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

In the Matter of:	)	
	)	PETITION FOR REVIEW
	)	
	)	
Avenal Power Center PSD Permit	)	

INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), Rob Simpson ("Petitioner") petitions for review of the conditions of Clean Air Act Prevention of Significant Deterioration Permit No. SJ 08-01 ("the Permit"), which was issued to Avenal Power Center, LLC ("APC") on May 27, 2011 , by Regina McCarthy, Assistant Administrator, Office of Air and Radiation, Environmental Protection Agency. The permit at issue in this proceeding authorizes APC to construct and operate the Avenal Energy Project in Avenal, California.

Petitioner contends that certain pertain conditions are based on clearly erroneous findings of fact and conclusions of law. Specifically, petitioner challenges the following permit conditions:
(1) Permit in its entirely
(2) Permit conditions or lack of permit conditions relating to NO2, SO2, or greenhouse gases emissions.

FACTUAL AND STATUTORY BACKGROUND

Permit

The EPA received an application for a PSD permit for the Avenal Power Center project ("APC") in February, 2008. The EPA notified the applicant March 19, 2008 that its permit application was complete. On June 16, 2009 the EPA issued a proposed permit. This was followed by additional notices for comment and the closure of the public comment period October 15, 2009. Pursuant to the Endangered Species Act, the application required section 7 consultation with the U.S. Fish and Wildlife Service. The EPA requested consultation on July 10, 2008 and the USFWS published its biological opinion in August 9, 2010, generally signaling the conclusion of consultation.

On March 1, 2011, Administrator Lisa Jackson granted the assistant administrator for the Office of Air and Radiation, Gina McCarthy ("Assistant Administrator") the authority to issue a final decision on the APC PSD permit application. The Administrator issued a memorandum dated March 3, 2011 purporting to address the delegation of PSD permitting authority to an assistant administrator. Neither the letter nor memo were published in the federal register and interested parties were not otherwise noticed or given the opportunity to comment. A fact sheet was never produced.

On March 4, 2011 the Assistant Administrator issued a Supplemental Statement of Basis and a notice of an April 12, 2011 hearing and comment period. Comment was limited to: "(1) EPA's proposal to approve APC's PSD permit application for the Project without requiring a demonstration that this source will not cause or contribute to a violation of the hourly NO2 standard; (2) EPA's proposal not to require this source to meet emissions limitations for greenhouse gases or to demonstrate that the proposed source will not cause or contribute to a violation of the NAAQS for hourly concentrations of sulfur dioxide; and (3) EPA's Environmental Justice Analysis for its proposed PSD permit action for the Project." Supplemental Statement of Basis, page 3.

NOx and Sox

The Clean Air Act requires all major emitting facilities on which construction is commenced after August 7, 1977 to obtain a Prevention of Significant Deterioration permit setting forth emission limitations for the facility. 42 U.S.C. § 7475(a). The PSD permit application process requires analysis "of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility." 42 U.S.C. § 7475(e)(1). The Clean Air Act 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 Standards ("NAAQS"). 42 U.S.C. § 7475(a)(3); 40 C.F.R. 52.21(k).

On February 9, 2010, the EPA published a final rule establishing a primary NAAQS for nitrogen dioxide (NO2) based on a 1-hour averaging time ("1-hour NO2 NAAQS"), which became effective on April 12, 2010. 75 Fed. Reg. 6474 (Feb. 9, 2010). On April 1, 2010, the EPA issued a memorandum explaining that permits on or after the April 12, 2010 effective date must be supported by a demonstration that the source will not cause or contribute to a violation of the 1-hour NO2 NAAQS. Supplemental Statement of Basis, page 4 citing 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). The memorandum explained:

> [P]ermits 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 NO2 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 NO2 NAAQS that would enable the required permit to be issued to a prospective source.

Id.

On June 22, 2010, the EPA published a final rule establishing a primary NAAQS for sulfur dioxide (SO2) based on a 1-hour averaging time, which became effective on August 23, 2010. 75 Fed. Reg. 35,520 (Jun. 22, 2010).

Greenhouse Gas Regulation

On May 7, 2010, the EPA adopted greenhouse gas emissions (GHG) standards (including separate standards for CO2, N2O, CH4) for new on-road passenger cars and light duty trucks for 2012 models, first proposed in September of 2009. 75 Fed. Reg. 25,324. Under EPA certification rules, 2012 model year vehicles can be sold as early as January 2, 2011. Id at 25445. Thus, GHG became subject to regulation January 2, 2011 and review of applications for a PSD permit, after January 2 must now include analysis of GHG.

In anticipation of the May 7, 2010 Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards Final Rule, the EPA issued a rule addressing the

scope of pollutants subject to the PSD program, specifically addressing the applicability of the PSD permitting programs to greenhouse gases (GHGs). 75 Fed. Reg. 17,004. This rule extensively addressed the issue of timing and grandfathering. As the notice Supplemental Public Notice For The Avenal Energy Project Announcement so nicely explains, " EPA interprets the Clean Air Act and applicable regulations to require that PSD permits issued after January 2, 2011 contain limitations on greenhouse gas emissions. 75 Fed. Reg. 17,004 (April 2, 2010)."

The EPA provides a detailed argument as to why "each PSD permit issued on or after January 2, 2011 would need to contain provisions that satisfy the PSD requirements that will apply to GHGs as of that date." Id. at 17,021. It is useful to cite from the April 2, 2010 EPA rule at length:

> In light of EPA's conclusion that pollutants become subject to regulation for PSD purposes when control requirements on that pollutant take effect and that such requirements will not take effect for GHGs until January 2, 2011 if EPA finalizes the proposed LDV Rule as anticipated, EPA does not see any grounds to establish a transition period for permit applications that are pending before GHGs become subject to regulation. 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). Thus, in the absence of an explicit transition or grandfathering provision in the applicable regulations (and assuming EPA finalizes the LDV Rule as planned), each PSD permit issued on or after January 2, 2011 would need to contain provisions that satisfy the PSD requirements that will apply to GHGs as of that date.
>
> Under certain circumstances, EPA has previously allowed proposed new major sources and major modifications that have submitted a complete PSD permit application before a new requirement becomes applicable under 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 such a way, these proposed sources and modifications were "grandfathered" or exempted from the new PSD requirements that would otherwise have applied to them.
>
> For example, EPA adopted a grandfathering provision when it changed the indicator for the particulate matter NAAQS from total suspended particulate matter (TSP) to particulate matter less than 10 microns (PM10). The Federal PSD regulations at 40 CFR 52.21(i)(1)(x) provide that the owners or operators of proposed sources or modifications that submitted a complete permit application before July 31, 1987, but did not yet receive the PSD permit, are not required to meet the requirements for PM10, but could instead satisfy the requirements for TSP that were previously in effect.

In addition, EPA has allowed some grandfathering for permit applications submitted before the effective date of an amendment to the PSD regulations establishing new maximum allowable increases in pollutant concentrations (also known as PSD "increments"). The Federal PSD regulations at 40 CFR 52.21(i)(10) provide that proposed sources or modifications that submitted a complete permit application before the effective date of the increment in the applicable implementation plan are not required to meet the increment requirements for PM10, but could instead satisfy the increment requirements for TSP that were previously in effect. Also, 40 CFR 52.21(i)(9) provides that sources or modifications that submitted a complete permit application before the provisions embodying the maximum allowable increase for nitrogen oxides (NO X) took effect, but did not yet receive a final and effective PSD permit, are not required to demonstrate compliance with the new increment requirements to be eligible to receive the permit.

Under the particular circumstances presented by the forthcoming application of PSD requirements to GHGs, EPA does not see a justification for adopting an explicit grandfathering provision of the nature described above. Permit applications submitted prior to the publication of this notice should in most cases be issued prior to January 2, 2011 and, thus, effectively have a transition period of nine months to complete processing before PSD requirements become applicable. Additional time for completion of action on applications submitted prior to the onset of PSD requirements for GHGs therefore does not appear warranted to ensure a smooth transition and avoid delays for pending applications. To the extent any pending permit review cannot otherwise be completed within the next nine months based on the requirements for pollutants other than GHGs, it should be feasible for permitting authorities to begin incorporating GHG considerations into permit reviews in parallel with the completion of work on other pollutants without adding any additional delay to permit processing.

Furthermore, the circumstances surrounding the onset of requirements for GHGs are distinguishable from prior situations where EPA has allowed grandfathering of applications that were deemed complete prior to the applicability new PSD permitting requirements. First, this action and the PSD Interpretive Memo do not involve a revision of the PSD permitting regulations but rather involves clarifications of how EPA interprets the existing regulatory text. This action articulates what has, in most respects, been EPA's longstanding practice. It has been EPA's consistent position since 1978 that regulation of a pollutant under Title II triggers PSD requirements for such a pollutant. See 42 FR 57481. Thus, permitting authorities and permit applicants could reasonably anticipate that completion of the LDV Rule would trigger PSD and prepare for this action. Many commenters interpreted EPA's October 7, 2009 notice as proposing to trigger PSD requirements within 60 days of the promulgation of the LDV Rule rather than the January 2, 2011 date that EPA has determined to be the date the controls in that rule take effect. Second, there are presently no regulatory requirements in effect for GHGs. On the other hand, at the time EPA moved from using TSP to using PM10 as the indicator for the particulate matter NAAQS, grandfathered sources were still required to satisfy PSD requirements for particulate matter based on the TSP indicator. Likewise, when EPA later updated the PSD increment for particulate matter to use the PM10 indicator, the

> grandfathered sources were still required to demonstrate that they would not cause or contribute to a violation of the particulate matter increment based on TSP. In the case of the adoption of the NO 2 increment, grandfathered sources were still required to demonstrate that they would not cause or contribute to a violation of the NO 2 NAAQS. In contrast, for GHGs, there are no measures currently in effect that serve to limit emission of GHGs from stationary sources.
>
> For these reasons, EPA does not intend to promulgate a transition or grandfathering provision that exempts pending permit applications from the onset of GHG requirements in the PSD program. As discussed above, in the absence of such a provision, PSD permits that are issued on or after January 2, 2011 (in accordance with limitations promulgated in the upcoming Tailoring Rule) will be required to contain provisions that fulfill the applicable program requirements for GHGs.

75 Fed Reg 17021 – 17022.

On June 3, 2010, the EPA promulgated a rule intended to tailor "the applicability criteria that determine which stationary sources and modification projects become subject to permitting requirements for greenhouse gas (GHG) emissions under the Prevention of Significant Deterioration (PSD) and title V programs of the Clean Air Act (CAA or Act)." 75 Fed. Reg. 31514 (June 3, 2010). The June 3, 2010 rule adopted the reasoning and conclusions of the April 2, 2010 rule regarding grandfathering of permits. *Id.* at 31527. "We are not promulgating an exemption for PSD permit applications that are pending when Step 1 of the permitting phase-in begins for those sources that would otherwise need to obtain a PSD permit based on emissions of pollutants other than GHGs. Any PSD permits issued to such Step 1 sources on or after January 2, 2011 will need to address GHGs. This action makes no change to the position we expressed on this issue on April 2, 2010." *Id.*

EPA's arguments against grandfathering regarding the GHG regulations apply to the new regulations governing NOx and SOx as well:

> Using the effective date of a NAAQS to determine when a pollutant covered by a NAAQS becomes a regulated NSR pollutant is more consistent with EPA's general approach for determining when a new NAAQS applies to pending permit applications. EPA generally interprets a revised NAAQS that establishes either a lower level for the standard or a new averaging time for a pollutant already regulated to apply upon the effective date of the revised NAAQS. Thus, unless EPA promulgates a grandfathering provision that allows pending applications to apply standards in effect when the application is complete, a final permit decision issued after the effective date of a NAAQS must consider such a NAAQS. As described above, the effective date of the NAAQS is also the date a NAAQS takes effect through the PSD permitting program to regulate construction of a new or modified source.

75 Fed. Reg. 17,004 at 17018.

THRESHOLD PROCEDURAL REQUIREMENTS

Petitioner satisfies the threshold requirements for filing a petition for review under Part 124, to wit:

1. Petitioner has standing to petition for review of the permit decision because he participated in the public comment period on the permit. See 40 C.F.R. § 124.19(a). Petitioner's October 15, 2009 comments are attached and can be found in the administrative record as Document: EPA-R09-OAR-2009-0438-0030. Petitioner's April 12, 2001 comments are attached and can be found in the administrative record as Docket ID: EPA-R09-OAR-2009-0438-0105.

2. With the exception of the issue of unrecorded public comments, the issues raised by Petitioner in its petition were raised during the public comment period and therefore were preserved for review.

-Delegation of power: Petitioner's April 12, 2011 comments
- Violations of APA and CAA: Petitioner's April 12, 2001 comments
- Notice and public participation: Petitioner's October 15, 2009 comments

ARGUMENT

I. THE PERMIT WAS UNLAWFULLY ISSUED BASED ON UNJUSTIFIED AD HOC RULEMAKING

A. The Administrator Improperly Delegated Power To An Assistant Administrator

In delegating the authority to the Assistant Administrator to rule on this permit application, the EPA has engaged in a prohibited ad hoc rulemaking in violation of the clear directive of 40 C.F.R. part 124 that the Regional Administrator rules on PSD permit applications. Pursuant to the Clean Air Act,

> No major emitting facility on which construction is commenced after the date of the enactment of this part [enacted Aug. 7, 1977], may be constructed in any area to which this part [42 USCS §§ 7470 et seq.] applies unless--
> (1) a permit has been issued for such proposed facility in accordance with this part [42 USCS §§ 7470 et seq.] setting forth emission limitations for such facility which conform to the requirements of this part [42 USCS §§ 7470 et seq.];
> (2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator.

42 USCS § 7475(a)

The EPA promulgated regulations for the administration of the Prevention of Significant Deterioration permit program in 1980 as 40 C.F.R. part 124. 45 Fed. Reg. 33484 (May 19, 1980). These regulations are explicit in granting the Regional Administrator control over the PSD permit application process and the ultimate decision making power on whether to issue or deny PSD permits, "the Regional Administrator shall issue a final permit decision." 40 C.F.R. § 124.15; *also see Rhode Island v. United States EPA*, 378 F.3d 19 (1st Cir. 2004) ("At the end of this process, the regional administrator hands down a decision denying or granting the permit.); *Greenpeace, Inc. v. EPA*, 43 F. 3d 701, 705 (D.C. Cir. 1995) ("[A] Regional Administrator makes a final decision to issue, deny, modify, revoke and reissue, or terminate a permit . . .)

Neither the Administrator's letter attempting to change this rule, properly promulgated through notice and comment rulemaking, nor her memorandum purporting to explain her actions offer any reason for why there is a need to make this ad hoc change to the regulation. The response to comment does not substantively address Petitioner's comment but simply restates the conclusions reached in the memorandum. Response to Comments, page 71. The only explanation offered in the memorandum is that the Administrative Procedure Act's, 5 U.S.C. § 553, requirements of notice and comment rulemaking are inapplicable because this is a matter of procedure and is thus exempted. But, the Administrator has completely ignored the fact that she has engaged in an ad hoc rulemaking that served to change the only interpretation of the statute the EPA has ever operated under, for over 3 decades. As in the seminal case condemning ad hoc rulemaking, *Morton v. Ruiz,* 415 U.S. 199, 232 (U.S. 1974), "The Secretary has presented no reason why the requirements of the Administrative Procedure Act could not or should not have been met." *Id.* at 232; *Cf. SEC v. Chenery Corp*., 332 U.S. 194, 202 (1947).

Griffin v. Harris, 571 F. 2d 767 (3rd Cir. 1978) provides the appropriate framework for examining the Administrator's actions:

> Our inquiry begins with some fundamentals of administrative law. Validly promulgated regulations have the force and effect of law. *E. g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265, 74 S.Ct. 499, 98 L.Ed. 681 (1954). Government agencies must follow their own published regulations, even when the particular decision involves some discretion. *E. g., Vitarelli v. Seaton*, 359 U.S. 535, 539, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959); *Service v. Dulles*, 354 U.S. 363, 372, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957). Agencies may not publish regulations pursuant to the Administrative Procedure Act while at the same time producing ad hoc, unpublished decisions. *E. g., Morton v. Ruiz,* 415 U.S. 199, 232, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974).

Id. at 772.

In this case, the Administrator's action fails to comply with these most basic tenants of administrative law. 40 C.F.R. part 124 was validly promulgated, the EPA has not followed its own published regulations, and has produced an ad hoc, unpublished decision on a topic governed by regulations published pursuant to the Administrative Procedures. "It is a well-settled proposition of administrative law that when an agency deviates from established precedent, it must provide a reasoned explanation for its failure to follow its own precedents. The leading case is *Secretary of Agriculture v. United States*, 347 U.S. 645, 74 S.Ct. 826, 98 L.Ed.

1015 (1954). This requirement does not mean that an agency may not change its policies, but rather that if the agency wishes to overrule or distinguish its precedents, it must explain why it has acted as it did. It follows from that general proposition that when an agency treats two similar transactions differently, an explanation for the agency's actions must be forthcoming." *Baltimore Gas & Elec. Co. v. Heintz*, 760 F. 2d 1408, 1418 (4th Cir. 1985).

The Administrator has not provided any reason whatsoever why she felt it necessary to go out of her way to make a special exception for this case. She has treated two similar transactions differently, with the treatment of the transaction at issue defying the clear language of the applicable regulations. "A court need not accept an agency's interpretation of its own regulations if that interpretation is inconsistent with the statute under which the regulations were promulgated, is plainly inconsistent with the wording of the regulation, or otherwise deprives affected parties of fair notice of the agency's intentions. *See United States v. Larionoff, supra*, 431 U.S. at 872-873, 97 S.Ct. 2150; *Udall v. Tallman, supra*, 380 U.S. at 16-17, 85 S.Ct. 792; 4 K. Davis, Administrative Law Treatise § 30.12, at 260-261 (1958)." *Oglala Sioux Tribe of Indians v. Andrus*, 603 F. 2d 707, 715 (8th Cir. 1979).

Administrator Jackson has attempted to repeal the clear directive of 124.15 that Regional Administrators have the authority to make permit decisions, and promulgate a new ad hoc rule whereby an Assistant Administrator is granted this authority.

Any attempt by the EPA to argue that its notice and comment is sufficient notice and comment rulemaking for the Administrator's redelegation of the authority to make final permit decisions is defeated by the notice's clear directive that comment is limited to topics that do not include this issue:

> This supplemental public notice requests public comment on the following three issues: (1) EPA's proposal to approve APC's PSD permit application for the Project without requiring a demonstration that this source will not cause or contribute to a violation of the hourly NO2 standard; (2) EPA's proposal not to require this source to meet emissions limitations for greenhouse gases or to demonstrate that the proposed source will not cause or contribute to a violation of the NAAQS for hourly concentrations of sulfur dioxide; and (3) EPA's Environmental Justice Analysis for its proposed PSD permit action for the Project. EPA is now taking comment solely on these three matters. EPA previously provided opportunity for public comment on all other aspects of the Project's and the proposed PSD permit's compliance with PSD requirements, and a written response to those comments will be provided with EPA's final permit decision for the Project. EPA is not reopening the comment period generally or accepting additional comment at this time on any issues other than the three matters described immediately above.

B. The Permit Unlawfully Allows For Violation Of The Requirements For Regulations Of No2, So2, And Greenhouse Gases

The EPA has likewise engaged in a complete change of course in its decision to grandfather the requirements for NO2, SO2, and greenhouse gases without proffering any reasoned explanation for it about-face. When an agency decides to change course by rescinding or changing a rule,

the agency "is obligated to supply a reasoned analysis for the change*." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 42, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). If an agency fails to comply with that obligation, the new rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and is invalid. *Bush-Quayle'92 Primary Committee v. FEC*, 104 F. 3d 448, 453 (DC Cir. 1997).

This Board has already spoken against the grandfathering of PSD permit requirements and should follow its own directive in this matter. *In re Vulcan Construction Materials, Lp,* 15 E.A.D. ___, 37-38 (EAB 2011), a PSD permit was issued one day before the new one hour NOx NAAQS standard became effective, April 12, 2010. The EAB held that, the applicant was not required to follow the standard because the permit was issued before the standard became effective and the application of new rules or guidance is dependent on when the permit was issued. *Id.* But, when the Board remanded the permit on other grounds, it required that the new permit comply with the standards.

"As this Board has stated, for purposes of determining the applicability of new rules or guidance, a permit is "issued" when the permit issuer makes its final permit decision pursuant to 40 C.F.R. § 124.15(a). *See Russell City*, slip op. at 109 n.100 ("[u]nder EPA's procedural regulations, a permit is 'issued' when the Regional Office makes a final decision to grant the application, not when the permit becomes effective or final agency action.") (quoting Office of Air & Radiation, U.S. EPA, *PSD and Title V Permitting Guidance for Greenhouse Gases* at 3 n.6 (Nov. 2010))." *Id.*

In this case, no final permit has been issued. The new NAAQS for NOx and SOX and GHG requirements have already been issued and so, apply to any permit granted APC at the time any permit is issued.

In Vulcan, the EAB took the concept of when a permit is granted even farther – holding that, because the permit had been remanded and the comment period would have to be reopened, the reissued permit must comply with all applicable standards at the time of reissuance.

> The Board's decision in this case includes a broad remand on significant and foundational issues, including the BACT and air quality analyses, and it will require a reopening of the comment period and reissuance of the permit. Under the facts of this case, where the significant issues to be addressed on remand will necessitate reopening the comment period, IEPA must comply with all applicable standards in effect at the time the permit is issued on remand. *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").

In re Vulcan Construction Materials, Lp, 15 E.A.D. ___, 39n41 (EAB 2011).

II. THIS PERMIT WAS GRANTED IN VIOLATIONS OF NOTICE AND PUBLIC PARTICIPATION REGULATIONS

The EPA provided misleading, factually and legally incorrect information in its public notices; held a public meeting in which public comment was not recorded; and did not notice Californians for Renewable Energy, a participant in past proceedings in the area. The EPA "clearly erred by issuing the Permit without providing adequate notice of the issuance of the draft permit and opportunity to comment as required by § 124.10. To redress this harm, the appropriate remedy is to remand the Permit so that a draft permit can be "renoticed" pursuant to § 124.10. 27." *In re Russell City Energy Center* 14 E.A.D. _ (EAB 2008).

The EPA must provide public notice when a draft permit has been prepared. 40 C.F.R. § 124.10. The notice must include a description of the "activity described in the permit application or the draft permit." 40 C.F.R.124.10(d)(iii). 40 C.F.R. § 124.10 directs the EPA to proactively assemble a "mailing list" of persons to whom PSD notices should be sent. See 40 C.F.R. § 124.10(c)(1)(ix). The mailing list must include those who request in writing to be on the list, persons from "area lists" of participants in past permit proceedings in that area. Id. The EPA must notify the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as Regional and State funded newsletters, environmental bulletins, or State law journals. Id.

A. Notices Included A Factually And Legally Inaccurate Description Of Air Pollution Emissions

The EPA's June 16, 2009 public notice entitled "ANNOUNCEMENT OF PROPOSED PERMIT AND REQUEST FOR PUBLIC COMMENT ON PERMIT WHICH REGULATES THE EMISSION OF AIR POLLUTANTS" included an inaccurate description of the effect of the potential air pollution emissions from AEP. The June 16, 2009 notice states:

> The proposed PSD permit will require the use of Best Available Control Technology to limit emissions of carbon monoxide (CO), oxides of nitrogen (NOx), particulate matter (PM), and particulate matter less than 10 micrometers in diameter (PM10), to the greatest extent feasible. The emissions of other air pollutants from the proposed project will be regulated and limited by the San Joaquin Valley Air Pollution Control District (District). Air pollution emissions from Avenal Energy Project will not cause or contribute to violations of any of the National Ambient Air Quality Standards (NAAQS).

The second and third subsequent public notices announcing the proposed permit included the exact same language. See Document ID: EPA-R09-OAR-2009-0438-0005 and EPA-R09-OAR-2009-0438-0016.

Petitioner objected to this false statement of fact and of law in his October 15, 2009 comments. "I contend that the Notice statement "Air pollution emissions from Avenal Energy Project would not cause or contribute to violations of any of the National Ambient Air Quality Standards

(NAAQS)." is false." Mr. Simpson included the following chart in his comment demonstrating how emissions from AEP will contribute to the violation of PM10 and PM2.5 NAAQS.

AIR QUALITY Table 14
Avenal Energy, Routine Operation Maximum Impacts (µg/m^3)

Pollutant	Averaging Time	Modeled Impact	Background	Total Impact	Limiting Standard	Percent of Standard
PM10	24 hour	2.9	**254**	**256.9**	50	**514**
	Annual	0.8	**46.3**	**47.1**	20	**236**
PM2.5	24 hour	2.9	**92.5**	**95.4**	35	**273**
	Annual	0.8	**18.4**	**19.2**	12	**160**
CO	1 hour	2,175	4,222	6,397	23,000	28
	8 hour	337	2,900	3,237	10,000	32
NO_2	1 hour	190.0	137.2	327.2	339	97
	Annual	0.5	22.6	23.1	57	41
SO_2	1 hour	9.7	47.2	56.9	655	9
	24 hour	1.5	7.9	9.4	105	9
	Annual	0.1	2.6	2.7	80	3

Source: AFC Table 6.2-31.
Note: One-hour NO2 impact assumes the combined emission rates of the two combustion turbine exhausts during staggered startups would not exceed 240 lb/hr of NOx (as in Condition of Certification **AQ-SC11**).

CEC Preliminary Staff Assessment Staff page 4.1-22
http://www.energy.ca.gov/2009publications/CEC-700-2009-001/CEC-700-2009-001-PSA.PDF
and attached

By design, emissions of any pollutants, including those from AEP, that are in nonattainment contribute to violation of NAAQS. The EPA's response to Petitioner's comments is insufficient to explain this highly misleading statement:

> The statement quoted by the commenter refers to applicable NAAQS for pollutants regulated under the PSD permit. As discussed above, the project demonstrates compliance with the NAAQS that are regulated under this PSD permit. For further information about why PSD permits do not have to demonstrate compliance with the NAAQS for nonattainment pollutants, please see our response to comment number 8, 11, 12 and 17 in Section II.A.1.

Comment 23

The statement "Air pollution emissions from Avenal Energy Project would not cause or contribute to violations of any of the National Ambient Air Quality Standards (NAAQS)" does not in any way limit itself to pollutants regulated under the PSD permit. The general public would have no way of decoding this statement to mean what the EPA suggests it does. The misleading nature of this statement painted a very different picture for the public of the effect of this proposed power plant than was true and is an inaccurate description of the "activity described in the permit application or the draft permit." 40 C.F.R.124.10(d)(iii).

"The Board has consistently acted to ensure that permitting authorities rigorously adhere to procedural requirements that facilitate public participation and input during EPA permitting. *See In re Weber*,

#4-8, 11 E.A.D. 241, 245 (EAB 2003); *In re Rockgen Energy Center*, 8 E.A.D. 536, 557 (EAB 1999)." *Russell City Energy Center*, 14 E.A.D. 1 ,22 (EAB 2008).

In *Russell City*, a petition also brought by Petitioner, this Board remanded the permit based on similar failures of the EPA to comply with procedures for proper notice. In *Rockgen*, this Board recognized the central role of public participation in PSD permitting and the need for Board intervention to safeguard that role. Id at 23. "Also, in *Rockgen*, we described a remand as necessary to validate a key statutory objective of the Clean Air Act's PSD program, namely to "assure that any decision to permit increased air pollution * * * is made only after consideration of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process." See Rockgen, 8 E.A.D. at 557 (quoting CAA § 160(5), 42 U.S.C. § 7470(5))." Id.

In this case, the EPA did not provide adequate procedural opportunities for informed public participation as it actually misinformed the public about the true nature of the project. The EPA further violated public participation procedures in holding a meeting during the comment period and failing to record public comment made at that meeting.

B. <u>The EPA Held A Public Meeting During The Comment Period And Did Not Record Public Comment</u>

In its Response to Public Comments, the EPA announced for the first time that it failed to record public comment at a public meeting. This issue was not "reasonably ascertainable" at the time Petitioner made his comments as it only came to light in the EPA's Response to Comments where the EPA stated "EPA held a public information meeting on September 30, 2009 in Avenal, California. The purpose of the public information meeting was to provide information about the proposed permit and how to participate in the public comment process. A Spanish language interpreter was present for oral translation. EPA responded to questions at these meetings but did not formally record remarks from the audience." Response to Public Comments, page 10.

In *Russell City*, the Board questioned the EPA's diligence in addressing public input where the EPA attended the meeting of a state agency, gave the public the impression that their comments would be considered, and then failed to record any comments:

> Another issue that raises serious doubts about the adequacy of the District's procedures for public participation in this case is the District's role with respect to a CEC-conducted public workshop regarding the proposed RCEC. As noted previously, the workshop, in which the District apparently participated, was held on April 25, 2007, during the public comment period for the draft permit, and air quality issues appeared on the agenda. See supra Part II.B; Opening Statement of Rob Simpson at 2. During the teleconference hearing, CEC's counsel stated his "belief" that the District was present at the workshop along with members of the public. See Teleconf. Hr'g at 21. As noted previously, Mr. Simpson represents that the "public attended this workshop believing that this was a hearing and made 'comments' believing that they would be considered." Opening Statement of Rob Simpson at 2. While there is no independent verification of this

> representation, it is certainly plausible. In any event, the fact that the workshop occurred during the time frame of the draft permit comment period with likely District participation and that no recording was made of any public comments (including air quality issues) raises legitimate concerns about whether the District showed sufficient diligence in addressing public input into the permitting process for RCEC.

Russell City at 37.

In this case, the EPA has acted much more recklessly and itself verifies that it held its own public meeting during the comment period and then failed to record public comment. The EPA has shown a true dereliction of its duty to protect the integrity of the public participation process and this permit should be remanded with further opportunity for public participation. This Board is to be commended for its strong history of support for the public's right to participate in the PSD permitting process and is called upon yet again to act in this regard.

> This concern for protecting the integrity of EPA's public participation procedures, as expressed in Weber and Rockgen, forms the context for considering the District's repeated suggestions in its briefs that any supposed violation of § 124.10 by it was essentially "harmless." Clearly, any violation of § 124.10 that would deny the public its rightful opportunity to comment and therefore have its views considered by the permitting agency could cause a "harm" or "prejudice" similar to that which prompted our corrective action in Weber and Rockgen. This is
> clear since initial notice of permitting actions –along with soliciting public comments, incorporating comments and EPA responses thereto in the administrative record, and providing proper notice of final permitting actions – constitute a set of related procedures that together support the statutory directive to foster effective public participation in PSD permitting. See CAA § 160(5), 42 U.S.C. § 7470(5).

Id. at 24.

C. The EPA Did Not Compile A Sufficient Mailing List

The EPA failed to compile a sufficient mailing list as required by 40 C.F.R. § 124.10 resulting in the failure to notice Californians for Renewable Energy ("CARE"), a participants in past permit proceedings in the area. CARE participated in proceedings for the GWF Tracy Peakers also located in the San Joaquin Valley Air Pollution Control District. See attached Declaration of Mike Boyd. CARE is undoubtedly just one of many persons who were denied their right to participatin based upon the EPA's failure to comply with procedural requirements intended to protect public participation. Furthermore, the EPA missed out on the benefit of CARE's experience participating in such proceedings. As this Board ordered in *Russell City*, the EPA's failure to notify persons that should have been included on the mailing list is cause for remand.

> Initial outreach and notice activities under § 124.10 are clearly intended to generate the public participation upon which standing to challenge permit decisions is predicated. See In re MCN Oil & Gas Co., UIC Appeal No. 02-03, at 11 (EAB Sept. 4, 2002) (Order Denying Review) ("Standing to appeal a final permit determination is limited under [40

> C.F.R. §] 124.19 to those persons who participated in the permit process leading up to the permit decision * * *.") (emphasis added). Obviously, a person who does not receive notice of a draft permit (and is otherwise unaware of its issuance) will not be able to participate to the extent of filing comments on the draft permit, and thereby satisfy the procedural threshold imposed by section 124.19(a), entitling that person to standing before the Board. If a person is entitled to such notice, failure to receive it is clearly prejudicial. For that reason, part 124 contains very specific requirements in section 124.10 as to whom notice must be given and as to the contents of the notice.

Id.

III. THE EPA FAILED TO CONSIDER THE NEED FOR THE FACILITY

Based on a misunderstanding of the deregulated nature of the California energy Market, the EPA has failed to address need for the APC. The EPA has punted this responsibility to an unnamed state agency tasked with considering the issue: " EPA has previously recognized that it may consider the need for a facility and a no build alternative within the context of CAA section 165(a)(2). In re Prairie State Generating Company, 13 E.A.D. 1, 32 (EAB 2006) ("Prairie State"). However, we have also observed that it is appropriate to refrain from analyzing whether a proposed facility is needed where the state has tasked another state agency with the authority to consider that issue." Response to Comments.

In this case, no state agency has or will consider need and so this responsibility cannot be punted to the state. The California Energy Commission (CEC) does not have the authority to consider "need" for a project and did not consider the need for this one. The agency has not provided evidence of a CPUC proceeding which identified need for this facility because the CPUC has not considered this project or approved procurement of the electricity from this project.

This document contains 6963 word.

Respectfully submitted,

April Rose Sommer June 27, 2010

I, Michael Boyd, declare as follows:

1. I am president of CAlifornians for Renewable Energy (CARE) and have personal knowledge of the information contained in this declaration.

2. On Monday, November 15, 2010, 1:08 PM I contacted Dave Warner Director of Permit Services San Joaquin Valley Air Pollution Control District to ask “Is the District accepting comments on the Avenal Power Center PDOC?” to which he replied “The public comment period is over, and we are working on finalizing the Determination of Compliance. “

3. On Friday, March 4, 2011, 8:26 AM I received from R9AirPermits@epamail.epa.gov Supplemental Public Notice of “request for public comment concerning EPA's proposed PSD permit action for the Avenal Energy Project in Kings County, California”.

4. On Thursday, March 10, 2011, 9:07 AM I received from R9AirPermits@epamail.epa.gov “The errata notice and full text version of the corrected public notice”.

5. No subsequent Notice concerning EPA's proposed PSD permit action for the Avenal Energy Project in Kings County, California was provided.

6. CARE was denied an opportunity to comment on the San Joaquin Valley Air Pollution Control District PDOC, and US EPA’s PSD permit, because both agencies failed to notify CARE of the opportunity for public comment in a timely manner.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct to the best of my knowledge and that this declaration was executed at Soquel, California on June 27, 2011.

Michael E. Boyd

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