CRPE

CENTER ON RACE, POVERTY & THE ENVIRONMENT

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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. EPA's Grounds for Grandfathering this Permit Application Are Flawed.

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

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

[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. Monitoring Data in the EJ Assessment Are Not Reflective of Conditions In At-Risk Communities Near Project Site.

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. NAAQS Are Insufficient to Demonstrate No Impact Given the Number of Risk Factors Present in the Impacted Communities.

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.

[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 1-

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,

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