

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

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In re: )  
)  
)  
Avenal Power Center, LLC ) PSD Appeal Nos. 11-02, 11-03,  
) 11-04 & 11-05  
)  
PSD Permit No. SJ 08-01 )  

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)

**EXHIBITS**

**RESPONSE TO PETITIONS FOR REVIEW  
BY EPA OFFICE OF AIR AND RADIATION**

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**EXHIBIT A**

**Response to Petitions for Review  
By EPA Office of Air and Radiation**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AVENAL POWER CENTER, LLC,	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Civ. Action No. 10cv383 (RJL)</b>
	)	
U.S. ENVIRONMENTAL PROTECTION	)	
AGENCY, <i>et al.</i> ,	)	
	)	
<b>Defendants.</b>	)	

ORDER

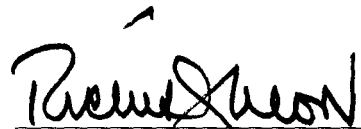
For the reasons set forth in the Memorandum Opinion entered this 26 day of May, 2011, it is hereby

**ORDERED** that plaintiff's Motion for Judgment on the Pleadings [#12] is **GRANTED** in part and **DENIED** in part<sup>1</sup>; and it is further

**ORDERED** that the defendants' Motion for Summary Judgment [#14] is **DENIED**; and it is further

**ORDERED** that the EPA Administrator issue a final agency action, either granting or denying plaintiff's permit application, no later than August 27, 2011.

**SO ORDERED.**

  
 \_\_\_\_\_  
 RICHARD J. LEON  
 United States District Judge

<sup>1</sup> The Court reserves judgment with respect to plaintiff's request for attorney's fees and costs. In addition, in light of the February 4, 2011 declaration by Regina McCarthy, Assistant Administrator of the EPA's Office of Air and Radiation, which was released after plaintiff filed its Motion, as well as subsequent briefs and oral argument, the relief sought by plaintiff has been accordingly revised.

**EXHIBIT B**

**Response to Petitions for Review  
By EPA Office of Air and Radiation**

## Memorandum

To: File

Subject: Delegation of PSD Permit Authority to Assistant Administrator

Date: March 3, 2011

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This memorandum sets forth the legal basis for the Administrator's decision to delegate, without notice and comment rulemaking, authority to the Assistant Administrator for the Office of Air and Radiation to issue a final permit decision on the Avenal PSD permit application under 40 CFR § 124.15 and to take other associated actions that are assigned to a Regional Administrator under 40 CFR Part 124.

### Conclusion

The Administrator's decision to delegate this authority to one official rather than another is an internal agency procedure that does not affect the rights of members of the public. The delegation can thus be classified as a rule of "agency organization, procedure, or practice" that is not subject to the notice and comment requirements of the Administrative Procedure Act (APA) or Clean Air Act (CAA). *See* 5 U.S.C. § 553(b)(A); 40 U.S.C. 7607(d). EPA is not required to publish this procedural rule in the Code of Federal Regulations in order for the delegation to be effective.

### Legal Analysis

#### I. Notice and comment rulemaking is not required for procedural rules.

Section 553 of the APA and section 307(d) of the Clean Air Act require public notice and opportunity for comment prior to the promulgation of substantive rules. The APA contains an exception for "rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A). The applicability of this exception is expressly preserved under section 307(d) of the Clean Air Act. This exception for procedural rules has repeatedly been affirmed by the courts. The Third Circuit stated plainly in *SBC Inc. v. FCC*, 414 F.3d 486, 498 (3d Cir. 2005) that "procedural rules . . . are exempted from the notice and comment requirement." Similarly, the D.C. Circuit explained the following in *James A. Hurson Assocs. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000): "Although federal agencies ordinarily must provide the public with notice of a proposed rule and the opportunity to submit comments on it, the APA makes an exception for, among others, rules of agency organization, procedure, or practice." Furthermore, courts have recognized that "[t]he express exemption under section 553(b)(3)(A) extends to 'technical regulation of the form of agency action and proceedings.'" *S. Cal. Edison Co. v. FERC*, 770 F.2d 779 (9th Cir. 1985) (FERC rule establishing approval procedures for interim rates exempt from notice and comment).

## **II. A delegation of authority within an agency is a procedural rule, not a substantive rule.**

Courts recognize that the delegation of authority from one agency official to another is procedural, not substantive. In *Sacora v. Thomas*, the Ninth Circuit determined that an agency's requirement that regional directors approve prisoner placements was an agency practice "merely assign[ing] a particular official the responsibility of exercising the authority delegated to the [Bureau of Prisons] and its Director by statute." 628 F.3d 1059, 1063 (9th Cir. 2010). Similarly, in *United States v. Gonzales*, a district court held that the decision by the Department of Homeland Security to delegate immigration bond-breach review authority to the Bureau of Citizenship and Immigration Services was not subject to the APA's notice and comment requirements "[s]ince the delegation specifies the internal organization of the agency." 728 F. Supp. 2d 1077, 1085 (N.D. Cal. 2010). The court reasoned that the delegation "does not alter the right to make an appeal; it only identifies the body that will exercise jurisdiction over the appeal once the appeal is made." *Id.* Finally, the court noted that the rights or obligations of the party making the appeal "are properly laid out in a separate section of the Code of Federal Regulations." *Id.* at 1085-86.

These principles apply here. First, the temporary delegation applicable to the Avenal permit application specifies the internal organization of EPA and, thus, falls within the APA's procedural exemption. The Administrator's decision here to authorize the Assistant Administrator to issue the final permit decision on this application instead of the Regional Administrator affects only which Agency official is responsible for completing procedures specified in the Part 124 regulations. Second, the delegation does not alter the rights and obligations of parties under Part 124, including rights to request appeals to the Environmental Appeals Board (EAB), which are located elsewhere in the Code of Federal Regulations (CFR). *See, e.g.*, 40 C.F.R. § 124.19(a) (establishing right of appeal to EAB); *id.* (obligation to raise issues during comment period in order to preserve them for appeal). Accordingly, the Administrator can effect this delegation without notice and comment. *See* 5 U.S.C. § 553(b)(A).

## **III. The references to the Regional Administrator in Part 124 are procedural rules.**

Part 124 of Title 40 sets forth the "Procedures for Decisionmaking" governing the issuance, modification, and termination of permits. It contains two types of provisions. First, it contains substantive provisions that (a) vest in the public rights to participate in the decisionmaking process, including the right to appeal certain permits to the EAB and (b) establish obligations regarding the content and timing of the public comment process and petitions for an appeal. *See e.g.* 40 C.F.R. § 124.19(a) (authorizing appeals for issues raised during comment period within fixed time frames). Second, it contains language establishing specific procedures to be followed by EPA and assigning responsibility to particular officials to carry out those procedures. *See, e.g.*, 40 C.F.R. § 124.15 (noting that "after the close of the public comment period under § 124.10 on a draft permit, the Regional Administrator shall issue a final permit decision."); *id.* ("the Regional Administrator shall notify the applicant" of the final permit decision); 40 C.F.R. § 124.19(a) (the 30-day deadline for filing an appeal "begins with the service of the notice of the Regional Administrator's action"). Unlike Part 124's substantive provisions which provide rights to third parties, these references to the Regional Administrator

identify the official within the agency responsible for implementing particular steps in the procedures required under Part 124 and provide the framework and context within which the public can participate in the Agency's decisionmaking process, including exercising its appeal rights and obligations. In promulgating these rules, EPA chose to describe its procedures in the "active voice" (rather than the "passive voice") and to identify as the subject of these sentences' the official delegated the authority to complete these actions, *i.e.*, the Regional Administrator. EPA's decision to avoid passive phrases like "the applicant shall be notified" or "the permit shall be issued" was motivated by an attempt to clarify for the public the agency permitting procedures; it did not create rights or obligations outside the agency with respect to who would implement the procedures.

Characterizing these provisions as procedural rules is consistent with longstanding case law. The D.C. Circuit has explained that "the critical feature of a rule that satisfies the so-called procedural exception is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *James A. Hurson Assocs. v. Glickman*, 229 F.3d at 280; *see also SBC Inc. v. FCC*, 414 F.3d at 497 (rate recovery rule that did not impose new duties upon regulated entities was not substantive). In *Glickman*, the court characterized an agency decision to abolish face-to-face meetings during the label approval process as procedural, even though the change affected the party's interaction with agency decision makers. Despite its impact, the rule was held to be a procedural rule because it did not change substantive criteria, but merely procedures for applying them. *Id.*; *see also Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 350 (4th Cir. 2001) (rule permitting dismissal of appeals for untimely filing is "a procedural rule for handling appeals" because it "does not alter the substantive standards by which it reviews provider claims"). The Administrator's decision here to direct one Agency official rather than another to propose and issue this permit will have even less external impact than the rule upheld in *Glickman*, since the instant decision does not affect the rights of parties, or even the manner in which parties interact with the agency. Furthermore, the Administrator's selection of the official who will issue a final permit decision under 40 CFR 124.15 under the particular circumstances of the Avenal permit application does not impinge upon the underlying standards by which permit decisions are made, or even the procedures for applying those standards.

To determine whether a rule is procedural, the D.C. Circuit has also "inquir[ed] more broadly whether the agency action . . . encodes a substantial value judgment." *Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002) (State Department's new date cutoff for FOIA requests was procedural). "[V]alue judgment" has been construed narrowly and does not encompass "judgments about what mechanics and processes are most efficient." *JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994). Under this standard, the Administrator's decision to direct one Agency official rather than another to propose and issue this permit reflects an assessment of procedural efficiency, rather than a substantial value judgment for which notice and comment would be required.

An agency's characterization of its rule in the Federal Register provides guidance as to whether it is substantive or procedural in nature. *United States v. Am. Prod. Indus.*, 58 F.3d 404, 408 (9th Cir. 1995) (noting that agency described rule delegating compromise authority to Branch Directors as "related to agency organization and management"). The preamble to Part 124 notes that "[t]hese regulations are an important element of an Agency-wide effort to

consolidate and unify procedures and requirements applicable to EPA and State-administered programs” and “[e]stablish[] the procedures to be followed in making permit decisions.” The references in Part 124 to the permit issuance and notification process, *e.g.*, 40 C.F.R. §§ 124.15, 124.16 are examples of the procedural rule provisions encompassed within these historical descriptions.

#### **IV. EPA is not required to publish notice of the delegation in Federal Register.**

The APA’s publication requirements are centered upon providing public access to agency promulgations that affect the rights of the public. Section 552 is the only provision of the APA that discusses publication in the CFR (or Federal Register). Section 552(a) of the APA requires the publication of certain agency materials, including “the nature and requirements of all formal and informal procedures available,” 5 U.S.C. § 552(a)(1)(B), and “rules of procedure,” 5 U.S.C. § 552(a)(1)(C). Section 552(b), however, specifically exempts certain materials from publication, including “matters that are related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. § 552(b)(2). Courts have interpreted § 552(b) as exempting internal agency practices from publication in the Federal Register. *See, e.g., Bunge Corp. v. United States*, 5 Cl. Ct. 511, 523 (1984) (“When the matter in issue involves a policy that is entirely internal to the agency and that, of itself, does not affect the conduct of private parties, publication is not required.”); *Diller Active v. Schweiker*, 556 F. Supp. 478, 483 (D.D.C. 1983) (Medicare reimbursement guidelines need not be published where “[t]here is no evidence that the guidelines impose mandatory obligations . . . or that they effect pre-existing legal rights or obligations”). The exception in § 552(b)(2) encompasses changes in internal agency procedure. *Morgan v. U.S. Postal Serv.*, 798 F.2d 1162 (8th Cir. 1986) (internal procedures regarding administrative remedies for employee discrimination claims need not be published); *Whelan v. Brinegar*, 538 F.2d 924 (2d Cir. 1976) (DOT not required to comply with APA publication requirements prior to abrogating rule governing compensation). As discussed above, the delegation of PSD permitting authority to the Assistant Administrator affects only internal agency practice, and does not affect the rights of the public to submit comments or to petition for administrative review of the final permit decision reached by the Administrator’s delegate. Hence, this delegation falls within the § 552(b) exemption.

Furthermore, the courts have specifically characterized delegation as an internal agency procedure subject to this exemption. *United States v. Fitch Oil Co.*, 676 F.2d 673 (Temp. Emer. Ct. App. 1982) (DOE not required to publish statement delegating authority to issue subpoenas); *United States v. Goodman*, 605 F.2d 870, 888 (5th Cir. 1979) (Attorney General did not have to publish delegation of authority to identify controlled substances to DEA Assistant Administrator because APA “does not require that all internal delegations of authority . . . must be published.”); *Hogg v. United States*, 428 F.2d 274 (6th Cir. 1970) (DOJ not required to publish internal instructions delegating authority to file notices of appeal). The publication requirements of § 552 “attach only to matters which if not published would adversely affect a member of the public.” *Chevron Oil v. Andrus*, 588 F.2d 1383, 1388 fn. 8 (5th Cir. 1979), *cert. denied*, 444 U.S. 879 (1979) (publication not required for DOI guidelines stating that an officer who delegates authority does not divest himself of it). Consequently, the Administrator’s delegation regarding the Avenal permit application is precisely the type of delegation for which publication is not required.



This analysis is not altered by EPA's past decision, as a matter of policy, to publish its EAB procedures in the CFR. Part 124 interweaves legislative and procedural rules. EPA chose to publish the procedural rules, including the references to the Regional Administrator in 40 C.F.R. §§ 124.15, 125.16 and 124.19 among other places, in order help the public understand the context for the rights to submit public comments and appeal a final permit decision created in Part 124. This good-government choice does not change the provisions' references to the Regional Administrator as "internal personnel rules and practices of an agency"; nor, therefore, does it nullify the exemption established in § 552(b)(2). The Agency could, if it wished, revise the CFR to codify this particular one-time delegation, but it has no legal obligation to do so. In this case, EPA believes that clarity is not served by changing the CFR text. Nor is the public interest served; rather, all members of the public will have received actual and timely notice of the delegation to the Assistant Administrator by virtue of the supplemental statement of basis that explains why the Administrator has issued this delegation and by the placement of the delegation in the public docket for this permit. Therefore, as a matter of policy, the agency has the discretion to decide not to revise the CFR to accommodate the one-time delegation.

In short, the Administrator's decision to make this delegation without providing notice and an opportunity to comment and without revising Part 124 to memorialize this delegation is consistent with the APA.