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

IN THE MATTER OF:	)	Appeal No.
	)	
AVENAL ENERGY PROJECT	)	PSD Approval No.
	)	SJ 08-01
	)	

PETITION FOR REVIEW

Ingrid Brostrom
Center on Race, Poverty & the Environment
47 Kearny St. Ste. 804
San Francisco, CA 94108
(415) 346-4179 ext. 302
(415) 346-8723 (fax)

Laura Baker
Center on Race, Poverty & the Enviroment
1302 Jefferson St. Ste. 2
Delano, CA 93215
(661) 720-9140 ext. 303
(661) 720-9483 (fax)

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INTRODUCTION

Pursuant to 40 C.F.R. section 124.19(a), El Pueblo Para El Aire y Agua Limpio (El Pueblo), petitions for review of the conditions of the Avenal Energy Project Prevention of Significant Deterioration (PSD) Permit Number SJ 08-01, which Regina McCarthy, Assistant Administrator of the Office of Air and Radiation (OAR) for the Environmental Protection Agency (EPA) issued to Avenal Power Center, LLC (APC) on May 27, 2011. The permit at issue authorizes APC to construct and operate a new 600 megawatt natural gas-fired combined cycle power plant in Avenal, California.[1] Because the permit fails to include necessary permit conditions, fails to make necessary findings, is based on erroneous legal interpretations, and raises important policy considerations that the Environmental Appeals Board (Board) should address, review is appropriate pursuant to 40 C.F.R. Part 124.

THRESHOLD PROCEDURAL REQUIREMENTS

El Pueblo satisfies the threshold requirements for filing a petition for review under Part 124. El Pueblo has standing to petition for review of the permit decision because its members live in the communities that will be impacted by the Energy Project's emissions and because it participated in the public comment period on the draft permit and at the public hearing on April 12, 2011. 40 C.F.R. § 124.19(a); Petitioner's Comment Letter (Comments) (Exhibit 2). The issues raised by Petitioners below were raised with EPA during the public comment period, are directly related to EPA's response to public comments, or were not reasonably ascertainable during the comment period. Consequently, the Board has jurisdiction to hear Petitioner's timely request for review. 40 C.F.R. Part 124.

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[1] A copy of the final AEP PSD permit is attached as Exhibit 1.

FACTUAL BACKGROUND

Avenal Power Center applied for a PSD permit for the Avenal Energy Project (Energy Project) in February 2008. EPA notified APC that its application was complete on March 18, 2008. On June 16, 2009, Region 9 released a proposed permit and statement of basis for public comment. EPA accepted public comment through October 2009.

On February 9, 2010, during the pendency of the APC permit, EPA established a primary National Ambient Air Quality Standard (NAAQS) for nitrogen dioxide (NO2) based on a 1-hour averaging time (1-hour NO2 NAAQS). The rule became effective April 12, 2010. 75 Fed. Reg. 6474 (Feb. 9, 2010). Thereafter, on June 22, 2010, EPA established a primary NAAQS for sulfur dioxide (SO2) based on a 1-hour averaging time (1-hour SO2 NAAQS), which became effective on August 23, 2010. 75 Fed. Reg. 35,520 (June 22, 2010). Finally, on January 2, 2011, greenhouse gases (GHGs) became "subject to regulation" under the Clean Air Act (CAA). 75 Fed. Reg. 17004, 17019 (April 2, 2010). EPA did not include grandfathering provisions in any of these rules.

On April 1, 2010, EPA issued a memorandum, addressed to all regional administrators, confirming that permits issued on or after April 12, 2010, must be supported by a demonstration that the source will not cause or contribute to a violation of the hourly NO2 NAAQS. *See* 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) (Exhibit 3).

In response to the NO2 rulemaking and in conformity with the Page Memorandum, on May 6, 2010, EPA requested that APC provide a demonstration that the project would not violate

the 1-hour NO2 NAAQS. APC attempted, but was unable to make the required demonstration. *See* EPA's May 2011, Response to Comments (Response) at 78.

Meanwhile, APC's application had been pending beyond the one-year deadline by which Section 165(c) of the Act requires EPA to grant or deny a PSD application. APC brought suit in Federal District Court to compel EPA to issue a final decision. The Assistant Administrator of OAR submitted a declaration representing to the Court that EPA would issue a final permit decision in accordance with 40 C.F.R. § 124.15 by May 27, 2011. The declaration also announced EPA's intention to grandfather the Energy Project from compliance with the new NAAQS and GHG standards, in a departure from its earlier stance. On March 1, 2011, EPA Administrator, Lisa Jackson, issued a memorandum temporarily re-delegating permitting authority from the Regional Administrator to the Assistant Administrator of OAR.

EPA issued a Supplemental Statement of Basis on March 4, 2011 and held a public hearing on April 12, 2011 to receive public comment.

The United States District Court for the District of Colombia issued an order on May 26, 2011, requiring that EPA "issue a final agency action, either granting or denying [APC's] permit application, no later than August 27, 2011." *Avenal Power Center, LLC v. USEPA et al.*, 2011 U.S. Dist. LEXIS 56251, *2.

EPA approved APC's PSD permit application for the Project on May 27, 2011 without requiring a demonstration that the source will not cause or contribute to a violation of the hourly NO2 and SO2 standards and without requiring the source to meet emission limitations for GHGs. EPA publically announced that it may similarly grandfather 10 to 20 currently pending PSD applications.[2]

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[2] EPA Plan to 'Grandfather' Key Air Permit Raises Major Legal, Policy Queries," InsideEPA.Com (March 7, 2011) (available at: http://insideepa.com/Inside-EPA/Inside-EPA-03/04/2011/epa-plan-to-grandfather-key-air-permit-

The Energy Project is proposed to be built and operated in Avenal, California, just a few miles from the communities of Avenal, Huron, and Kettleman City. EPA admits that all three of these communities include "populations of interest" for the purposes of analyzing the impacts of the project on overburdened communities. Supplemental Statement of Basis ("SSB") at 17-18. As EPA acknowledges, these communities have very high (more than 85 percent) people of color populations, are highly linguistically isolated, and are predominately low-income. *Id.* They are also disproportionately impacted by pollution sources. *Id.* at 25.

Even without a new 600-megawatt fossil fuel power plant, these communities are burdened by multiple environmental harms. The San Joaquin Valley is one of the worst-polluted air basins in the nation and suffers from "some of the highest PM2.5 levels in the country." *Id.* at 18. Drinking water in these rural communities is contaminated with high levels of arsenic, benzene, and other pollutants. Response at 82. Toxic pesticides and other agricultural chemicals applied to surrounding agricultural fields can drift into the homes and yards of local residents, many of whom also work in the fields. *Id.*

Additionally, Kettleman City is located adjacent to the Interstate 5 freeway, defunct oil and natural gas extraction operations, a sewage sludge processing operation, and the state's largest hazardous waste landfill, which was recently fined $300,000 for violations of its PCB handling permit. Letter from Earthjustice (April 12, 2011) at 14. Together, these impacts contribute to, among many other harms, higher-than-average asthma prevalence and asthma-related hospitalizations and emergency room visits. SSB at 22, 24. These communities are plagued by high unemployment and lack of access to health care, making it more difficult to

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raises-major-legal-policy-queries/menu-id-153.html) (reporting that "[Assistant Administrator] McCarthy noted EPA would apply the policy to other permits in similar situations but has not yet identified them, except to say it expects it will affect 10 to 20 permits nationwide."

cope with the health impacts associated with the high levels of pollution in the area. *Id.* at 17, 25.

Recent developments highlight health disparities faced in the communities. In 2008, residents of Kettleman City uncovered an unprecedented spike in birth defects and infant deaths, which officials ultimately determined affected 11 children. Residents estimated that the birth defect cluster affected nearly a quarter of all children born within an 18-month time period beginning in September 2007. Factors that increase risk of birth defects include genetic predisposition, at risk behaviors, and environmental exposures. While a State sponsored survey was unable to determine a common cause for the birth defects, the investigation ruled out the possibility that mothers' health or lifestyle could have caused the birth defects. (California EPA and California Department of Public Health, Investigation of Birth Defects and Community Exposures in Kettleman City, California 60 (December 2010), *available at* http://www.calepa.ca.gov/envjustice/Documents/2010/KCDocs/ReportFinal/FinalReport.pdf).

ISSUES PRESENTED FOR REVIEW

Petitioner respectfully requests that the Board review the following issues:

1. EPA erred by failing to require a demonstration of the 1-hour NO2 NAAQS, 1-hour SO2 NAAQS, and application of the Greenhouse Gas Best Available Control Technology (BACT) requirements.

2. EPA created illegal grounds for grandfathering facilities from substantive PSD requirements.

3. EPA's actions violate the Administrative Procedure Act (APA) and Due Process Clause of the United States Constitution.

4. EPA's removal of the Regional Administrator's approval authority over the permit is unlawful without a rulemaking.

5. EPA abused its discretion by failing to identify disproportionate human health and environmental effects in its environmental justice analysis.

6. EPA abused its discretion by failing to address disproportionate cumulative impacts in its environmental justice analysis.

STANDARD OF REVIEW

The Board reviews a permitting authority's final permit decision if the decision is based on "a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review." *In re N. Michigan Univ.*, PSD Appeal No. 08-02, slip op. at 10 (EAB Feb. 18, 2009) (*citing* 40 C.F.R. § 124.19(a)). As part of its review, the Board determines "whether the permit issuer 'duly considered' the issues raised in the comments and whether the approach ultimately adopted by the [permit issuer] is rational in light of all information in the record." *In re Shell,* 13 E.A.D. 357, 386 (EAB 2007) (*quoting In Re Gov't of D.C. Mun. Separate Storm Sewer.,* 10 E.A.D. 323, 342 (EAB 2002)). The rationale for the decision must be "adequately explained and supported in the record." *Id.* at 386 (*citing In re City of Moscow, Idaho,* 10 E.A.D. 135, 142 (EAB 2001); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567-68 (EAB 1998)). Furthermore, "two differing explanations" render the rationale for the permit determination unclear and subject to remand. *In re Austin Powder Co.,* 6 E.A.D. 713, 719-20 (EAB 1997) (*citing In re GSX Servs. of S. Carolina, Inc.,* 4 E.A.D. 451, 454 (EAB 1992) (holding that the administrative record must reflect the "considered judgment" necessary to the support the permit determination)). Lastly, OAR's interpretations of statutory or regulatory provisions are not entitled to any deference. *See, e.g., In re Lazarus, Inc.*, 7 E.A.D. 318, 351 n.55 (EAB 1997) (noting the general rule that agencies may not advance "the doctrine of administrative deference . . . because the Board serves as the final decisionmaker for EPA in cases within the Board's jurisdiction").

ARGUMENT

OAR, in approving the Energy Project's permit without requiring compliance with new federal air quality standards, attempts to rewrite the rules in order to permit the construction of this major new power plant in one of the most polluted environmental justice communities in the country. EPA's proposed action violates the plain language of the Clean Air Act, undermines clear Congressional intent in adopting the PSD program, has no rational factual basis, ignores public health impacts in nearby communities, and discriminates against Latino residents in Kettleman City, Huron and Avenal. OAR's decision is based on clearly erroneous finding of facts and conclusions of law, and also involves important matters of policy and discretion that this Board should carefully review.

I. EPA ERRED BY FAILING TO REQUIRE A DEMONSTRATION OF THE 1-HOUR NO_2 NAAQS, 1-HOUR SO_2 NAAQS, AND APPLICATION OF THE GHG BACT REQUIREMENTS.

OAR's decision to allow the Avenal Power Center to construct a power plant without demonstrating that the facility will not cause or contribute to violations of NO2 and SO2 national ambient air quality standards ("NAAQS") in place at the time of approval is a violation of law. The agency also erred when it relieved APC from its obligation to apply best available control technology for greenhouse gases.

The agency's actions violate the plain language of the statute which requires a demonstration of compliance with all NAAQS in place at the time the permit is approved. To support its decision, EPA must clear three distinct hurdles: it must demonstrate that 1) the language of the act is ambiguous; 2) Congress has authorized EPA to exempt facilities from the statute's requirements; and 3) the five factors that EPA has chosen to support its grandfathering

determination are factually and legally valid as applied to the Energy Project. EPA fails to make any of these demonstrations.

A. EPA Violated Plain Language of the Act.

To receive a permit, sources must demonstrate that they "will not cause, or contribute to, air pollution in excess of any . . . national ambient air quality standard," and that they are "subject to the best available control technology for each pollutant subject to regulation . . . ." CAA §§ 165(a)(3) and (4). The statutory language is unambiguous – a new source cannot cause or contribute to a violation of any NAAQS and must be subject to best available controls for all regulated pollutants. Unless the source can meet these criteria, it may not be built. *See* CAA § 165(a) (prohibiting the construction of major emitting facilities that do not comply with the applicable permitting requirements where "construction is commenced after the date of the enactment of this part."). EPA has no statutory authority to waive these requirements.

During public comment, El Pueblo and others objected to EPA's proposal to issue a PSD permit in violation of the plain language of the statute. Comments at 2 (*citing* 42 U.S.C. § 7475(a)(3)-(4)). EPA argues that despite the plain language of the Act, it has "discretion" based on a need to read the sections that require a demonstration of compliance with NAAQS (CAA § 165(a)(3)-(4)) in conjunction with the section that requires EPA to make a decision on a permit application within one year of the date EPA deemed the application complete (CAA §165(c)). Response at 56. EPA explains that "where a strict reading of section 165(a)(3) would frustrate Congressional intent that EPA act in a timely manner, the Agency has discretion to interpret the reach of section 165(a)(3)." *Id.* However, EPA cites no authority to support its contention that a statute's plain language ceases to control when an agency perceives it to conflict with another statutory provision. *See id.*

In fact, the Supreme Court rejected this very proposition in *General Motors Corp. v. United States*, 496 U.S. 530 (1990). The Court held that delay on the part of EPA does not affect the ability or obligation of EPA to enforce other requirements of the Act, unless Congress has provided some express authority or direction for EPA to ignore otherwise applicable requirements when EPA misses a deadline for acting on a permit. *Id.* at 535, 540. The Board should reject EPA's attempt to carve out an exception to well-established law dictating that the plain language of a statute shall control.

EPA's argument fails factually as well. Sections 165(a) and 165(c) are not in conflict. Section 165(c) requires EPA to act, not approve, within one year. Should the statutory deadline approach and a project cannot be shown at that time to comply with federal air quality standards and best available control technology, then EPA must disapprove the project. APC's remedy for delay is a deadline action under section 304(a)(2) to compel action; it is not entitlement to approval by avoiding compliance with substantive portions of the statute.[3] EPA's grandfathering scheme did not remedy EPA's failure to meet the one-year deadline; it merely caused EPA to violate an additional statutory obligation.

B. Congressional Intent Is Not Relevant, Nor Does It Support EPA's Action.

EPA requests that the Board look beyond the plain language of the Act to infer Congressional intent in support of its action. Response at 55-56. However, the Board should not defer to the agency's interpretation of legislative intent when a statute's language is plain on its face. *In re Rochester Pub. Utils.*, 11 E.A.D. 593, 603-08 (EAB 2004) (Board generally will give effect to unambiguous regulatory language); *see also In re Arecibo & Aguadilla Regional*

[3] CAA § 304(a)(2) ("[A]ny 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.").

Wastewater Treatment Plants, 12 E.A.D. 97 n.60 (EAB 2005) (A fundamental canon of statutory construction is that if language is plain and unambiguous it must be given effect.).

Even if the Board looks beyond the unambiguous language of the statute itself, the Act's legislative history does not support EPA's interpretation. To infer congressional intent, EPA cites a Report of the Committee on Public Works, which states "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." Response at 56, *citing* S. Rep. No. 94-717, at 26 (1976). This argument is absurd since requiring adherence to substantive statutory requirements for air quality standards cannot be the "bureaucratic delay" Congress envisioned. The Committee stated that the "chief tool to be used in implementing the no significant deterioration requirements [would be] the permit" and explained that State and Federal agencies must act "responsibly on . . . permit applications and those studies necessary to judge the impact of an application." S. Rep. No. 94-717, at 26 (1976). The Committee did not find that avoidance of bureaucratic delay should take precedence over the responsible review of permit applications and "those studies necessary" to evaluate project impacts. *Id.*

Additionally, EPA cites a House Committee Report stating that the Committee "authorized extensive grandfathering of both existing and planned sources" in order to avoid construction and permitting delays. Response at 59, *citing* H.R. Rep. No. 95-294, at 171 (1977). Again, EPA excerpts only those portions of legislative history which appears to support its position, without providing relevant context. A complete reading of the Report demonstrates that the House Committee sought to prevent undue delays in possible land reclassifications as a result of the 1977 Amendments. H.R. Rep. No. 95-294, at 172 (1977). The report concludes that

the grandfather provisions supplied by Congress, in section 165(b) would be sufficient to "assure that no moratorium" on current development would result from the 1977 Amendments. *Id.*

In fact, the statute's legislative history supports El Pueblo. In adopting the PSD program in 1977, Congress foresaw a need to grandfather some sources from new PSD permit requirements and provided specific relief to these sources in section 168(b). Congress provided no further authority to EPA to waive or grandfather additional sources from PSD requirements. Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); *see also NRDC v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007).

Further, Congress's intent appears in the Act itself. Congress outlined the purposes of the PSD program in section 160 of the Act:

> (1) to protect health and welfare from any actual or potential adverse effect which may be reasonably anticipate[d] to occur from air pollution . . . not withstanding attainment and maintenance of all national ambient air quality standards;
> (2) to preserve, protect, and enhance air quality in national parks . . . and other areas of special . . . value;
> (3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;
> (4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and
> (5) to assure that any decision to permit increased air pollution . . . is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

42 U.S.C. § 7470. EPA's stated reasons for exempting the Avenal facility from NAAQS compliance, including equity and fairness concerns, find no support in the language of the Act. EPA's proposed approach also undermines the fundamental policy choices that Congress made in adopting the PSD program: (1) that it is preferable to prevent air pollution from becoming a

problem in the first place; and (2) that controls should be installed when new sources are being constructed rather than as retrofits on existing sources. *See* S. Rep. No. 95-127, at 11 (1977). Thus, the Board should review OAR's violation of the unambiguous statutory requirements.

C. EPA's Sudden Change in Interpretation Is Not Entitled to Deference.

EPA's new interpretation directly contradicts EPA's prior guidance and is not entitled to much deference. As recently as April 2010, EPA publicly announced its interpretation that each final PSD permit decision must reflect consideration of any NAAQS in effect at the time the permitting agency issues a final permit. Page Memo at 2 (citing extensive case law establishing that permitting decisions of regulatory agencies must reflect the law in effect at the time the agency makes a final determination on a pending application.).[4]

El Pueblo challenged EPA's proposal to grandfather the Energy Project based on EPA's own interpretation that the "meaning of the phrase 'subject to regulation' in the PSD provisions and associated regulations covered any NAAQS in effect at the time of a final permit decision." Comments at 2. EPA responded that its "overall interpretation of the phrase 'subject to regulation' . . . is unchanged by this decision to grandfather the Avenal permit." Response at 80. EPA's rationalization is inconsistent and flawed. In fact, EPA admits that "[i]n ordinary circumstances, [grounds for denying a permit would] clearly include failing to show a source will not cause a violation of the NAAQS or meet the BACT requirement for each pollutant subject to regulation." Response at 65.

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[4] *See also* "Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs." 75 Fed.Reg. 17004 (2010). EPA Administrator Stephen Johnson Memorandum (December 18, 2008); *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB Nov. 13, 2008) (Board remanded a PSD permit because of flawed assertions by EPA relating to the phrase "subject to regulation"); *In re Phelps Dodge Corp.* 10 E.A.D. 460, 478 n.10 (EAB May 21, 2002) (Board held "applicable requirements" of the Clean Water Act and its regulations to "include all statutory requirements that take effect prior to issuance of permit...").

EPA simply carves out a narrow exception to its interpretation of "subject to regulation," for this project. EPA's new and inconsistent interpretation, even so narrowly defined, is not entitled to deference. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446 n. 30 (1987); *see also Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457 (9th Cir. 1992) (No deference to the agency's "expertise" when the agency position has fluctuated); *Sierra Club v. Martin*, 168 F.3d 1, 4 (11th Cir. 1999) (Agencies must scrupulously follow the regulations and procedures promulgated by the agency itself).

EPA fails to support its new interpretation of its regulation with relevant law or analysis. In fact, EPA's only rationale for deviating from the standard is the "extraordinary circumstances present" whereby "denying this permit on the basis for the 1-hour NAAQS for NO2 and SO2 and the BACT requirement for GHGs would frustrate Congressional intent." Response at 65. First, as detailed above, denying the permit would not frustrate congressional intent. Second, EPA has no discretion to deviate from a consistently held agency position based solely on vague and imprecise references to Congressional intent. *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, at 62 ("[A]n agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required . . . in the first instance.") (*quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

The Board should not afford the agency any deference for its sudden departure from well-established interpretations of its PSD permitting obligations and the Board should review OAR's clearly erroneous conclusions of law.

D. EPA's Grounds for Grandfathering the Energy Plant Are Legally and Factually Flawed.

Congress did not include any grandfathering provision in the statute. Notwithstanding, EPA creates five factors which it used to justify grandfathering the Avenal Energy Project from demonstrating compliance with otherwise applicable NAAQS. These factors include: (1) emissions from the proposed facility, (2) permit timing, (3) unanticipated challenges, (4) addressing NO_2 caused the additional delay, and (5) legal precedence. SSB at 6. EPA cannot simply create exceptions to its statutory obligations, no matter how many criterion it establishes to justify itself. *NRDC v. EPA*, 489 F.3d 1250, 1260 (D.C. Cir. 2007) ("EPA may not, consistent with *Chevron*, create an additional exception on its own."). The Board should reject EPA's attempt to grandfather the Avenal Energy Project.

Even if the agency could develop such criteria, each of the five factors is legally and factually flawed as applied to the Avenal Energy Project. Since EPA relies on these factors in combination to exempt the Energy Project from new standards, the Board should remand if even one of the factors is based on an erroneous finding of fact or conclusion of law as discussed below.

(1) Emissions from the Proposed Facility: El Pueblo commented that EPA applied the wrong standard when it proposed to exempt the Avenal facility based on its finding that the facility would not violate any NAAQS previously in effect. Comments at 3. The facility's compliance with outdated requirements is not an indicator that the project will preserve public health. *Id.* This is especially true in light of the agency's own finding that the previous NO2 NAAQS was insufficient to protect public health with an adequate margin of safety against adverse respiratory effects. SSB at 14. Moreover, the facility's compliance with annual NO2 standards is not indicative of whether it will satisfy hourly NO2 standards, since the new

standard measures accounts for short-term fluctuations in NO2 levels ignored by the annual standard. In fact, multiple modeling attempts revealed the Energy Project could not meet the hourly NO2 standard. Response at 78.

In response, EPA argues that "when the expected air quality is balanced against the amount of time that EPA has been considering this permit application and the impact this delay had on the permit applicant, EPA believes grandfathering is justified." Response at 74.

This does not address El Pueblo's argument but instead creates a new criterion for grandfathering the permit not present in the statement of basis, one of balance. However, "an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *In re Deseret Power Electric Cooperative* at 62 (*quoting Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42). EPA fails to support the inclusion of a new factor.

(2) Permit Timing: El Pueblo commented that EPA did not cause any delay beyond the one-year statutory deadline since a required endangered species analysis "did not conclude until August 2010, well after the statutory one-year period had ended." Comments at 4; *see also* Letter from Susan K. Moore, U.S. Fish and Wildlife Service, to Gerardo C. Rios, EPA (Aug. 9, 2010). Since EPA did not cause delay beyond the statutory deadline for agency action, EPA's legal authority to justify grandfathering the permit does not apply.

EPA responded that judicial decisions recognize it may be appropriate to apply retired legal standards regardless of the cause of the delay. However, in each of cases cited by EPA, the decisionmaking agency caused the delay. *See, e.g., Application of Martini*, F.Supp.395, 401 (S.D.N.Y. 1960); *Mitchell v. Overman*, 103 U.S. 62, 64-65 (1880). EPA cites no legal authority

to support its position that an agency may rely on out-dated legal standards when the agency did not cause the delay. *See* Response at 64-65.

Additionally, EPA argues that the applicant experiences the effects of delay regardless of which agency is responsible. Response at 64-65. However, as noted in public comment, the delay has largely been to Avenal's benefit since it allowed Avenal to supplement its application to support compliance with the Clean Air Act and the Endangered Species Act. *See, e.g.*, Letter from Gary Rubenstein, Sierra Research, to Gerardo Rios, EPA (May 11, 2010) (outlining Avenal's responses to outstanding BACT and other issues identified by EPA). Had EPA aggressively applied the one-year deadline in section 165(c), EPA would have been forced to deny Avenal's permit application. Letter from Earthjustice (April 12, 2011) at 10. Though this argument completely undermines EPA's reliance on factors based on equity or fairness, EPA ignored this argument in its Response to Comments.[5]

(3) Unanticipated Challenges: EPA argued APC's "unanticipated challenges" related to new modeling techniques for the annual NO_2 standard should serve as part of EPA's basis for grandfathering. SSB at 6. However, EPA's response to comments referenced APC's modeling results and its finding that "Avenal could not show that its impact alone would be less than the significant impact level for 1-hour NO_2 concentrations reflected in EPA guidance." Response at 78. EPA "determined that [APC's] submission did not meet applicable EPA guidelines." Response at 77-78. In this context, it appears that APC was not challenged by the modeling techniques so much as it was challenged by its inability to demonstrate NAAQS compliance.

EPA's response not only proves that application of the "new" modeling techniques was possible, but that EPA had grounds to deny APC's permit based on these guidelines.

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[5] The agency's failure to duly consider issues raised in comments is sufficient grounds for remand. *See Gov't of D.C Mun. Separate Storm Sewer*, 10 E.A.D. at 342.

(4) *Addressing NO2 Caused the Additional Delay*: EPA claimed that, but for the challenge encountered in supplementing the APC permit to address short-term NO2 emissions, the hourly SO2 NAAQS and GHG requirements would not have become applicable. EPA argued that grandfathering this application is an equitable approach to avoid further delays in completing action on this permit in contravention of Congressional intent. Response at 79.

With this response, EPA seeks to justify grandfathering on the grounds of equity. Congressional intent in creating the PSD program, as set out in section 160, is to protect health and welfare and improve air quality. 42 U.S.C. § 7470. The Act and its legislative history make no mention of equity or fairness to the applicant over public health as a policy objective. *See* S. Rep. No. 94-717 (1976); H.R. Rep. No. 95-294 (1977). EPA's creation of new precedential policy based on the tenant of equity is, therefore, not supported by law or congressional intent.

Moreover, with this argument, EPA ignores its ability to deny the permit if the applicant is unable to demonstrate compliance with the new standards. Denial of the permit would also "avoid further delays in completing action on the permit," without violating substantive requirements of the act.

(5) *Legal Precedence*: As the final factor in grandfathering the Energy Project from NAAQS compliance, EPA argues that case law supports its ability "to issue a permit decision based on the legal requirements that were applicable at the time the Agency should have taken action. SSB at 10, *citing Mitchell*, 103 U.S. at 64-65 (1880); *Martini*, 184 F.Supp. at 401-402, *Fassilis v. Esperdy*, 301 F.2d 429, 434 (2d Cir. 1962).

El Pueblo argued that EPA's reliance on the dicta in *Martini* was misplaced because "[t]he court did not...afford the agency authority to fashion and administer it's [sic] own remedy." Comments at 6, (*citing Martini*, 184 F. Supp. at 399-402). EPA responded that the

court extended the principle of 'the act of that court shall prejudice no man' to the act of an administrative agency (not just the act of the court) in order to effectuate Congressional intent with respect to individuals like Martini." Response at 62 (*citing Martini,* 184 F. Supp. at 400).

EPA misrepresents *who* has authority to remedy unlawful delays. *Martini* held that "it is the duty of the *court* to see that the parties shall not suffer by the delay." *Id.* at 402 (emphasis added). Further, EPA references to *Fassilis* are unavailing as the case supports El Pueblo. In *Fassilis,* the Court notes that Congress elected not to "enact a savings clause to protect pending administrative proceedings" and thus found that Congress intended a new rule to apply to pending actions. *Fassilis*, 301 F.2d at 433; *see also Zifftin v. United States*, 318 U.S. 73 (1943) (where governing statute is amended after applicant submits his permit application but before agency renders its decision, the agency is "required to act under the law as it existed" at the time of its decision rather than at the time of application); *State of Alabama v. EPA*, 557 F.2d 1101, 1110 (5th Cir. 1977) (appropriate standards to be applied to a permit are those in effect at time of initial permit issuance)). None of the cases referenced in *Fassilis* address the power of an agency to fashion a remedy for its own delay. *Fassilis*, 301 F.2d 429.

EPA's response to comments fails to provide authority to support its argument that it has the power "to issue a permit decision based on the legal requirements that were [previously] applicable" much less to support the factors EPA employs in doing so. SSB at 10. Thus, the Board should review OAR's clearly erroneous conclusion of law.

II. EPA'S ACTIONS VIOLATE THE ADMINISTRATIVE PROCEDURE ACT AND DUE PROCESS CLAUSE

EPA creates two contradictory explanations as to the precedent it sets in allowing the Energy Project to escape compliance with the standards in place at the time it issues the permit. On the one hand, EPA explains that "this decision in the context of Avenal should not be viewed

as establishing a general rule or precedent applicable to any other permit application." Response at 69. On the other, EPA also explains that it "has made clear that we intend to enable similarly situated permit applications to receive the same treatment as Avenal." Response at 72. EPA cannot have it both ways. If the agency intends its new interpretation on grandfathering to apply more generally, it must comply with the Administrative Procedures Act. If EPA intends its interpretation to apply only to Avenal, it violates the Equal Protection Clause by singling out one facility for disparate treatment.

A. The Administrative Procedure Act Applies to EPA's New Interpretation

An agency must satisfy the APA's formal rulemaking requirements when it fundamentally changes the agency's interpretation of a substantive regulation. *See Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("Once an agency gives its regulations an interpretation, it can only change that interpretation as it would modify the regulation itself: through notice and comment rulemaking."). An agency engaged in rulemaking under the APA must publish the proposed rule in the Federal Register; provide notice of the proposed rulemaking and hearing; provide an opportunity for interested persons to participate; receive and consider comments from all interested parties; and publish the rule as adopted in the Federal Register, incorporating a statement of its basis and purpose. 5 U.S.C. § 553 (b)-(d).

Here, El Pueblo challenged EPA's adoption of a new interpretation of the Clean Air Act and its regulations without engaging in a formal rulemaking process. Comments at 6-7, *citing* SSB at 1, 6; *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87 (1995). This new interpretation contradicts EPA's previous interpretation of the Act and changes existing rights and duties. Assuming that EPA is allowed to reinterpret the plain language of the Clean Air Act requirements regarding NAAQS compliance, because it intends to use its new interpretation to

exempt 10 to 20 facilities from compliance[6], EPA must first comply with Administrative Procedure Act (APA) rulemaking requirements.

While EPA admits to changing its "prior interpretation" of the regulation, EPA argues that this action need not conform with APA requirements because it is an interpretive rule. Response at 70-71 (*citing Miller v. California Speedway Corp.* 536 F.3d 1020, 1032-33 (9th Cir. 2008)). In *Miller*, the Court found that a technical assistance manual explaining ambiguous regulatory language one year after an agency issued the regulation did not require a notice and comment rulemaking. *Id.* The Court reached this conclusion because the manual did not change the agency's prior understanding, and therefore was "interpretive," rather than "legislative." *Id.* at 1033. EPA's action here is legislative, as it changes the agency's prior understanding and application of law. *See* Response at 70 (EPA admits that it "no longer subscribes to the strict reading of 40 CFR 52.21(k)").

Further, in *United States v. Magnesium Corp. of America*, 616 F.3d 1129, 1138-1142, the Court determined that APA rulemaking applies to an agency's reinterpretation of previously definitive agency interpretations as opposed to previous temporary or unclear interpretations. Here, EPA issued previous final definitive guidance that newly issued permits must comply with standards in effect at the time issued with no equivocation. Page Memo at 2. Therefore, EPA's new interpretation is subject to the APA.

EPA also claims that its change in interpretation should be considered an "ad hoc adjudication to formulate standards of conduct" as recognized by the Supreme Court in *SEC v. Chenery Corp.* 332 U.S. 194, 199-203 (1947). However, *Chenery* also stated that where an agency has the ability to make new law prospectively through the exercise of its rule-making

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[6] *See* footnote 2, *supra*.

powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct. Most importantly, the Court recognized an agency's ability to make case by case determinations only in the absence of statutory and regulatory authority. *Id.* at 202-204. Here, unlike in *Chenery*, there is clear statutory and regulatory authority that a permit must comply with standards that in effect at the time of issuance. *Id.*

EPA's failure to comply with APA rulemaking results from a clearly erroneous conclusion of law subject to Board review.

B. EPA Violates the Equal Protection Clause.

If EPA's decision on APC's permit does not apply to any other similarly situated facility, then EPA has violated the Due Process Clause of the U.S. Constitution. The Due Process Clause prohibits the Federal government from taking intentional action to treat similarly situated individuals differently. EPA, in exempting the Energy Project from requirements applicable to all other PSD permit applicants, treats similarly situated applicants differently. Comments at 7. EPA confirms this disparate treatment by explaining that its "decision in the context of Avenal should not be viewed as establishing a general rule or precedent applicable to any other permit application." Response at 69.

In light of this statement, EPA's contradictory response that it "intend[s] to apply the same transition policy to others who are in a similar situation to Avenal," is disingenuous. *See* Response at 72. In fact, EPA admits that it "has not yet determined the exact form or scope the action that we intend to take to more precisely define similarly situated sources." *Id.* Thus, while EPA's denies treating similarly situated applicants differently from APC, it provides no support for its denial.

EPA's action also treats similarly situated individuals differently. El Pueblo commented that:

> EPA proposed to exempt an emission-causing power plant from applicable emission reducing regulations in an area already bearing a disproportionate brunt of the environmental load with an 85% minority population, 34% of whom are linguistically isolated. Meanwhile, EPA applies current standards to other PSD applicants, whose projects are not located in a disadvantaged and already decimated region, without grandfathering them.

Comments at 8.

In response, EPA argues that commenters failed to meet the requirements for a procedural due process claim since they "have not identified a property interest that has been affected by EPA's action or explained how this action would deprive anyone of such a property interest without adequate procedural rights." Response at 72, *citing Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000).

While it can be inferred from El Pueblo's comments that individuals near the proposed Energy project site seek to protect their interests in safe housing and enjoyment of residence free from harmful pollution, to preserve an argument for review, a comment need only be raised with a reasonable degree of specificity. *See In re New Eng. Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001); *see also In re Westborough*, 10 E.A.D. 297, 304 (EAB 2002).

EPA's response fails to recognize that local residents, as opposed to applicants, also have equal protection rights. This is especially true in light of the demographic information provided by EPA which demonstrates that populations nearest the site are over 85 percent Latino. Latino residents near the proposed project site will not be treated similar to individuals located around other proposed facilities that EPA has not grandfathered from applicable requirements.

Furthermore, instead of providing a rational basis for EPA's differential treatment in its response to comments, EPA responds that it will develop a rational basis to distinguish applications sometime in the future. Response at 72. Not only does this "assurance" demonstrate that EPA is currently acting without a "rational basis," any future attempts to establish a "rational basis" will be nothing more than a post hoc rationalization to support action already taken. This is a clearly erroneous conclusion of law and is an important matter of policy that warrants the Board's consideration.

III. EPA'S REMOVAL OF THE REGIONAL ADMINISTRATOR'S AUTHORITY IS UNLAWFUL.

PSD permitting regulations only authorize the Regional Administrator to issue a final permit decision. 40 CFR § 124.15; *see also* 40 C.F.R. §124.19(f)(2) (reiterating that the "final permit decision shall be issued by the Regional Administrator. "). However, on March 1, 2011, EPA Administrator Lisa Jackson issued a memo temporarily delegating permitting authority to the Assistant Administrator for OAR. The Administrator cannot simply rewrite applicable regulations governing issuance of such PSD permits without first conducting notice and comment rulemaking under the APA. 5 U.S.C.A. § 553; *see also* Section III above.

El Pueblo challenged Administrator Jackson's delegation of authority. Comments at 8.[7] In response, EPA asserts that the delegation of authority in this case was not unlawful because "a

[7] El Pueblo also challenged EPA's delegation based on the fact that OAR has no established PSD permit processing procedure, no historical or systematic practice of application evaluation and no regular staff designated to review and issue PSD permits. Comments at 8. EPA's response to comments lacked any reasoning or detail demonstrating that OAR has established a regular, fair, and systematic approach to permit review. See Response at 71. For example, EPA's allusions to OAR's "experience with PSD permits" provides no reference to any established and systematic practices of evaluation. *See In re Amerada Hess Corp. Port Reading Refinery*, 12 E.A.D. 1, 19 (EAB 2005) ("Ultimately, the failure to *reasonably* respond to significant comments is itself sufficient grounds for remanding the Permit." (emphasis added) (*citing In re Washington Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 586, 589-90 (EAB July 24, 2004)).

one-time delegation of this nature is a procedural rule."[8] Response at 71. In its memorandum in support of this position, EPA cites *James V. Hurson Assocs., Inc. v. Glickman* to assert that re-delegation is procedural. 229 F.3d 277, 281 (D.C. Cir. 2000). *Glickman* is not analogous. In *Glickman*, the Court held that the agency could do away with one of three methods for receiving requests for the approval of food labeling since the change would not have a "substantive impact." *Id.* at 281. However, in *Home Health Agencies*, the case relied on in *Glickman*, the Court held that re-delegating decision-making authority to a different staff member was a substantive issue. 690 F.2d at 951. This situation is analogous to *Home Health Agencies*, because here the Agency has re-delegated authority from Region 9 staff to Headquarters staff. Thus, re-delegation is a substantive change.

Further, an agency decision is not considered procedural if it "narrowly limits administrative discretion or establishes a binding norm" or if it "is inconsistent with or amends an existing legislative rule." *Sacora v. Thomas,* 628 F.3d 1059, 1067 (9th Cir. 2010) (finding a subsequent agency document to be procedural where it merely provided clarifying guidance to agency officials). In contrast to *Sacora*, here EPA is not merely clarifying existing procedure, but adopts new policy that is inconsistent with an existing regulation.

In another case relied upon by EPA, *United States v. Gonzales & Gonzales Bonds and Ins. Agency, Inc.*, the Court held that delegation of authority was procedural because the statute expressly provided the agency with the authority to delegate as it saw fit. 728 F.Supp.2d 1077, 1084 (N.D.Cal. 2010). Here, 40 C.F.R. § 124.15 has specifically designated the Regional Administrator as having sole authority to issue final permit decisions. Since the re-delegation of

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[8] While APA does not apply to rules of agency organization, procedure, or practice, procedural rules do not include "any action which goes beyond formality and substantially affects the rights of those over whom the agency exercises authority." *Pickus v. United States Parole Board* 507 F.2d 1107 (D.C. Cir. 1974).

authority was not merely procedural, the APA requires EPA to comply with notice and comment rulemaking before delegating permit authority.

Since EPA failed to follow APA rule-making requirements before re-delegating approval authority, OAR's permit approval is invalid.

IV. EPA Failed to Identify Disproportionate Human Health and Environmental Effects In its Environmental Justice Analysis.

OAR approved APC's PSD permit without identifying the disproportionate human health and environmental effects of its decision. In so doing, EPA ignored all available evidence which demonstrated that approving the permit would cause a disproportionate impact.

EPA's action violates Executive Order 12898 and Board precedent requiring the identification of disproportionate impacts prior to issuing a permit. To avoid identifying impacts, EPA 1) relies on an inappropriate application of agency discretion; 2) makes unsupported and contradictory conclusions; 3) withholds available and germane information demonstrating disproportionate impacts; and 4) ignores all evidence in the administrative record demonstrating disproportionate impacts. These actions are a clear abuse of the agency's discretion and demonstrate a fundamental disregard for the Board's commitment to the fair and equitable treatment of all.

A. Factual Background on EPA's Environmental Justice Analysis.

EPA prepared an Environmental Justice Analysis as part of its supplemental statement of basis to address the facility's potential disproportionate impacts on low-income and minority populations. SSB at 12. EPA focused primarily on short-term NO2 concentrations because of its decision to grandfather the facility from demonstrating 1-hour NO2 NAAQS compliance coupled with its determination that the annual NO2 standard alone is insufficient to protect public health with an adequate margin of safety against adverse respiratory effects associated

with short-term exposures to NO2. SSB at 14. The EPA also included an analysis of the project's ozone and fine particle emissions, prepared during the state permitting and certification process. SSB at 12.

EPA analyzed an area encompassed by a 25-kilometer radius from the proposed facility, including the communities of Avenal, Huron, and Kettleman City. SSB at 17. EPA concluded that all three communities include "populations of interest" for the purposes of analyzing the impacts of the project on overburdened communities based on very high (more than 85 percent) minority populations, high linguistic isolation, and low-income levels. SSB at 17-18.

EPA reported the closest 1-hour NO2 monitoring data available, collected in both Visalia and Hanford, at 61.3 ppb and 50.0 ppb (61% and 50% of the 1-hour NO2 NAAQS, respectively). SSB at 18. EPA did not rely on this data to assess local impacts, but merely used the data to determine that "background levels at the monitors closest to the facility are on par with measured levels of NO2 statewide." SSB at 26. The agency did not determine whether the monitoring data was representative of the area around the proposed project site. Response at 91.

Operational emissions from the facility will result in a maximum 1-hour NO2 impact of 82.43 μg/m3 (44 ppb), which represents 44 percent of the standard (188 μg/m3 or 100 ppb). SSB at 27. APC was unable to demonstrate that the proposed project's impact alone would be less than the significant impact level for 1-hour NO2 concentrations after five months of modeling. Response at 78.

B. EPA Has Affirmative Duty To Identify Disproportionate Impacts.

Section 101 of Executive Order 12898 states, in whole:

> To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse

human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.

The Board requires the agency to consider environmental justice issues in connection with the issuance of PSD permits pursuant to Executive Order 12898. *In Re Shell Gulf of Mexico, Inc. and Shell Offshore, Inc.*, OSC Appeal Nos. 10-1 to 10-4, Slip Op at 63-4 (EAB 2010) ("Shell"); *In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121, 174-75 (EAB 1999); *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 67-69 (EAB 1997).

El Pueblo's comments challenged EPA's failure to identify and address disproportionate human health impacts as required under Executive Order 12898 and past Board decisions. Comments at 9. Specifically, El Pueblo argued that EPA had an affirmative duty to identify whether or not the project would disproportionately impact poor and minority populations before issuing a permit. *Id.*

EPA contends that "where available data is limited, and where EPA has determined that it is appropriate to grandfather this permit from demonstrating that the source will not cause or contribute to a violation of the 1-hour NO2 NAAQS, EPA does not read the Executive Order to call for EPA to reach a definitive determination that the Project will not result in disproportionate adverse impacts with respect to short-term NOx emissions." *Id.*

However, in implementing Executive Order 12898 in the context of PSD permitting, the Board has interpreted its obligation to "make achieving environmental justice part of [the agency's] mission" "to the greatest extent practicable" to *require each Region* to identify and address disproportionate impacts when there is any 'superficially plausible' claim that a minority or low-income population may be disproportionately affected by a particular facility." *In re EcoElectrica, L.P.*, 7 EAD 56, 69. EPA has thus established an appropriate benchmark for when each Region shall follow the Executive Order's directive to identify and address disproportionate

impacts. The Board has not exempted the agency from this requirement when EPA grandfathers a source from demonstrating compliance with NAAQS. In fact, the Board has held just the opposite. The Board recently remanded a permit for its inadequate environmental justice analysis where EPA did not require compliance with new 1-hour NO2 NAAQS and instead relied on compliance with outdated standards to find no disproportionate impacts. *See Shell*, OSC Appeal Nos. 10-1 to 10-4, Slip Op at 63-4 (EAB 2010).

In its Response to Comments, the agency attempts to explain its deviation from the Board's established standard arguing that the Order's use of "to the greatest extent practicable" language provides the agency with "considerable discretion . . . in determining how to address any impacts that we may identify in light of uncertainties regarding those impacts."[9] Response at 87. Given the context, EPA is presumably using this argument to apply discretion not only to how it addresses impacts, but also to limit when it must identify impacts. However, the Board has not recognized the discretion of the agency to avoid identifying impacts based on difficulty alone.[10] Since the Board has already determined when it is appropriate to comply with Executive Order 12898, the agency may not simply supersede the Board's determination based on its own discretion. *See In re Lazarus, Inc.*, 7 E.A.D. 318, 351 n.55 (EAB 1997) (noting the general rule that agencies may not advance "the doctrine of administrative deference . . . because the Board serves as the final decisionmaker for EPA.").

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[9] Additionally, the language "to the greatest extent practicable and permitted by law" applies to the Order's directive for each Federal agency to "make achieving environmental justice part of its mission," not the Order's directive to meet this standard by "identifying and addressing" disproportionate impacts. *See Hough*, 239 B.R. at 415 ("Under the canon reddendo singula singulis, "[w]here a sentence contains several antecedents and several consequents they are to be read distributively. The words are to be applied to the subjects that seem most properly related by context and applicability.") (quoting 2A Norman J. Singer, Sutherland Stat. Constr. § 47:26 (5th ed. 1992)).

[10] *See Shell*, OSC Appeal Nos. 10-1 to 10-4, Slip Op at 63-4 (EAB 2010). Since EAB did not require a demonstration of compliance with recently adopted NO2 NAAQS, presumably EAB recognized that EPA should rely on other methods for determining impacts. *Id.*

Even in the face of imperfect information, EPA must use its best judgment and available data to formulate an informed opinion on the likelihood of disproportionate impacts. Instead, here, EPA simply throws its hands up. The Board should review this clearly erroneous interpretation of law and as an important matter of policy.

C. EPA Fails to Support Its Environmental Justice Findings

The Board must remand when the agency fails to provide details regarding its environmental justice determination in the administrative record because without such details the Board is unable to judge the adequacy of the agency's analysis. *In re Knauf Fiber Glass*, 8 E.A.D. 121, 174-75 (EAB 1999). ("If an environmental justice issue is unlikely in the context of this proposed project, we need to know the basis for that conclusion.").

Throughout EPA's environmental justice analysis and its response to comments, EPA maintains that it has insufficient information upon which to assess local impacts from short-term NO2 emissions. *See e.g.* SSB at 27 ("EPA cannot reach any definitive conclusion about the specific human health or environmental impacts of short-term exposure to NO2 emissions from the facility on minority and low income populations."). However, EPA contradicts itself in the Introduction to its Response to Comments, stating that "EPA's judgment is that, despite some uncertainties and limitations in available data, emissions from this source are unlikely to add significant environmental harm to the local communities." Response at 5. This conclusion fails for lack of explanation and evidentiary support.

Not only does the agency's finding contradict its own analysis, the record is devoid of any evidence to support the agency's eleventh hour determination that "emissions are unlikely to add significant environmental harm to the local communities." *Id.*

The Board has established that "[w]ithout an articulation by the permit writer of his analysis, we cannot properly perform any review whatsoever of that analysis and, therefore, cannot conclude that it meets the requirement of rationality." *In re Government of D.C. Municipal Separate Sewer System*, 10 E.A.D. 323, 342 (EAB 2002); *see also In re Hawaii Electric Light Company, Inc*, 8 E.A.D. 66, 103-05 (EAB 1998) (rejecting similar attempts by a permitting agency to rely on conclusions not supported by sufficient explanation.).

Since EPA failed to support its finding with an explanation, analysis, or evidence, the Board should reject the agency's unsupported conclusion. Moreover, not only does the agency fail to provide any support for its conclusion, all evidence in the record suggests that the project will, in fact, disproportionately impact local communities. *See* Section D, below.

D. EPA Withheld Relevant Information from its Environmental Justice Analysis

EPA had, but withheld, necessary data to evaluate the impacts of increased short-term NO2 on low-income and minority communities closest to the project site. Moreover, El Pueblo challenged EPA's failure to present any specific information or data in its environmental justice analysis upon which to assess potential short-term NO2 impacts from the project. Comments at 9.

In response, EPA acknowledges that it did not reach any definitive conclusion about the specific human health or environmental impacts of short-term NOx emissions associated with the Project. Response at 87. While EPA argues in its response to comments that "the analysis describes what EPA believes is the best available data concerning the impacts of the project's short-term NOx emissions in the absence of an approved PSD modeling analysis," it references

no specific information to support this contention and El Pueblo is unable to ascertain data that EPA, in fact, relied upon.[11] Response at 87.

EPA acknowledges that "[t]he permit issuer must endeavor to include and analyze in its environmental justice analysis available data that are germane to the environmental justice issue raised during the comment period." *Id., citing In re Shell*, OCS Appeal Nos. 10-1 to 10-4, Slip Op. at 80. Yet, in its Response to Comments, EPA discloses the existence of extensive short-term NO2 analysis and modeling that it withheld from the environmental justice analysis. Response at 78. Information contained in these documents is relevant to determining potentially disproportionate impacts.

EPA explains that:

> EPA first requested that Avenal provide a demonstration that it would not violate the 1-hour NO2 NAAQS in May 6, 2010. Over the course of the next five months, Avenal made four separate submissions of information to EPA. EPA responded with two detailed analyses of Avenal's submissions which identified additional information that was necessary to justify Avenal's conclusions. . . . EPA asked for a second round of modeling which Avenal supplied in the fourth submission on September 13, 2010. EPA determined that this submission did not meet applicable EPA guidelines."

Response at 78. The Response to Comments also references an hourly NO2 analysis conducted by the local air district for a similar project at the same project site. Response at 89.

These statements prove the existence of four separate 1-hour NO2 data submissions by the applicant, two sets of 1-hour modeling data for the proposed project, two detailed analyses from EPA in response to the applicant's submissions, and local air district modeling for 1-hour NO2 for the proposed project. Far from having limited data, the EPA possesses substantial available data, germane to determining local short-term NO2 impacts to local communities, but simply declined to include it in its environmental justice analysis.

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[11] For example, EPA did not rely on the *only* monitoring data cited in the analysis to determine short-term NO2 impacts from Avenal Energy Project's emissions, collected in Hanford and Visalia, 28 and 46 miles from the proposed project site, respectively. *See* Response to Comments at 91.

EPA's failure to rely on relevant data to inform its environmental justice analysis is clearly in error subject to Board review.

E. All Data in the Administrative Record Indicate that the Project Will Cause a Disproportionate Impact

The Board has recognized potential for disproportionate impacts when the applicant fails to demonstrate compliance with NAAQS.[12] *See In re Shell*, OCS Appeal Nos. 10-1 to 10-4, Slip Op. at 80. All available data indicates that the project will result in a violation of the 1-hour NO2 NAAQS and therefore presents an unacceptable health risk to local populations. El Pueblo argued that EPA ignored its own data that demonstrated a likely violation of the new hourly NO2 NAAQS. *Id.* at 9-10.

For its analysis of 1-hour NO2 impacts, EPA identifies limited data from monitors in Hanford (50 ppb) and Visalia (61 ppb), approximately 28 and 46 miles away (respectively) from the proposed facility. SSB at 18. The maximum hourly NO2 emissions expected from the plant is 44 ppb. Even assuming the concentrations of NO2 in Hanford or Visalia do not under-represent the background NO2 levels in the project vicinity, the added burden of the project would exceed or very nearly exceed the new 1-hour NO2 standard adopted by EPA.[13] Additionally, all available data demonstrates that these background levels in Hanford and Visalia are lower than what would be expected in the project vicinity. As EPA points out, "NO2 concentrations on or near major roads are appreciably higher than those measured at monitors in the current network . . . and near roadway concentrations have been measured to be approximately 30 to 100% higher than those measured away from major roads." SSB at 19. Kettleman City is directly adjacent to Interstate 5 – one of the State's main commerce freeways –

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[12] Since NAAQS represents the minimum level that is protective of human health. *In re Shell*, OCS Appeal Nos. 10-1 to 10-4, Slip Op. at 80.

[13] Using Hanford background levels, the total emissions are likely to be 94 ppb (44ppb +50ppb), and for Visalia backgrounds levels, 109ppb (44ppb+65ppb).

and therefore is reasonably expected to have background levels of NO2 of at least 65 ppb (30 percent greater than Hanford's 50 ppb background level). In a "worst case" scenario, background levels in Kettleman City could be 130 ppb (100 percent greater than Visalia's 65 ppb). In addition, Kettleman City hosts the Kettleman Hills Hazardous Waste Landfill and is impacted by hundreds of trucks passing through and idling near the community each day. Based on even the limited information EPA provides in its environmental justice analysis, there is no reasonable basis for concluding that Kettleman City or the other communities in the vicinity of the proposed project would not be disproportionately impacted by NO2 emissions from the plant.

This finding is supported by data inappropriately withheld from the Environmental Justice analysis. In a letter, EPA informs the applicant that:

> The results from the 1-hour NO2 CAAQS comparison . . . show maximum 1-hour Avenal facility impacts of 190 μg/m3, combined with a background concentration of 137.2 μg/m3 to give a total impact of 327.2 μg/m3. *This cumulative 1-hour NO2 impact is well above the EPA 1-hour NO2 standard [of188 μg/m3].*

Letter from US EPA to Avenal (08/12/10) (emphasis added.).[14]

Despite this evidence, EPA argued that it did not believe that the available data provided sufficient information to determine that the Project's emissions would cause an exceedance of the 1-hour NO2 NAAQS. *Id.* at 89. EPA's argument presumes that to make a finding of disproportionate impacts, EPA is first required to determine that the facility would cause an exceedance of NAAQS based on EPA's highly technical regulatory process. This simply is not the case. EPA has discretion to choose the methodology it will use to determine disproportionate impacts. *See In re Chemical Waste Management of Indiana*, 6 E.A.D. 66 (finding that the selection of method for determining disproportionate impacts is best left to the technical

[14] Also EPA reports in its Response to Comments that "the applicant could not show that the proposed project's impact alone would be less than the significant impact level for 1-hour NO2 concentrations." Response at 78. After attempting to demonstrate compliance for over five subsequent months, the applicant was unable to satisfy EPA that the facility would meet the standard. *Id.*

expertise of the Region.). Where the agency has exempted a facility from compliance with NO2 NAAQS, the agency should use alternative measures for determining whether the facility will exceed pollution levels that impact public health. By failing to use other criteria, EPA essentially engages in circular reasoning: EPA exempts the applicant from demonstrating NO2 NAAQS compliance and then argues that since the applicant did not comply with NAAQS, EPA does not have sufficient information to conclude whether the project will cause disproportionate impacts. This circular reasoning does not constitute a fact-based environmental justice analysis as previously required by this Board.

V. EPA ABUSED ITS DISCRETION BY FAILING TO ADDRESS DISPROPORTIONATE CUMULATIVE IMPACTS.

OAR identified disproportionate cumulative impacts from the Energy Plant when combined with existing pollution sources; however, OAR failed to address the Energy Project's contribution to cumulative impacts.

To avoid addressing impacts from approving the Energy Project, EPA 1) relies on speculative pollution reductions from wholly unrelated activities in the region; and 2) inappropriately withdraws its analysis of nonattainment pollution from the Energy Project without responding to legitimate concerns. These actions violate Executive Order 12898 and require Board review.

A. Factual Background Demonstrating EPA's Failure to Address the Project's Disproportionate Cumulative Impacts.

Communities near the project are burdened by multiple sources of pollution including some of the highest ozone and PM2.5 levels in the Country, drinking water contamination, exposure to pesticides and other agricultural chemicals, near roadway exposure to diesel particulate emissions from the I-5 freeway, defunct oil and gas extraction operations, risk

associated with proximity to a hazardous waste facility, impacts associated with composting and land application of sewage sludge, immuno-compromised health associated with a spike in birth defects and a high number of miscarriages. Response at 82.

EPA recognized that these factors increase vulnerability to the health effects of air pollution, such as emissions from the Energy Project. *Id.* at 82. To address these cumulative impacts, EPA references EPA, State, and local governmental agencies actions around Kettleman City and the region. *Id.* at 5. EPA specifically references a study of potential off-site impacts of PCB disposal at the Chemical Waste Management facility, the State's study on increased birth defect incidences in Kettleman City, EPA's RCRA and TSCA enforcement at the Chem Waste facility, various funding programs for emission reduction projects in the San Joaquin Valley and Kings County, and enforcement activities against Kettleman City based on the Safe Drinking Water Act.

As part of its environmental justice analysis, EPA also included nonattainment emissions from the project as identified in the State's permitting process. *Id.* at 6.

B. EPA Should Not Address Disproportionate Cumulative Impacts of the Avenal Energy Project Through Wholly Unrelated Actions.

El Pueblo commented that EPA failed to account for, not only the local impacts of increased air emissions, but also how these added emissions will contribute to the cumulative impact of all the environmental and social stressors with which these communities are already burdened. Comments at 11. In response, EPA recognized that the existing conditions identified by commenters would increase residents' vulnerability to the health effects of air pollution, such as emissions from the Energy Project. Response at 82. However, EPA failed to address these cumulative impacts in the context of the Energy Project itself. *Id.* at 5.

EPA argues that language in the Executive Order directing federal agencies to identify and address impacts "as appropriate" and "to the greatest extent practicable" afforded considerable discretion to the agency in determining how to address any impacts that it may identify. EPA argues that this discretion includes responding to environmental justice issues within the context of all the actions EPA, state, and local governmental agencies are taking to reduce environmental hazards in the communities potentially affected by emissions from the project. *Id.* at 83.

Executive Order 12898 and the Board require that EPA "identify and address" disproportionate impacts stemming from "*its programs, policies and activities.*" Here, EPA's activity is its approval of a PSD permit for the Avenal Energy Center. Therefore, to comply with Executive Order 12898, EPA must address impacts of approving APC's PSD permit. EPA may not address disproportionate impacts by relying on wholly unrelated actions that may or may not decrease pollution from sources outside its PSD permitting jurisdiction. *See e.g. In re Chemical Waste Management of Indiana*, 6 E.A.D 66 (finding that Executive Order's language requiring Federal agencies to implement the order "consistent with, and to the extent permitted by, existing law" limited EPA's jurisdiction to address disproportionate impacts solely within in its permitting authority.).

Since the agency has determined that approval of the Energy Project may exacerbate existing vulnerabilities when combined with existing pollution sources, the EPA should address cumulative impacts in the context of the PSD permit. Instead, EPA relies on unrelated activities, including inconclusive studies, enforcement actions at existing facilities, and funding opportunities, to address the disproportionate cumulative impacts contributed by the Avenal Energy Project.

As an initial matter, nearly each activity cited by EPA predated the permit approval, and therefore cannot be reasonably said to address the impacts of adding a power plant in the vicinity. Secondly, none of the activities reduce short-term NO2, which is one of the Energy Project's primary contributions to the cumulative impact in the area. Finally, EPA provides no explanation to the Board demonstrating that the activities relied upon by EPA have reduced or will reduce cumulative impacts contributed by the Avenal Energy Project. EPA, therefore, has not provided sufficient information to support its use of activities outside the PSD process to address disproportionate cumulative impacts. *In re City of Moscow, Idaho,* 10 E.A.D. 135, 142 (EAB 2001) (The rationale for a decision must be "adequately explained and supported in the record,"); *In re Austin Powder Co.*, 6 E.A.D. 713, 720 (EAB 1997) (remand due to lack of clarity in permitting authority's explanation). In fact, several of the cited actions are merely inconclusive studies with no associated pollution reductions. Other actions are entirely speculative, such as the future application of funding opportunities over which EPA has no authority to direct.

C. EPA Should Address Nonattainment Pollutants

PSD provisions "assure that any decision to permit increased air pollution . . . is made only after careful evaluation *of all the consequences* of such a decision." 42 U.S.C. § 7470(5) (Emphasis added.). In its Environmental Justice Analysis, EPA included an assessment of nonattainment pollutants that was prepared as part of the State permitting process. This inclusion was appropriate because the facility's emissions of attainment and nonattainment pollutants together will increase local resident's exposure to asthma inducing pollutants.

However, several commenters, including El Pueblo, criticized the State's analysis for relying on the purchase of pollution offsets far removed from the local communities and at

interpollutant exchange rates that failed to avoid local impacts. Rather than addressing the criticism, however, EPA excluded the analysis from further consideration. Response at 94 ("Given the larger context in which the commenters' concerns regarding nonattainment pollutants has been raised, EPA's judgment is that it is not appropriate to address these issues further in the context of this PSD permitting action."). Once EPA considered an issue relevant to its analysis, it should not subsequently refuse to consider the issue based solely on its unwillingness or inability to address commenters legitimate concerns.

As part of its review, the Board determines "whether the permit issuer 'duly considered' issues raised in comments. *In re Shell,* slip op. at 41 (*quoting In Re Gov't of D.C. Mun. Separate Storm Sewer.,* 10 E.A.D. 323, 342 (EAB 2002)). Here, commenters, including El Pueblo, explained the significant problems with the State's analysis which underestimated the local impacts from nonattainment pollutants, including the State's failure to consider local impacts of the emissions, its use of an interpollutant ratio out of line with similar projects in the area and EPA's own guidance, and its use of offsets far removed from the location of the facility. EPA failed to respond to these concerns. This failure to respond to comments is a sufficient basis to remand the permit.

VI. EPA'S ACTIONS ARE DISCRIMINATORY.

In permitting the Energy Project without requiring a demonstration with NAAQS, without identifying and addressing disproportionate impacts, and while actively investigating claims of discrimination for the State's approval process for the Energy Project, EPA is conducting its PSD permitting program in a manner that subjects residents of Avenal, Huron and Kettleman City to discrimination based on their race and national origin.

A. EPA's Approval of the Facility Has a Discriminatory Effect

Under Executive Order 12898, not only must EPA identify and address disproportionate impacts stemming from its programs and activities, EPA must also ensure that it conducts its activities so as to avoid discriminatory effects based on race or national origin. The Order states:

> Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health and the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.

Section 2-2. 59 Fed. Reg. 7629 (Feb. 16, 1994).

Here, EPA is conducting its PSD program in a manner that provides people of color living near the Energy Project with fewer health protections and assurances than those afforded to other communities. First, EPA's decision to grandfather the facility from demonstrating compliance with new NAAQS and greenhouse gas standards fails to provide local communities any assurance that emissions from the Energy Project will not impact their health. Secondly, EPA's failure to identify potential disproportionate impacts leaves local residents uninformed about potential consequences of residing near the project. Finally, EPA's refusal to address emissions that will, in fact, exceed health protective standards, actually exacerbates health risks in the region.

EPA, in full knowledge of the local demographics, health disparities, and existing pollution sources, uses its "discretion" at each step of its analysis to benefit the applicant, to the detriment of local residents, the majority of whom are people of color. Taken together, EPA's actions demonstrate a willful disregard for the health of the local population. The Board should not condone OAR's conduct in this permitting process, because of its discriminatory effect on

Latino residents. Based on EPA's clearly erroneous findings of fact and this important matter of policy, the Board should review and remand APC's permit.

B. EPA Must Resolve Title VI Complaint Prior to Issuing Permit.

El Pueblo questioned the use of information obtained through the State's permitting process since EPA is currently investigating the process for violations of civil rights laws under Title VI. Given the on-going investigation, El Pueblo challenged EPA's role in permitting the activity that it is tasked with policing under its Title VI authority. SSB at 14.

EPA responds that "EPA's Title VI investigation is an administrative process separate from EPA's PSD permit decision, is carried out independently of the CAA PSD permitting program, and pertains to a local permitting process that is also outside the scope of EPA's PSD permit decision action." Response at 90.

However, this is not persuasive. First, the Executive Order 12898 requires all agencies to conduct their programs, policies and activities with respect to environmental justice. Second, EPA uses data from the state process in making its own factual determinations on this project, recognizing that these permitting processes are interrelated. Similarly, EPA relies on other agencies' activities to cure cumulative impacts stemming from this permit. EPA cannot have it both ways. To avoid potential conflicts of interest or the appearances of conflict, EPA should not, as a matter of policy, participate in activities that are currently subject to EPA investigation for civil rights violations. The Board should review this important matter of policy

CONCLUSION

For the reasons stated above, El Pueblo requests the Board review APC's permit and remand the permit back to EPA.

STATEMENT OF COMPLIANCE

I, Ingrid Brostrom, hereby certify that I prepared the foregoing petition for review on behalf of my client, and that the word count for this petition is 12,418, which does not include the cover or tables. This petition therefore complies with Order Governing Petitions for Review of Clean Air Act New Source Review Permits which limits a petition to 14,000 words. I certify that I prepared this document in Microsoft Office Word 2003, and that this is the word count Word 2003 generated for this document.

Dated: June 25, 2011

____
Ingrid Brostrom
Attorney for El Pueblo

LIST OF EXHIBITS

EXHIBIT 1: PSD Permit Avenal Energy Project

EXHIBIT 2: Comments Submitted by The Center on Race, Poverty & the Environment (CRPE) and El Pueblo Para El Aire y Agua Limpio (El Pueblo), April 12, 2011

EXHIBIT 3: 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)

PREVENTION OF SIGNIFICANT DETERIORATION PERMIT ISSUED PURSUANT TO THE REQUIREMENTS AT 40 CFR § 52.21

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION IX

PSD PERMIT NUMBER: SJ 08-01

PERMITTEE: Avenal Power Center, LLC
500 Dallas Street, Level 31
Houston, Texas 77002

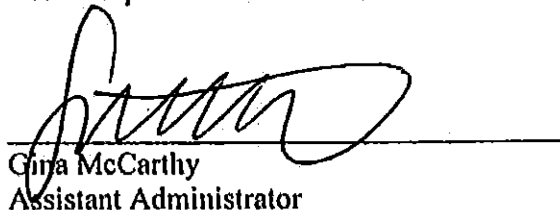
FACILITY NAME: Avenal Energy Project

FACILITY LOCATION: 33119 Avenal Cutoff Road
Avenal, California 93204

Pursuant to the provisions of the Clean Air Act (CAA), Subchapter I, Part C (42 U.S.C. Section 7470, *et. seq.*), and the Code of Federal Regulations (CFR) Title 40, Section 52.21, the U.S. Environmental Protection Agency, Region 9 is issuing a *Prevention of Significant Deterioration* (PSD) permit to the Avenal Power Center, LLC (APC). The Permit applies to the construction and operation of a new 600 megawatt (MW, nominal) natural gas-fired combined-cycle power plant known as the Avenal Energy Project (AEP) in Avenal, California.

APC is authorized to construct and operate the AEP power plant as described herein, in accordance with the permit application (and plans submitted with the permit application), the federal PSD regulations at 40 CFR § 52.21, and other terms and conditions set forth in this PSD Permit. Failure to comply with any condition or term set forth in this PSD Permit may result in enforcement action pursuant to Section 113 of the Clean Air Act (CAA). This PSD Permit does not relieve APC from the responsibility to comply with any other applicable provisions of the CAA (including applicable implementing regulations in 40 CFR Parts 51, 52, 60, 61, 63, and 72 through 75), or other federal, state, and San Joaquin Valley Air Pollution Control District (District) requirements.

Per 40 CFR § 124.15(b), this PSD Permit becomes effective 30 days after the service of notice of this final permit decision unless review is requested on the permit pursuant to 40 CFR § 124.19.



Gina McCarthy
Assistant Administrator

5/27/11
Date

AVENAL ENERGY PROJECT (SJ 08-01)
PREVENTION OF SIGNIFICANT DETERIORATION PERMIT
FINAL PERMIT CONDITIONS

PROJECT DESCRIPTION

The Facility is a combined-cycle power plant capable of generating up to 600 megawatts (MW, nominal) of net power. Electrical power will be generated from the combustion of natural gas in two 180 MW (nominal) combustion turbine generators (CTG). Exhaust from each gas turbine will flow through a dedicated Heat Recovery Steam Generator (HRSG) to produce steam to power a shared 300 MW (nominal) Steam Turbine Generator (STG). Each HRSG will be equipped with natural gas-fired duct burners to augment steam production during peaking operation. Each of the CTGs will be equipped with dry low-NOx (DLN) combustors. The Facility will install selective catalytic reduction (SCR) and oxidation catalyst (Ox-Cat) systems. Additional equipment includes a natural gas-fired auxiliary boiler, which is used to provide steam for auxiliary purposes such as when the plant is off-line or during startup, equipped with an ultra low-NOx burner, a natural gas-fired emergency generator equipped with a post-combustion integrated SCR/oxidation catalyst system, and a diesel-fired emergency firewater pump engine with a turbocharger and an intercooler/aftercooler.

The Facility is subject to the Prevention of Significant Deterioration (PSD) Program for emissions of Carbon Monoxide (CO), Nitrogen Dioxide (NO_2), Particulate Matter (PM), and Particulate Matter of less than or equal to 10 micrometers (μm) in diameter (PM_{10}).

EQUIPMENT LIST

The following devices are subject to this PSD permit:

Unit ID	Description
GEN1	• 180 MW Combustion Turbine Generator (CTG), with a maximum heat input rate of 1,856.3 MMBtu/hr, high heating value (HHV) • Natural gas-fired General Electric Model Frame 7FA • Vented to a dedicated Heat Recovery Steam Generator (HRSG) and a 300 MW Steam Turbine Generator (STG) shared with GEN2 • Emissions of NO_x and CO controlled by Dry Low-NO_x (DLN) Combustors, Selective Catalytic Reduction (SCR), and an Oxidation Catalyst (Ox-Cat)
GEN2	• 180 MW CTG, with a maximum heat input rate of 1,856.3 MMBtu/hr (HHV) • Natural gas-fired General Electric Model Frame 7FA • Vented to a dedicated HRSG and a 300 MW STG shared with GEN1 • Emissions of NO_x and CO controlled by DLN combustors, SCR and an Ox-Cat

Unit ID	Description
DB1	• 562.26 MMBtu/hr (HHV) Duct Burner for GEN1, fired on natural gas
DB2	• 562.26 MMBtu/hr (HHV) Duct Burner for GEN2, fired on natural gas
D1	• 37.4 MMBtu/hr (HHV) Auxiliary Boiler with ultra low-NO_x burner, fired on natural gas
D2	• 550 kW (860 hp) Emergency Internal Combustion (IC) Engine, fired on natural gas • Emissions of NO_x and CO controlled by post-combustion integrated SCR/oxidation catalyst system
D3	• 288 hp Emergency Diesel-fired IC Engine Firewater Pump Engine • Equipped with a turbocharger and an intercooler/aftercooler

PERMIT CONDITIONS

I. PERMIT EXPIRATION

As provided in 40 CFR § 52.21(r), this PSD Permit shall become invalid if construction:

A. is not commenced (as defined in 40 CFR § 52.21(b)(9)) within 18 months after the approval takes effect; or

B. is discontinued for a period of 18 months or more; or

C. is not completed within a reasonable time.

II. PERMIT NOTIFICATION REQUIREMENTS

Permittee shall notify EPA Region IX by letter or by electronic mail of the:

A. date construction is commenced, postmarked within 30 days of such date;

B. actual date of initial startup, as defined in 40 CFR § 60.2, postmarked within 15 days of such date;

C. date upon which initial performance tests will commence, in accordance with the provisions of Condition X.G, postmarked not less than 30 days prior to such date. Notification may be provided with the submittal of the performance test protocol required pursuant to Condition X.G; and

D. date upon which initial performance evaluation of the continuous emissions monitoring system (CEMS) will commence in accordance with 40 CFR § 60.13(c), postmarked not less than 30 days prior to such date. Notification may

be provided with the submittal of the CEMS performance test protocol required pursuant to Condition X.F.

III. FACILITY OPERATION

At all times, including periods of startup, shutdown, shakedown, and malfunction, Permittee shall, to the extent practicable, maintain and operate the Facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the EPA, which may include, but is not limited to, monitoring results, opacity observations, review of operating maintenance procedures and inspection of the Facility.

IV. MALFUNCTION REPORTING

A. Permittee shall notify EPA at R9.AEO@epa.gov within two (2) working days following the discovery of any failure of air pollution control equipment, process equipment, or of a process to operate in a normal manner, which results in an increase in emissions above the allowable emission limits stated in Section X of this permit.

B. In addition, Permittee shall provide an additional notification to EPA in writing or electronic mail within fifteen (15) days of any such failure described under Condition IV.A. This notification shall include a description of the malfunctioning equipment or abnormal operation, the date of the initial malfunction, the period of time over which emissions were increased due to the failure, the cause of the failure, the estimated resultant emissions in excess of those allowed in Section X, and the methods utilized to mitigate emissions and restore normal operations.

C. Compliance with this malfunction notification provision shall not excuse or otherwise constitute a defense to any violation of this permit or any law or regulation such malfunction may cause.

V. RIGHT OF ENTRY

The EPA Regional Administrator, and/or an authorized representative, upon the presentation of credentials, shall be permitted:

A. to enter the premises where the Facility is located or where any records are required to be kept under the terms and conditions of this PSD Permit;

B. during normal business hours, to have access to and to copy any records required to be kept under the terms and conditions of this PSD Permit;

C. to inspect any equipment, operation, or method subject to requirements in this PSD Permit; and

D. to sample materials and emissions from the source(s).

VI. TRANSFER OF OWNERSHIP

In the event of any changes in control or ownership of the Facility to be constructed, this PSD Permit shall be binding on all subsequent owners and operators. Permittee shall notify the succeeding owner and operator of the existence of this PSD Permit and its conditions by letter, a copy of that shall be forwarded to EPA Region IX within thirty (30) days.

VII. SEVERABILITY

The provisions of this PSD Permit are severable, and, if any provision of the PSD Permit is held invalid, the remainder of this PSD Permit shall not be affected.

VIII. ADHERENCE TO APPLICATION AND COMPLIANCE WITH OTHER ENVIRONMENTAL LAWS

Permittee shall construct this project in compliance with this PSD permit, the application on which this permit is based and all other applicable federal, state, and local air quality regulations. This PSD permit does not release the Permittee from any liability for compliance with other applicable federal, state and local environmental laws and regulations, including the Clean Air Act.

IX. RESERVED

X. SPECIAL CONDITIONS

A. Annual Facility Emission Limits

1. Annual emissions, in tons per year (tpy) on a 12-month rolling average basis, shall not exceed the following:

	NO_x	CO	PM	PM_{10}
Total Facility	144.3 tpy	602.7 tpy	80.7 tpy	80.7 tpy

2. Only Public Utilities Commission (PUC)-quality pipeline natural gas shall be fired at this Facility. PUC-quality pipeline natural gas shall not exceed a sulfur content of 0.36 grains per 100 dry standard cubic feet on a 12-month rolling average basis and shall not exceed a sulfur content of 1.0 grains per 100 dry standard cubic feet, at any time.

B. Air Pollution Control Equipment and Operation

As soon as practicable following initial startup of the power plant (startup as defined in 40 CFR § 60.2) but prior to commencement of commercial operation (as defined in 40 CFR § 72.2), and thereafter, except as noted below in Condition X.D, the Permittee shall install, continuously operate, and maintain: (1) the SCR systems for control of NO_x and the Ox-Cat systems for control of CO for Units GEN1 and GEN2, and (2) the post-combustion integrated SCR/oxidation catalyst system for control of NO_x and CO for D2. Permittee shall also perform any necessary operations to minimize emissions so that emissions are at or below the emission limits specified in this permit.

C. Combustion Turbine Generator (CTG) Emission Limits

1. Except as noted below under Condition X.D, on and after the date of initial startup, Permittee shall not discharge or cause the discharge of emissions from each CTG Unit (of GEN1 and GEN2) into the atmosphere in excess of the following:

	Emission Limit (per CTG) (no duct burning)	Emission Limit (per CTG) (with duct burning)
NO_x	• 13.55 lb/hr • 1-hr average • 2.0 ppmvd @ 15% O_2	• 17.20 lb/hr • 1-hr average • 2.0 ppmvd @ 15% O_2
CO	3-Year Demonstration Period • 8.35 lb/hr • 1-hr average • 2.0 ppmvd @ 15% O_2 Post-Demonstration Period • 6.27 lb/hr • 1-hr average • 1.5 ppmvd @ 15% O_2 Conditions in X.C.3 may affect the timing and applicability of post-demonstration period emission limits.	• 10.60 lb/hr • 1-hr average • 2.0 ppmvd @ 15% O_2
PM / PM10	• 8.91 lb/hr • 12-month rolling average • PUC-quality pipeline natural gas	• 11.78 lb/hr • 12-month rolling average • PUC-quality pipeline natural gas

2. Annual heat input to each duct burner (DB1 and DB2) shall not exceed 449,800 MMBtu per 12-month rolling period. The Permittee shall ensure that the duct burners are not operated unless the associated turbine units are in operation.

3. CO Emissions Limit Demonstration Period – The Demonstration Period is defined as the first 3 years immediately following the commencement of commercial operations.

   a. The Permittee shall design the gas turbines to achieve a CO emission rate of 1.5 ppmvd @ 15% O_2 and 6.27 lb/hr over a 1-hour period without duct firing. Prior to construction, the Permittee shall submit design specifications to EPA as proof that the gas turbines were designed to achieve such a rate. The Permittee shall also submit a plan to EPA that sets

forth the measures that will be taken to maintain the system and optimize its performance.

b. During the Demonstration Period, the Permittee shall operate the gas turbines according to the design specifications, within the design parameters, and consistent with the maintenance and performance optimization plan described above in Condition X.C.3.a. During the Demonstration Period the Permittee shall not discharge or cause the discharge of CO emissions from each CTG Unit (GEN1 and GEN2) into the atmosphere in excess of 2.0 ppmvd CO @ 15% O_2 and 8.35 lb/hr with or without duct firing over a 1-hour averaging period.

c. Following the Demonstration Period, the Permittee shall not discharge or cause the discharge of CO emissions from each CTG Unit (GEN1 and GEN2) into the atmosphere in excess of the following amounts except as specified in Condition IX.C.3.d:

   i. 1.5 ppmvd @ 15% O_2 without duct firing;

   ii. 2.0 ppmvd @ 15% O_2 with duct firing;

   iii. 6.27 lb/hr without duct firing; and

   iv. 8.35 lb/hr with duct firing.

d. If, during the Demonstration Period, the Permittee determines that the CO limits in Conditions X.C.3.i or X.C.3.iii are not feasible, the Permittee shall submit an application to EPA prior to the end of the Demonstration Period requesting a revision of those limits. Such an application must contain data and information that demonstrates that the Facility was operated according to the design specifications and parameters, and the maintenance and performance optimization plan, identified above in Condition X.C.3.a, as well as a technical justification explaining why the lower limits are not feasible. If, after the applicable review process following such a submission (which will include an opportunity for public review and comment), it is determined through data and information gathered during the Demonstration Period that different CO limits are necessary, the limits in Condition X.C.3.i and X.C.3.iii will be revised accordingly. Provided that the application specified in this condition is postmarked prior to the end of the Demonstration Period, the emission limits in Condition X.C.3.b shall remain in effect until EPA evaluates the application and makes a final decision regarding the revision of the limits in Conditions X.C.3.i or X.C.3.iii.

D. Requirements during Gas Turbine (GEN1 and GEN2) Startup and Shutdown

1. Startup is defined as the period of time during which a unit is brought from a shutdown status to its operating temperature and pressure, including the time required by the unit's emission control system to reach full operations and demonstrate compliance with Conditions X.C.

2. Shutdown is defined as the period beginning with the lowering of equipment from normal operating load to minimum operating load and lasting until fuel flow is completely off and combustion has ceased.

3. During startup and shutdown periods emissions from each CTG and associated HRSG unit, verified by the CEMS, shall not exceed the following:

	NO_x	CO
Each CTG and HRSG Startup / Shutdown	160 lb/hr	1,000 lb/hr
Both CTG and HRSG Combined Startup / Shutdown	240 lb/hr	1,902 lb/hr

	Event Duration	Annual Limit for Both CTG Combined
Each CTG and HRSG Startup	4.50 hours	1,248 hours/yr
Each CTG and HSRG Shutdown	0.50 hour	

4. The Permittee must operate the CEMS during startups and shutdowns.

5. The Permittee must record the time, date, and duration of each startup and shutdown event. The records must include calculations of NO_x and CO emissions during each event based on the CEMS data. These records must be kept for five years following the date of such event.

6. During startup, the CTG and HRSG emissions shall comply with Condition X.D.3, and the SCR system, including ammonia injection, shall be operated in a manner to minimize emissions, as technologically feasible, and not later than when the load reaches 60% of plant net output.

E. **Auxiliary Combustion Equipment Emission Limits**

1. At all times, including equipment startup and shutdown, Permittee shall not discharge, or cause the discharge of emissions from each unit into the atmosphere, in excess of the following:

Unit ID	NO_x	CO	PM and PM_{10}	Restrictions on Usage
Unit D1 37.4 MMBtu/hr (HHV) Boiler	• 9 ppmvd @ 3% O_2 • 3-hr average	• 50 ppmvd @ 3% O_2 • 3-hr average	• 0.0034 gr/dscf • PUC-quality pipeline natural gas	• 46,675 MMBtu/yr
Unit D2 550 kW (860 hp) engine	• 1.0 g/hp-hr	• 0.21 g/hp-hr	• PUC-quality pipeline natural gas • 0.34 g/hp-hr,	• 50 hrs/yr
Unit D3 288 hp firewater pump	• 3.4 g/hp-hr	• 0.447 g/hp-hr	• Use of ultra-low sulfur fuel, not to exceed 15 ppmvd fuel sulfur	• 50 hrs/yr

2. Unit D1 shall not operate during normal operations of GEN1 or GEN2, except during periods of, or immediately following, startup. Unit D1 shall be shut down as soon as practicable after the completion of any startup process as defined in Condition X.D.1.

3. Unit D2 restrictions on usage shall be limited to operation of the engine for all maintenance and testing.

4. Unit D3 restrictions on usage shall be limited to the total hours of operations for all maintenance and testing.

5. Units D2 or D3 shall not operate during startup of GEN1 or GEN2, except when Units D2 or D3 are required for emergency operations.

F. **Continuous Emissions Monitoring System (CEMS) for GEN1 and GEN2**

1. At the earliest feasible opportunity after first fire of GEN1 and GEN2 and before GEN1 and GEN2 commence commercial operation (as defined in 40 CFR § 72.2), in accordance with the recommendations of the equipment manufacturer and the construction contractor, Permittee shall install, calibrate, and operate a CEMS each for GEN1 and GEN2 that measures stack gas NO_x, CO, and O_2 or CO_2 concentrations in ppmv. The concentrations shall be

corrected to 15% O_2 on a dry basis. No later than the end of the shakedown period as defined in Condition X.J. or upon commencing commercial operations, whichever comes first, Permittee shall also maintain, certify, and quality-assure a CEMS for each CTG that measures stack gas NO_x, CO, and O_2 concentrations in ppmv, and shall conduct initial certification of the CEMS in accordance with Condition X.F.6. The concentrations shall be corrected to 15% O_2 on a dry basis.

2. The NO_x and O_2 CEMS shall meet the applicable requirements of 40 CFR Part 75.

3. The CO CEMS shall meet the applicable requirements of 40 CFR Part 60 Appendix B, Performance Specification 4, and 40 CFR Part 60 Appendix F, Procedure 1, except the relative accuracy specified in section 13.2 of 40 CFR Part 60 Appendix B, Performance Specification 4 shall not exceed 20 percent.

4. Each CEMS shall complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute clock-hour period.

5. The CEMS shall be tested in accordance with Conditions X.F.2 and X.F.3.

6. The initial certification of the CEMS may either be conducted separately, as specified in 40 CFR § 60.334(b)(1) or as part of the initial performance test of each emission unit. CEMS must undergo and pass initial performance specification testing on or before the date of the initial performance test.

7. CEMS shall meet the requirements of 40 CFR § 60.13. Data sampling, analyzing, and recording shall also be adequate to demonstrate compliance with emission limits during startup and shutdown.

8. Not less than 90 days prior to the date of initial startup of the Facility, the Permittee shall submit to the EPA a quality assurance project plan for the certification and operation of the continuous emission monitors. Such a plan shall conform to EPA requirements contained in 40 CFR Part 60 Appendix F for CO, 40 CFR Part 75 for NO_x and O_2 or CO_2, and 40 CFR Part 75 Appendix B for stack flow. The plan shall be updated and resubmitted upon request by EPA. The protocol shall specify how emissions during startups and shutdowns will be determined and calculated, including quantifying flow accurately if calculations are used.

9. The gas turbine CEMS shall be audited quarterly and tested annually in accordance with 40 CFR Part 60 Appendix F, Procedure 1. Permittee shall

perform a full stack traverse during initial run of annual RATA testing of the CEMS, with testing points selected according to 40 CFR Part 60 Appendix A, Method 1.

10. Permittee shall submit a CEMS performance test protocol to the EPA no later than 30 days prior to the test date to allow review of the test plan and to arrange for an observer to be present at the test. The performance test shall be conducted in accordance with the submitted protocol and any changes required by EPA.

11. Permittee shall furnish the EPA a written report of the results of performance tests within 60 days of completion.

12. The stack gas volumetric flow rates shall be calculated in accordance with the fuel flowmeter requirements of 40 CFR Part 75 Appendix D in combination with the appropriate parts of EPA Method 19.

13. Prior to the date of initial startup of GEN1 and GEN2, Permittee shall install, and thereafter maintain and operate, continuous monitoring and recording systems to measure and record the following operational parameters:

    a. The ammonia injection rate of the ammonia injection system of the SCR system.

    b. The plant output as noted in Condition X.D.6.

G. Performance Tests

1. Stack Tests

    a. Within 60 days after achieving normal operation, but not later than 180 days after the initial start-up of equipment, and, unless otherwise specified, annually thereafter (within 30 days of the initial performance test anniversary), Permittee shall conduct performance tests (as described in 40 CFR § 60.8) as follows:

        i. NO_x, CO, PM, and PM_{10} emissions from each gas turbine (Units GEN1/DB1 and GEN2/DB2),

        ii. NO_x and CO emissions from the 37.4 MMBtu/hr boiler (D1); PM and PM_{10} emissions from the 37.4 MMBtu/hr boiler (D1) shall be tested initially and at least every five years (within 30 days of the initial performance test anniversary)

iii. NO_x, CO, PM, and PM_{10} emissions from the 550 kW (860 hp) internal combustion engine (D2), only upon notification by EPA

iv. NO_x, CO, PM, and PM_{10} emissions from the 288 hp firewater pump (D3), only upon notification by EPA

b. Permittee shall submit a performance test protocol to EPA no later than 30 days prior to the test to allow review of the test plan and to arrange for an observer to be present at the test. The performance test shall be conducted in accordance with the submitted protocol, and any changes required by EPA.

c. Performance tests shall be conducted in accordance with the test methods set forth in 40 CFR § 60.8 and 40 CFR Part 60 Appendix A, as modified below. In lieu of the specified test methods, equivalent methods may be used with prior written approval from EPA:

i. EPA Methods 1-4 and 7E for NO_x emissions measured in ppmvd

ii. EPA Methods 1-4, 7E, and 19 for NO_x emissions measured on a heat input basis

iii. EPA Methods 1-4 and 10 for CO emissions

iv. EPA Methods 5 and 202, or Methods 201A and 202, for both PM and PM_{10}, in accordance with the test methods set forth in 40 CFR § 60.8,- 40 CFR Part 60 Appendix A, and 40 CFR Part 51 Appendix M. In lieu of Method 202, the Permittee may use EPA Conditional Test Methods for particulate matter CTM-039.

v. the provisions of 40 CFR § 60.8 (f).

d. The initial performance test conducted after initial startup shall use the test procedures for a "high NO_2 emission site," as specified in San Diego Test Method 100, to measure NO_x emissions. The source shall be classified as either a "low" or "high" NO_2 emission site based on these test results. If the emission source is classified as a:

i. "high NO_2 emission site," then each subsequent performance test shall use the test procedures for a "high NO_2 emission site," as specified in San Diego Test Method 100.

ii. "low NO_2 emission site," then the test procedures for a "high NO_2 emission site," as specified in San Diego Test Method 100, shall be performed once every five years to verify the source's classification as a "low NO_2 emission site."

e. The performance test methods for NO_x emissions specified in Condition X.G.1.c.i and ii., may be modified as follows:

i. Perform a minimum of 9 reference method runs, with a minimum time per run of 21 minutes, at a single load level, between 90 and 100 percent of peak (or the highest physically achievable) load.

ii. Use the test data both to demonstrate compliance with the applicable NO_x emission limit and to provide the required reference method data for the RATA of the CEMS.

f. Upon written request and adequate justification from the Permittee, EPA may waive a specific annual test and/or allow for testing to be done at less than maximum operating capacity.

g. For performance test purposes, sampling ports, platforms, and access shall be provided on the emission unit exhaust system in accordance with the requirements of 40 CFR § 60.8(e).

h. Permittee shall furnish the EPA a written report of the results of performance tests within 60 days of completion.

2. Fuel Testing

a. Permittee shall take monthly samples of the natural gas combusted. The samples shall be analyzed for sulfur content using an ASTM method. The sulfur content test results shall be retained on site and taken to ensure compliance with Special Conditions X.C and X.E for Units GEN1/DB1, GEN2/DB2, D1, and D2.

H. Monitoring for Auxiliary Combustion Equipment

1. Permittee shall install and maintain an operational non-resettable totalizing mass or volumetric flow meter in each fuel line for the 37.4 MMBtu /hr boiler (Unit D1).

2. Permittee shall install and maintain an operational non-resettable elapsed time meter for the 550 kW emergency use engine (Unit D2) and the 288 hp emergency-use firewater pump (Unit D3).

I. Recordkeeping and Reporting

1. Permittee shall maintain a file of all records, data, measurements, reports, and documents related to the operation of the Facility, including, but not limited to, the following: all records or reports pertaining to adjustments and/or maintenance performed on any system or device at the Facility; all records relating to performance tests and monitoring of auxiliary combustion equipment; for each diesel fuel oil delivery, documents from the fuel supplier certifying compliance with the fuel sulfur content limit of Special Condition

X.E for Unit D3; and all other information required by this permit recorded in a permanent form suitable for inspection. The file must be retained for not less than five years following the date of such measurements, maintenance, reports, and/or records.

2. Permittee shall maintain CEMS records that include the following: the occurrence and duration of any startup, shutdown, shakedown, or malfunction, performance testing, evaluations, calibrations, checks, adjustments, maintenance, duration of any periods during which a continuous monitoring system or monitoring device is inoperative, and corresponding emission measurements.

3. Permittee shall maintain records of all source tests and monitoring and compliance information required by this permit.

4. Permittee shall maintain records and submit a written report of all excess emissions to EPA semi-annually, except when: more frequent reporting is specifically required by an applicable subpart; or the Administrator, on a case-by-case basis, determines that more frequent reporting is necessary to accurately assess the compliance status of the source. The report is due on the 30th day following the end of each semi-annual period and shall include the following:
    a. Time intervals, data and magnitude of the excess emissions, the nature and cause (if known), corrective actions taken and preventive measures adopted;
    b. Applicable time and date of each period during which the CEMS was inoperative (monitor down-time), except for zero and span checks, and the nature of CEMS repairs or adjustments;
    c. A statement in the report of a negative declaration; that is, a statement when no excess emissions occurred or when the CEMS has not been inoperative, repaired, or adjusted;
    d. Any failure to conduct any required source testing, monitoring, or other compliance activities; and
    e. Any violation of limitations on operation, including but not limited to restrictions on hours of operation.

5. Excess emissions shall be defined as any period in which the Facility emissions exceed the maximum emission limits set forth in this permit.

6. A period of monitor down-time shall be any unit operating clock hour in which sufficient data are not obtained to validate the hour for NO_X, CO or O_2, while also meeting the requirements of Condition X.F.7.

7. Excess emissions indicated by the CEM system, source testing, or compliance monitoring shall be considered violations of the applicable emission limit for the purpose of this permit.

8. All records required by this PSD Permit shall be retained for not less than five years following the date of such measurements, maintenance, and reports.

J. Shakedown Periods

The combustion turbine emission limits and requirements in Conditions X.C, X.D, and X.E shall not apply during combustion shakedown periods. Shakedown is defined as the period beginning with initial startup and ending no later than initial performance testing, during which the Permittee conducts operational and contractual testing and tuning to ensure the safe, efficient and reliable operation of the plant. The shakedown period shall not exceed 90 days. The requirements of Section III of this permit shall apply at all times.

XI. ACROYNMS AND ABBREVIATIONS

AEP	Avenal Energy Project
APCD	Air Pollution Control District
ASTM	American Society for Testing and Materials
Btu	British Thermal Unit
CEMS	Continuous Emissions Monitoring System
CFR	Code of Federal Regulations
CO	Carbon Monoxide
CTG	Combustion Turbine Generator
District	San Joaquin Valley Air Pollution Control District
DLN	Dry Low NOx
(d)scf	(dry) Standard Cubic Feet
EPA	Environmental Protection Agency
g	Grams
gr	Grains
HHV	Higher Heating Value
HRSG	Heat Recovery Steam Generator
hp	Horsepower
hr	Hour
kW	Kilowatt
lbs	Pounds
MMBtu	Million British Thermal Units
MW	Megawatt
NO_2	Nitrogen Dioxide
NO_x	Oxides of Nitrogen
NSCR	Non-Selective Catalytic Reduction
OTM	Other Test Method
Ox-Cat	Oxidation Catalyst
O_2	Oxygen
PM	Total Particulate Matter
PM_{10}	Particulate Matter with aerodynamic diameter less than 10 micrometers
ppmvd	Parts Per Million by Volume, Dry basis
ppmv	Parts Per Million by Volume
PSD	Prevention of Significant Deterioration
PUC	Public Utilities Commission
RATA	Relative Accuracy Test Audit
SCR	Selective Catalytic Reduction
STG	Steam Turbine Generator
tpy	Tons Per Year
µm	micrometers
yr	Year

XII. AGENCY NOTIFICATIONS

All correspondence as required by this Approval to Construct must be forwarded to:

A. Director, Air Division (Attn: AIR-5)
EPA Region IX
75 Hawthorne Street
San Francisco, CA 94105-3901

Email: R9.AEO@epa.gov
Fax: (415) 947-3579

B. Air Pollution Control Officer
San Joaquin Valley Air Pollution Control District
1990 E. Gettysburg Avenue
Fresno, CA 93726-0244

Email: sjvapcd@valleyair.org
Fax: (559) 230-6061

EXHIBIT
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CRPE

CENTER ON RACE, POVERTY & THE ENVIRONMENT

1302 JEFFERSON STREET, SUITE 2, DELANO, CA 93215 TEL 661-720-9140 FAX 661-720-9483
47 KEARNY STREET, SUITE 804, SAN FRANCISCO, CA 94108 TEL 415-346-4179 FAX 415-346-8723
WWW.CRPE-EJ.ORG

April 12, 2011

Shirley Rivera (AIR-3)
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105-3901

Re: Avenal Energy Project PSD Permit, Supplemental Statement of Basis

Dear Ms. Rivera:

The Center on Race, Poverty, & the Environment ("CRPE") submits these comments on behalf of itself, El Pueblo Para El Aire y Agua Limpio, Greenaction for Health and Environmental Justice, and Center for Biological Diversity opposing the Proposed Action and Supplemental Statement of Basis Relating to the Clean Air Act Prevention of Significant Deterioration ("PSD") Permit for the Avenal Energy Project.

CRPE represents low-income communities and communities of color throughout the central San Joaquin Valley, including in Kings County, where this project would be located. People living in the communities surrounding this Project—more than 90 percent of whom are minorities—are already living with both substandard air quality and significant respiratory health problems as the Central Valley, including Kings County, has worse air quality than any other region in the Nation. Yet the U.S. Environmental Protection Agency ("EPA") proposes to exempt Avenal Energy from requirements to demonstrate that it will not cause or contribute to a violation of the nitrogen dioxide ("NO2") or sulfur dioxide ("SO2") National Ambient Air Quality Standards ("NAAQS") for the one-hour averaging time or a showing that this source will meet the Best Available Control Technology ("BACT") requirement for greenhouse gases.

EPA makes such a proposal in violation of the plain language of the Clean Air Act ("CAA"), EPA's own prior policy and interpretation, and precedential case law.

Additionally, EPA fails to identify potential impacts from short-term NO2 exposures as part of its Environmental Justice Analysis as required by Executive Order 12898. This failure places the communities of Avenal, Huron and Kettleman City at unreasonable risk of unhealthy short-term exposures to NO2. Given EPA's inability to assess disparate impacts due to insufficient local data, its decision to exempt Avenal Energy Center from demonstrating NAAQS compliance is especially egregious.

I. EPA May Not Grandfather the Project From CAA Requirements.

A. The Application Does Not Satisfy The Clean Air Act Requirements.

The Clean Air Act requires that a source demonstrate it will not cause or contribute to a violation of any NAAQS and that the proposed source will meet emissions limitations achievable through application of BACT for each pollutant subject to regulation under the CAA. 42 U.S.C. 7475(a)(3)-(4); 40 CFR 52.21(k); 40 CFR 52.21(b)(12); 75 Fed. Reg. 17004 (April 2, 2010). EPA's Supplemental Statement of Basis proposes to facially violate the CAA by issuing a PSD permit without requiring a demonstration that the source will not cause or contribute to a violation of the NO2 or SO2 NAAQS for the one-hour averaging time or a showing that the source will meet the BACT requirement for greenhouse gases.

The CAA and PSD regulations provide that a permit may not be issued unless the applicant demonstrates that the source will not cause or contribute to a violation of "any national ambient air quality standard in any air quality control region." 42 U.S.C. § 7475 (a)(3); 40 CFR 52.21(k). This includes the 1-hour NO2 and SO2 NAAQS, and greenhouse gas emissions. 75 Fed. Reg. 6474 (Feb. 9, 2010), 75 Fed. Reg. 35520 (June 22, 2010), and 75 Fed. Reg. 17004 (April 2, 2010). Each of these standards had effective dates prior to the issuance of the Avenal PSD permit and none provide grandfathering provisions for pending applications. (The effective dates are April 12, 2010, August 23, 2010, and January 2, 2011, respectively.) For this reason, EPA may not exempt the applicant from the demonstration requirements mandated by law.

In addition, EPA has steadfastly and repeatedly represented to the public and regulated industries that the meaning of the phrase "subject to regulation" in the PSD provisions and associated regulations covered any NAAQS in effect at the time of a final permit decision. EPA publicly repeated this interpretation as recently as April 2, 2010 in its action for the "Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs:" 75 Fed. Reg. 17004 (April 2, 2010). Prior to that, EPA Administrator Stephen Johnson issued a Memorandum setting forth this same interpretation on December 18, 2008. The PSD Interpretive Memo was spurred by a November 13, 2008, Environmental Appeals Board ("EAB") ruling which remanded a PSD permit because of flawed assertions by EPA relating to the phrase "subject to regulation." *In re: Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB Nov. 13, 2008). *See also In re: Phelps Dodge Corp.* 10 E.A.D. 460, 478 n.10 (EAB 2002) where the EAB held "applicable requirements" of the Clean Water Act and its regulations to "include all statutory requirements that take effect prior to issuance of permit..."

EPA can not simply ignore its previously adopted policies since agencies must scrupulously follow the regulations and procedures promulgated by the agency itself. *Sierra Club v. Martin*, 168 F.3d 1, 4 (11th Cir. 1999). Additionally, EPA's sudden departure from its well-established policies is entitled to very little deference. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446 n. 30 (1987). An inconsistent position taken by an agency on an issue casts serious doubt on the validity of its analysis. *See, e.g., Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457 (9th Cir. 1992) (no deference to the agency's "expertise" when the agency position has fluctuated).

The proposed BACT determination is also faulty as a matter of law because EPA failed to consider or analyze the greenhouse gas emissions ("GHGs") from the Project or any technology to control them. As discussed in EPA's final action for "Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs," EPA construes the BACT requirements to apply to each pollutant that is "subject to regulation under the Act" at the time the PSD permit is issued, as EPA now seeks to construe the phrase. 75 Fed. Reg. 17004 (April 2, 2010). In that rulemaking , EPA asserted that GHGs became "subject to regulation" when rules limiting greenhouse gas emission from vehicles first effected the sale of such vehicles, or on January 2, 2011. *PSD Interpretive Memo* at 6, n. 5. The rule addresses six greenhouse gases: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). 75 Fed. Reg. 31518 (June 3, 2010). However, the proposed BACT determination does not consider or analyze GHG emissions at all, thus it is in plain error.[1]

B. <u>EPA's Grounds for Grandfathering this Permit Application Are Flawed.</u>

EPA seeks to justify the proposal to exempt the Avenal permit based on five specific factors. Each justification is legally and factually flawed, as discussed below.

1. Emissions From the Proposed Facility

EPA asserts that the Project will not violate any NAAQS regulated under the proposed permit that were previously in effect. Supplemental Statement of Basis at 6. Regardless of the veracity of this statement, EPA applies the wrong standard. As discussed above, the applicable standard is that which is in place at the time the permit issued. 75 Fed. Reg. 17004 (April 2, 2010). By merely asserting that the facility will meet the old standards as a justification for an exemption from the new standards, EPA posits a circular argument lacking any credible legal basis. Moreover, EPA has no discretion to violate the plain language of a regulation.

In adopting a new hourly NAAQS for NO2, EPA recognized that "the annual NO2 standard alone is not sufficient to protect public health with an adequate margin of safety against adverse respiratory effects associated with short-term exposures to NO2." Final Rule, 75 Fed. Reg. 6474, (Feb. 9, 2010). Therefore, by requiring compliance with previous NO2 standards only, EPA fails to ensure the protection of public health as required by the Clean Air Act.

2. Permit Timing

The Clean Air Act specifies that "[a]ny completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted *or denied* not later than one year after the date of filing of such completed application." 42 U.S.C. § 7475(c)

[1] Additionally, as detailed in our October 14, 2009 Comment Letter to U.S. EPA Region IX, which we incorporate by reference, the proposed BACT determinations do not comply with federal PSD top-down BACT analysis requirements and the proposed CO emission limitation for the combustion turbines is not BACT.

(emphasis added.). This language clarifies that Avenal Energy Center has no vested right to a PSD permit one year after EPA initially deemed its application complete, as EPA could have denied the permit for numerous reasons. Instead, EPA attempts to use this language to justify exempting the applicant from substantive requirements to protect public health. The agency's failure to make a decision on the permit does not deprive the public of protections afforded by the Clean Air Act.

Additionally, project applicants are required to complete an Endangered Species Analysis prior to receiving a PSD permit. The formal Fish & Wildlife consultation process did not conclude until August 2010, well after the statutory one-year period had ended. EPA, through no fault of its own, could not have approved the permit prior to August 2010, more than one-year prior after March 18, 2010. 16 U.S.C.§ 1536(a)(2).

The one-year time limitation is well-known by EPA, and EPA has previously established transition periods in the codification of new or modified regulations.[1] Yet here, EPA did not "see any grounds to establish a transition period" or grandfathering provisions for any of the pending permit applications. 75 Fed. Reg. 17021 (April 2, 2010). EPA made this assessment after reviewing the Avenal application. As explained in this Supplemental Statement of Basis, EPA "believed it would be feasible to begin incorporating greenhouse gas considerations into permit reviews in parallel with completion of work on other pollutants." Supplemental Statement of Basis at 5. The PSD and Title V Greenhouse Gas Tailoring Rule further affirmed the lack of grandfathering provisions. 75 Fed. Reg. 31514, 31592-93 (June 3, 2010).

However, EPA now proposes to cherry-pick unspecified facilities, on either unspecified or entirely vague- and illegal- grounds, to exempt from the applicable standards. Not only does this proposal, by definition, fail to meet the requirements of the CAA but also the very notice requirements which EPA cites in-part for re-opening the public comment period on this matter.

Finally, EPA specifically claims that the applicant lacked notice that the hourly NO2 NAAQS would apply to the Avenal permit, and therefore should be exempt from the requirement. Such an argument lacks credibility because even if the Applicant lacked notice, such deficiency did not prevent APC from endeavoring to complete "sufficient modeling demonstrations to show this source will not cause or contribute to violations of the hourly NO2 standard." Supplemental Statement of Basis at 8. The fact that APC undertook to demonstrate that the project would not violate the NO2 standard undermines EPA's assessment that APC lacked fair notice.

EPA cannot justify an exemption from applicable standards for the Avenal permit based on its own failure to deny the permit, or its negligent regulatory development processes. In *General Motors Corp. v. United States*, the Court held EPA's delay in acting on a SIP revision did not affect the ability or obligation of EPA to enforce the requirements of the Act. 496 U.S. 530 (1990). Such

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inadequacies on the part of EPA do not excuse the requirements of the law. Regardless of whether the permitting authority meets the obligation to grant or deny a permit application within the time period specified, the permit must comply with all applicable standards in effect at the time the permit is issued. *In re Shell Gulf of Mexico, Inc. & Shell Offshore, Inc.*, OCS Appeal No. 10-01 through 10-04, slip op. at 66 n.76 (EAB Dec. 30, 2010), 15 E.A.D. ___; *In re Shell Gulf of Mexico, Inc. & Shell Offshore, Inc.*, OCS Appeal No.10-01 through 10-04, at 19-25 (EAB Feb. 10, 2011) (Order on Motions for Reconsideration and/or Clarification) ("Clarification Order").

3. Unanticipated Challenges

EPA seeks to justify exempting this specific project based on an "unanticipated" challenge which it claims may have affected applicants. EPA claims this challenge relates to the modeling techniques required to demonstrate compliance with the annual NO2 standard. Without providing details, EPA simply asserts that the level of refinement necessary in these demonstrations requires acquisition and analysis of additional data inputs that are not very readily accessible to permit applicants and authorities. EPA has completely failed to demonstrate that this purported difficulty was in fact encountered by Avenal. In any event, modeling challenges do not constitute grounds for evading the law, nor do they allow the Agency to pick and choose which facilities do and do not have to meet that law. "Unanticipated challenges" do not justify post-hoc facility-specific exemptions.

4. Addressing NO2 Caused the Additional Delay

EPA claims that, but for the challenge encountered in supplementing the APC permit to address the hourly NO2 NAAQS, the hourly SO2 NAAQS and GHG requirements would not have become applicable. This argument fails to acknowledge that the applicant and the Fish & Wildlife Service, by failing to conclude their Endangered Species consultation until August of 2010, in fact delayed the PSD process until *after* both the NO2 and SO2 standards had already been adopted, and until *after* the GHG standards had been proposed. 75 Fed. Reg. 6474 (Feb. 9, 2010), 75 Fed. Reg. 35520 (June 22, 2010), and 75 Fed. Reg. 17004 (April 2, 2010). In any event, in making this argument, EPA concedes, as it has to, that the NO2 and SO2 NAAQS, and GHG requirements became applicable to this pending PSD permit. Also, it acknowledges that APC could have, and in fact did, endeavor to satisfy the new NO2 NAAQS standard, which begs the question of why it should now be exempted from having to make the required NO2 demonstration.

5. Legal Precedence

EPA attempts to justify its disregard of unequivocal statutory requirements by pointing to inapplicable and distinguishable case law. *See Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943); *State of Alabama v. EPA*, 557 F.2d 1101, 1108 (5th Cir. 1977).

The grounds EPA cites for "authority" stems from an 1880's case where the court found that a judgment could be entered retrospectively after a dely in rendering a judicial judgment arose from an act of the court itself. *Mitchell v. Overman*, 103 U.S. 62, 64-65 (1880). The narrow exception carved out in *Mitchell* is inapplicable here as there has been no court inaction. To the contrary, the

only role the court has played here is to ensure that the agency grants or denies the PSD permit in a timely manner.

EPA cites *Fassilis v. Esperdy*, to argue that this principle is applicable to government agencies as well. While the court in *Fassilis* did recognize a narrow exception for "situations involving prejudicial delays in the administrative proceedings," the exception was not applied in that case. 301 F.2d 429, 434 (2d Cir. 1962). EPA also relies on dicta in *Application of Martini*, 184 F. Supp. 395 (S.D.N.Y. 1960), where the court allowed a naturalization applicant to take the naturalization oath retroactively to avoid deportation which was mandated by the agency's own delay. *Id.* at 399-400. The court did not, however, afford the agency authority to fashion and administer it's own remedy. *Id.* at 402.

EPA posits each of the above "justifications" for this action as "factors" in the decision to exempt the Avenal permit from the legal obligation to demonstrate the proposed facility will not cause or contribute to a violation of the one-hour NAAQS for NO2 and SO2 or that this facility will be capable of meeting emissions limitations for greenhouse gases based on BACT requirements. EPA has no authority, and no discretion, to invent "factors" that would exempt any facility from compliance with Clean Air Act requirements. Even if it did, each of these factors is itself flawed and/or misapplied to the present situation. Even if EPA had valid policy reasons for attempting to exempt Avenal Energy Center from NAAQS demonstration, EPA cannot circumvent its own rules.

II. EPA's Proposed Action Will Cause Administrative and Due Process Violations.

At present, the Agency proposes to exempt only the Avenal project from the current PSD requirements. This creates two issues: 1) if this exemption creates a policy applicable to other permit applicants, it violates the Administrative Procedure Act, 5 U.S.C. § 553, for failure to conform to notice and comment rulemaking; and 2) if the exemption is only applicable to the Avenal facility, it violates the equal protection guarantees applicable to the Federal government through the Fifth Amendment of the U.S. Constitution.

A. Administrative Procedure Act Violations.

EPA seeks to create a new national policy outside of the required formal rulemaking process through the Avenal permit application. EPA Assistant Administrator of the Office of Air and Radiation, Regina McCarthy's declaration of January 31, 2011, stated that Avenal was "among those PSD permit applications that EPA believes it is appropriate to grandfather..." McCarthy goes on to note that "EPA will propose to extend similar relief to other permit applicants that can show they are similarly situated." Pg. 2. The Supplemental Statement of Basis for Avenal permit then laid out the requirements for gaining an exemption; "application was complete and a proposed permit [was] issued in advance of EPA's proposal of certain recently promulgated regulations establishing new and additional requirements and other compelling factors," of which five factors were specifically identified. Supplemental Statement of Basis at 1 and 6.

Whether an agency action must satisfy the Administrative Procedure Act's ("APA") formal rulemaking requirements turns on whether the agency "intend[s]" the rule "to create new rights or duties." *See Orengo-Caraballo*, 11 F.3d 186, 195 (D.C.Cir.1993). Here, the agency seeks to create a right to PSD permits based on outdated and inapplicable standards which the Agency itself has found to harm public health and welfare. Thus, formal rulemaking is required. In addition, courts

look to whether an interpretation will carry "the force and effect of law" as opposed to spelling out "a duty fairly encompassed within the regulation that the interpretation purports to construe." *Frank J. Kelley v. Environmental Protection Agency*, 15 F.3d 1100, 1108 (D.C.Cir. 1993); 5 U.S.C. §§ 553(b), (b)(3)(A). Here, EPA proposes to re-interpret and implement a provision to grandfather, post-hoc, specific facilities from well-established requirements, in a complete reversal of its own prior rules, guidances, statements in court and sworn declarations. As such, there is no right or duty "fairly encompassed" in the regulations or current agency policy and practice which an applicant could have reasonably anticipated.

The Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation "adopt[s] a new position inconsistent with ... existing regulations." *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87 (1995); see also *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 240-41 (D.C.Cir. 1992). The rulemaking requirements exist so as to prevent agencies from "easily evad[ing] notice and comment requirements by amending a rule under the guise of reinterpreting it." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

The rulemaking procedural requirements include publication in the Federal Register; notice of the proposed rulemaking and hearing; an opportunity for interested persons to participate; receipt and consideration of comments from all interested parties; and publication in the Federal Register of the rule as adopted, incorporating a statement of its basis and purpose. 5 U.S.C. § 553 (b)-(d). Absent these procedures, the proposed action and the expected future action regarding "similarly situated" applicants violate the APA.

B. Due Process Violations.

Under the Due Process Clause of the Fifth Amendment to the U.S. Constitution, the Federal government is prohibited from "discriminatory" acts. EPA's PSD permit application process, hourly NO2 standard, SO2 standard, and greenhouse gas regulations are neutral as written. However, EPA proposes an unequal application of the regulations on two fronts.

First, EPA proposes to exempt the Avenal facility from the regulations applicable to all other PSD permit applicants.[2] Every other PSD permit applicant who applied for a permit application prior to the effective dates for the NO2 standard, SO2 standard, and greenhouse gas regulations will be subject to the new regulations, while Avenal will be exempt. Such unequal treatment violates the tenets of equal protection. This is especially so where the grounds for the purported exemption are as extremely ill-defined as in the instant case, and where there is no factual basis to conclude that some of these grounds apply to Avenal.

> "Though the law itself be fair on its face and impartial in appearance, yet if applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the

[2] Note: EPA has stated publically that it may also grandfather 10-20 other PSD applications but information regarding which facilities and why has not been released.

denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Second, EPA proposes to exempt an emission-causing power plant from applicable emission reducing regulations in an area already bearing a disproportionate brunt of the environmental load with an 85% minority population, 34% of whom are linguistically isolated. Meanwhile, EPA applies current standards to other PSD applicants, whose projects are not located in a disadvantaged and already decimated region, without grandfathering them. Thus, the residents of Avenal and its surrounding areas will suffer yet another unconstitutional disparate impact.

III. EPA's Removal Of The Region IX Regional Administrator's Authority To Issue PSD Permit Decision Is Unlawful.

In an unprecedented move, EPA Administrator Lisa Jackson granted Assistant Administrator of Air and Radiation ("OAR"), Gina McCarthy, the authority to issue the PSD permit for the Avenal power plant, thereby circumventing Region IX's role in the permit process. The regulatory authority to issue PSD permits is specifically granted to regional administrators. "After the close of the public comment period under §124.10 on a draft permit, the regional Administrator shall issue a final permit decision..." 40 CFR § 124.5; *In re Zion Energy, LLC*, 9 E.A.D. 701, 701 n.1 (EAB 2001). To change the codified delegation, a formal notice and comment rulemaking is required under the APA. Therefore, Jackson's attempt to remove the Regional Administrator's authority to issue a PSD permit is unlawful. *See United States v. Nixon*, 418 U.S. 683, 695-96 (1974)("So long as [a] regulation is extant it has the force of law"); *Am. Fed'n of Gov't Employees, AFL-CIO, Local 3090 v. fed. Labor Relations Auth.*, 777 F.2d 752,759 (D.C.Cir. 1985) ("unless and until [an agency] amends or repeals a valid legislative rule or regulation, [the] agency is bound by such a rule or regulation").

Further, delegation to OAR is highly inappropriate. Unlike the regional offices, OAR has no established PSD permit processing procedure, no historical or systematic practice of application evaluation and no regular staff designated to timely review and issuance of PSD permits. This is inapposite to the non-discriminatory systematic approach that regions have establish to ensure proper application review by knowledgeable staff. For an example of the process in place in Region IX, see http://www.epa.gov/region9/air/permit/psd-issuing.html.

IV. EPA's Environmental Justice Analysis Is Flawed.

As part of a PSD process, the EPA must identify and address disproportionately high and adverse human health or environmental effects of its permitting decision on minority and low-income populations. Executive Order 12898; *In re Shell Gulf of Mexico, Inc. and Shell Offshore, Inc.*, OCS Appeal Nos. 10-1 to 10-4. In its Supplemental Statement of Basis, EPA attempts to analyze potential impacts of short-term NO2 exposures associated with the proposed project on residents within a 25-kilometer radius of the Avenal Energy Center. However, since EPA exempts Avenal Energy Center from demonstrating compliance with the hourly NO2 standard, EPA is unable to make a determination on potential impacts of NO2 on nearby communities. Supplemental Statement of Basis at 27. Additionally, EPA's analysis is flawed because it 1) relies on monitoring data that does not reflect conditions in the impacted communities; 2) fails to account for near roadway exposures experienced by the impacted communities; and 3) fails to

adequately address cumulative risk factors present in Avenal, Huron, and Kettleman City. The EPA's analysis of disproportionate impacts from attainment pollutants is flawed because it is wholly based on the California Energy Commission's analysis which failed to account for local impacts. Finally, EPA's proposal to move forward with approving a PSD permit while investigating a Title VI complaint and without providing adequate notice[3] violates basic environmental justice principles.

A. The EPA Must Conduct Analysis to Identify and Address Disproportionate Impacts of Approving the PSD Permit.

EPA is required to identify and address disproportionately high and adverse human health or environmental effects of its permitting decision on minority and low-income populations. Executive Order 12898; *In re Shell Gulf of Mexico, Inc. and Shell Offshore, Inc.*, OCS Appeal Nos. 10-1 to 10-4. These provisions prohibit the EPA from approving the PSD permit without making a determination that its decision will not disproportionately impact minority populations.

Here, since EPA proposes to exempt the facility from demonstrating compliance with the hourly NO2 standard, the EPA may not rely on the presumption that NAAQS compliance avoids disproportionate impacts on minority and low-income populations. *In re Shell Gulf of Mexico, Inc. and Shell Offshore, Inc.*, OCS Appeal Nos. 10-1 to 10-4. Rather, EPA must make the required demonstration by analyzing sufficient data to determine potential adverse impacts from short-term NO2 exposure on residents of Avenal, Huron, and Kettleman City.

EPA's EJ analysis contains no information or data on local impacts from hourly NO2 exposures. Instead, the "analysis" is little more than a general treatise on demographic information around the project site and basic health consequences of pollution exposure. The analysis contains no information upon which to judge the probable impacts of increased NO2 on minority and low-income communities near the project site. Without concrete information on background levels of NO2 emissions or NO2 impacts from the Avenal Energy Center, EPA is unable to identify or address disproportionate impacts, as required by law. In fact, EPA admits its Environmental Justice analysis is inconclusive, stating "EPA cannot reach any definitive conclusion about the specific human health or environmental impacts of short term exposure to NO2 emissions from the facility on minority and low-income populations." Supplemental Statement of Basis at 27. EPA, therefore, fails to make the required demonstration. This failure, coupled with evidence of the high vulnerability of nearby populations, confirms that EPA's decision to exempt the facility from NAAQS demonstration is especially egregious.

1. Data Suggests that Avenal Project Will Adversely Impact Communities.

Though EPA does not have data available on background levels at the facility site, data suggests that the additional hourly NO2 emitted from the project site will result in a violation of the NAAQS. EPA acknowledges that an assessment of one hour ozone demonstrated that the facility may result in a maximum 1-hour NO2 impact of 44 ppb. When combined with

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[3]EPA's notice buries information on the hearing date, time and place on the third page of dense text. Additionally, residents of Kettleman City have reported that they did not receive the notice.

background levels found throughout California, this additional NO2 would result in a violation of the standard of 100 ppb. For example, EPA found background levels of NO2 in Visalia to be 61.3 ppb. The addition of 44 ppb of hourly NO2 from the Avenal Power Center would result in a violation. Since EPA estimates that "near roadway concentrations have been measured to be approximately 30 to 100 % higher than those away from major roads" the background levels in a communities adjacent to the proposed facility are likely higher than those measured in Visalia and other parts of the state. The EPA's EJ analysis should disclose the likelihood that the Avenal Energy Center will result in a NAAQS violation, even given the limited data currently available.

2. EPA Must Resolve Title VI Complaint Before Issuing a PSD Permit

EPA accepted for investigation a Title VI Complaint alleging that issuance of an NSR permit and the certification of the project will result in adverse health impacts on residents of color in Avenal and Kettleman City, who are already impacted by multiple sources of pollution. Even while this investigation is pending, EPA now proposes to take similar action in permitting the facility. This creates an obvious conflict of interest as the agency is tasked with policing the same activity in which it is participating. The draft issuance of a permit would undermine EPA's own responsibility to uphold Title VI. In order to avoid real or apparent bias, the EPA must conclude its investigation prior to making a final decision on the permit.

B. <u>Monitoring Data in the EJ Assessment Are Not Reflective of Conditions In At-Risk Communities Near Project Site.</u>

EPA concludes that "background levels of 1-hour NO2 in the general area surrounding the facility are not disproportionately high as compared with communities elsewhere in the State." This conclusion contradicts EPA's own statements that the nearest monitors to the facility are located 28 and 46 miles from the site, outside EPA's 25-kilometer boundary to determine disproportionate impacts. EPA must acknowledge that it has no information upon which to determine background levels near the facility.

Data collected from Hanford and Visalia has little probative value since neither location reflects conditions at the project site. For example, EPA explained that "near roadway concentrations have been measured to be approximately 30-100 percent higher than those measured way from measured roads." EPA acknowledges that "NO2 concentrations on or near major roads are appreciably higher than those measures at monitors in the current network." The monitors in Hanford and Visalia measured NO2 concentrations far removed from any major highway: Hanford is 13 miles from the nearest major Highway and Visalia is 7 miles. Conversely, Kettleman City, sits adjacent to Interstate 5 and is also bisected by a smaller highway (Hwy 41). Monitors in Hanford and Visalia, therefore, failed to account for near-roadway impacts that are present in communities nearest the proposed facility.

The impact of failing to account for near roadway impacts is likely to be significant as "[i]Individuals who spend time on or near major roads can experience short-term NO2 exposures considerably higher than measured by the current network, which are of particular concern for at-risk populations, including people with asthma, children and the elderly." EPA explains that motor vehicles are the largest emitters of NO2 and exposure to short term NO2 spikes associated with motor vehicles was the greatest concern identified in the review for NO2 NAAQS. Supplemental Statement of Basis at 19. Heavy trucks contributed to more than half of the NOx emissions in

Kings County in 2010. Kettleman City hosts the Kettleman Hills Hazardous Waste landfill and is impacted by hundreds of trucks passing through and idling near the community each day. EPA's EJ analysis should account for the high number of vehicle trips passing directly through or by Kettleman City when assessing probable background levels of NO2. Without identifying the likely very high background levels of NO2 in Kettleman City, EPA is unable to determine the health impacts associated with adding additional NO2 pollution from the Avenal Energy Center. Again, deficiencies in available data cast serious doubt on EPA's proposal to exempt Avenal Energy Center from demonstrating hourly NO2 NAAQS compliance.

Background information from Hanford and Visalia fail to represent conditions in the impacted communities for a second reason. Hanford and Visalia, in general, do not experience the same level of economic and racial disadvantage as other San Joaquin Valley communities and, therefore, do not fairly represent the pollution burden borne by the Valley's more marginalized communities such as Avenal, Huron and Kettleman City.[4]

C. <u>NAAQS Are Insufficient to Demonstrate No Impact Given the Number of Risk Factors Present in the Impacted Communities.</u>

The EJ analysis concludes that proposed emissions limits for NO2 (annual average), CO, and PM 10 will not result in disproportionately high and adverse human health or environmental effects on minority and low-income populations. This finding is based solely on compliance with applicable NAAQS based on the margin of safety written in the standards to account for sensitive populations. Supplemental Statement of Basis, pg. 26. However, the NAAQS do not provide an adequate margin of safety to account for the overwhelming overlap of risk factors experienced in Kettleman City, Avenal, and Huron.

These factors include:

- Immuno-compromised health due to unexplained spike in birth defects.
- Drinking water contaminated with arsenic and benzene.
- Proximity to pesticide application sites.
- Toxic exposure risk due to proximity of hazardous waste facility.
- Near roadway exposures to diesel particulate and other vehicle pollution.
- Extreme nonattainment for 8-hour NAAQS.
- Nonattainment for PM2.5 NAAQS.

Kettleman City, Avenal and Huron are economically depressed. Residents have few resources available to cope with the cumulative exposures to environmental stressors such as pesticides applied on nearby fields, diesel trucks on Interstate 5 and Highway 41, the dumping of hazardous waste, solid waste and PCBs, and contaminated drinking water. Residents also are vulnerable due to less occupational and residential mobility, less access to health care, lower income, linguistic isolation, and less political power than other sectors of the Kings County population.

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[4] Visalia is 47 percent minority and Hanford is 50 percent minority, compared with 85 percent minority populations within a 15- kilometer radius around the project site.

While EPA's EJ analysis acknowledges many of these factors in isolation increase vulnerability to the health effects air pollution, EPA does not analyze the impact of these factors in combination.

1. EPA's Assumptions Regarding Reduced Highway Traffic Contradict Recent Studies.

EPA assumes that NO2 concentrations will continue to decrease due to new fuel and truck standards. Supplemental Statement of Basis at 19. EPA ignores, however, recent studies that indicate additional vehicle and truck traffic are anticipated along the I-5 corridor nearest the project site. In 2009, Kings County prepared a lengthy traffic study on the region during its environmental review process for the Kettleman Hills Hazardous Waste expansion. EPA received a copy of the *Traffic Impact Study for the Chemical Waste Management, Inc. - Kettleman Hills B-18/B-20 Class 1 Landfill Project* and a 2009 addendum to the study. The studies found significant traffic increases due to cumulative growth in the region. Additionally, in the cumulative impact analysis, Kings County concluded that "the proposed B-18 / B-20 Landfill Project and the offsite Avenal Energy Project are considered to have a cumulatively significant impact for traffic on I-5 and SR-41" over baseline conditions. EPA should address the likely increase in mobile vehicle traffic along the I-5 corridor.

D. Nonattainment Pollutants Will Adversely Impact Communities.

As part of its EJ analysis, the EPA included findings made by the CEC that the project would not result in any significant adverse environmental or public health impacts to any population. Supplemental Statement of Basis at 27. However, the CEC based its findings that air pollution would be fully mitigated on the purchase of emission reduction credits (ERCs). The EPA must not base its environmental justice findings on ERCs that will do little to reduce pollution in the communities closest to the project site.

While the CEC identified the *amount* of nonattainment criteria pollutants that will be emitted by the project, it failed to identify the *impact* emissions of these pollutants would have on nearby communities. Final Staff Assessment ("FSA") 4.1-21 (Explaining that the determination of impact is limited to assessing whether the project's emissions would cause or contribute to a violation of a district-wide ambient air quality standard.). The CEC's focus on district-wide impacts ignores the local impacts of these emissions.

CEC staff acknowledged that "[a]s development and growth occurs throughout the region, some communities may experience local emission increases while other communities experience the reductions." FSA 4.1-37. Additionally, while the FSA states "emission reductions from any location in the basin provide some benefit" CEC staff did not demonstrate that the basin-wide benefit is sufficient to offset local air quality impacts from the increase in emissions at the project site. *Id.*

The major mitigation measure for the project's air quality impacts in the FSA is the application of Emission Reduction Credits (ERCs). FSA 4.1-27; 4.1-44. However, the CEC did not provide sufficient information on the ERCs for the EPA or the public to judge their adequacy as mitigation. Because the ERCs must be spatially, temporally, and qualitatively equivalent to the project's actual emissions, information on the location and type of each emission reduction claimed

is required to demonstrate their application adequately mitigates the project's air quality impacts. The majority of the ERCs listed in the FSA were not identified by location or type. For example, the four largest sources of NOx and VOC reductions are labeled in the FSA as either "Unknown, (Previously Pastoria Energy Facility)" or "Unknown, Southern." FSA 4.1-28, 4.1-29. Together, these "unknown" sources represent more than half of the NOx reductions claimed by the applicant and 90 percent of its VOC offset holdings.

The FSA also provides insufficient support for its findings that ERCs located outside the local area and as far away as Stockton fully mitigate the project's local air quality impacts. FSA 4.1-28, 4.1-29, 4.1-30. Many of this Project's air quality impacts will occur locally—at the residences, schools, and businesses in Avenal, Kettleman City, and Huron. Yet the CEC does not demonstrate how non-local emission reductions, located over a hundred miles away, will mitigate impacts from the localized emissions.

While the CEC required that ERCs located 15 miles from a project location use a ratio of 1.5 to 1 to offset emissions, the CEC did not increase that ratio for ERCs located more than 15 miles from the project site. The CEC had no support that ERCs located 15 miles from the project will have the same mitigation value as ERCs located 150 miles away. Here, many of the ERCs are located in Stockton, more than 150 miles from the project site. The closest ERCs are in Fresno, over 60 miles away. The FSA did not support the CEC's conclusion that ERCs will actually and effectively mitigate the Project's air emissions.

1. Interpollutant Trading Ratios Are Not Protective of Human Health.

The Project proposes to meet 98% of its PM10 offset requirements from SOx offsets at a one-to-one ratio. FSA 4.1-30. The CEC's finding that the proposed ratio of 1:1 between SOx and PM fully mitigates particulate emissions is unsupported by evidence. Neither the CEC or EPA analyzed the difference in health effects caused by exposure to PM as compared to SOx; the difference in dispersal rates of SOx as compared to PM; or whether removing one ton/year of SOx will, in fact, prevent one ton/year of PM particles from being created.

There is evidence however, that the interpollutant ratio is insufficient to mitigate PM pollution. The project applicant concluded that 1.4 tons of SOx reductions would be needed to offset each new ton of PM10 emissions. Application for Certification, Table 6.2-39. The FSA reported that "staff raised concerns because the one-to-one interpollutant trading ratio is lower than what has historically required by the District on similar past power plant cases" and cited the ratio of 1.867:1 used by the nearby Panoche Energy Center in western Fresno County. The FSA also acknowledged that "[i]n rules issued by the U.S. EPA in 2008 related to P.M NSR, the U.S. EPA's 'nationwide preferred ratio' would be 40-to-1 for SO2 to PM2.5." FSA 4.1-35; 73 FR 28339. In fact, CEC staff acknowledged the likelihood that the U.S. EPA's review of the District's 2008 PM2.5 Plan would lead to a rejection of the 1:1 interpollutant trading ratio used by the SJVAPCD. FSA 4.1-35. The EPA should explain why it does not object to the use of the 1:1 ratio in its EJ analysis.

E. Monitoring NO2 Is Not Mitigation

The signatories to this letter support the placement of NO2 monitors near the project site. Kettleman City offers a good representation of a community with near roadway impacts from I-

hour NO2. However, a proposal to place monitors and gather additional data on local NO2 emissions does not fulfill EPA's mandate to determine potential adverse impacts of the Avenal Energy Center on minority communities before approving a PSD permit for the facility. Until EPA has sufficient information to identify and prevent disproportionate impacts on nearby residents, the EPA may not issue a PSD permit.

V. Conclusion

We urge EPA to deny the PDS permit for the Avenal Energy Center and require compliance with new 1-hour NO2 and SO2 standards and BACT requirements for greenhouse gas emissions on pending PSD permits. Please keep us informed of any additional actions taken on this project or proposals to exempt other PSD permits from applicable standards. Thank you for the opportunity to comment.

Sincerely,

Ingrid Brostrom
Staff Attorney

Laura Baker
Staff Attorney

EXHIBIT 3

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

APR - 1 2010

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards

FROM: Stephen D. Page, Director
Office of Air Quality Planning & Standards (C404-04)

TO: Air Division Directors and Deputies
Regions I - X

This memorandum responds to inquiries that we are receiving from parties who are currently developing or reviewing applications for Prevention of Significant Deterioration (PSD) permits under the Clean Air Act (CAA) requesting that the Office of Air and Radiation (OAR) provide guidance on the applicability of PSD permitting requirements to a newly promulgated or revised National Ambient Air Quality Standard (NAAQS or standards). Accordingly, I am writing to reiterate the Environmental Protection Agency's (EPA's) existing interpretation of the relevant provisions of the CAA and EPA regulations, and EPA's position on how these requirements apply under the federal PSD program.

General Applicability of PSD Permit Requirements to New or Revised NAAQS

The CAA requires that proposed new and modified major stationary sources must, as part of the issuance of a permit to construct, demonstrate that emissions from the new or modified major source –

> will not cause, or contribute to, air pollution in excess of any
> (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies...;
> (B) national ambient air quality standard in any air quality control region; or
> (C) any other applicable emission standard or standard of performance under this chapter;

CAA §165(a)(3). Similarly, EPA's federal PSD program regulations at 40 CFR 52.21(k)(1) require proposed sources and modifications to demonstrate that their allowable emissions will not cause or contribute to a violation of "any national ambient air quality standard in any air quality control region."

EPA generally interprets the CAA and EPA's PSD permitting program regulations to require that each final PSD permit decision reflect consideration of any NAAQS that is in effect at the time the permitting authority issues a final permit. As a general matter, permitting and licensing decisions of regulatory agencies must reflect the law in effect at the time the agency makes a final determination on a pending application. See *Ziffrin v. United States*, 318 U.S. 73, 78 (1943); *State of Alabama v. EPA*, 557 F.2d 1101, 1110 (5th Cir. 1977); *In re: Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 614-616 (EAB 2006); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 478 n. 10 (EAB 2002).

Consistent with such interpretations, EPA has previously concluded that the relevant provisions cover any NAAQS that is in effect at the time of issuance of any permit. For example, in the context of applying the PSD provisions to the NAAQS for particulate matter less than 2.5 micrometers ($PM_{2.5}$), EPA has stated that "section 165 of the CAA suggests that PSD requirements become effective for a new NAAQS upon the effective date of the NAAQS." 73 FR 28321, 28340, (May 16, 2008); 70 FR 65984, 66043, (Nov. 1, 2005). That observation was based, in part, on EPA guidance for implementing the $PM_{2.5}$ NAAQS that the Agency issued shortly after those standards first became effective in 1997. John Seitz, EPA Office of Air Quality Planning and Standards, "Interim Implementation for the New Source Review Requirements for $PM_{2.5}$" (Oct. 23, 1997). Both the 1997 guidance and EPA's final rule addressing the application of the PSD program to $PM_{2.5}$ explained that section 165(a)(1) of the CAA provides that no new or modified major source may be constructed without a permit that meets all the requirements in section 165(a). In addition, those documents observe that one such requirement is the provision in section 165(a)(3) which says that emissions from such source may not cause or contribute to a violation of any NAAQS. The October 23, 1997 guidance provided an interim policy for assuring compliance with the requirements for $PM_{2.5}$, after observing that the "new NAAQS for $PM_{2.5}$, became effective on September 16, 1997." In addition, the guidance expressed EPA's intent to provide a separate memorandum that would address "EPA's views on implementing the ozone and PM_{10} NAAQS during the interim period following *the effective date* of the new 8-hour ozone and revised PM_{10} NAAQS." [Emphasis added.] Those statements made shortly after the promulgation of new NAAQS in 1997 are consistent with the view expressed in the final rule for $PM_{2.5}$ in 2008 that "PSD requirements become effective for a new NAAQS upon the effective date of the NAAQS."

Additional precedent for this interpretation can be found in the 1987 final rule titled "Regulations for Implementing Revised Particulate Matter Standards" (52 FR 24672. July 1, 1987) issued at the time EPA established new PM_{10} standards. In that rule, EPA stated that "once the PM_{10} NAAQS becomes effective, EPA will be responsible for the protection of the PM_{10} NAAQS as well as the review of PM_{10} as a regulated pollutant." 52 FR at 24682. In support of that conclusion, EPA observed that the federal

PSD regulations at 40 CFR 52.21(k)(1) contain "a general provision requiring prospective PSD sources to demonstrate that their potential emissions will not cause or contribute to air pollution in violation of 'any' NAAQS." Id. at 24682 n. 9. Based on that analysis, EPA concluded that "[w]hen the revised NAAQS for particulate matter becomes effective, each PSD application subject to EPA's Part 52 PSD regulations, and not eligible to be grandfathered under today's action, must contain a PM_{10} NAAQS analysis." 52 FR at 24684.

As illustrated above, under 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. In the transition from the total suspended particulate NAAQS to the PM_{10} NAAQS, EPA explicitly established rule provisions that allowed proposed new major sources and major modifications that had submitted a complete PSD permit application before the effective date of new PM_{10} NAAQS, but that had not yet received a final and effective federally-issued PSD permit, to continue relying on information already in the submitted application rather than immediately having to amend applications to demonstrate compliance with the new PSD requirements. *See*, e.g., 40 CFR 52.21(i)(1)(x). EPA has adopted similar provisions pertaining to new or revised PSD increments. 40 CFR 52.21(i)(9)-(10). Those proposed sources and modifications meeting these transition requirements were "grandfathered" or exempted from the new PSD requirements that would otherwise have applied to them. Thus, while we have included the necessary provisions to grandfather sources from new requirements under certain circumstances, we have not always chosen to do so for NAAQS revisions in general.

Applicability of the New 1-Hour NO_2 NAAQS to Existing Permit Applications

On January 22, 2010, the EPA Administrator signed a final rule containing a new NAAQS for nitrogen dioxide (NO_2) based on a 1-hour averaging time. That final rule was published in the Federal Register on February 9, and will become effective on April 12, 2010. EPA did not promulgate a grandfathering provision related to the 1-hour NO_2 NAAQS for permits in process but not yet issued as of April 12, 2010. Accordingly, permits issued under 40 CFR 52.21 on or after April 12, 2010, must contain a demonstration that the source's allowable emissions will not cause or contribute to a violation of the new 1-hour NO_2 NAAQS. In the case of the new NO_2 1-hour NAAQS, while the short-term standard is new, the pollutant is not, having been considered a regulated pollutant for many years pursuant to the NO_2 annual NAAQS. There are no exceptions under 40 CFR 52.21 in this case because as noted above, EPA has not adopted a grandfathering provision applicable to the 1-hour NO_2 NAAQS that would enable the required permit to be issued to prospective sources in the absence of such ambient air quality demonstration.

cc: Jeff Clark
Anna Wood
Peter Tsirigotis
Lydia Wegman
Richard Wayland