administrative Procedure Act, 5 U.S.C. § 706, as well as Section 304 of the Clean Air Act, also authorizes lawsuits to compel EPA to take actions, such as permitting decisions, that have been unreasonably delayed. This letter provides the necessary notice required before such actions can be filed, which may occur sixty (60) days (for a mandatory duty suit) and one-hundred and eighty (180) days (for a suit based on EPA's

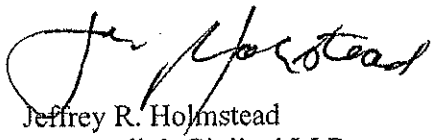
unreasonable delay) from the date of this letter. 42 U.S.C. § 7604. If Avenal Power finds it necessary to file any such action, it will seek all appropriate relief, including injunctive, declaratory, monetary, and any other relief as may be awarded by a court of competent jurisdiction.

This permitting action is straightforward and does not raise any unusual issues. Avenal Power has proposed to construct a natural gas-fired combined cycle generating station that would employ state-of-the-art control technology for minimizing emissions. The Company and its expert consultants have worked cooperatively with EPA throughout the permitting process to ensure that the Agency has everything it needs to process the permit application and issue the permit. From the very beginning, Avenal Power has made it clear that time was of the essence because of financial commitments the Company was required to make, and that it was relying on EPA issue the permit in accordance with the schedule set by Congress. Even though this deadline passed many months ago, the Company has been somewhat reassured by statements from EPA officials that the permit would be issued before the end of the year. It now appears, however, that this schedule is in doubt.

The comment period, which had been extended to accommodate everyone who had raised any concerns about the proposed project, ended more than two months ago. Even so, there were relatively few comments on the proposed permit, and these comments do not raise any new or difficult issues. We simply do not understand why it has taken so long to finalize a PSD permit for a state-of-the-art combined cycle gas-fired power plant.

We still hope that the Agency will issue the permit by year end and that it will not be necessary for us to bring a lawsuit to force the EPA to issue a permit that, by law, it should have issued almost a year ago. However, unless the Agency acts within the 60-day notice period, we are prepared to file a complaint seeking all appropriate remedies from a court of competent jurisdiction.

Very truly yours,



Jeffrey R. Holmstead
Bracewell & Giuliani LLP

CC : Laura Yoshii, EPA Region 9 (by electronic mail)
Deborah Jordan, EPA Region 9 (by electronic mail)
Kerry Drake, Region 9 (by electronic mail)
Gerardo Rios, EPA Region 9 (by electronic mail)
Gina McCarthy, OAR (by electronic mail)
Bill Harnett, OAR/OAQPS (by electronic mail)
Brian Doster, OGC (by electronic mail)

C
10-383
RJL

CIVIL COVER SHEET

JS-44
(Rev.1/05 DC)

I (a) PLAINTIFFS

Avenal Power Center, LLC

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

U S. Environmental Protection Agency and Lisa P Jackson, in her capacity as Administrator of the United States Environmental Protection Agency

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)
NOTE IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Jeffrey R Holmstead, Bracewell & Giuliani LLP
2000 K St , NW, Suite 500
Washington, DC 20006-1872
Telephone. (202) 828-5852

Case: 1:10-cv-00383
Assigned To : Leon, Richard J.
Assign. Date : 3/9/2010
Description: Admn Agency Review

II. BASIS OF JURISDICTION

(PLACE AN x IN ONE BOX ONLY)

- ○ 1 U S Government Plaintiff
- ○ 3 Federal Question (U S Government Not a Party)
- ◉ 2 U S Government Defendant
- ○ 4 Diversity (Indicate Citizenship of Parties in item III)

III CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) FOR DIVERSITY CASES ONLY!

	PTF	DFT		PTF	DFT
Citizen of this State	○ 1	○ 1	Incorporated or Principal Place of Business in This State	○ 4	○ 4
Citizen of Another State	○ 2	○ 2	Incorporated and Principal Place of Business in Another State	○ 5	○ 5
Citizen or Subject of a Foreign Country	○ 3	○ 3	Foreign Nation	○ 6	○ 6

IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place a X in one category, A-N, that best represents your cause of action and one in a corresponding Nature of Suit)

○ A. *Antitrust*

- ☐ 410 Antitrust

○ B. *Personal Injury/ Malpractice*

- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Medical Malpractice
- ☐ 365 Product Liability
- ☐ 368 Asbestos Product Liability

◉ C. *Administrative Agency Review*

- ☐ 151 Medicare Act

Social Security:
- ☐ 861 HIA ((1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g)
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g)

Other Statutes
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☒ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 890 Other Statutory Actions (If Administrative Agency is Involved)

○ D. *Temporary Restraining Order/Preliminary Injunction*

Any nature of suit from any category may be selected for this category of case assignment.

(If Antitrust, then A governs)

○ E. *General Civil (Other)* OR ○ F. *Pro Se General Civil*

Real Property
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent, Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

Personal Property
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

Bankruptcy
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

Prisoner Petitions
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

Property Rights
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

Federal Tax Suits
- ☐ 870 Taxes (US plaintiff or defendant
- ☐ 871 IRS-Third Party 26 USC 7609

Forfeiture/Penalty
- ☐ 610 Agriculture
- ☐ 620 Other Food &Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 RR & Truck
- ☐ 650 Airline Regs
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

Other Statutes
- ☐ 400 State Reapportionment
- ☐ 430 Banks & Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced & Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Satellite TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 900 Appeal of fee determination under equal access to Justice
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions (if not administrative agency review or Privacy Act

(4)

○ G. *Habeas Corpus/ 2255* ☐ 530 Habeas Corpus-General ☐ 510 Motion/Vacate Sentence	○ H. *Employment Discrimination* ☐ 442 Civil Rights-Employment (criteria: race, gender/sex, national origin, discrimination, disability age, religion, retaliation) *(If pro se, select this deck)*	○ I. *FOIA/PRIVACY ACT* ☐ 895 Freedom of Information Act ☐ 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	○ J. *Student Loan* ☐ 152 Recovery of Defaulted Student Loans (excluding veterans)
○ K. *Labor/ERISA (non-employment)* ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 730 Labor/Mgmt. Reporting & Disclosure Act ☐ 740 Labor Railway Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	○ L. *Other Civil Rights (non-employment)* ☐ 441 Voting (if not Voting Rights Act) ☐ 443 Housing/Accommodations ☐ 444 Welfare ☐ 440 Other Civil Rights ☐ 445 American w/Disabilities-Employment ☐ 446 Americans w/Disabilities-Other	○ M. *Contract* ☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholder's Suits ☐ 190 Other Contracts ☐ 195 Contract Product Liability ☐ 196 Franchise	○ N. *Three-Judge Court* ☐ 441 Civil Rights-Voting (if Voting Rights Act)

V. ORIGIN

(●) 1 Original Proceeding ○ 2 Removed from State Court ○ 3 Remanded from Appellate Court ○ 4 Reinstated or Reopened ○ 5 Transferred from another district (specify) ○ 6 Multi district Litigation ○ 7 Appeal to District Judge from Mag. Judge

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

42 U S.C § 7604(a)(2), against the Defendants for their failure to perform a mandatory duty required by law

VII. REQUESTED IN COMPLAINT ☐ CHECK IF THIS IS A CLASS ACTION UNDER F R C P 23 **DEMAND $** Attorney fees and costs Check YES only if demanded in complaint **JURY DEMAND:** YES ☐ NO ☒

VIII. RELATED CASE(S) IF ANY (See instruction) YES ☐ NO ☒ If yes, please complete related case form

DATE 3/8/10 **SIGNATURE OF ATTORNEY OF RECORD** [signature]

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44

Authority for Civil Cover Sheet

The **JS-44** civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleadings or other papers as required by law, except as provided by local rules of court This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet Consequently a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed Listed below are tips for completing the civil cover sheet These tips coincide with the Roman Numerals on the Cover Sheet

I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence Use 11001 to indicate plaintiff is resident of Washington, D C , 88888 if plaintiff is resident of the United States but not of Washington, D.C , and 99999 if plaintiff is outside the United States

III. CITIZENSHIP OF PRINCIPAL PARTIES This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II

IV. CASE ASSIGNMENT AND NATURE OF SUIT The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint You may select only one category You must also select one corresponding nature of suit found under the category of case

VI. CAUSE OF ACTION Cite the US Civil Statute under which you are filing and write a brief statement of the primary cause

VIII. RELATED CASES, IF ANY If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AVENAL POWER CENTER, LLC, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator, United States Environmental Protection Agency, Defendants.	)	Case No.: 1:10-cv-00383-RJL

ANSWER

Defendants United States Environmental Protection Agency and Lisa P. Jackson, Administrator (jointly referred to as EPA), hereby answer the allegations in the Complaint as follows:

1. Paragraph 1 characterizes Plaintiff's cause of action and requires no response.

2. EPA admits that Plaintiff contacted EPA regarding certain aspects of the PSD permit application for the Avenal Energy Project in August 2007. EPA lacks sufficient information to form a belief as to the truth or falsity of the remaining allegations in Paragraph 2, and therefore denies such allegations.

3. Paragraph 3 is a conclusion of law, to which no response is required.

4. EPA denies the allegations in the first sentence of Paragraph 4. EPA lacks sufficient information to form a belief as to the truth or falsity of the allegation in the second sentence of Paragraph 4, and therefore denies such allegations.

5. EPA admits the allegations in Paragraph 5.

6. The first sentence of Paragraph 6 characterizes the Clean Air Act, which speaks

for itself and is the best evidence of its content. The second sentence of Paragraph 6 is a conclusion of law, to which no response is required.

7. EPA admits that Plaintiffs have requested that EPA take final action on the Avenal Energy Project PSD permit application, and that EPA has not yet taken final action to grant or deny the application. EPA denies the remaining allegations in Paragraph 7.

8. EPA lacks sufficient information to form a belief as to the truth or falsity of the allegations in Paragraph 8, and therefore denies such allegations.

9. EPA admits the first two sentences of Paragraph 9, except for the allegation that EPA's zip code is 20004. EPA alleges that its zip code is 20460. The third sentence of Paragraph 9 characterizes the Federal Rules of Civil Procedure and the Clean Air Act, which speak for themselves and are the best evidence of their content.

10. EPA admits the allegation in the first sentence of Paragraph 10. The second sentence of Paragraph 10 is a conclusion of law, to which no response is required.

11. Paragraph 11 is a conclusion of law, to which no response is required.

12. Paragraph 12 is a conclusion of law, to which no response is required.

13. Paragraph 13 characterizes the Clean Air Act, which speaks for itself and is the best evidence of its content.

14. Paragraph 14 characterizes the Clean Air Act, which speaks for itself and is the best evidence of its content.

15. Paragraph 15 characterizes the Clean Air Act and federal regulations, which speak for themselves and are the best evidence of their content.

16. Paragraph 16 characterizes a federal regulation, which speaks for itself and is the best evidence of its content.

17. The first sentence of Paragraph 17 characterizes the Clean Air Act, which speaks for itself and is the best evidence of its content. The second sentence of Paragraph 17 is a conclusion of law, to which no response is required.

18. EPA admits that the Avenal Energy Project is a major stationary source that Plaintiff has proposed to construct in an area that has been designated attainment for certain of the National Ambient Air Quality Standards, but otherwise denies the allegations in Paragraph 18.

19. EPA admits that Plaintiff contacted EPA regarding certain aspects of the PSD permit application for the Avenal Energy Project in August 2007. EPA lacks sufficient information to form a belief as to the truth or falsity of the remaining allegations in Paragraph 19, and therefore denies such allegations.

20. EPA admits the allegation in Paragraph 20.

21. EPA admits the allegations in Paragraph 21.

22. Paragraph 22 contains conclusions of law, to which no response is required. Nevertheless, EPA admits that it did not take final action to grant or deny Plaintiff's PSD permit application for the Avenal Energy Project by March 19, 2009, and has not taken such action to date.

23. Paragraph 23 characterizes the Clean Air Act, which speaks for itself and is the best evidence of its content.

24. Paragraph 24 characterizes the Clean Air Act, which speaks for itself and is the best evidence of its content.

25. EPA admits the allegations in the first two sentences of Paragraph 25. The third sentence of Paragraph 25 is a conclusion of law, to which no response is required.

26. Paragraph 26 contains conclusions of law, to which no response is required.

27. EPA incorporates by reference the responses in the preceding paragraphs of this Answer as though fully set forth herein.

28. Paragraph 28 contains conclusions of law, to which no response is required.

29. EPA denies the allegations in Paragraph 29.

30. Paragraph 30 is a conclusion of law, to which no response is required.

PRAYER FOR RELIEF

Plaintiff's Complaint requests various forms of relief, to which no response is required.

GENERAL DENIAL

To the extent any allegations have not been specifically addressed in the preceding paragraphs, EPA hereby denies such allegations.

DEFENSES

1. With respect to any remedy awarded to Plaintiff, such remedy must provide a reasonable time for EPA to ensure compliance with section 7 of the Endangered Species Act, 16 U.S.C. § 1536. Pursuant to section 7, EPA is currently engaged in formal consultation regarding the Avenal Energy Project with the United States Fish & Wildlife Service.

2. With respect to any remedy awarded to Plaintiff, such remedy must also provide EPA with reasonable time to follow appropriate procedures to determine, pursuant to section 165(a)(3) of the Clean Air Act, 42 U.S.C. § 7475(a)(3), whether Plaintiff has demonstrated that emissions from the Avenal Energy Project will not cause or contribute to air pollution in excess of the recently-promulgated 1-hour national ambient air quality standard for nitrogen dioxide, effective April 12, 2010. 75 Fed. Reg. 6474 (Feb. 9, 2010).

WHEREFORE, EPA asks that the complaint be denied.

Respectfully submitted,

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Dated: May 18, 2010

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the ANSWER via Notice of Docket Activity by the Court's CM/ECF system, on May 18, 2010, on the following counsel of record:

Jeffrey R. Holmstead
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/s/ Stephanie J. Talbert
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Counsel for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AVENAL POWER CENTER, LLC, **Plaintiff,** **v.** **U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,** **Defendants.**	**Case No. 10-cv-00383 (RJL)** **(Hon. Richard J. Leon)**

PLAINTIFF AVENAL POWER CENTER, LLC'S
MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO RULE 12(c)
AND REQUEST FOR EXPEDITED DECISION

Pursuant to Federal Rule of Civil Procedure 12(c), Plaintiff Avenal Power Center, LLC ("Avenal" or the "Company"), by and through its attorneys, files this Motion for Judgment on the Pleadings and Request for Expedited Decision and states:

The Complaint Avenal filed against the U.S. Environmental Protection Agency ("EPA" or "the Agency") and Lisa P. Jackson, Administrator of the U.S. Environmental Protection Agency (the "Administrator") (collectively, "Defendants" or "EPA"), prevails as a matter of law because (1) Defendants violated a statutory deadline imposed by Congress in the Clean Air Act ("CAA" or "the Act"), and (2) Defendants' violation of that deadline was unreasonable.

Avenal filed a CAA permit application that EPA found to be complete as of March 19, 2008. Therefore, under Section 165(c) of the Act, EPA was required to take final action on Plaintiff's permit application within one year—by no later than March 19, 2009. *See* 42 U.S.C. § 7475(c) (2006). Defendants have failed to perform this statutory duty and continue, for unlawful reasons, to delay a final decision granting Plaintiff's permit. Further, Defendants have offered no cognizable defense for EPA's statutory violations and failures.

Avenal adopts and incorporates the accompanying Memorandum as though fully set forth herein. The Memorandum shows that Plaintiff has met all the applicable requirements for obtaining the permit it seeks. The Memorandum also shows that Defendants violated the CAA and ignored the intent of Congress when they failed to meet the Act's deadline for issuing such a permit and that their failure is unreasonable and unsupported by the facts and the law. And, despite Avenal's ongoing good faith efforts to work with EPA to secure a permit, EPA continues unreasonably and unlawfully to delay a final decision granting the permit.

Rather than offering any defense for its violations and failures, EPA answered Plaintiff's Complaint by arguing that "any remedy awarded to Plaintiff" must provide time for EPA to take two additional actions. (Answer, Defenses ¶¶ 1-2.) First, the Agency asserts that "any remedy awarded to Plaintiff" "must provide a reasonable time for EPA to ensure compliance with section 7 of the Endangered Species Act." (Answer, Defenses ¶ 1.) As discussed in the Memorandum, Plaintiff disagrees that the Endangered Species Act ("ESA") was a valid basis for delaying a decision on the permit, but this issue is now moot because the Fish and Wildlife Service of the U.S. Department of the Interior recently issued a formal "biological opinion" that concludes the consultation process under Section 7 of the ESA.

Second, EPA argues that "any remedy awarded to Plaintiff" "must also provide EPA with reasonable time to follow appropriate procedures to determine . . . whether Plaintiff has demonstrated that it will not cause or contribute to air pollution in excess of the recently-promulgated 1-hour national ambient air quality standard for nitrogen dioxide, effective April 12, 2010." (Answer, Defenses ¶ 2.) This standard, however, was not even proposed, much less finalized, until ***after*** the date by which EPA was statutorily required to make a final decision on Avenal's permit. (Moreover, as explained in the attached Memorandum, Avenal was not informed

that it would be required to meet this standard until more than a month after it filed its Complaint.) Under any logical extension of this defense, the permitting process could go on in perpetuity—in direct violation of Congress's intent under the CAA—while EPA continues to delay permit decisions in order to develop and "follow appropriate procedures" to determine whether a permit applicant has satisfied every new permitting requirement that the Agency decides to impose.

It is clear from the pleadings that this issue—whether EPA can lawfully withhold a permit in order to retroactively impose a new standard—is the sole remaining issue in this case. Defendants do not and cannot point to any statute, regulation, or court decision to support their position on this issue. And Defendants make no attempt to square this position with Section 165(c) of the CAA, which requires EPA to make a final decision on the permit within a year of receiving a complete permit application. 42 U.S.C. § 7475(c). Moreover, the Agency's own rules provide a procedure for obtaining a "completeness determination" for a permit application and make it clear that subsequent events do not make an already completed application incomplete. *See* 40 C.F.R. § 124.3(c) (2010). Thus, Defendants have not offered a defense for their statutory violation, and Avenal is entitled to judgment as a matter of law.

EPA's attempt to impose new standards retroactively has left Avenal in an untenable position. Because of new permitting requirements that EPA has issued in the last few months, and others that the Agency has proposed or announced but not yet issued, Avenal is now facing the prospect of a never-ending permitting process. *See, e.g.*, 75 Fed. Reg. 2938 (Jan. 19, 2010) (proposed new standard for ozone); 75 Fed. Reg. 6474 (Feb. 9, 2010) (final rule establishing new standard for NO2); 75 Fed. Reg. 6827 (Feb. 11, 2010) (proposal to apply new PM modeling requirements to pending permit applications); 75 Fed. Reg. 17004 (Apr. 2, 2010) (final rule imposing new permitting requirements for greenhouse gases, including for permit applications

pending as of January 2, 2011); 75 Fed. Reg. 35520 (Jun. 2, 2010) (final rule establishing new standard for SO2).

The prospect of a perpetual permitting process is not just a theoretical concern. EPA has already finalized new permitting requirements for greenhouse gases ("GHGs") that, by their own terms, will apply to Avenal unless EPA chooses (or is ordered by this Court) to issue the Avenal permit within the next four months. *See* 75 Fed. Reg. 31514 (Jun. 3, 2010). Under EPA's new GHG rule, regardless of when a permit application was submitted, if the Agency refuses to grant the permit by the end of this year, then the permit applicant must go back and develop a new permit application that includes an extensive analysis of GHGs (without any guidance, at least to date, on how such an analysis should be performed or evaluated). *Id.* That analysis, and presumably anything else that EPA decides to require in the new application, would then have to go through another notice-and-comment process before EPA will even consider issuing a final permit. As the record in this case shows, this process (multiple rounds of public comment followed by the many months that EPA takes to review such comments) can go on for years. Then, if at any time during this process EPA decides to impose any new permitting standard or requirement, the permit applicant is sent back to starting line—all without any regard to the statutory deadline that Congress imposed on EPA for issuing permits.

Plaintiff understands that this Court has a very full docket and extensive obligations over the next six months, but Avenal respectfully requests that the Court decide this dispositive motion on an expedited basis and order EPA to grant the Avenal permit before the end of this year. Although the background in this case may appear somewhat complex, the legal issues presented to this Court are very straightforward. If this Court does not order EPA to grant the permit by year end, then Avenal will face a new set of legal and procedural issues and additional years of delay.

WHEREFORE, Avenal respectfully moves this Court for an Order Granting its Motion for Judgment on the Pleadings and requiring that Defendants perform their mandatory duty to take final agency action to issue Avenal's permit by December 31, 2010, and for an award of attorney's fees and costs and such further relief this Court deems appropriate.

Date: August 25, 2010

Respectfully submitted,

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Avenal Power Center, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of August 2010, a true and complete copy of the foregoing Plaintiff Avenal Power Center, LLC's Motion for Judgment on the Pleadings Pursuant to Rule 12(c) and Request for Expedited Decision, Memorandum in Support thereof, Statement of Material Facts, and proposed Order was served by the Court's electronic filing system on the following registered participants:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AVENAL POWER CENTER, LLC, **Plaintiff,** **v.** **U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,** **Defendants.**	**Case No. 10-cv-00383 (RJL)** **(Hon. Richard J. Leon)**

MEMORANDUM IN SUPPORT OF
PLAINTIFF AVENAL POWER CENTER, LLC'S
MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO RULE 12(c)
AND REQUEST FOR EXPEDITED DECISION

Pursuant to Federal Rule of Civil Procedure 12(c), Plaintiff Avenal Power Center, LLC ("Avenal" or the "Company"), by and through its attorneys, submits this Memorandum in Support of its Motion for Judgment on the Pleadings and Request for Expedited Decision and states:

I. INTRODUCTION

The Complaint Avenal filed against the U.S. Environmental Protection Agency ("EPA" or "the Agency") and Lisa P. Jackson, Administrator of the U.S. Environmental Protection Agency (the "Administrator") (collectively, "Defendants" or "EPA"), prevails as a matter of law. Plaintiff prevails because Defendants failed to meet their statutory duties and deadlines, and because those failures, as well as Defendants' continuing failure, are unreasonable and factually and legally unjustified.

Avenal filed a Clean Air Act permit application that EPA found to be complete as of March 19, 2008. Thus, according to Section 165(c) of the Clean Air Act ("CAA" or "the Act"), EPA was required to take final action on Avenal's permit application within one year—by no later than March 19, 2009. *See* 42 U.S.C. § 7475(c) (2006). Defendants, however, have failed to perform this

mandatory duty and continue unreasonably to delay a final decision to grant Plaintiff's permit. Defendants have offered no adequate defenses for EPA's statutory violations and failures. Accordingly, Avenal is entitled to judgment as a matter of law.

II. MATERIAL FACTS NOT IN DISPUTE

A. Procedural Background

Avenal is the developer of the proposed Avenal Energy Project ("AEP" or the "Project"), a 600-megawatt natural gas-fired power plant. (Compl. ¶¶ 2, 10.) The Project is a major stationary source that Avenal has proposed to construct in an area designated as attaining the National Ambient Air Quality Standards. (Compl. ¶ 18; Answer ¶ 18.) The plant would be located six miles northeast of the City of Avenal in Kings County, California. (Compl. Ex. A; Answer ¶ 21.)

Avenal first contacted EPA in August 2007 in regard to the application process for securing the necessary CAA permit, known as a Prevention of Significant Deterioration ("PSD") permit. (Compl. ¶¶ 2, 19; Answer ¶¶ 2, 19.) Avenal submitted its initial PSD permit application for construction and operation of the Project to EPA in February 2008. (Compl. ¶¶ 5, 20; Compl. Ex. A; Answer ¶¶ 5, 20, 21.) On March 19, 2008, the EPA notified Avenal, by letter, that its PSD permit application was complete. (Compl. ¶¶ 5, 21; Answer ¶¶ 5, 21.) A true and correct copy of that letter was attached to the Complaint and also hereto as Exhibit A. (*Id*.) EPA failed to issue a final decision on Avenal's PSD application by March 19, 2009. (Compl. ¶ 22; Answer ¶ 22.)

Following EPA's failure to timely grant or deny Avenal's PSD permit application,[1] EPA published a draft permit and its Statement of Basis and Ambient Air Quality Impact Report on June 16, 2009, in which EPA stated that Avenal met all Clean Air Act standards.[2] It was not until this point that EPA began the public comment period for the Project, which it also unilaterally extended for an additional three months—from a July 16, 2009 close to an October 15, 2009 close. Then, between September and October 2009, EPA went on to schedule a public information meeting, a public hearing, and a supplemental public hearing regarding the Project.[3]

Despite the close of EPA's extended public comment period almost a year ago,[4] EPA still has not taken final action on Avenal's PSD permit application. (Compl. ¶ 22; Answer ¶ 22.) Therefore, on December 21, 2009, Avenal provided the EPA with notice of its intent to file the present action. (Compl. ¶ 25; Answer ¶ 25.) A true and correct copy of that letter was attached to the Complaint and also hereto as Exhibit B. (*Id*.)

[1] Avenal's efforts to secure a PSD permit have been documented on the U.S. government website Regulations.gov. EPA makes PSD permitted documents available to the general public on Regulations.gov, which lists: (1) regulations, proposed and final rules; (2) application, petition or adjudication documents; and (3) public comments for numerous federal agencies, including EPA. *See* EPA's public docket of Avenal's PSD application [hereinafter EPA's Avenal Docket], *available at* http://www.regulations.gov/search/Regs/home.html#docketDetail?R=EPA-R09-OAR-2009-0438 (last visited August 25, 2010). The Regulations.gov website includes "Docket Folders," which contain relevant permit applications documents, public notices, and relevant correspondence between EPA and a party. An index of the Avenal PSD permit documents listed on EPA's website are attached hereto as Exhibit C—please note that the documents are listed by post date and do not necessarily appear chronologically. Matters of public record are properly the subject of judicial notice, and this Court may therefore consider them on review of a motion for judgment on the pleadings. *See DiLorenzo v. Norton*, 2009 U.S. Dist. LEXIS 66862, at *9 n.7 (D.D.C. 2009); *Marshall County Health Care Auth. v. Shalala*, 988 F. 2d 1221, 1226 n.6 (D.C. Cir. 1993); *Phillips v. Bureau of Prisons*, 591 F.2d 966, 969 (D.C. Cir. 1979).

[2] *See* EPA's Avenal Docket, EPA Region 9's Statement of Basis and Ambient Air Quality Impact Report, Doc. #EPA-R09-OAR-2009-0438-0004, p. 9 (June 2009) [hereinafter June 2009 Statement of Basis], attached hereto as Exhibit D.

[3] S*ee* EPA's Avenal Docket, Public Notices Regarding the Avenal Energy Project, Doc. #EPA-R09-OAR-2009-0438-0002 (June 16, 2009), Doc. #EPA-R09-OAR-2009-0438-0005 (August 28, 2009), Doc. #EPA-R09-OAR-2009-0438-0016 (September 11, 2009), attached hereto collectively as Exhibit E.

[4] *Id*.

B. The Clean Air Act

According to the Defendants, each statutory provision cited by Avenal in its Complaint "speaks for itself and is the best evidence of its content." (Answer ¶¶ 6, 13-17, 23, 24.) Plaintiffs agree that these provisions are clear and do speak for themselves. In relevant part, they are quoted below:

- Section 165(c) of the CAA states that: "Any completed permit application under [the PSD program] 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." 42 U.S.C. § 7475. (*See* Compl. ¶¶ 3, 6, 15, 17, 22, 28.)

- Section 304(a) of the Act states that: "any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. . . . The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed." 42 U.S.C. § 7604(a). (*See* Compl. ¶¶ 1, 11, 12, 23, 30.)

- Section 304(b)(2) of the Act states that: "No action may be commenced . . . under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator." 42 U.S.C. § 7604(b)(2). (*See* Compl. ¶¶ 24-26.)

- Section 304(d) of the Act states: "The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." 42 U.S.C. § 7604(d). (*See* Compl. ¶ 30.)

III. STANDARD FOR JUDGMENT ON THE PLEADINGS

Federal Rule of Civil Procedure 12(c) specifically provides that a party may file a motion for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay the trial . . ." Fed. R. Civ. P. 12(c). The moving party is not required to await discovery before filing such a motion. *See Carlson v. Reed*, 249 F.3d 876, 878 n.1 (9th Cir. 2001). "A motion for judgment on the pleadings under Rule 12(c) should be analyzed in the same manner as is a motion to dismiss under

Rule 12(b)(6). *Dale v. Exec. Office of the President*, 164 F. Supp. 2d 22, 24 (D.D.C. 2001) (quoting 2 Moore's Federal Practice 3d § 12.38, 12-101 ("In fact, any distinction between them is merely semantic because the same standard applies to motions made under either subsection."))." *Moment v. District of Columbia*, U.S. Dist. LEXIS 19458, at *7 (D.D.C. 2007).

Rule 12(d), however, states that if, on a motion for judgment on the pleadings, ". . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). "Factual allegations in briefs or memoranda of law may likewise not be considered, particularly when the facts they contain contradict those alleged in the complaint." *Egilman v. Keller & Heckman, LLP*, 401 F. Supp. 2d 105, 110 (D.D.C. 2005) (citing *Henthorn v. Dep't of Navy*, 29 F.3d 682, 688 (D.C. Cir. 1994)).

Thus, while a court may not consider matters outside the pleadings when deciding a motion for judgment on the pleadings, it may take into account "facts alleged in the complaint, any documents attached to or incorporated in the complaint, matters of which the court may take judicial notice, and matters of public record." *Robinson v. District of Columbia*, 403 F. Supp. 2d 39, 47 (D.D.C. 2005) (citing *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997)). "As far as what constitutes a matter 'outside the pleadings,' it is well established that courts 'are allowed to take judicial notice of matters in the general public record, including records and reports of administrative bodies and records of prior litigation' without triggering the conversion requirement." *Jane Does I through III v. District of Columbia and MRDDA*, 238 F. Supp. 2d 212, 217 (D.D.C. 2002); *see also Doe v. District of Columbia*, 238 F. Supp. 2d 212, 216 (D.D.C. 2002) ("It is well established that courts are allowed to take judicial notice of matters in the general public record, including records and reports of administrative bodies and records of prior litigation").

IV. ARGUMENT

A. EPA Confirmed that Avenal Met All Clean Air Act Permit Application Requirements

In February 2008, Avenal submitted its PSD permit application to EPA.[5] Pursuant to the CAA and EPA's implementing regulations, Avenal's application was required to, and did, include the following:

- Avenal's Project Description and Engineering (Section 2.0), which included a description of the project, an overview of the Project's benefits to California, facility and transmission line details and schedule for construction, environmental design features and benefits, and a summary of applicable laws, ordinances, regulations and standards;
- AEP's impact analysis on the agriculture and soils in the vicinity of the Project (Section 6.4.2);
- AEP's impact analysis on the biological resources on and in the vicinity of the "Site and Project linear corridors" (Section 6.6.2);
- AEP's impact analysis on the industrial zoned lands of the City of Avenal (Section 6.9.3);
- AEP's impact analysis on the socioeconomic aspects of region surrounding the Project (Section 6.10);
- AEP's air quality impact analysis, air quality modeling, source impact analysis and Class I Area evaluation (Section 6.2); and
- AEP's impact analysis on the public's health, including the methodology and results of the human health risk assessment performed to assess potential impacts and public exposure associated with airborne emissions from the construction and operation of the Project." (Section 6.16).[6]

See 40 C.F.R. § 52.21(k)-(p) (2010).

[5] Avenal's February 15, 2008 cover letter to its PSD application stated: "Enclosed please find an Application for a Prevention of Significant Deterioration (PSD) Permit for the proposed Avenal Energy Project, filed by Avenal Power Center, LLC. . . . This AFC is being filed with the California Energy Commission on February 19, 2008. The portions of the AFC materials that are relevant to the PSD permitting process, as well as air quality modeling data on compact disc, are enclosed for your review." EPA's Avenal Docket, Letter from Sierra Research to EPA's Region 9, Doc. #EPA-R09-OAR-2009-0438-0003.1 (February 15, 2008), attached hereto as Exhibit F.

[6] EPA's Avenal Docket, Attachment to Avenal's February 2008 Application, Doc. #EPA-RO9-OAR-2009-0438-0003 (including hyperlinks to CEC document submissions in Avenal's PSD Application Information), attached hereto as Exhibit G.

On March 19, 2008, EPA certified the completeness of Avenal's application. *See* Exhibit A. EPA cannot process a PSD permit application "until the applicant has fully complied with the application requirements for that permit." 40 C.F.R. § 124.3(a)(2). In accordance with the requirements of the CAA and EPA's implementing regulations,[7] EPA notified Avenal that its PSD permit application was complete:

> [Avenal's] application was submitted with the letter of transmittal dated February 15, 2008 and received by this office on February 20, 2008. Additional application copies also were provided on March 3, 2008. The application is for the construction and operation of a 600 MW combined-cycle electric power generating plant and ancillary facilities. . . . After our review of the above application, as well as follow-up information submitted per our request and received on March 14, 2008 and March 17, 2008, we have determined that the PSD permit application is administratively complete as of March 19, 2008.

Exhibit A.

Thus, EPA's letter of completeness also certified that Avenal had complied with the PSD application requirements under the Clean Air Act. "If the application is incomplete, the Regional Administrator shall list the information necessary to make the application complete." 40 C.F.R. § 124.3(c). The date on which the Regional Administrator notifies the applicant that the application is complete—here, March 19, 2008—is also the application's effective date. 40 C.F.R. §124.3(f). Section 165(c) of the CAA then dictates that EPA must render a decision on the PSD application within a year from that date. *See* 42 U.S.C. § 7475(c).

During the year following EPA's determination of completeness, EPA may then seek public comments, hold public hearings, analyze reports and testing results, and request any additional or clarifying information it believes necessary to render its decision on the PSD permit application. *See*

[7] After receiving Avenal's permit application, EPA was required to review it within 30 days of receipt to determine if it was complete. *See* 40 C.F.R. § 124.3 (2010).

40 C.F.R. §§ 124.10-124.12. Once the completeness determination has been made, however, "the Regional Administrator [or delegated authority] may request additional information from an applicant but only when necessary to clarify, modify, or supplement previously submitted material. *Requests for such information will not render an application incomplete*." 40 C.F.R. § 124.3(c) (emphasis added).

B. EPA Failed To Meet Its Statutory Obligations Under the CAA

1. EPA has ignored its statutory duties under the Clean Air Act

EPA failed to render a decision on Avenal's PSD permit application by March 19, 2009—the deadline set by Section 165(c) of the CAA—despite the fact that Avenal fulfilled all the PSD application requirements under the Act and despite the fact that EPA confirmed the completeness of the application and compliance with applicable regulations. (*See* Exhibit A; Answer ¶ 22.) According to at least one court, a "completeness" determination equates to full compliance with federal requirements, and once an application is deemed complete, a reviewing entity does not have the legal authority to compel any additions or changes to that application. *See East Bay Recycling v. Cahill*, 2005 U.S. Dist. LEXIS 11817, at *10 (S.D.N.Y. 2005) (holding that unless an entity is specifically permitted to require additional information even after an application has been deemed complete, that entity would not be entitled to obtain additional information). Thus, EPA's failure to render a timely decision should not be legally excused by its own subsequent actions or additional requests.

It was not until June 2009—after the statutory deadline for making a final permit decision had already passed—that EPA finally published a draft permit along with its June 2009 Statement of

Basis, which "describe[d] the legal and factual basis for the proposed permit per 40 C.F.R. § 124.7, including requirements under the PSD Regulation at 40 C.F.R. § 52.21."[8]

In the Executive Summary of its June 2009 Statement of Basis, EPA stated:

> The Avenal Power Center, LLC has applied for a Prevention of Significant Deterioration (PSD) permit under the federal Clean Air Act (CAA), 42 U.S.C. Section 7401 et seq., for the Avenal Energy Project, a new power plant that will generate 600 megawatts (MW, nominal) of electricity while firing natural gas. The power plant will be located in Kings County, California, within the San Joaquin Valley Air Pollution Control District. ***The proposed PSD permit is consistent with the requirements of the PSD program for the following reasons***:
>
> - The proposed permit requires the Best Available Control Technology (BACT) for Nitrogen Oxides (NO2), Carbon Monoxide (CO), Total Particulate Matter (PM) and Particulate Matter under 10 micrometers (PM10);
>
> - The ***proposed emission limits will protect the National Ambient Air Quality Standards (NAAQS) for NO2, CO, and PM10***. There is no NAAQS set for Total Particulate Matter (PM);
>
> - The ***facility will not adversely impact soils and vegetation, or air quality, visibility, and deposition in Class I areas***, which are parks or wilderness areas given special protection under the Clean Air Act.[9]

Thus, EPA had concluded, as of June of 2009, that Avenal had met all requirements for a PSD permit. Still, EPA failed to render a decision on Avenal's application. Instead, EPA continued to delay its decision by slow-walking Avenal through the review process, as shown in the public record and discussed below.

2. EPA has unreasonably delayed issuance of Avenal's PSD permit for well over a year

EPA has unreasonably and unlawfully delayed the grant of Avenal's permit. Part C of the CAA defines EPA's responsibilities for permitting new facilities, including new energy projects. *See* 42 U.S.C. § 7470. Among the purposes of Part C is to ensure economic growth as long as an

[8] June 2009 Statement of Basis 7, Section IV.A.

applicant meets the appropriate air quality standards and submits the required testing analyses and reports.[10] As stated above, according to EPA's June 2009 Statement of Basis, Avenal has done just that.

In the conclusion of its June 2009 Statement of Basis, EPA indicated that the approval of Avenal's permit was all but inevitable:

> 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. (Emphasis added.)[11]

No comments were filed to dispute these findings in any material way.[12] Despite this fact, and EPA's own conclusion that that Avenal met all applicable requirements and that the Project would not cause an exceedance of any applicable National Ambient Air Quality Standards (NAAQS), including the NAAQS for nitrogen dioxide (NO2),[13] EPA continued to withhold its decision on Avenal's PSD permit.

Instead of proceeding with the public comment period after determining Avenal's application was complete in March 2008, EPA failed to request any public comments or schedule any public meetings for more than a year.[14] Despite numerous requests from Avenal, it was not until June 16, 2009—three months after the Agency was statutorily required to issue a final decision on Avenal's

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[9] *Id.* at 6 (emphasis added).
[10] *See generally Clean Air Act*, EPA, http://www.epa.gov/air/caa/ (last visited August 25, 2010).
[11] June 2009 Statement of Basis 30.
[12] *See* generally EPA's Avenal's Docket, Public Comments.
[13] June 2009 Statement of Basis 6, 30.
[14] EPA's Avenal Docket, Public Notice, Doc. # EPA-R09-OAR-2009-0438-0002 (June 16, 2009).

application—that EPA issued its first request for public comment.[15] That notice stated that "[a]ll comments on the proposed permit, and [any] request for a Public Hearing, must be received by email or postmarked by **July 16, 2009**."[16] Rather than reviewing and responding to the comments that were submitted by July 16 and then issuing a final permit, EPA instead published two additional notices for public comments on August 28, 2009, and September 11, 2009, and held three separate public meetings and hearings on September 30, 2009, October 1, 2009, and October 15, 2009.[17]

At the conclusion of this string of notices and hearings, however, EPA still failed to take action on Avenal's PSD permit. When it became clear that the Agency would not issue the permit by the end of the year, Avenal had little choice but to notify EPA of its intent to file this civil action, which it did on December 21, 2009. *See* Exhibit B.

3. EPA now seeks to use its own unlawful delay as justification for retroactively imposing new standards on Avenal

Shortly after Avenal filed its Complaint in this case, EPA informed Avenal that it was imposing a new requirement on the Project: in order to obtain the permit the Company had been seeking for more than 2 years, the Company would now be required to develop and submit a new study showing that the Project would not cause an exceedance of EPA's new 1-hour standard for NO2.[18] As part of its 2008 permit application, Avenal had submitted analysis showing that the

[15] *Id*.

[16] *Id.* (emphasis in original).

[17] *See* EPA's Avenal Docket, Public Notices Regarding the Avenal Energy Project, Doc. # EPA-R09-OAR-2009-0438-0002 (June 16, 2009), Doc. # EPA-R09-OAR-2009-0438-0005 (August 28, 2009), Doc. # EPA-R09-OAR-2009-0438-0016 (September 11, 2009).

[18] Avenal filed its Complaint on March 9, 2010. EPA did not inform Avenal that it was required to meet the new NO2 until shortly after it received an April 21, 2010 letter from Earthjustice, on behalf of a number of environmental groups opposing Avenal's permit. *See* EPA's Avenal Docket, Email to EPA, Doc. #EPA-R09-OAR-2009-0438-0045.1 (May 5, 2010); Letter to EPA, Doc. #EPA-R09-OAR-2009-0438-0046 (May 11, 2010); EPA letter to Avenal and attachment, Doc. #EPA-R09-OAR-2009-0438-0048 thru 0048.1 (June 15, 2010), attached collectively hereto as Exhibit H. EPA's Avenal Docket indicates that EPA received an April 21, 2010 letter from Earthjustice, arguing that, because the new NO2 standard had become effective on April 12, 2010, and because the Agency had not yet issued the final Avenal permit, Avenal should be required to go back and conduct an additional analysis to show that the Project would not cause the new 1-hour standard to be exceeded. It further argued that EPA would need to provide an

Project would not cause an exceedance of the EPA's longstanding annual standard for NO2, which EPA accepted and confirmed.[19] Avenal had not submitted a similar analysis for the new supplemental 1-hour standard for the simple reason that no such standard existed at the time; nor was there any indication that EPA was even considering a 1-hour standard when the application was submitted. In fact, EPA *did not even propose* its new NO2 standards until July 2009—well after the date by which the permit should have been issued.[20]

Thus, EPA was able to propose a major new standard, allow sufficient time for hearings and public comment, consider and respond to hundreds of voluminous comments dealing with scientific, technical and legal issues, and then promulgate a final standard in less time than has passed since the Agency missed its statutory deadline for issuing a PSD permit for the Avenal Project. 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 seemed to make it quite clear 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

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opportunity for public comment on this additional analysis before issuing the final permit. EPA's Avenal Docket, Email Letter Transmittal from Earthjustice to EPA, Doc. #EPA-R09-OAR-2009-0438-0044 (April 21, 2010), attached hereto as Exhibit I.

[19] June 2009 Statement of Basis 6.

[20] 74 Fed. Reg. 34404 (July 15, 2009).

> 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.

It was not until May of 2010, over a year after EPA was legally required to issue the permit and more than a month after Avenal had filed the present action, that the Agency advised the Company that EPA would not issue a final permit until Avenal submitted a new modeling analysis of the new 1-hour NO2 standard.[21] Avenal also learned at this time that, once it submitted this analysis and the Agency found it to be acceptable (apparently based on guidelines that were yet to be developed), there would need to be another round of public comments before the Agency would issue the final permit that, by law, should have been issued more than a year before. *See* Answer, Defenses ¶ 2.

Notwithstanding its frustration with this process, Avenal continued to work with EPA to supply information and analysis to show that the Project would, in fact, meet the new NO2 standard.[22] In submitting such information and analysis, however, Avenal made it very clear that it disagreed with EPA's position that the new 1-hour standard applied to any decision about the proposed permit:

> EPA is now taking the position that, before we can get our PSD permit, we must go back and do additional modeling to meet a new requirement that had not even been proposed as of the deadline date for EPA to issue the PSD permit. As you know, we believe that EPA's position on this matter is legally improper, but we nevertheless agreed to conduct the additional modeling in the hope of

[21] *See supra* Fn. 18.

[22] *See supra* Fn. 18, Exhibit H. *See also* EPA's Avenal Docket, Letters from Bracewell & Giuliani, LLP to U.S. Department of Justice and EPA, Doc. #EPA-R09-OAR-2009-0438-0053 (June 28, 2010) and Doc. #EPA-R09-OAR-2009-0438-0077, attached hereto collectively as Exhibit J. *See also* Response to Issues Raised in the EPA Region 9 Letter of June 15, 2010, Doc #EPA-R09-OAR-2009-0438-0054.

> obtaining the permit as quickly as possible and without the need for litigation. On May 13, 2010, we submitted this additional modeling analysis, which concluded that the proposed project would not cause or contribute to a violation of the new 1-hour NO2 National Ambient Air Quality Standard. . . After waiting more than a month for EPA to review this analysis, we received the June 15th letter from EPA Region 9. . .[which] simply requests additional analysis and explanation that are already in the permitting record.[23]

Although Avenal believes that EPA's continuing refusal to grant the permit is unreasonable and unlawful, Avenal has worked in good faith to develop and provide the information that EPA claims is necessary to show that the Project will not cause any exceedance of the new 1-hour standard. *Id.* EPA, however, continues to demand additional information without providing Avenal with clear guidance as to the type of analysis EPA views as acceptable.[24]

C. EPA Ignores the Clear Language of the Clean Air Act, the Clear Intent of Congress, and Court Decisions Regarding the Retroactive Application of New Requirements

EPA has not only failed to meet its statutory obligations, but has frustrated the intent and purpose of Part C of the CAA and is attempting to create a permit application process that could continue in perpetuity without resolution. Congress included Section 165(c) as part of the 1977 Amendments to the CAA to address its concern that the PSD program could fall prey to unreasonable bureaucratic delays. *See* S. Rep. No. 94-717, at 23 (1976). The purpose of this section is specifically discussed in the Senate Committee on Public Works Report regarding the 1977 Amendments, which states:

> 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 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

[23] Letter from Bracewell & Giuliani, LLP to U.S. Department of Justice and EPA, Doc. # EPA-R09-OAR-2009-0438-0053 (June 28, 2010).

[24] EPA's Avenal Docket, Letter from EPA to Avenal, Doc. #EPA-R09-OAR-2009-0438-0078 (August 12, 2010), attached hereto as Exhibit K.

> 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.*

Id. (emphasis added).

The plain language of Section 165(c) confirms Congress's expressed intent that PSD permitting procedures should *not* delay construction projects. If Congress had intended to allow EPA to bog down and delay the permit process by retroactively applying new requirements, then it would not have explicitly set an end date for EPA's permit decision—one year after the receipt of a complete application. *See* 42 U.S.C. § 7475(c). EPA's disregard of its statutory mandate to take final agency action and grant Avenal's PSD permit application is exactly the type of inaction and delay Congress sought to prevent.

EPA's Answer, and indeed the history of this case, would essentially read Section 165(c) completely out of the CAA. In the Agency's view, it can apparently avoid its statutory obligation forever as long as it continues to develop new permitting rules. This is clearly not what Congress intended. Nothing in Part C of the CAA contemplates the imposition of perpetual, additional permitting requirements. *See generally* 42 U.S.C. §§ 7470-7492.

EPA actions in this case also fly in the face of numerous court decisions disfavoring the retroactive application of new requirements. "Those regulated by an administrative agency are entitled to know the rules by which the game will be played." *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999). "[O]ngoing proceedings should not be interrupted when proposed regulations become final. A contrary rule would create havoc in EPA's permit development procedures." *Alabama v. EPA*, 557 F.2d. 1101, 1110 (5th Cir. 1977). Thus, EPA's attempt to hold up Avenal's permit so that it may apply new laws and policies retroactively is inconsistent with a jurisprudential presumption against such retroactive rulemaking. As the Supreme

Court has stated: "'Retroactivity is not favored in the law,' and its interpretive corollary that 'congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994).

Any energy project depends on the rule of law to provide clear standards and some degree of certainty so that engineers can design a proposed project and assess its impacts, project developers can gauge the likelihood of a return on investment in the project, and lenders can weigh the risk of lending money to finance the project. "Excessive 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 (D.C. Cir. 1987) (internal citations omitted). "Moreover, unjustifiable delay may undermine the statutory scheme and could inflict harm on individuals in need of final action." *Id.* Thus, rewarding EPA's violations and failures with an opportunity to laden Avenal's permit with additional requirements—established more than year after the permit should have been issued—sends the wrong message to the Agency, to the applicant, and to countless other developers, investors, and workers.

D. EPA's Defenses For Its Failures Are Legally Insufficient

EPA's Answer offered no cognizable defense for its statutory failures and delays. And, while Avenal acknowledges that EPA's responsibilities are numerous and time-consuming, Avenal has, in good faith, attempted to work with EPA over the last two and a half years to secure a decision on its PSD permit—to no avail.

1. EPA's defenses do not meet the legal standards

Federal Rule of Civil Procedure 8(c) specifically provides that "a party must affirmatively state any avoidance or affirmative defense" when responding to a pleading. EPA's defenses simply

reference possible remedies available to Avenal; EPA's Answer provides no factual or legal reason to defend its actions. (*See generally* Answer.) It is unclear why EPA chose to answer Avenal's Complaint without asserting defenses for its actions.

Although Rule 8(c) does not mention waiver or forfeiture as a consequence of not timely asserting an affirmative defense, the D.C. Circuit has held that "[a] party's failure to plead an affirmative defense . . . generally 'results in the waiver of that defense and its *exclusion from the case*.'" *Harris v. Sec'y of the Dep't of Veterans Affairs*, 126 F.3d 339, 343 (D.C. Cir. 1997) (quoting *Dole v. Williams Enters., Inc*., 876 F.2d 186, 189 (D.C. Cir. 1989) (emphasis in original)). The D.C. Circuit has held in no uncertain terms that "Rule 8(c) means what it says: a party must first raise its affirmative defenses in a responsive pleading before it can raise them in a dispositive motion." *Id*. at 345; *see also Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998) ("[A]n affirmative defense not raised by answer cannot be raised in dispositive motions that are filed post-answer."). Accordingly, it is also unclear what defense EPA believes it could raise in its response to this motion.

2. EPA's "defenses" support Avenal's claims

EPA does not, in essence, dispute the allegations put forth by Avenal in its Complaint because EPA's defenses are not "defenses tending to exculpate defendants from liability." *Williams Enters., Inc. v. Strait Mfg. & Welding Inc.*, 728 F. Supp. 12, 23 (D.D.C. 1990), *aff'd in part and remanded in part on other grounds sub nom. Williams Enters., Inc. v. Sherman R. Smoot Co.*, 938 F.2d 230 (D.C. Cir. 1991). In its Answer, EPA stated its defenses in this case:

> With respect to any remedy awarded to Plaintiff, such remedy must provide a reasonable time for EPA to ensure compliance with section 7 of the Endangered Species Act, 16 U.S.C. § 1536. Pursuant to section 7, EPA is currently engaged in formal consultation regarding the Avenal Energy Project with the United States Fish & Wildlife Service. (Answer, Defenses ¶ 1.)

> With respect to any remedy awarded to Plaintiff, such remedy must also provide EPA with reasonable time to follow appropriate procedures to determine, pursuant to section 165(a)(3) of the Clean Air Act, 42 U.S.C. § 7475(a)(3), whether Plaintiff has demonstrated that emissions from the Avenal Energy Project will not cause or contribute to air pollution in excess of the recently-promulgated 1-hour national ambient air quality standard for nitrogen dioxide, effective April 12, 2010. 75 Fed. Reg. 6474 (Feb. 9, 2010). (Answer, Defenses ¶ 2.)

Rather than seeking to exculpate EPA from liability, or even limit its liability, EPA's defenses in this case seek to limit the *remedy* that may be awarded to the Plaintiff. Thus, EPA offers no defense for its actions (and inaction). Furthermore, because the burden of proving an affirmative defense rests with the Defendants, Avenal's "burden is met by a sufficient 'showing . . . that there is an absence of evidence to support the nonmoving party's case.'" *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1032 (D.C. Cir. 1988) (quoting *Celotex v. Catrett*, 477 U.S. 317, 325 (1986)).

3. The Endangered Species Act "defense" is no longer at issue

EPA's first stated "defense" is now moot. As noted above, EPA's first "defense" was that it needed more time "to ensure compliance with section 7 of the Endangered Species Act . . . [because] EPA is currently engaged in formal consultation regarding the Avenal Energy Project with the United States Fish & Wildlife Service." (Answer, Defenses ¶ 1.) On August 9, 2010, however, the U.S. Fish & Wildlife Service ("USFWS") sent a letter to EPA containing the final Biological Opinion necessary to conclude "formal consultation" on the Project under Section 7 of ESA.[25] Thus, EPA can no longer excuse its failure to make a final permit decision by pointing to the ESA process.[26]

[25] EPA's Avenal Docket, Letter from USFWS to EPA, Doc. #EPA-R09-OAR-2009-0438-0079 (August 9, 2010), attached hereto as Exhibit L.

[26] According to the August 9 Biological Opinion, the only condition sought by USFWS is an amendment to the PSD permit simply accepting the conditions included in the Biological Opinion. *Id.* at 4 (containing USFWS's Biological Opinion for the Proposed Avenal Energy Power Center). This requested "amendment" is administrative and does not excuse EPA's failure to decide Avenal's permit within the statutory deadline.

Even if the issue were not moot, it would not be an adequate defense. EPA does not have a legal obligation to withhold a PSD permit until the ESA consultation is complete—a fact that Courts have recognized in a variety of similar contexts. *See Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193-94 (9th Cir. 1989) (finding no ESA § 7(d) violation where the government action on leases occurred before the completion of ESA § 7 consultation because "stipulations" or "disclaimers" on future ESA compliance had been inserted into the leases); *Village of False Pass v. Clark*, 733 F.2d 605, 610-12 (9th Cir. 1984) (same); *North Slope Borough v. Andrus*, 642 F.2d 589, 611 (D.C. Cir. 1980) (same); *Conservation Law Found. v. Andrus*, 623 F.2d 712, 714-16 (1st Cir. 1979) (same). Thus, EPA cannot claim that its failure to issue the permit by March 19, 2009, was justified by the ongoing ESA process. In any event, pointing to the formal ESA consultation with USFWS is not a proper defense to the allegations set forth in Avenal's Complaint. Section 165(c) requires that EPA—not USFWS—follow the necessary procedures to render a decision on a PSD permit within a year of receiving a complete application.

Even if EPA could rely on the consultation process with USFSW as a proper defense for its delay in deciding Avenal's permit application, that argument has little traction given the time line of events in this matter. In June 2009, EPA stated that "Formal consultation with the U.S. Fish and Wildlife Service under Section 7 of the federal Endangered Species Act (ESA) concerning the Avenal Energy Project is ongoing and ***is nearing completion***."[27] Moreover, after receiving USFWS's draft biological opinion, regarding the ESA Section 7 consultation, on July 1, 2009, EPA waited almost six months to provide its final comments to USFWS.[28] As stated above, this issue is

[27] June 2009 Statement of Basis 6 (emphasis added).

[28] *See* EPA's Avenal Docket, Letter from USFWS to EPA's Region 9, at 4, Doc. # EPA-R09-OAR-2009-0438-0079.

now moot, but Avenal reiterates that EPA is not required to wait until the conclusion of the ESA consultation process before issuing a final PSD permit.

4. A desire to retroactively impose new standards is not a proper defense

EPA's only other "defense" stands in direct contradiction to Congress's intent and legal precedent. The Agency simply asserts that "any remedy awarded to Plaintiff" "must also provide EPA with reasonable time to follow appropriate procedures to determine . . . whether Plaintiff has demonstrated that it will not cause or contribute to air pollution in excess of the recently-promulgated 1-hour national ambient air quality standard for nitrogen dioxide, effective April 12, 2010." (Answer, Defenses ¶ 2.)

To put this "defense" in context, it must be noted again that: (1) EPA did not even *propose* its new 1-hour standard until more than three months after the Agency was statutorily required to make a *final* decision on Avenal's permit, s*ee* 74 Fed. Reg. 34403 (July 15, 2009); (2) EPA did inform Avenal that it was required to meet the new NO2 emission standard until more than a month after Avenal filed its Complaint.[29] Under EPA's logical extension of this defense, the permitting process could go on in perpetuity because the Agency may continue to change the rules for permits by applying new rules and standards retroactively to applications submitted years before.

The language of Section 165(c) and Congress' intent is not debatable—EPA must decide a permit application within a year of receiving a complete application. The Supreme Court's position is clear—"The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Landgraf*, 511 U.S. at 271.

[29] *See supra* Fn. 18.

Despite the clear intent of Congress and the Supreme Court, Avenal worked with EPA to show the Project would meet the newly proposed NO2 standard even though its application was deemed complete before the new standard was proposed and in spite of the fact that EPA was statutorily obligated to render a decision before the standard was finalized.[30] Avenal submitted additional studies using accepted modeling protocols available at the time of submission to show that the Project did in fact, comply with the new NO2 standards.[31] Unlike Avenal, EPA does not and cannot point to any statute, regulation, or court decision to support this "defense" and it makes no attempt to square this position with Section 165 of the CAA.

E. The Court Has Discretion to Compel EPA to Meet its Statutory Obligations.

EPA has unlawfully withheld its decision on Avenal's PSD Permit application, and this violation merits equitable relief. Section 304(a) of the Act provides that this Court has the jurisdiction to compel the Administrator to perform a non-discretionary duty that has been unreasonably delayed. *See* 42 U.S.C. § 7604(a). Respectfully, Avenal requests that this Court declare that EPA has violated the CAA by failing to take final action on Avenal's PSD permit application not later than one year after the date that Avenal filed its completed application. Avenal believes that, based on EPA's own findings, EPA should approve its application and grant Avenal a PSD permit. Thus, in addition, Avenal seeks an order from this Court compelling EPA to take final agency action and grant Avenal's PSD permit application by December 31, 2010, should the Court decide in Plaintiff's favor. Avenal believes that its request is justified based not only on the procedural facts detailed above, but also based on the law, which is, in the first instance, a relatively

[30] *See generally* EPA's Avenal Docket.

[31] EPA's Avenal Docket, Letter from Sierra Research to USEPA, Doc. #EPA-R09-OAR-2009-0438-0047 (May 17, 2010), attached hereto as Exhibit M; Letter from Bracewell & Giuliani, LLP to U.S. Department of Justice and EPA, Doc. # EPA-R09-OAR-2009-0438-0053.

simple exercise in statutory interpretation, and is, in the second instance, an inquiry into the balance of the equities in exercising the Court's inherent authority to grant the requested relief.

1. EPA has plainly violated Section 165(c) of the Clean Air Act

EPA admits that it found Avenal's PSD application complete on March 19, 2008 (Answer ¶ 5), that it failed to render a decision on Avenal's PSD permit application by March 19, 2009 (Answer ¶ 22), and that it has yet to render any decision (Answer ¶ 7). Again, Section 165(c) of the CAA states: "Any completed permit application under section 7410 of this title [the PSD permitting program] 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 such a completed application. " 42 U.S.C. § 7475(c) (emphasis added).

The Supreme Court has made it clear that when a statute uses the word "shall," as Section 165(c) does here, Congress has imposed a mandatory duty upon the subject of the command. *See United States v. Monsanto*, 491 U.S. 600, 607 (1989) (by using "shall" in civil forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied"); *Pierce v. Underwood*, 487 U.S. 552, 569-70 (1988) (Congress' use of "shall" in housing subsidy statute constitutes "mandatory language"); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 n. 15 (1981) (same under Fair Labor Standards Act); *see also In re Barr Laboratories, Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991) (same under Food, Drug and Cosmetic Act). EPA's admission of these allegations demonstrates a clear violation of a mandatory duty under Section 165(c) to grant or deny the permit within one year of filing the completed application.

2. This Court should exercise its equitable powers to compel EPA and its Administrator to render a final decision on Avenal's application

Avenal has a remedy available under the CAA for EPA's violation of Section 165(c)—it may seek an order compelling the Administrator to perform her nondiscretionary duty decide Avenal's PSD permit application. *See* 42 U.S.C. § 7604(a) ("[D]istrict courts shall have jurisdiction . . . to order the Administrator to perform such act or duty"); *New York Public Interest Research Group, Inc. v. Whitman*, 214 F. Supp. 2d 1, 3-4, 6 (D.D.C. 2002). As discussed in Section IV.D., *supra*, EPA offers no defense for its failure to take final action to grant or deny the application. (*See* Answer, Defenses ¶¶ 1-2.)

Avenal argues that EPA's delay is egregious and, whether intended or not, has the effect of delaying the permit until such time as Avenal complies with additional, and as-yet-unwritten, new standards and requirements. Each of the parties' arguments goes not to the violation—which is not in doubt—but to the remedy to be provided by the Court. In assessing whether EPA's statutory violation necessitates the Court's exercise of its equitable powers, D.C. Circuit case law focuses on a reasonableness test, and "this court has stated generally that a reasonable time for an agency decision could encompass months, occasionally a year or two, but not several years or a decade." *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987).

Specifically, this test is outlined in the *TRAC* case and directs the Court to weigh six factors (the "*TRAC* factors"):

> (1) the time the agencies take to make decisions must be governed by a rule of reason;
>
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;

> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at risk;
>
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
>
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
>
> (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Sandoz, Inc. v. Leavitt, 427 F. Supp. 2d 29, 38 (D.D.C. 2006) (quoting *Telecomm. Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*")); *see also In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 549 (D.C. Cir. 1999). The first two *TRAC* factors have no impact where, as in the present case, a deadline is imposed by Congress—here, Section 165(c) of the CAA provides the foundation for the "rule of reason." *In re Barr*, 930 F.2d at 75; *Sandoz*, 427 F. Supp. 2d at 38.

The third *TRAC* factor weighs in favor of compelling EPA action in this case. The applicability of this factor is not readily apparent because EPA's delay does not directly risk human health and welfare, except in broad economic terms, at which point the inquiry overlaps with the fifth *TRAC* factor. *See In re Barr*, 930 F.2d at 75. Where the petitioner's main interest may be commercial, however, courts have recognized that the commercial activity may contribute to the benefit of the public welfare. *Id.* ("[Petitioner] makes money getting useful drugs into the hands of sick people."). In this case, the Court need not speculate about the value of the Project for the public welfare because the California Energy Commission ("CEC") has already found that "The Avenal

Energy Project will provide a degree of economic benefits and electricity reliability to the local area."[32] This factor therefore supports EPA's fulfilling its statutory obligation.

Weighing the fourth *TRAC* factor—agency activities of a higher or competing priority—can be difficult when an agency has failed to process applications under a congressional deadline. Here, the PSD permitting process "does not take the form of a first in, first out operation." Whether other PSD applications are "stuck in the ether," however, "constitutes a factor that this court considers in determining the reasonableness" of EPA's delay in processing or completing its review of Avenal's PSD permit application, as does "whether that delay is 'egregious.'" *Sandoz*, 427 F. Supp. 2d at 39 (citing *In re Monroe Commcn'ns Corp.*, 840 F.2d 942, 945 (D.C. Cir. 1988)). Certainly, the retroactive imposition of new emission standards on Avenal's application speaks to "unreasonableness," "egregiousness," and, arguably, whether Avenal's permit will become "stuck in the ether."

Moreover, as of the filing of this motion, EPA Region 9's website indicates that there are no other PSD permits that are the subject of public comment periods at this time.[33] As such, an order expediting Avenal's PSD permit application would not directly bottleneck other PSD permit applications because the requisite steps have already been completed and process is complete—a draft permit has been submitted to the public for comment, comments have been received, public hearings held, EPA's findings have been released, and applicant comments addressed. *See* Section IV.B, *supra*.

[32] 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), *available at* http://www.energy.ca.gov/2009publications/CEC-800-2009-006/CEC-800-2009-006-CMF.PDF.

[33] *See Region 9: Air Programs*, EPA, http://www.epa.gov/region9/air/permit/r9-permits-issued.html (last visited August 25, 2010).

The sixth *TRAC* factor notes that "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed." *TRAC*, 750 F.2d at 80 (internal quotes omitted). Where impropriety lurks behind agency lassitude, "the agency will have a hard time claiming legitimacy for its priorities." *In re Barr*, 930 F.2d at 76. Although Plaintiff does not accuse EPA of any hidden impropriety in this case, it does note the Agency's stated interest in imposing new requirements on pending permit applications—something that is contrary to the statutory scheme created by Congress and is not countenanced by the Supreme Court.

V. REQUEST AND RATIONALE FOR SEEKING EXPEDITED DECISION

EPA's attempt to impose new standards retroactively has left Avenal in an untenable position. Because of new permitting requirements that EPA has issued in the last few months, and others that the Agency has proposed or announced but not yet issued, Avenal is now facing the prospect of a never-ending permitting process. *See, e.g.*, 75 Fed. Reg. 2938 (Jan. 19, 2010) (proposed new standard for ozone); 75 Fed. Reg. 6474 (final rule establishing new standard for NO2); 75 Fed. Reg. 6827 (Feb. 11, 2010) (proposal to apply new PM modeling requirements to pending permit applications); 75 Fed. Reg. 17004 (April 2, 2010) (final rule imposing new permitting requirements for greenhouse gases, including for permit applications pending as of January 2, 2011); 75 Fed. Reg. 35520 (Jun. 2, 2010) (final rule establishing new standard for SO2).

The prospect of a perpetual permitting process is not just a theoretical concern. EPA has already finalized new permitting requirements for greenhouse gases ("GHGs") that, by their own terms, will apply to Avenal unless EPA chooses (or is ordered by this Court) to issue the Avenal permit within the next four months. "We are not promulgating an exemption for PSD permit applications that are pending. . . . Any PSD permits issued on or after January 2, 2011 will need to address GHGs." 75 Fed. Reg. 17004, 17021; 75 Fed. Reg. 31514, 31527 (Jun. 3, 2010). Under

EPA's new GHGs rules, regardless of when a permit application was submitted, if the Agency refuses to grant the permit by the end of this year, then the permit applicant must go back and develop a new permit application that includes an extensive analysis of GHGs (without any guidance, at least to date, on how such an analysis should be performed or evaluated). *Id*. That analysis, and presumably anything else that EPA decides to require in the new application, must then go through another notice-and-comment process before EPA will even consider issuing a final permit. As the record in this case shows, this process (multiple rounds of public comment followed by the many months that EPA takes to review such comments) can go on for years. Then, if at any time during this process EPA decides to impose any new permitting standard or requirement, the permit applicant is sent back to starting line—all without any regard to the statutory deadline that Congress imposed on EPA for issuing permits.

Plaintiff understands that this Court has a very full docket and extensive obligations over the next six months, but Avenal respectfully requests that the Court decide this dispositive motion on an expedited basis and order EPA to grant the Avenal permit before the end of this year. Although the background in this case may appear somewhat complex, the legal issues presented to this Court are very straightforward. According to EPA, the only remaining reason for continuing to withhold its decision on the permit is that EPA wants to impose new requirements relating to NO2 that did not exist at the time the permit application was submitted and found to be complete, or even as of the date by which EPA was statutorily required to issue the permit. (*See* Answer, Defenses ¶ 2) If this Court does not address this issue and order EPA to grant the permit by year end, then Avenal will be faced with a whole new set of legal and procedural issues and additional years of delay.

VI. CONCLUSION

As discussed above, Avenal has met all the statutory requirements for obtaining the Clean Air Act permit that it has been seeking for almost three years. EPA, on the other hand, has failed to fulfill its statutory obligations and ignored the language, purpose and intent of the Act. Further, EPA has unreasonably and unlawfully delayed issuance of the final PSD permit and offers no valid defense for its failures.

This Court has the authority to impose a deadline compelling final agency action. Avenal respectfully requests that the Court issue an order preventing the Agency from retroactively imposing new emission standards in this case and requiring the Administrator to issue a decision, conclusive of all internal EPA proceedings and constituting final agency action, that grants Avenal's pending PSD permit by December 31, 2010.

For the reasons set forth above, Avenal is entitled to judgment as a matter of law and an award of attorney's fees and costs and an Order requiring that Defendants perform their mandatory duty on the requested schedule.

Date: August 25, 2010

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AVENAL POWER CENTER, LLC, **Plaintiff,** **v.** **U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,** **Defendants.**	**Case No. 10-cv-00383 (RJL)** **(Hon. Richard J. Leon)**

PLAINTIFF AVENAL POWER CENTER, LLC'S OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Avenal Power Center, LLC ("Avenal" or "Plaintiff"), by and through its attorneys, files this Opposition to the Cross-Motion for Summary Judgment filed by U.S. Environmental Protection Agency ("EPA" or "the Agency") and Lisa P. Jackson, Administrator of the U.S. Environmental Protection Agency (the "Administrator") (collectively, "Defendants" or "EPA") on September 17, 2010.[1]

I. INTRODUCTION

Avenal's Motion for Judgment on the Pleadings has been fully briefed and is now before the Court. *See* Docket Numbers 12, 14 and 16. Avenal continues to believe that this case can and should be resolved based on the pleadings alone and respectfully asks the Court to grant the relief requested in that motion.

[1] Defendants filed a single pleading serving as both a Motion for Summary Judgment and an Opposition to Avenal's Motion for Judgment on the Pleadings. The Court noted this fact in the docket entry for Defendants' motion [#15]. Avenal did not assent to this dual motion and believes that it was improper. A motion for summary judgment is substantively different than an opposition to a motion for judgment on the pleadings, most significantly in this case because a motion for summary judgment may include affidavits. Therefore, Avenal asks the court to rule on the Motion for Judgment on the Pleadings without considering arguments supported only by the affidavit. Further, Avenal did not address any facts asserted in the affidavit attached to Defendants' motion in its Reply in Support of its Motion for Judgment on the Pleadings [#16] but does so here in this Opposition to Defendants' Motion for Summary Judgment.

If the Court disagrees and believes that further factual development is necessary to resolve this case, then the Court should deny EPA's Cross-Motion for Summary Judgment ("Motion") for several reasons: (1) key "facts" asserted by EPA are very much in dispute; (2) the remedy offered in EPA's Motion does not actually provide a meaningful remedy for EPA's unlawful conduct in this case; and (3) EPA's Motion is procedurally defective under the Federal and Local Rules.

EPA's motion rests on the assertion that it "has acted in good faith and with 'utmost diligence' in processing Plaintiff's permit application." (*See* Defs.' Mem. of P. & A. Summ. J. 16.) The question of whether EPA has acted in good faith and with utmost diligence is very much in dispute. Indeed, the stipulated facts show quite the opposite—that EPA has repeatedly dragged its feet at every step of the permitting process and chosen to exercise its discretion to create new and unnecessary hurdles to avoid issuing the permit that Avenal has been seeking for almost three years. (*See* Joint Stipulations, Exhibit 1, Joint Statement Regarding Case Management and Scheduling [#11], filed June 30, 2010, ("Joint Stips").) Plaintiff believes that further factual development would show that the reasons and motivations for EPA's delays have been improper.

The Agency also asserts that "EPA cannot conclude review of Plaintiff's permit application on any schedule more expedited than that proposed [in its motion]." (Defs.' Mem. of P. & A. Summ. J. 1.) Yet the schedule and the remedy proposed by EPA do not provide any assurance that Avenal's permit will *ever* be granted or denied. EPA argues that its proposed remedy—a court order requiring a mid-level official at one of EPA's regional office to take an interim step in the permitting process—is the only remedy that the Court may grant in this case.

(*Id.*) Plaintiffs vigorously dispute this assertion, as both a factual and a legal matter. (*See infra; see also* Pl.'s Mot. for J. Pleadings 12; Pl.'s Reply 16.)

The parties do agree on two key facts: (1) Defendants have violated Section 165(c) of the Clean Air Act ("CAA" or "the Act") (42 U.S.C. § 7475(c)); and (2) a decision on Plaintiff's Prevention of Significant Deterioration ("PSD") permit can be made by December 31, 2010. (*See* Pl.'s Mot. for J. Pleadings 1, 28; Defs.' Mem. of P. & A. Summ. J. 1, 10.) As noted above, there is a serious disagreement about the nature of the decision that EPA can make by the end of 2010. (*See infra*; *see generally* Pl.'s Mot. for J. Pleadings and Pl.'s Reply.) Avenal believes that the Court should require final agency action on its permit (*see* Pl.'s Mot. for J. Pleadings 26-27; Pl.'s Reply 4-6); EPA believes that the Court's jurisdiction is limited to ordering an interim step in the permitting process (*see* Defs.' Mem. of P. & A. Summ. J. 3-4.).

In addition, because Defendants' comingled filing contained a Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Judgment on the Pleadings and In Support of Defendants' Cross-Motion for Summary Judgment [#14], the facts and arguments contained in Avenal's Reply in Support of its Motion for Judgment on the Pleadings [#16] are reasserted and incorporated by reference in this opposition.

II. STATEMENT OF GENUINE ISSUES IN DISPUTE

In accordance with Local Rule 7(h), attached to this Opposition is a statement of material facts Avenal believes remains in dispute and includes references to the record. Those genuine issues are also referenced *infra*.

III. ARGUMENT

A motion for summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any

material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). Facts are material if they might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc*. 477 U.S. 242, 248 (1986). A genuine issue exists when "the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party." *Id.* When the application of law depends on the resolution of disputed facts, a motion for summary judgment is not appropriate. *See, e.g., Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 899 (1990). Further, in deciding a summary judgment motion, the court must look at the whole record and make reasonable inferences about the facts presented in favor of the non-movant. *See Scott v. Harris*, 550 U.S. 372, 380 (2007).

EPA has failed to meet the standards for granting its motion. (*See infra*, Section III.) Avenal maintains that the record here, when considered in its entirety, clearly shows that EPA's delays have been unlawful and unreasonable. Further, the parties' factual disputes affect some of the legal arguments in this matter because the parties dispute the legality of EPA's application of its new NO2 standard to Avenal's complete PSD application and EPA's past practices of imposing new regulatory requirements on permittees with complete permit applications. (*See infra.*)

EPA also argues that "Plaintiff's request for relief goes far beyond that permitted by statute." (*See* Defs.' Mem. of P. & A. Summ. J. 14.) It is clear, however, that "District courts have 'broad latitude in fashioning equitable relief when necessary to remedy an established wrong.'" *Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 999-1000 (9th Cir. 2000) (quoting *Alaska Ctr. for Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1984)). Moreover, as EPA correctly points out: "In a suit alleging violation of a Congressionally mandated duty, the district court exercises its discretion to fashion a remedy by considering whether 'the official involved . .

. has in good faith employed the utmost diligence in discharging his statutory responsibilities.'" (Defs.' Mem. of P. & A. Summ. J. 12 (quoting *Train*, 510 F.2d at 713).) As Avenal detailed below and in its Motion for Judgment on the Pleadings [#12], EPA and its Administrator have violated their statutory duties and failed to act in good faith by unlawfully refusing to issue a permit that, according to EPA's own findings, meets all the requirements of the Clean Air Act. (*See* Pl.'s Mot. for J. Pleadings 9-14.)

A. EPA's Motion For Summary Judgment Relies On Facts Still In Dispute

EPA relies on facts that remain in dispute in this case. EPA asserts that it has diligently worked with Avenal, in good faith, during the application process and also cites to the Jordan Declaration as proof of its good faith. (*See* Defs.' Mem. of P. & A. Summ. J. 4-9, 16.) Avenal disagrees with this claim and the facts EPA relies on to support this assertion. Avenal disputes EPA's rendition of the timeline of the Avenal PSD permitting process to the extent it is used to justify EPA's request for summary judgment on its proposed "remedy." Indeed, the permitting timeline actually highlights EPA's unreasonable delays both during and after the one-year period in which it was required to complete the permitting process under Section 165(c) of the Clean Air Act. (*See* Defs.' Mem. of P. & A. Summ. J. 4-10.) Furthermore, EPA only promises an interim decision that would lead to additional months, and perhaps years, of internal EPA permit review and would leave Avenal exposed to the imposition of (1) EPA's greenhouse gas permitting requirements scheduled to take effect on January 2, 2011, and (2) under EPA's view of the law, any other new permitting requirements that EPA may adopt before the Agency chooses to issue a final permit to Avenal.[2] *See* Pl.'s Mot. for J. Pleadings 26-27; Pl.'s Reply 18.) Thus, EPA still offers no foreseeable end in sight for Avenal's PSD permit.

[2] If the permit is granted only by the Regional Administrator, then an appeals process through the EPA's EAB could take years.

EPA dutifully notes all requests for information it demanded of Avenal between March 19, 2008 (the date EPA deemed Avenal's PSD application complete) and March 19, 2009 (the date EPA was statutorily obligated to grant or deny Avenal's PSD permit), but fails to connect the dots when laying out these facts. (*See* Defs.' Mem. P. & A. Summ. J. 4-10.) For example, EPA again raises the now moot issue of the U.S. Fish and Wildlife Service's ("USFWS") failure to timely issue a final Biological Opinion as a reason for its inability to grant or deny Avenal's permit within the statutory deadline and shortly thereafter. (*See* Answer, Defenses ¶ 1 and Defs.' Mem. of P. & A. Summ. J. 10.) But, in its rendition of Avenal's permit process, EPA fails to note the many ways in which its own inaction and delays caused the delayed issuance of the Biological Opinion. For instance, the date Avenal submitted its Biological Assessment and request for formal consultation with USFWS—May 12, 2008—because to do so would show that EPA waited almost two months before even requesting formal consultation of USFWS on July 10, 2008. (*See* Defs.' Mem. of P. & A. Summ. J. 5.)

In referencing the parties' interactions between July 2009 and December 2009, EPA "overlooks" its delay of almost four months in providing its initial comments to USFWS's draft Biological Opinion. (*See* Defs.' Mem. of P. & A. Summ. J. 7.) Under USFWS procedures, the draft Biological Opinion was also provided to Avenal for its comments, which Avenal provided in a relatively short and straightforward document in less than two weeks, but EPA took three months to comment on the same document. (*See* Joint Stips. ¶ 10.) This is not evidence of EPA acting "in good faith and with the 'utmost diligence' in processing Plaintiff's permit application." (Defs.' Mem. of P. & A. Summ. J. 16.)

EPA cites the Jordan Declaration as proof of its "diligent" internal analysis and regular communication "concerning additional information EPA deemed necessary." (Defs.' Mem. of

P. & A. Summ. J. 5.) After referencing the parties' permit meeting in San Francisco in November 2008, EPA glosses over its subsequent three month delay in requesting additional information from Avenal at the end of February 2009. (*Id.*) In fact, Region 9 personnel indicated during the November 2008 meeting that they expected to issue a permit by January or February 2009, not request additional information. (*See* Declaration of Jim Rexroad, ¶ 10, referring to a Region 9 email attached thereto.) Another Region 9 email in February 2009 stated that it was close to having a draft permit ready to circulate within EPA. (*See* Rexroad Declaration ¶ 13, citing a February 10, 2009 Region 9 email attached thereto.) Nevertheless, Avenal provided the information two weeks later, still leaving EPA time to fulfill its statutory obligation. (*See* Defs.' Mem. of P. & A. Summ. J. 5.) Yet another three months passed before EPA even reacted to the additional information it received from Avenal on March 11, 2009—finally issuing a proposed permit and seeking public comment for the first time on June 16, 2009. (*See* Joint Stips ¶ 10.) Again, EPA's assertions of good faith and utmost diligence are, at best, disputable.

Further, in citing its statutory obligation to present Avenal's proposed permit to the public for comment, EPA appears to ignore the numerous unreasonable delays which, had EPA timely responded to the information it requested, would have avoided the unnecessary delays in this permit process. (*See* Defs.' Mem. of P. & A. Summ. J. 3, 6.) EPA then suggests that its further delays and issuances of subsequent public comment periods, hearings, and meetings were necessary because "members of the public requested an extension of the public comment period, a public meeting and hearing on the project, and the public notice in Spanish." (Defs.' Mem. of P. & A. Summ. J. 6.) EPA cites to the Jordan Declaration and states that other "[m]embers of the public [then] expressed concern about conflicting public proceedings in the area, and EPA

determined that a supplemental public hearing would be appropriate." (Defs.' Mem. of P. & A. Summ. J. 6, citing Jordan Decl. ¶ 9.) However, as Avenal references below in Section III.C., EPA provides no citation for this conclusion in the declaration and, accordingly, Avenal moves to strike that paragraph.

Moreover, EPA makes no attempt to explain how these public requests satisfy the very regulations they rely on in their motion—that is, how these requests for extensions qualify as "significant comments raised during the public comment period or during any hearing" to which EPA must respond. (Defs.' Mem. of P. & A. Summ. J. 3, citing 40 C.F.R. § 124.17(a).) Thus, it is unclear how these comments and requests justified two additional public comment periods and a public meeting and two public hearings, that increased the statutory 30-day public comment period to an incredible 120 days. (*See* Joint Stips ¶ 10.)

Despite the numerous extensions for public comment, which ended on October 15, 2009, EPA still refused to make a decision. (*Id.*) Another four months passed before EPA met with Avenal to discuss the PSD application. (*Id.*) At the parties' February 23, 2010 meeting, EPA failed to mention any intentions to require that Avenal meet its new NO2 standard, which had been announced at the beginning of that same month. (*See* Defs.' Mem. of P. & A. Summ. J. 9; Joint Stips. ¶ 10; Rexroad Dec. ¶¶ 25-26.) Instead, EPA waited until after Avenal initiated this litigation before indicating that Avenal would need to show that it met the new standard before the Agency would issue the permit. (*See* Defs.' Mem. of P. & A. Summ. J. 7, 9; Rexroad Dec. ¶ 28.) The very fact that EPA never even mentioned this possibility, either to Avenal or as a matter of general policy for pending applications, until after Avenal filed this deadline suit calls EPA's good faith into question.

As indicated above, Avenal disputes EPA's claims of "good faith" and "utmost diligence" during this process. At no time in its motion does EPA explain why it was unable to meet its statutory deadline or why its numerous delays justify its proposed remedy which EPA could not claim as a "remedy" but for its unreasonable delay. (*See generally* Pl.'s Mot. for J. Pleadings.) That is, had EPA timely met its statutory obligations, the new NO2 standard would not now be an issue that EPA could claim is somehow an impediment to EPA's decision-making ability and the basis of its summary judgment motion.

B. EPA's Motion for Summary Judgment is Inappropriate and Premature

EPA's motion for summary judgment is inappropriate because the parties' dispute over material facts also concern the application of law. *See, e.g., Lujan,* 497 U.S. at 899. Not only is EPA's asserted remedy not supported by any undisputed facts, it also ignores the fact that Avenal disputes whether EPA's proposed remedy is legally sufficient and factually justified. (*See* Pl.'s Mot. for J. Pleadings 20-21; Pl.'s Reply 8-10.) Avenal is only asking for a decision on its permit that is consistent with the record here. Avenal believes that its request to receive a final decision by the end of the year is supported by the relevant facts and law (*see* Pl.'s Mot. for J. on Pleadings 26-27; Pl.'s Reply 4-6); EPA does not agree (s*ee* Defs.' Mem. of P. & A. Summ. J. 3-4).

1. EPA's Motion Fails Because the Parties' Legal Arguments Regarding the EAB Process Concern Material Facts in Dispute

While the parties do agree on the same proposed deadline—December 31, 2010—Avenal disagrees with EPA's assertion that it can satisfy its statutory obligation by having a mid-level EPA official take an initial permitting step that could eventually lead to a final permit after months or years of additional internal EPA review. (*See* Defs.' Mem. of P. & A. Summ. J. 10; Pl.'s Reply 4-6). EPA concedes that it has violated the CAA but argues that the Court's remedy

should be limited to "grant[ing] the Regional Air Division Director until December 31, 2010, to grant or deny [Avenal's] permit application." (Defs.' Mem. of P. & A. Summ. J. 1, 20-21.) EPA does not discuss in any way how this interim decision would achieve compliance with section 165(c) of the CAA or remedy its violation of that section. A decision on the permit application by this mid-level EPA manager would not constitute final agency action and Avenal would not be able to start construction of the Avenal Energy Project ("AEP") after such a decision. 40 C.F.R. § 124.19. Avenal has requested that the Court order EPA to take *final* "agency action" on Avenal's PSD permit application by the end of this year. (*See* Pl.'s Mot. for J. on Pleadings 23-26; *see also* Proposed Order.)

EPA argues that Avenal is asking this Court to "foreclose access by interested parties to the [Environmental Appeal Board] appeal process provided by EPA's regulations." (Defs.' Mem. P. & A. Summ. J. 19; *See* 40 C.F.R. § 124.19.) There is nothing in the CAA or any other statute, however, that gives anyone a right to appeal a permitting decision to EPA's Environmental Appeals Board ("EAB"). Rather, as discussed below, the CAA explicitly provides that any interested party may appeal a permitting decision to the relevant court. *See* Section 307(d) of the CAA.

To address the increased number of permit applications following the expansion of the PSD program under the 1990 Clean Air Act Amendments, the Administrator created the EAB, a group within the Office of the Administrator that handles permitting appeals to streamline the Administrator's workload. *See* 57 Fed. Reg. 5320 (Feb. 13, 1992). (*See* Defs.' Mem. of P. & A. Summ. J. 3-4.) The EAB is thus a component of the Office of the Administrator that "answers to the Administrator of the Agency." *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 795 (EAB 1995), *aff'd sub nom. Marine Shale Processors, Inc. v. EPA*, 81 F.3d 1371 (5th Cir. 1996), *cert.*

denied, 519 U.S. 1055 (1997); *see also* S. Rep. No. 103-257 (1994) (legislative history for Water Pollution Prevention and Control Act of 1994) ("[EAB] is independent from all EPA components outside of the Office of the Administrator").

While the regulations cited by EPA do provide that, if an initial permitting decision is made by a Regional EPA official, then anyone who has participated in the permitting proceeding may appeal that decision to the EAB, these regulations do not say, nor could they, that regional officials are the only EPA officials who have authority to issue permits. They only have this authority because of a 1984 delegation from the EPA Administrator. *See* EPA Delegations Manual at 7-24 (July 25, 19984.).) This delegation is neither permanent nor exclusive, and the Administrator clearly retains the authority to issue or deny permits. As noted above, there is nothing in any statute or regulation that provides a right of appeal to the EAB, which after all, works for the Administrator. Rather, any permit signed by the Administrator is final agency action, which can then be appealed to a court of law as provided under section 307(d) of the CAA.

EPA now raises the EAB appeals process as an excuse for its failure to act, yet Congress could not have intended for the EAB appeals process to be grounds for delay because the EAB did not exist when the 1977 Amendments were added to the Clean Air Act, when the mandate of section 165(c) was first drafted by Congress. *See* S. Rep. No. 94-717, at 23 (1976). At that time, the EPA Administrator was the only official with authority to "grant or deny" a PSD permit. Thus, when Congress required that any PSD permit be "granted or denied" within one year after the submission of a complete permit application, Congress clearly intended that it would be the Administrator making the decision to grant or deny the permit.

Thus, the Court is authorized to order the "Administrator" to act. *See* 42 U.S.C. § 7604(a)(2). Avenal respectfully requests that the Court do so in this case. Congress imposed the one year time limit on the Administrator to take final action and any other type of interim agency action would not in any way fulfill the legislative intent of Section 165(c), which is to prevent unnecessary and bureaucratic delay of important development projects, such as AEP. (*See* Pl.'s Mot. for J. Pleadings 14-16.) The Administrator may not use her delegated authority to evade her responsibilities under Section 165(c). EPA can settle on whatever internal proceedings it likes, but it must comply with Section 165(c).

EPA's error is perpetuated in its assertion that the Court's deadline cannot include conclusion of all other internal Agency deliberations, such as the EAB appeal. (*See* Defs.' Mem. of P. & A. Summ. J. 19.) EPA's argument, however, rests on the fiction that the EAB is an independent tribunal, which it is not. "The EAB is a *delegatee* of the Administrator and is located within the Administrator's Office." *Tennessee Valley Auth. v. Whitman*, 336 F.3d 1236, 1246 (11th Cir. 2003). Accordingly, the EAB's decision regarding a PSD permit appeal is the same as a decision by the Administrator. *Ciba-Geigy Corp. v. Sidamon-Eristoff*, 3 F.3d 40, 45 (2d Cir. 1993).

The Administrator is free to—and does—impose deadlines on the EAB. *See In the Matter of Tennessee Valley Auth.*, 2000 WL 968329 (EAB June 29, 2000). When there is a voting deadlock among members of the EAB, the Administrator breaks the tie. 57 Fed. Reg. 5320 (Feb. 13, 1992). The EAB may refer any case or motion to the Administrator for a final decision, 40 C.F.R. § 22.4(a)(1) (2010), and in certain matters federal agencies may request that the Administrator review an EAB final order to issue an overriding decision, 40 C.F.R.

§ 22.31(e). Ultimately, then, the EAB is a creature of regulation, serving at the pleasure and at the direction of the Administrator.

The Administrator's delegation of authority to the Regional Administrator and the EAB are not exclusive delegations, and they certainly are not permanent. *See* 40 C.F.R. § 22.4 (describing delegations to the EAB and Regional Administrators); *EPA Delegations Manual* at 7-24 (July 25, 1984). There is nothing in EPA regulations or in law that would prohibit the Administrator from using an alternative process other than that described in EPA delegations or in the regulations creating the EAB. This Court has broad equitable authority to impose a deadline on the Agency's consideration of the pending PSD permit application, and the Administrator has the ultimate authority to issue the Agency's final decision on the pending PSD permit application. (*See* Defs.' Mem. P. & A. Summ. J. 12.) Thus, Avenal disputes EPA's proposed remedy because Avenal believes any deadline imposed by the Court should include all agency interim procedures and result in a final decision on the permit application. (See Pl.'s Reply 4-8.) Anything less, would not ensure compliance with the CAA.

EPA also argues that "Plaintiff's request for relief goes far beyond that permitted by statute." (Defs.' Mem. of P. & A. Summ. J. 3, 15.) It is clear, however, that "District courts have 'broad latitude in fashioning equitable relief when necessary to remedy an established wrong.'" *Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 999-1000 (9th Cir. 2000) (quoting *Alaska Ctr. for Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1984)). Moreover, as EPA correctly points out: "In a suit alleging violation of a Congressionally mandated duty, the district court exercises its discretion to fashion a remedy by considering whether 'the official involved . . . has in good faith employed the utmost diligence in discharging his statutory responsibilities.'" (Defs.' Mem. of P. & A. Summ. J. 12 (quoting *Train*, 510 F.2d at 713).) As Avenal detailed

above and in its Motion for Judgment on the Pleadings, EPA and its Administrator have violated their statutory duties and the parties dispute whether EPA failed to act in good faith by unlawfully refusing to issue a permit that, according to EPA's own findings, meets all the requirements of the Clean Air Act. (*See* Pl.'s Mot. J. Pleadings 9-14.)

Finally, in order to ensure PSD permit decisions could be appealed to the courts as a check on EPA, Congress enacted the judicial review provisions of the Clean Air Act in Section 307(b) of the Act. 42 U.S.C. § 7607(b). Congress did not envision, nor did it proscribe an administrative appeal process that could take years after an interim agency decision. Congress ensured the public's right to challenge PSD permits decisions under Section 307(b), and Avenal is in no way asking this Court to take away any rights a third-party may have to the appeal process established by Congress.

2. EPA's Motion Is Not Yet Ripe for Disposition Because Discovery is Necessary Regarding EPA's Past Practices as to Grandfathering Pending Permit Applications from New Regulatory Requirements.

As noted above, Avenal believes that the Court should resolve this case by granting Avenal's Motion for Judgment on the Pleadings, in part, because it is unlawful for EPA to impose its new NO2 standard on the Avenal Project. If the Court does not grant Avenal's Motion, the Court should still deny EPA's Motion because additional, relevant evidence to support Avenal's opposition can only be gleaned through discovery. Pursuant to Fed. R. Civ. P. 56(f), "if a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may. . .deny the motion." Accordingly, Avenal believes that EPA's motion for summary judgment should be denied so that Avenal may be afforded a proper defense through the discovery process.

Avenal maintains that EPA cannot retroactively apply new emission standards to the circumstances of Avenal's completed PSD permit application and force Avenal to meet a yet-to-be defined modeling protocol for its new NO2 standard, which was not even proposed (much less finalized) until after EPA was statutorily required to render a decision on Avenal's application. (*See* Pl.'s Mot. for J. Pleadings 20-21; Pl.'s Reply 8-10.) However, EPA claims, through the Jordan Declaration, that "EPA has consistently interpreted the plain language of the Clean Air Act to require that end final PSD permit decision reflect consideration of any NAAQS in effect at the time the permitting authority issues a final permit." (Defs.' Mem. of P. & A. Summ. J. 19.) Yet the only support for this claim is an internal EPA memorandum that was not even drafted until after this case was filed. Avenal also disputes EPA's assertion regarding EPA's past practice in this regard and has reason to believe that EPA has not consistently applied this practice. (*See infra*.)

Avenal challenges EPA's contention that its internal procedures and guidance memoranda prevent EPA from issuing Avenal's permit until Avenal can show that the AEP will meet any new NAAQS standards that are adopted by EPA before the issuance of a final permit. (*See* Defs.' Mem. of P. & A. Summ. J. 8, citing 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 Memo"), attached to Defs' Mem. of P& A Summ. J., Exh. 5.)

As an initial matter, the Page Memo was issued one year after the statutory deadline in this case and almost a month after this litigation was initiated. (*See* Defs.' Mem. of P. & A. Summ. J. 8.) More importantly, this memorandum shows EPA's key assertion to be untrue. In

several places, EPA claims, without any support other than the Page Memo, that "EPA has consistently interpreted the plain language of the Clean Air Act to require that end final PSD permit decision reflect consideration of any NAAQS in effect at the time the permitting authority issues a final permit." (Defs.' Mem. of P. & A. Summ. J. 19.) The Page Memo makes a very different point—that EPA believes it may exercise its discretion on this matter and that it has routinely decided not to require pending permit applications to meet new permitting requirements. Specifically, the Page Memo states:

> [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 Memo at 3. The Page Memo then cites examples of instances where EPA has actually issued regulations to clarify that pending permit applications were not covered by new PSD requirements. *Id.* (citing 40 C.F.R. § 52.21(i)(1)(x) and 40 C.F.R. § 52.21(i)(9)-(10)).

EPA cites no document other than the Page Memo that explains why the Agency decides to apply some new standards, but not others, to pending permit applications. The Agency appears to believe that it may simply address this issue in any way it chooses. In fairness to the Page Memo, it does assert that EPA now believes that it can choose not to apply new standards to pending permit applications, but can only do so if it goes through notice and comment rulemaking and explicitly adopts a "grandfathering provision" to exempt pending permit applications from new requirements that become effective before a final permit is issued. *See* Page Memo at 3. Again, however, the Page Memo is the first place in which EPA has made this assertion. As far as Avenal has been able to determine, this new theory—that new requirements

apply to pending permit applications unless EPA chooses to adopt a grandfathering provision—is nothing more than an attempt to justify the approach that EPA now wants to take. Avenal believes that discovery would show that EPA has, in the past, grandfathered in certain pending permit applications.

It is noteworthy that EPA does not cite to any specific cases in which an applicant with a pending permit was required to meet a new standard that was adopted after the permit application was found to be complete. Nor does EPA cite anything in the CAA or other law that requires notice and comment rulemaking for it to exercise the discretion it says it has in the Page Memo. As explained below, the case law EPA cites does not support the retroactive application of new NAAQS to complete permit applications. To the contrary, Avenal has cited many cases that disfavor the retroactive application of new requirements. (*See also* Pl.'s Reply 12-14.)

EPA implies that the only way that a permit may be exempt from recently promulgated National Ambient Air Quality Standards ("NAAQS") is if the rule expressly includes an exemption for permit applications that were determined complete prior to the NAAQS standard revision. (*See* Defs.' Mem. of P. & A. Summ. J. 8.) Further, EPA implies that such rules must be subject to public notice and comment before adoption. (*Id.* at n.3.) Notably, EPA does not expressly state that no other mechanism is available for providing an exemption to permits that are determined complete before new NAAQS standards are adopted. Rather than relying on these implications provided by EPA, Avenal believes it would be appropriate to allow discovery on the issue of EPA's past practices to determine whether there have ever been other instances where exemptions were provided using means other than rulemaking that included public notice and comment.

EPA relies on two cases to justify the application of new NAAQS requirements to pending permits. (*See* Defs.' Mem. of P. & A. Summ. J. 19, citing *Ziffrin v. United States*, 318 U.S. 73 (1943) and *Alabama v. EPA*, 557 F.2d. 1101 (5th Cir. 1977).) However, those cases are not relevant and actually stand for the opposite proposition than EPA cites them for.

In *Ziffrin*, a case decided decades before the CAA and its mandatory statutory deadline were written, the Supreme Court addressed the application of a grandfather clause under the Interstate Commerce Act. 318 U.S. 73 (1943). While the permit application in *Ziffrin* was pending, Congress changed the law and the Court determined that the Interstate Commerce Commission must make its permit decision in accordance with the statute as amended. *Id.* at 78. Here, Congress has not changed the CAA in any manner. Congress did not modify the Act to require that EPA disregard its statutory deadline. Congress also has not imposed language in the statute requiring EPA to apply new NAAQS standards to all air permit applications that are complete but for which no permit decision has been made when a NAAQS standard is changed. Because Congress has not changed the CAA, *Ziffrin* is inapplicable to the facts before the Court.

Furthermore, the second case EPA relies on, *Alabama v. EPA*, supports Avenal's position and contradicts EPA's. 557 F.2d. 1101 (5th Cir. 1977). In *Alabama*, 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. A contrary rule would create havoc in EPA's permit development procedures." *Id.* at 1110. Moreover, *Alabama* is distinguishable because the permit at issue was one issued under the Clean Water Act—a statute that does not contain a statutory deadline such as the one provided in Section 165(c) of the CAA, mandating the completion of the permitting process within a certain timeframe. *See generally* 33 U.S.C. § 401. Thus, *Alabama* does not provide adequate support for EPA's

position that new NAAQS standards must be reflected in any decisions made regarding pending air permit applications.

Finally, EPA's argument that it must apply new NAAQS standards to all pending permit applications is contrary to EPA's obligation to only apply its discretion in a manner that is consistent with the statute as written by Congress. *See Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984) (noting that agencies "must give effect to the unambiguously expressed intent of Congress"). Here, EPA has attempted to exercise its discretion in a manner that prohibits a timely permit decision for Avenal. To do so is contrary to law. *Id.*

Accordingly, EPA's Motion for Summary Judgment is premature and should be denied because Avenal should be entitled to discovery on this point. As EPA notes in the Page Memo, EPA has discretion as to whether to apply new NAAQS requirements on pending applications. *See* Page Memo at 3. Avenal should be afforded the ability to fact find on EPA's use and application of that discretion.

C. EPA's Motion is Procedurally Defective Under the Federal and Local Rules

First, EPA failed to provide a statement of material facts not in dispute. "Each motion for summary judgment shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on to support the statement." LCvR 7(h)(1). Nowhere in its motion does EPA define what section or facts adhere to this requirement. EPA cites to certain facts in Section II of its motion but many other statements and conclusions in that section are not cited at all. (*See* Defs.' Mem. of P. & A. Summ. J. 4-10.) "[F]ailure to file a proper Rule [7(h)] statement 'may be fatal to the delinquent party's position.'" *Jackson*, 101 F.3d at 151 (quoting *Gardels v. CIA*, 637 F.2d 770 (D.C. Cir. 1980)).

Second, EPA's declaration by the Director of Region 9's Air Division, Deborah Jordan, ("Jordan Declaration") is inadequate to prove EPA's request for summary judgment. *See* Fed. R. Civ. P. 56(e). Portions of the Jordan Declaration contain legal conclusions and unsubstantiated assertions. *See* Jordan Decl. ¶ 8, 9, 12, 14, 18. Specifically, paragraphs 8 and 9 of the Jordan Declaration do not have any factual support for the statements within. Paragraph 12 makes the legal conclusion that the ESA obligations must be satisfied before the permit can be issued. Paragraph 14 makes the legal conclusion that the permit cannot be issued unless there is a demonstration that the new NO2 standard will be met. Paragraph 18 makes the legal conclusion that an additional 33-day public comment period is required. Accordingly, Avenal moves to strike the aforementioned paragraphs in the Jordan Declaration.

Finally, EPA has failed to properly plead its motion for summary judgment under the Local and Federal Rules, which constitutes grounds for denying the motion. *See Heasley v. DC General Hospita*l, 180 F.Supp.2d 158, 163 (D.D.C. 2002); *Jackson v. Finnegan, Henderson, Farbarow, Garret, and Dunner*, 101 F.3d 145, 150-151 (D.C. Cir. 1996). First, as mentioned above, EPA improperly comingled into one document its opposition to Plaintiff's Motion for Judgment on the Pleadings and its Cross-Motion for Summary Judgment. These pleadings should have been filed with the Court as separate documents. Both pleadings also rely on different standards of review. A motion for judgment on the pleadings limits the parties to the pleadings and matters of public record (*see* Fed. R. Civ. P. 12(c)), while a motion for summary judgment allows the parties to rely on discovery, affidavits and other documents (*see* Fed. R. Civ. P. 56(c)-(e)). Here, EPA improperly relies on a declaration to support its opposition to Avenal's Motion for Judgment on the Pleadings.

IV. CONCLUSION

Again, Avenal has timely met every requirement set forth under the CAA and has endured more than a year and a half of EPA's unreasonable delays and only the promise of more EPA invented requirements that directly conflict with the CAA and the relevant case law. Instead of directly debating the legal issues set forth in Avenal's pleadings, EPA simply states that the law is somehow not applicable to the facts here and that the Court lacks the jurisdiction to decide the disputed legal issues.

For the reasons set forth above and in Avenal's Motion for Judgment on the Pleadings, and its Reply thereto, Avenal respectfully requests the Court deny Defendants' Motion for Summary Judgment. If the Court agrees with the date of Defendant's proposed remedy, then Avenal requests that the Court choose Avenal's proposal instead and require EPA's Administrator to make a final decision on Avenal's permit before the end of this year so that EPA may not impose a new set of legal and procedural issues and additional years of delay.

Date: October 8, 2010

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AVENAL POWER CENTER, LLC, **Plaintiff,** **v.** **U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,** **Defendants.**	**Case No. 10-cv-00383 (RJL)** **(Hon. Richard J. Leon)**

PLAINTIFF AVENAL POWER CENTER, LLC'S
STATEMENT OF GENUINE ISSUES

Pursuant to Local Civil Rule 7(h), Plaintiff Avenal Power Center, LLC ("Avenal" or "Plaintiff"), by and through its attorneys, submits its Statement of Genuine Issues ("Plaintiff's Statement"). As Defendants failed to label any portion of their motion as a "Statement of Facts Not in Dispute", Plaintiff's Statement generally objects to the facts asserted in Defendant's motion and its attached Declaration because Defendants and Declarant either relied on (1) facts that are actually in dispute or (2) failed to cite "facts" with any evidentiary support or citation. *See* Defs.' Mot. for Summ. J. and Deborah Jordan Declaration attached thereto; *see also* Section III of Plaintiff's Opposition to Defendants' Cross-Motion for Summary Judgment.

In addition to the general objections, Avenal specifically objects to the following statements in EPA's declaration by Deborah Jordan because those statements either do not reference the record or provide any other support for that statement as required by Local Rule 7(h). Accordingly, Avenal moves to strike the below referenced paragraphs. *See* Section III.C, Defs.' Opp'n.

1. Paragraph 8 of the Jordan Declaration does not have any factual support for the statements within regarding EPA's internal analysis and regular communication with Avenal.

2. Paragraph 9 of the Jordan Declaration does not have any factual support for the statements within regarding the public's "concern about conflicting public proceedings in the area, and EPA determined that holding a supplemental public hearing would be appropriate."

3. Paragraph 12 makes the legal conclusion that the ESA obligations must be satisfied before the permit can be issued.

4. Paragraph 14 makes the legal conclusion that the permit cannot be issued unless there is a demonstration that the new NO2 standard will be met.

5. Paragraph 18 makes the legal conclusion that an additional 33-day public comment period is required.

Further, Avenal generally and specifically objects to EPA's claims that it worked "in good faith and with 'utmost diligence' in processing Plaintiff's permit application." *See* Defs.' Mem. of P. & A. Summ. J. 16. Avenal is unable to specifically refute EPA's statements on this point because Defendants failed to provide a "Statement of Facts Not in Dispute." In its Opposition to Defendants' Cross-Motion for Summary Judgment, and the Declaration of J.P. Rexroad ("Rexroad Declaration") attached thereto, Avenal cites to the record in this case and provides supporting information and documents to illustrate the material factual dispute regarding EPA's lack of good faith during the permit process. *See* Section III.A of Pl.'s Opp'n; *see also* Rexroad Declaration.

Date: October 8, 2010

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of October 2010, a true and complete copy of the foregoing *Plaintiff Avenal Power Center, LLC's Opposition to Defendants' Cross-Motion for Summary Judgment, Statement of Genuine Issues in support thereof, and proposed Order* was served by the Court's electronic filing system on the following registered participants:

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