IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, and for the reasons stated in the accompanying MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT, Defendants Lisa P. Jackson, Administrator, and the United States Environmental Protection Agency move for summary judgment with respect to remedy in the above-captioned matter.

Dated: September 17, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT with the clerk of the court for the United States District Court for the District of Columbia using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record:

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MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Avenal Power Center, LLC ("Plaintiff" or "Avenal") brought this action pursuant to the citizen suit provision of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7604(a)(2), to compel Defendants, U.S. Environmental Protection Agency and Lisa P. Jackson, Administrator ("EPA"), to grant or deny its permit application pursuant to CAA section 165(c), 42 U.S.C. § 7475(c), which requires the Agency to do so within one year of the filing of a complete application. EPA does not dispute that it has failed to act on Plaintiff's permit application within one year of declaring the application complete. Accordingly, the only issue to be resolved in this suit is the question of remedy – *i.e.*, the appropriate deadline by which EPA must grant or deny Plaintiff's permit application. Because EPA cannot conclude review of Plaintiff's permit application on any schedule more expedited than that proposed herein, EPA requests that its motion for summary judgment on remedy be granted, and that the Court enter an

order adopting EPA's proposed deadline.

BACKGROUND

I. STATUTORY BACKGROUND

A. THE CLEAN AIR ACT

Prior to beginning construction of a facility that will emit air pollution in excess of specified levels in an area that meets ambient air quality standards established by EPA, a party must obtain a permit that contains emission limitations that will prevent significant deterioration of the air quality in the area where the facility will be located—a Prevention of Significant Deterioration permit, or "PSD permit." 42 U.S.C. §§ 7475(a)(1), 7479(1). To obtain a PSD permit, an applicant must, among other things, demonstrate that the facility "will not cause, or contribute to, air pollution in excess of any . . . national ambient air quality standard in any air quality control region." 42 U.S.C. § 7475(a)(3). Similarly, EPA regulations require that an applicant "demonstrate that allowable emission increases from the [facility], in conjunction with all other applicable emission increases or reductions . . . , would not cause or contribute to air pollution in violation of (1) any national ambient air quality standard in any air quality control region." 40 C.F.R. § 52.21(k). Under the CAA, EPA has established national ambient air quality standards ("NAAQS") that are required to "protect public health" while "allowing for an adequate margin of safety." 42 U.S.C. § 7409(b)(1). EPA must review each NAAQS every five years and revise them if necessary to meet such criteria. 42 U.S.C. §§ 7409, 7409(d)(1).

CAA section 165(c) requires that a PSD permit application "be granted or denied not later than one year after the date of filing of such completed application." 42 U.S.C. § 7475(c). EPA's procedures for reviewing permit applications are contained in 40 C.F.R. Part 124. Under

the CAA and Part 124, EPA must provide the public with an opportunity to submit written and oral comments on proposed PSD permits and denials, and provide the public with notice that "all data submitted by the applicant" is part of the administrative record, during the permit review process. *See* 42 U.S.C. § 7475(a)(2); 40 C.F.R. §§ 124.1(c), 124.10-12. CAA section 165(e) provides that EPA regulations must "require the results of [the air quality analysis] be available at the time of the public hearing on the application for [the PSD] permit." 42 U.S.C. § 7475(e)(3)(c).

The regulations generally provide for a 30-day public comment period, and also provide that notice is to be given at least 33 days prior to EPA's holding a public hearing or before a comment period closes, when notice is given by mail. *See* 40 C.F.R. §§ 124.10-12, 124.20(d). In addition, EPA must respond to all significant comments raised during the public comment period or during any hearing. 40 C.F.R. § 124.17(a). After EPA reviews and responds to public comments, the EPA Regional Administrator, or his or her delegate, for the EPA Region responsible for reviewing the permit application must take action by granting or denying the permit application. *See* 40 C.F.R. §§ 124.15, 124.17-18.

Any person who commented on the draft permit or participated in a public hearing during the permit review process may challenge the final Regional permit decision by filing a Petition for Review of the final permit decision before the EPA's Environmental Appeals Board ("EAB"). *See* 40 C.F.R. § 124.19; *see also* 40 C.F.R. § 124.2 (definition of "Environmental Appeals Board"); 57 Fed. Reg. 5320 (Feb. 13, 1992) (describing the role of the EAB). The EAB has the discretion to refer an appeal to the EPA Administrator for resolution, *see* 40 C.F.R.

§ 124.2, but Part 124 does not authorize the EPA Administrator or the Regional Office to issue a final and effective permit decision without providing an opportunity for an appeal of that permit. The issuance or denial of a PSD permit does not become a final agency action for purposes of judicial review until the exhaustion of the EPA administrative review procedures, including appeal to the EAB. *See* 40 C.F.R. § 124.19(f).

B. THE ENDANGERED SPECIES ACT

Under section 7 of the Endangered Species Act, federal agencies must "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species . . . . ." 16 U.S.C. § 1536; *see generally* 50 C.F.R. Part 402. This is done through the agency's consultation with the United States Fish & Wildlife Service ("FWS"), which is concluded by the issuance of a "biological opinion" by the FWS. *Id.* "Following the issuance of the biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion." 50 C.F.R. § 402.15(a).

II. PLAINTIFF'S PERMIT APPLICATION BACKGROUND

Avenal is the developer of the proposed Avenal Energy Project ("the Project"), a 600-megawatt natural gas-fired power plant. Compl. ¶¶ 2, 10. Avenal first contacted EPA Region 9 in August 2007 regarding the application process for securing a PSD permit for the Project. Compl. ¶¶ 2, 19; Answer ¶¶ 2, 19. Avenal submitted its initial PSD permit application for the Project to EPA in February 2008. Compl. ¶¶ 5, 20; Compl. Ex. A; Answer ¶¶ 5, 20, 21. On March 19, 2008, EPA Region 9 notified Avenal, by letter, that its PSD permit application was complete as of that date. Compl. ¶¶ 5, 21; Answer ¶¶ 5, 21; Pls. Ex. A.

After EPA Region 9 issued its letter notifying Avenal that its PSD permit application was complete, EPA Region 9 processed the application by conducting its own internal analysis of the information provided, communicating regularly with Avenal concerning additional information EPA deemed necessary, and considering additional information received from Avenal. Declaration of Deborah Jordan (hereinafter "Jordan Decl.") ¶ 8. For example, on March 31, 2008, EPA requested additional information from Avenal, and on April 10, 2008, Avenal provided its response to that request. *See* Joint Stipulation of Facts ("Joint Stip."), Docket Entry 11, ¶ 6, and on June 6, 2008, EPA requested additional information regarding AEP's startup/shutdown. *Id.* On October 28, 2008, Avenal notified EPA that it had reduced its proposed carbon monoxide ("CO") limit to 2.0 ppm to address EPA concerns. *Id.* On November 17, 2008, Avenal and EPA had a permit status meeting in San Francisco. *Id.* On February 23, 2009, EPA requested an additional impacts analysis from Avenal, and on March 11, 2009, Avenal submitted the requested additional impacts analysis. *Id.*

Additionally, to ensure compliance with section 7 of the ESA and its implementing regulations, EPA Region 9 took the necessary steps to move forward with consultation regarding the Project with the FWS. Specifically, after receiving a biological assessment from Avenal, EPA Region 9 requested initiation of formal consultation with the FWS, and preparation of a biological opinion, to address potential impacts to the San Joaquin Kit Fox on July 10, 2008. Joint Stip. ¶ 6; Jordan Decl. ¶ 11 and Ex. 2 (July 10, 2009 letter requesting initiation of formal consultation). EPA also requested the FWS's written concurrence that the Project was not likely to adversely affect certain other federally listed endangered plant and wildlife species. *Id.* On September 9, 2008, the FWS requested additional information from EPA Region 9. Joint Stip. ¶

6. On October 1, 2008, Avenal submitted to EPA Region 9 information to respond to FWS's September 8, 2008 letter to EPA, and on October 22, 2008, EPA Region 9 provided additional information requested by FWS. *Id.*

EPA Region 9 issued a proposed PSD permit for the Project and its Statement of Basis and Ambient Air Quality Impact Report on June 16, 2009, and thereby initiated the public comment period for the Project's PSD permit. Pls. Ex. D and E. Shortly after EPA Region 9's issuance of the initial public notice on June 16, 2009, concerning the proposed PSD permit for the Project, members of the public requested an extension of the public comment period, a public meeting and hearing on the project, and public notice in Spanish. Jordan Decl. ¶ 9. On August 27, 2009, EPA Region 9 issued a public notice concerning the proposed PSD permit, and announced that it would hold a public information meeting on September 30, 2009, and a public hearing on October 1, 2009, and that the close of the public comment period would be extended to October 15, 2009. Pls. Ex. E. Members of the public expressed concern about conflicting public proceedings in the area, and EPA determined that a supplemental public hearing would be appropriate. Jordan Decl. ¶ 9. EPA Region 9 therefore issued an additional public notice on September 11, 2009 stating that a supplemental public hearing would be held on October 15, 2009, the date on which the public comment period was scheduled to close. Pls. Ex. E. The public information meeting and two public hearings were held as scheduled, after which the comment period for the proposed permit closed. Jordan Decl. ¶ 9.

EPA received public comments from dozens of organizations and individuals regarding various issues presented by Avenal's proposed PSD permit. Joint Stip. ¶ 10. Following the close of the comment period, EPA commenced work on considering and drafting the response to these

comments. Jordan Decl. ¶10. EPA discussed some of the issues raised in the comments with Avenal, and reviewed and considered additional relevant information to submitted by Avenal following the close of the comment period. Jordan Decl. ¶ 10 and Ex. 1 ; Pls. Ex. H (May, 11 2010 letter from Sierra Research to Gerardo Rios).

While the public review process for the proposed PSD permit was ongoing, and afterward, EPA Region 9 continued to work with FWS and Avenal on the ESA section 7 consultation for the Project. On July 1, 2009, FWS issued its draft Biological Opinion for the Project. Joint Stip. at ¶ 10. Between July 2009 and December 2009, EPA Region 9 and Avenal provided comments on the draft Biological Opinion to the FWS. *Id.* EPA continued to contact FWS regularly to inquire about the status of the final Biological Opinion, *see* Jordan Decl. ¶ 11, which was not issued by FWS until August 9, 2010. *See* Pls. Ex. L.

In the meantime, on February 9, 2010, EPA published a final rule establishing a primary NAAQS for nitrogen dioxide ("NO2") based on a 1-hour averaging time ("hourly NO2 NAAQS"). 75 Fed. Reg. 6474 (Feb. 9. 2010). The CAA requires that EPA review existing NAAQS and the underlying air quality criteria at 5-year intervals and revise the criteria and standards as appropriate. 42 U.S.C. §§ 7409, 7409(d)(1). Prior to the 2010 action, EPA had last completed such a review in 1996.[1] EPA retained the pre-existing NO2 NAAQS with an annual averaging time, but in the 2010 rule, the EPA Administrator concluded that "the current NO2

[1] EPA's February 9, 2010 rule was signed by the Administrator on January 22, 2010 to comply with a deadline established under a Consent Decree entered by this court. *Center for Biological Diversity v. Johnson*, Civ. No. 05-1814 (LFO) (D.D.C.). EPA first promulgated identical primary and secondary NAAQS for NO2 (based on an annual average) on April 30, 1971. *See* 36 Fed. Reg. 8186. EPA completed reviews of the air quality criteria and NO2 standards in 1985 and 1996 with decisions to retain the annual standard each time. *See* 50 Fed. Reg. 25,532 (June 19, 1985); 61 Fed Reg. 52,852 (Oct. 8, 1996).

primary NAAQS alone is not requisite to protect public health with an adequate margin of safety" and that "the NO2 primary standard should be revised in order to provide increased public health protection against respiratory effects associated with short-term exposures, particularly for susceptible populations such as asthmatics, children, and older adults."[2] 75 Fed. Reg. at 6490.

The new hourly NO2 NAAQS became effective on April 12, 2010. *See* 75 Fed. Reg. at 6474. Prior to this date, EPA issued a memorandum explaining that applicable statutes and regulations preclude the Agency from issuing a PSD permit without a demonstration that the source will not cause or contribute to a violation of the new hourly NO2 standard. *See* Jordan Decl., Ex. 5 (Memorandum from Stephen D. Page, EPA Office of Air Quality Planning and Standards, Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards (Apr. 1, 2010) ("Page Memorandum")). In two previous instances, EPA has established by rule exemptions for permit applications that were determined complete prior to the revision of a National Ambient Air Quality Standard for particulate matter. *See* 40 C.F.R. 52.21(i)(1)(x)-(xi).[3] However, since EPA did not promulgate such an exemption applicable to the hourly NO2 standard, existing

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[2] The CAA requires that not later than August 7, 1978, EPA "promulgate a national primary ambient air quality standard for NO2 concentrations over a period of not more than 3 hours unless … [the Administrator] finds that there is no significant evidence that such a standard for such a period is requisite to protect public health." 42 U.S.C. § 7409(c). EPA had previously addressed the issue of short-term exposures to NO2 and the appropriateness of a short term standard in both the 1985 and 1996 NAAQS reviews. *See* 50 Fed. Reg. 25,532 (June 19, 1985); 61 Fed Reg. 52,852 (Oct. 8, 1996).

[3] In response to a petition for reconsideration, EPA has recently proposed to repeal section 52.21(i)(1)(xi), in part because EPA adopted this provision without an opportunity for public comment. 75 Fed. Reg 6827, 6833 (Feb. 11, 2010). EPA previously stayed this provision until June 22, 2010. 74 Fed. Reg. 48,153 (Sept. 22, 2009).

regulations require permits issued after April 12, 2010 to be supported by a demonstration that the proposed source will not violate the hourly NO2 NAAQS. *See* Jordan Decl., Ex. 5, Page Memorandum at 3. Thus, EPA has determined, and notified Avenal on May 5, 2010, that Avenal must show compliance with the hourly NO2 standard in order to obtain a PSD permit. Jordan Decl., ¶¶ 14-15, 17; Joint Stip. at ¶ 10. As discussed more fully *infra*, EPA is currently evaluating, pursuant to section 165(a)(3) of the CAA, whether Plaintiff has demonstrated that emissions from the Project will not cause or contribute to air pollution in excess of the revised NO2 standard. Jordan Decl., ¶¶ 15, 17. Since the promulgation of the revised NO2 standard, EPA has been working with Avenal through a number of letter exchanges and discussions to determine whether the proposed facility will comply with the revised NO2 standard. *See* Pls. Exs. H, J, K, M. On August 17, 2010, Avenal confirmed its intent to provide EPA with additional information and justification concerning its hourly NO2 NAAQS analysis by September 13, 2010 as requested by EPA. Jordan Decl. Ex. 6. On September 13, 2010, EPA received Avenal's submission and is currently reviewing it. Jordan Decl. ¶ 17 and Ex. 7.

On June 22, 2010, EPA published a final rule establishing a primary NAAQS for sulfur dioxide ("SO2") based on a 1-hour averaging time. That rule became effective on August 23, 2010. 75 Fed. Reg. 35,520 (Jun. 22, 2010). EPA has already informed Avenal that it believes that the Project would be in compliance with the hourly SO2 NAAQS. EPA further informed Avenal that it has determined that additional analysis is not required from Avenal to address this standard, given that the Project's SO2 emissions are estimated to be 16.7 tons per year, which is below the significant emissions rate for SO2. *See* 40 C.F.R. §§ 52.21(m)(1) and 52.21(b)(23)(i); Jordan Decl., ¶ 16.

As discussed in the Jordan Declaration, EPA needs until December 31, 2010, to complete its review of Plaintiff's NO2 submissions, and complete the permit decision-making process.[4] Such a deadline will allow EPA Region 9 to evaluate the technical hourly NO2 NAAQS analysis provided by Plaintiff, make a determination regarding the analysis, submit its determinations on the NO2 analysis and the Project's compliance with the 1-hour SO2 NAAQS to the public for comment, consider and respond to comments, and make a well-reasoned and supported final determination on the permit application, so that EPA Region 9's final determination will withstand scrutiny if it is appealed to the Environmental Appeals Board.

III. LITIGATION BACKGROUND

Plaintiff filed the Complaint in this matter on March 9, 2010. When EPA filed its Answer on May 18, 2010, EPA was still engaged in consultation with FWS regarding the Project, and had not received the FWS's final Biological Opinion. *See* Answer, Defenses, ¶ 1. As stated above, on August 9, 2010, EPA received the Biological Opinion from the FWS, thereby completing EPA's formal consultation with the FWS under section 7 of the ESA. *See* Pls. Ex. L. ESA regulations provide that "[f]ollowing the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion." 50 C.F.R. § 402.15(a). Avenal submitted a letter to EPA Region 9 dated August 16, 2010, indicating its intent to commit to the terms of the Biological Opinion and requesting that the terms of its PSD permit be changed to

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[4] This proposed deadline is dependent on EPA Region 9's moving forward with its decision-making process based on the 1-hour NO2 NAAQS analysis submitted by Plaintiff to date, including the submittal received on September 13, 2010. If Plaintiff requests that EPA consider significant additional information or analysis submitted much later than that date, EPA may need to request an extension from the Court for issuing a final permit decision. Jordan Decl., ¶¶ 17-22.

include the Biological Opinion's requirements. Jordan Decl., Ex. 3. On September 1, 2010, EPA sent a letter to Plaintiff requesting that Plaintiff provide a letter addendum to its permit application to include a commitment to comply with the reasonable and prudent measures and terms and conditions included in the Biological Opinion, in lieu of EPA's changing the permit's requirements, consistent with the terms of the Biological Opinion[5] and EPA practice. Jordan Decl., Ex. 4. EPA has not received the requested permit application addendum letter from Avenal to date, but anticipates that it will receive this document shortly. Jordan Decl., ¶ 12. If Avenal promptly submits an adequate commitment letter, EPA will be able to conclude its ESA section 7 obligations for purpose of making a final decision on Plaintiff's permit application, consistent with 50 C.F.R. § 402.15(a). Jordan Decl., ¶ 12.

However, as explained *supra* in Part II of the Background Section, while review of Avenal's permit application remained pending, EPA promulgated an additional NAAQS for NO2, based on a 1-hour averaging time. EPA is currently evaluating, pursuant to section 165(a)(3) of the CAA, whether Plaintiff has demonstrated that emissions from the Project will not cause or contribute to air pollution in excess of the revised NO2 standard. Jordan Decl. ¶ 15. As discussed more fully *infra*, EPA will need until December 31, 2010, to follow the appropriate

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[5] The Biological Opinion's reasonable and prudent measures include, *inter alia*, the following:

> 2. Prior to PSD permit issuance, the applicant will submit a revised PSD permit application that includes the terms and conditions contained within this biological opinion. Including the terms and conditions of the biological opinion within the applicant's PSD permit application requires the applicant to adhere to those terms and conditions to remain in compliance with the PSD permit requirements.
> 3. The EPA shall forward to the Service a copy of the applicants' revised application containing the provisions of the biological opinion for the Service to review.

Pls. Ex. L at 29.

procedures to evaluate the information, provide the public with notice and an opportunity to submit written and oral comments on EPA's determination concerning Plaintiff's NO2 NAAQS data and other related matters, consider and respond to comments, and grant or deny the permit application.

Plaintiff filed a motion for judgment on the pleadings requesting injunctive and declaratory relief on August 25, 2010. For the following reasons, the Court should deny Plaintiff's requested relief, and grant Defendants' proposed remedy instead.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "should be rendered if the pleadings, . . . and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 n.4 (1986) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)).

ARGUMENT

I. THIS COURT HAS EQUITABLE DISCRETION TO DETERMINE A REASONABLE SCHEDULE FOR AGENCY ACTION.

A district court has broad discretion to fashion equitable remedies. *Weinberger v. Carlos Romero-Barcelo*, 456 U.S. 305, 311-13 (1982); *American Lung Ass'n v. Browner*, 884 F. Supp. 345, 347 (D. Ariz. 1984). In a suit alleging violation of a Congressionally mandated duty, the district court exercises its discretion to fashion a remedy by considering whether "the official involved . . . has in good faith employed the utmost diligence in discharging his statutory responsibilities." *NRDC v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1975). "The sound discretion of [a] . . . court does not embrace enforcement . . . of a party's duty to comply with an order that

calls [on] him to do an impossibility." *Natural Resources Defense Council v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1975) ("*Train*"). Indeed, "it would be inappropriate to set an infeasible schedule in order to punish a delinquent agency." *Sierra Club v. Thomas*, 658 F. Supp. 165, 172 (N.D. Cal. 1987). Thus, a statutory deadline should not be enforced to the extent that it is impossible or infeasible to comply with such a deadline. *American Lung Association v. Browner*, 884 F. Supp at 347.

In *Train*, the leading case on the subject of an agency's failure to meet statutory deadlines, the D.C. Circuit recognized two types of circumstances that might necessarily delay agency action and make it infeasible to comply with a particular deadline: (1) budgetary and manpower constraints, and (2) the need for an agency to have more time to sufficiently evaluate complex technical issues. 510 F.2d at 712-13. With respect to the latter, "[t]he public has a significant interest in ensuring that the government does not [act] via a process that emphasizes expediency over quality and accuracy." *Cronin v. Browner*, 90 F. Supp. 2d 364, 373 (S.D.N.Y. 2000). In setting deadlines, courts have considered the agency's need for time to act in a manner that would withstand the scrutiny of subsequent challenge. *See Sierra Club v. Thomas*, 828 F.2d 783, 798-99 (D.C. Cir. 1987); *United Steelworkers of America v. Rubber Mfrs. Ass'n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (holding judicial imposition of overly hasty timetable on agency would ill serve the public interest); *Maine Ass'n of Handicapped Persons v. Dole*, 623 F. Supp. 920, 926 (D. Me. 1985) (recognizing "the need to implement clear and effective regulations capable of withstanding the scrutiny of challenges following enactment."). In short, when an agency has missed a statutory deadline, a court should examine the relevant facts and circumstances and evaluate the time frame needed by the agency to make well-reasoned,

scientifically supportable, and defensible decisions.

II. THE REMEDY PROPOSED BY PLAINTIFF EXCEEDS THE SCOPE OF THE REMEDY AUTHORIZED BY THE CITIZEN SUIT PROVISION.

Because this is a suit against the United States, this Court has jurisdiction only to the extent that the United States has waived its sovereign immunity. The Supreme Court has repeatedly held that "[w]aivers of immunity must be construed strictly in favor of the sovereign . . . and not enlarged beyond what the language requires." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983) (quoting cases). Where the United States has consented to be sued, the terms of that waiver of sovereign immunity define the extent of the court's jurisdiction." *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

Under the Clean Air Act, the citizen suit provision provides a waiver of sovereign immunity for claims alleging that the agency has failed to perform a nondiscretionary duty under the Act. 42 U.S.C. § 7604(a). In fashioning a remedy to address such a failure, district courts do not have jurisdiction to review the substance of the agency's decisionmaking, or "direct the manner in which any discretion given the Administrator . . . should be exercised." *NYPIRG v. Whitman*, 214 F. Supp. 2d 1, 3 (D.D.C. 2002) (holding that the plaintiffs were not entitled to discovery since the court lacked power to grant equitable relief beyond setting a deadline for action required by the CAA provisions before the court). "Notably, the CAA does not allow district courts to address the content of EPA's conduct, issue substantive determinations on its own, or grant other forms of declaratory relief." *Sierra Club v. Browner*, 130 F. Supp. 2d 78, 90 (D.D.C. 2001). Rather, the CAA specifically limits district courts' jurisdiction to "order[ing] the Administrator to perform such act or duty." 42 U.S.C. § 7604(a).

Here, Plaintiff's request for relief goes far beyond that permitted by statute. Plaintiff

requests that the Court (1) order EPA to "[g]rant the PSD permit application for the Project . . . before December 31, 2010; (2) "[p]rohibit the Agency from retroactively imposing the new emission standards on Avenal's permit application;" and (3) order EPA to "[t]ake other appropriate actions to remedy, mitigate, and offset the harm to Plaintiff caused by [EPA's] disregard of their statutory duty. . . ." Plaintiff's Proposed Order, Docket Entry 12-1. Moreover, in its Memorandum in Support, Avenal asks this Court to order the Administrator herself to issue the permit, thus eliminating the possibility of an administrative appeal. *See* Plaintiff's Memorandum in Support at 28 (asking the Court to issue "an order preventing the Agency from retroactively imposing new emission standards in this case and requiring the Administrator to issue a decision, conclusive of all internal EPA proceedings and constituting final agency action, that grants Avenal's pending PSD permit by December 31, 2010"). By asking the Court to order the EPA *Administrator* to *grant* Plaintiff's application, Plaintiff is asking the Court to not only prescribe EPA's substantive decision on the application, but also to foreclose access by interested parties to the EAB appeal process provided by EPA's regulations. *See* 40 C.F.R. § 124.19. Additionally, by asking the Court to prohibit EPA from retroactively imposing new emission standards on Avenal's permit application, and order EPA to take action to remedy or mitigate harm to Plaintiff caused by EPA's failure to meet its statutory duty, Plaintiff is asking the Court to grant declaratory relief beyond setting a reasonable deadline for the agency to meet its duty. As the case law summarized above establishes, the Court has no jurisdiction to grant such relief.

III. EPA'S PROPOSED SCHEDULE REPRESENTS THE REASONABLE MINIMUM TIME NECESSARY FOR EPA TO COMPLETE THE REQUIRED ACTION.

As detailed in Parts II and III of the Background section *supra*, and established in the

Joint Stipulation of Facts and Jordan Declaration, EPA Region 9 has acted in good faith and with "utmost diligence" in processing Plaintiff's permit application. Specifically, EPA Region 9 requested and received additional information from Avenal after receiving the initial application and after deeming the application complete, received Avenal's biological assessment and initiated the consultation process with FWS under the ESA, facilitated communication between Avenal and FWS during the consultation process, commented on FWS's draft Biological Opinion, and contacted FWS regularly to inquire about the status of the final Biological Opinion, which was not issued by FWS until August 9, 2010. *See* Joint Stip. ¶ 6; Jordan Decl., ¶¶ 9-11. EPA also worked with Avenal through a number of letter exchanges and discussions to determine whether the Project will comply with the new hourly NO2 standard, which came into effect after EPA determined that Avenal's application was complete but before the final Biological Opinion was issued. *See* Joint Stip. ¶ 6; Jordan Decl., ¶¶ 13-17.

While Plaintiff's frustration with the requirement that it show compliance with the hourly NO2 NAAQS promulgated after EPA determined that its application was complete is understandable, EPA has a statutory obligation to review and revise the NAAQS every five years. The Agency's review of the NAAQS for NO2 was several years overdue at the time Plaintiff submitted its application in 2008. As explained more fully *infra,* EPA's interpretation of the CAA and its regulations as requiring compliance with NAAQS in effect at the time of the final permit decision is reasonable. Furthermore, while EPA regularly contacted FWS about the status of the final Biological Opinion, EPA does not control the timing of FWS's issuance of its Biological Opinions.

As discussed in the Jordan Declaration, EPA needs until December 31, 2010, to complete

its review of Plaintiff's NO2 submissions, and complete the permit decision-making process.[6] Such a deadline will allow EPA Region 9 to evaluate the technical hourly NO2 NAAQS analysis provided by Plaintiff, submit its determinations on the NO2 analysis and the Project's compliance with the hourly SO2 NAAQS to the public for comment, consider and respond to comments, and make a well-reasoned and supported final determination on the permit application, so that EPA Region 9's final determination will withstand scrutiny if it is appealed to the Environmental Appeals Board.

Specifically, Plaintiff submitted additional information concerning its compliance with the hourly NO2 standard on September 13, 2010. EPA will review and evaluate that information and analysis, and consider whether any modifications to the permit's emissions limitations or other aspects of its permit decision documentation will be necessary in conjunction with its review of that information and analysis. Jordan Decl.. ¶ 20. EPA will then prepare a written determination concerning Avenal's demonstration of compliance with the hourly NO2 NAAQS and any other necessary modifications to the permit's emissions limitations or other aspects of its permit decision documentation, which EPA would make available for public review and comment. Jordan Decl., ¶ 20.

EPA would concurrently prepare a public notice that would notify and seek comment from the public about EPA's determination whether Avenal has demonstrated compliance with the revised NO2 standard and the revised SO2 standard and other relevant information

[6] This proposed deadline is dependent on EPA Region 9's moving forward with its decision-making process based on the 1-hour NO2 NAAQS analysis submitted by Plaintiff to date, including the submittal received on September 13, 2010. If Plaintiff requests that EPA consider significant additional information or analysis submitted much later than that date, EPA may need to request additional time to reach a decision. Jordan Decl., ¶¶ 17, 22.

concerning the proposed permit decision that arises in the context of EPA's review of the 1-hour NO2 NAAQS analysis. Jordan Decl., ¶ 20. This notice will also propose a public hearing, which would need to be held at least thirty-three days after the date of the public notice. Jordan Decl., ¶ 20. Having recently received the additional hourly NO2 analysis from Avenal, EPA will also move forward with making arrangements for the public hearing, including, among other things, setting a date and location for the hearing, and arranging for a hearing officer, a court reporter, and a translator for the public hearing. Jordan Decl., ¶ 20. EPA believes that it will need approximately six weeks to accomplish all of the tasks described above and publish the notice. *Id.*

Consistent with EPA regulatory timeframes, the public hearing and comment period would last approximately thirty-three days from the date of the public notice announcing both the comment period and the hearing. After the close of the public comment period, EPA would use the next four weeks to consider and prepare a response to comments received during the comment period and public hearing, make any necessary changes to the permit and associated documents, prepare final decision documents, and issue a final decision. Jordan Decl., ¶ 21. In summary, EPA Region 9 requires a minimum of three and one-half months starting with its receipt of Avenal's September 13, 2010, hourly NO2 NAAQS analysis—assuming that analysis is not significantly supplemented after that date—to complete the permit review process, including the public participation process, and issue a final permit decision. Thus, Region 9 will be able to issue a final permit decision no earlier than December 31, 2010. Jordan Decl., ¶¶ 19-21.

Plaintiff argues that EPA cannot lawfully withhold action on the permit application in

order to "retroactively" impose the new NO2 standard, and asks this Court to prohibit EPA from applying any new standards retroactively. *See* Plaintiff's Memorandum in Support at 14-16. Although EPA disputes that this Court has jurisdiction to consider such a question or grant such relief in a deadline suit like this one, *see* discussion of Court's authority in Part II of the Argument *supra*, EPA's interpretation of the CAA requiring EPA to apply the standards in effect, including the hourly NO2 standards, at the time of its final permit decision is reasonable.

Indeed, as noted *supra*, the plain language of both the Clean Air Act and applicable regulations require a PSD permit applicant to demonstrate that its facility will not cause or contribute to a violation of "any" NAAQS. *See* 42 U.S.C. § 7475(a)(3); 40 C.F.R. § 52.21(k). Since at least 1987, EPA has consistently interpreted the plain language of the Clean Air Act to require that each final PSD permit decision reflect consideration of any NAAQS in effect at the time the permitting authority issues a final permit. *See* Jordan Decl., Ex. 5, Page Memorandum. Supreme Court precedent and other cases support EPA's interpretation that 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, Inc. v. United States*, 318 U.S. 73, 78 (1943); *State of Alabama v. EPA*, 557 F.2d 1101, 1110 (5th Cir. 1977). Accordingly, EPA's determination that the NO2 standards apply to Plaintiff's permit application is reasonable under the plain language of the CAA and the corresponding regulations, and is supported by Supreme Court precedent and case law.

Plaintiff cites *Landsgraf v. USI Film Products*, 511 U.S. 244 (1994), in support of its argument that "EPA actions in this case . . . fly in the face of numerous court decisions disfavoring the retroactive application of new requirements." Plaintiff's Memorandum at 15.

Yet in *Landsgraf*, the Supreme Court stated that a retroactive requirement is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." *Landsgraf* , 511 U.S. at 269. "A statute [or rulemaking] does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's [or rule's] enactment, or upsets expectations based in prior law." *Id.* (citations omitted).

Here, Plaintiff has not established that it acquired any rights by virtue of the submission of its permit application or the determination by EPA that its application was complete. In fact, nothing in CAA section 165, or elsewhere in the Act, establishes that Plaintiff is entitled to a decision on its permit application on the basis of the laws and regulations in effect at the time that permit application was submitted or deemed complete, or indeed that Plaintiff is necessarily entitled to have EPA grant, rather than deny, its application. *See generally* 42 U.S.C. § 7475. EPA did not promulgate any regulation exempting applications complete prior to April 12, 2010, from having to address the hourly NO2 NAAQS. Thus, Plaintiff has no basis for such an expectation, let alone a vested right to the permit's issuance without demonstrating compliance with the 1-hour NO2 NAAQS promulgated during EPA's review of the permit application.

EPA's proposed schedule represents the reasonable minimum time necessary for EPA to complete review of Plaintiff's hourly NO2 NAAQS submissions, which EPA reasonably interprets the CAA to require, and proceed through the public notice and comment procedures to grant or deny Plaintiff's permit application. Thus, because Plaintiff has requested relief that exceeds the scope of remedy authorized by the citizen suit provision, and EPA's proposed remedy is reasonable and serves the public interest, EPA respectfully requests that the Court

grant the Regional Air Division Director until December 31, 2010, to grant or deny Plaintiff's permit application

CONCLUSION

For the foregoing reasons, the Court should deny the relief requested by Plaintiff and instead grant EPA's motion on remedy.

Dated: September 17, 2010

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division
________/S/________________________
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Of Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT with the clerk of the court for the United States District Court for the District of Columbia using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record:

LaShon K. Kell
Jeffrey R. Holmstead
BRACEWELL & GIULIANI LLP
2000 K Street, NW, Suite 500
Washington, DC 20006

/s/ *Stephanie J. Talbert*
STEPHANIE J. TALBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Having received DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT on September 17, 2010, the Court hereby grants such motion. The Regional Air Division Director for EPA Region 9 must grant or deny Plaintiff Avenal's PSD permit application no later than December 31, 2010. Plaintiff's MOTION FOR JUDGMENT ON THE PLEADINGS is denied.

So ordered.

Dated:_______________

____
The Honorable Richard J. Leon
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF DEBORAH JORDAN

I, Deborah Jordan, under penalty of perjury, affirm and declare that the following statements are true and correct to the best of my knowledge and belief, and are based on my own personal knowledge or on information contained in the records of the United States Environmental Protection Agency ("EPA") or supplied to me by EPA employees under my supervision at EPA.

1. I am Director of the Air Division, Region 9, EPA. EPA's Region 9 Office generally has the responsibility within EPA for overseeing the implementation of the Clean Air Act ("CAA" or "the Act") in the Region 9 area. In Region 9, EPA has delegated the authority to implement procedures for preconstruction review for prevention of significant deterioration ("PSD") for new or modified major (stationary) sources under the CAA regulations in 40 C.F.R. § 52.21 to the Director of the Air Division.

2. I have been Director of the Air Division of Region 9 since March 7, 2004. Previously, I served as Associate Regional Administrator, in the role of chief of staff for former EPA Region 9 Regional Administrator Wayne Nastri. I have also served as Chief of the Federal Facilities and

Site Cleanup Branch in the Superfund Division of EPA Region 9, and as Associate Director of the Air Division for the Region.

3. As Director of the Air Division in Region 9, I oversee and have worked extensively with Region 9 staff and management in the Region 9 Air Permits Office, which is responsible for processing PSD permit applications, and the Air Quality Analysis Office, which is responsible for reviewing air modeling analyses submitted to Region 9 in conjunction with PSD permitting actions. Thus, I am knowledgeable about EPA Region 9's actions to date concerning EPA's processing of the PSD permit application for the Avenal Energy Project ("Project"). In addition, I am knowledgeable about how to establish a schedule for PSD permitting which involves reviewing air modeling analyses and undertaking associated PSD permitting actions such as preparing the necessary documentation concerning EPA's determinations concerning such an analysis, providing for public notice and comment on such an analysis, and preparing response to comments and final decision documents pertaining to such an analysis. I am familiar with the amount of staffing necessary to complete these actions, the time frames associated with this work and the total workload of the staff working on these actions, as well as that of their supervisors, managers, and senior management staff. These duties and activities have made me knowledgeable of the requisite procedures and workloads associated with the processing of PSD permit applications.

4. This declaration is filed in support of Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Judgment on the Pleadings and In Support of Defendants' Cross-Motion for Summary Judgment in the above-captioned proceeding. It is also filed specifically to support Defendants' request for a schedule providing for the Region 9 Air Division Director to issue a final permit decision on the pending Avenal Energy Project PSD

permit application by December 31, 2010. EPA believes this schedule to be the most expeditious time frame for a final permit decision by the Region 9 Air Division Director. Any shorter time frame would seriously jeopardize the technical adequacy of the EPA's permit decision as well as the opportunities for the public to provide input on this decision, as a shorter time frame would mean that EPA would not have sufficient time to analyze the relevant technical data submitted by the applicant, prepare documentation concerning its determination on this analysis, or to follow appropriate procedures to inform the public and respond to public comment on the issues.

I. LEGAL BACKGROUND AND EPA'S ACTIONS TO DATE

5. CAA section 165(a) provides that a major emitting facility subject to the PSD permitting program may not be constructed unless the following requirements, among others, are satisfied:

> (1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitation which conform to the requirements of this part; . . .
> (3) the owner of operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any . . . (B) national ambient air quality standard in any air quality control region.

6. EPA regulations require that a PSD permit applicant "demonstrate that allowable emission increases from the [facility], in conjunction with all other applicable emission increases or reductions . . . , would not cause or contribute to air pollution in violation of (1) any national ambient air quality standard in any air quality control region." 40 C.F.R. § 52.21(k).

7. EPA regulations at 40 C.F.R. Part 124 set forth the procedural requirements for EPA's decision making process for the PSD program. Among other things, the regulations generally provide for public notice and comment and an opportunity for public hearing on the basis for EPA's decision prior to EPA's making a final permit decision. 40 C.F.R. §§ 124.1(c), 124.10-12. The regulations generally provide for a 30-day public comment period, and also provide that

notice is to be given at least 33 days prior to EPA's holding a public hearing or before a comment period closes when notice is given by mail. 40 C.F.R. §§ 124.10-12, 124.20(d). In addition, EPA must respond to all significant comments raised during the public comment period or during any hearing. 40 C.F.R. § 124.17(a). The EPA Regional Administrator or his or her delegate (in the case of Region 9, the Regional Air Division Director) then issues the final permit decision. 40 C.F.R. §§ 124.15, 124.17-18.

8. After EPA issued its letter notifying Avenal that its PSD permit application was complete, EPA processed the application by conducting its own internal analysis of the information provided, communicating regularly with Avenal concerning additional information EPA believed necessary in order to move forward with the issuance of a proposed permit decision, and considering additional information received from Avenal.

9. EPA conducted an extended public comment process for the proposed PSD permit for the Project, including a public information meeting and two public hearings in response to requests from stakeholders. Shortly after EPA Region 9's issuance of the initial public notice on June 16, 2009 concerning the proposed PSD permit for the Project, members of the public requested that EPA extend the public comment period, hold a public meeting and hearing on the Project, and also provide public notice in Spanish. In addition, members of the public expressed concern about conflicting public proceedings in the area, and EPA determined that holding a supplemental public hearing would be appropriate. The public information meeting and the two public hearings were held as scheduled, after which time the comment period for the proposed permit closed.

10. After the close of the public comment period, EPA commenced work on considering and drafting responses to the dozens of comments received, some of which raised many different

issues. EPA also discussed some of these issues with Avenal, and reviewed additional information relevant to the comments submitted by Avenal following the close of the comment period. Attached hereto as Exhibit 1 is a true and correct copy of a letter dated November 16, 2009 from Jeffrey R. Holmstead of Bracewell & Giuliani, LLP to EPA Region 9.

11. EPA conducted a formal Endangered Species Act ("ESA") section 7 consultation in conjunction with the permit decision making process for the Project. After receiving a biological assessment from Avenal, EPA Region 9 requested initiation of formal consultation on the Project with the U.S. Fish and Wildlife Service ("FWS"), and preparation of a biological opinion, to address potential impacts to the San Joaquin Kit Fox, on July 10, 2008. EPA also requested the FWS's written concurrence that the Project was not likely to adversely affect certain other federally listed endangered plant and wildlife species. Attached hereto as Exhibit 2 is a true and correct copy of the July 10, 2008 letter. After providing its final comments to the FWS on the FWS's draft Biological Opinion for the Project in December 2009, EPA continued to regularly contact FWS to inquire about the status of the final Biological Opinion. EPA's formal section 7 consultation with FWS concluded with EPA receiving a final Biological Opinion from FWS on August 9, 2010. Avenal submitted a letter to EPA Region 9 dated August 16, 2010 indicating its intent to commit to the terms of the Biological Opinion and requesting that the terms of its PSD permit be changed to include the Biological Opinion's requirements. A true and correct copy of this August 16, 2010 letter (without the attached Biological Opinion) is attached hereto as Exhibit 3. On September 1, 2010, EPA sent a letter to Plaintiff requesting that Plaintiff provide a letter addendum to its permit application to include a commitment to comply with the reasonable and prudent measures and terms and conditions included in the Biological Opinion, in lieu of EPA's changing the permit's requirements, consistent with the terms of the Biological

Opinion and EPA practice. A true and correct copy of this September 1, 2010 letter is attached hereto as Exhibit 4.

II. EPA'S OUTSTANDING OBLIGATIONS

12. EPA must conclude that its ESA section 7 obligations are satisfied for purposes of making a final decision on Avenal's permit application. EPA has not yet received the requested ESA-related permit application addendum letter from Avenal, but anticipates that it will receive the letter shortly. If Avenal promptly submits an adequate commitment letter, EPA will be able to conclude that its ESA section 7 obligations are satisfied for purposes of making a final decision on Avenal's permit application, consistent with ESA regulations at 50 C.F.R. § 402.15(a).

13. EPA promulgated a new 1-hour national ambient air quality standard ("NAAQS") for nitrogen dioxide ("NO2"), effective April 12, 2010. 75 Fed. Reg. 6474 (Feb. 9, 2010).

14. EPA interprets applicable statutes and regulations as precluding the Agency from issuing a PSD permit without a demonstration that the source will not cause or contribute to a violation of the hourly NO2 standard. 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), a true and correct copy of which is attached here to as Exhibit 5.

15. EPA is currently evaluating, pursuant to section 165(a)(3) of the CAA, whether Plaintiff has demonstrated that emissions from the Project will not cause or contribute to air pollution in excess of the hourly NO2 NAAQS.

16. The public participation process that EPA has provided to date for the proposed Avenal PSD permit did not address the hourly NO2 NAAQS. In addition, the public

participation process did not address the hourly sulfur dioxide ("SO2") NAAQS, which became effective on August 23, 2010. EPA has informed Avenal that it believes that the Project's emissions would comply with the hourly SO2 NAAQS, and that it has determined that additional analysis is not required from Avenal to address this standard, given that the Project's SO2 emissions are estimated to be 16.7 tons per year, which is below the significant emissions rate for SO2, per 40 C.F.R. §§ 52.21(m)(1) and 52.21(b)(23)(i).

17. EPA has been working with Avenal through a number of letter exchanges and discussions to determine whether the proposed facility will comply with the hourly NO2 standard. On August 17, 2010, Avenal confirmed its intent to provide EPA with the additional information and justification EPA requested concerning its hourly NO2 NAAQS analysis by September 13, 2010 as requested by EPA. A true and correct copy of Avenal's August 17, 2010 letter is attached hereto as Exhibit 6. EPA received an additional hourly NO2 NAAQS submittal from Avenal on September 13, 2010, and is currently reviewing it. A true and correct copy of the cover letter and memorandum from that September 13, 2010 submittal (excluding the submittal's attachments) is attached hereto as Exhibit 7.

18. Consistent with EPA regulations in 40 C.F.R. Part 124, EPA has determined that an additional 33-day public comment period, which will conclude with a public hearing, concerning EPA's determination regarding whether emissions from the Project will cause or contribute to a violation of the hourly NO2 NAAQS and the hourly SO2 NAAQS is appropriate and necessary prior to Region 9's making a final decision on the PSD permit application for the Project. EPA has determined that it must also respond to all significant comments raised during the public comment period or during any hearing, thus EPA must consider and respond to all such comments prior to making its final permit decision for the Project.

III. EPA'S PROPOSED SCHEDULE FOR REGION 9 TO ISSUE A FINAL PERMIT DECISION

19. I believe that it will take Region 9 approximately 3½ months from September 13, 2010 – the date that Avenal submitted its most recent supplemental hourly NO2 NAAQS analysis – to undertake the various technical and procedural tasks needed to complete the permit decision making process for the Avenal PSD permit application, as described in more detail below.

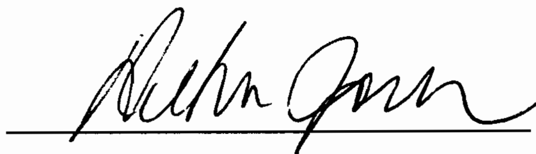
20. EPA will review and evaluate the information and analysis submitted by Avenal on September 13, 2010, and consider whether any modifications to the permit's emissions limitations or other aspects of its permit decision documentation would be necessary in conjunction with its review of that information and analysis. EPA will then prepare a written determination concerning Avenal's air quality impacts analysis for the hourly NO2 NAAQS and any other necessary modifications to the permit's emissions limitations or other aspects of its permit decision documentation, which EPA would make available for public review and comment. EPA will concurrently prepare a public notice that will notify and seek comment from the public about EPA's determination concerning whether Avenal has demonstrated compliance with the hourly NO2 NAAQS and the hourly SO2 NAAQS and other relevant information concerning the proposed permit decision that arises in the context of EPA's review of the hourly NO2 NAAQS analysis. This notice will also propose a public hearing, which would need to be held at least thirty-three days after the date of the public notice. Having received the additional NO2 information from Avenal, EPA will also move forward with making arrangements for the public hearing, including, among other things, setting a date and location for the hearing, and arranging for a hearing officer, a court reporter, and a translator for

the public hearing. EPA believes that it will need approximately six weeks to accomplish all of these tasks described in this paragraph ¶ 20.

21. Consistent with the EPA regulatory time frames described above, the public comment/hearing period would last approximately thirty-three days from the date of the public notice announcing both the comment period and the hearing. After the close of the public comment period, EPA will use the next approximately four weeks to consider and prepare a response to comments received during the comment period and public hearing, make any necessary changes to the permit and associated documents, prepare final decision documents, and have the Regional Air Division Director issue a final permit decision per 40 C.F.R. § 124.15 no later than December 31, 2010.

22. If Avenal requests that EPA consider significant additional new information or analysis submitted much later than September 13, 2010, EPA may need additional time complete its permit decision making process for the Project, in light of the tasks above to be completed as part of that process.

SO DECLARED:



DEBORAH JORDAN

Dated: 9-17-10

EXHIBIT 1

BRACEWELL
&GIULIANI

Texas
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Washington, DC
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Dubai
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Bracewell & Giuliani LLP
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November 16, 2009

By Overnight and Electronic Mail

Julie Walters
U.S. EPA Region 9
75 Hawthorne Street
Mail Code: ORC-2
San Francisco, CA 94105

Re: Avenal Energy Project; PSD Permit No. SJ 08-01

Dear Ms. Walters:

As you know, we have been working with Avenal Power Center, LLC ("Avenal Power") in the above-referenced permitting matter. In reviewing the public comments submitted on the proposed permit, we noticed that EarthJustice is seeking to reopen an issue that was resolved almost 30 years ago when the PSD program was created – arguing that PSD permitting requirements should apply not only to PSD pollutants, but to nonattainment pollutants as well. *See* Letter from Paul Cort to Shirley Rivera (October 15, 2009) at 9-18 ("EarthJustice Comments"). Because this issue is well settled in both law and practice, Avenal Power did not anticipate the need to address it. Now that it has been raised, however, we submit this letter to ensure that Region 9 has all the information it may need to prepare its response to comments.

The proposed Avenal Energy Project will be located in the San Joaquin Valley, which has been designated as nonattainment for ozone, PM_{10}, and $PM_{2.5}$. As a result, the Clean Air Act permitting requirements related to these pollutants are those set forth in Subchapter I, Part D, Requirements for Nonattainment Areas – not those set forth in Subchapter I, Part C, Prevention of Significant Deterioration of Air Quality. This means, among other things, that the facility must obtain offsets and meet the "lowest achievable emission rate" for its emissions of these pollutants and their precursors.

Pursuant to EPA rules, the issues related to these nonattainment pollutants are being handled in a separate permitting process that is being carried out by the San Joaquin Valley Air Pollution Control District and the California Energy Commission. EarthJustice has had

the opportunity to participate in this process, where issues related to nonattainment pollutants must be addressed. These issues are not properly raised in the PSD permitting process now before EPA Region 9. Because this is a PSD permitting matter, requirements related to ozone, PM_{10}, and $PM_{2.5}$ are not relevant as a matter of law.

EarthJustice apparently concedes that this is how the NSR and PSD programs have always been implemented, but argues that this approach is inconsistent with section 165(a)(3) of the Clean Air Act. To support this position, EarthJustice quotes a portion of section 165(a)(3) stating that a new major source cannot be constructed unless the proponent of the facility "*demonstrates* . . . that emissions from the construction or operation of such facility will not cause, or contribute to, air pollution in excess *any* . . . national ambient air quality standard in any air quality control region . . . ." EarthJustice Comments at 9 (emphasis in original). EarthJustice fails to note, however, that this provision only applies to PSD pollutants. The lead-in paragraph makes it clear that the requirements in section 165 apply only to proposed facilities "to which this part [Part C] applies." CAA Section 165(a). Because an area can be attainment for certain pollutants and nonattainment for others, EPA has always recognized that a proposed facility may need to comply with PSD requirements (Part C) for some pollutants and NSR requirements (Part D) for others.

As EarthJustice recognizes, EPA's long-standing position on this issue is codified in 40 C.F.R. § 52.21(i)(2), which provides that the PSD permitting process does not apply to a "major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to the particular pollutant, the source or modification is located in an area designated as nonattainment under section 107 of the Act." 40 C.F.R. § 52.21(i)(2). This interpretation dates back to the beginning of the current PSD program, which Congress adopted as part of the 1977 Amendments to the Clean Air Act. In 1978, when EPA finalized its first set of regulations to implement the new PSD program, it stated as follows:

> PSD applies irrespective of where a source would locate, except that it does not apply to any source which with respect to a particular pollutant is subject to the nonattainment requirements . . . ."

43 Fed. Reg. 26388 at 26389 (June 19, 1978). Later in the same Federal Register notice, the Agency reiterated this point:

> Any major source subject to nonattainment offset requirements for a particular pollutant which would impact no clean air area is not subject to PSD review for that pollutant. Review of such a source

> would be pointless. The nonattainment requirements would impose LAER, a limitation more stringent than BACT, and would ensure that the source would not contribute to a violation of any applicable NAAQS.

Id. at 26394.

After unrelated portions of the first set of PSD regulations were struck down by the D.C. Circuit, the Agency issued another set of regulations in 1980. These regulations are the source of the language that is now codified in 40 C.F.R. § 52.21(i)(2). In promulgating this second set of regulations, EPA again recognized that a proposed facility might need to meet nonattainment permitting requirements for some pollutants and PSD permitting requirements for others. Again, the Agency made it clear that nonattainment pollutants are not subject to PSD permitting:

> *Pollutant Applicability:* Any net significant emissions increase of any pollutant subject to regulation under the Act (not just those pollutants for which the source is major) now qualifies as a PSD modification. Nonattainment review will continue to focus on only the major nonattainment pollutant. *No PSD review will be required for a given criteria pollutant, if a source would construct in an area designated nonattainment for that pollutant.*

45 Fed. Reg. 52676 at 52681 (August 7, 1980) (emphasis added). EPA could not have been any clearer about its interpretation of the Clean Air Act and the applicability of PSD to particular pollutants.

Now, 29 years later and after two rounds of notice-and-comment rulemaking, EarthJustice apparently wants Region 9 to find that EPA's long-standing regulations and interpretation are somehow inconsistent with the Clean Air Act itself. It is well established, however, that permitting actions are not the proper forum to challenge EPA regulations and legislative interpretations. *See, e.g., In re Woodkiln, Inc.*, 7 E.A.D. 254, 269 (EAB 1997). Any such challenge must be brought directly to the U.S. Court of Appeals. *See* 42 U.S.C. § 7607(b).

* * * * *

We hope that the information contained in this letter will help you to respond to the comments that have been submitted on the proposed PSD permit for the Avenal Energy Project. If you have any questions, please call me at (202) 828-5852.

Very truly yours,

Jeffrey R. Holmstead
of Bracewell & Giuliani LLP

cc: Allan Zabel (via electronic mail)
Gerardo Rios (via electronic mail)
Shirley Rivera (via electronic mail)
R9airpermits@epa.gov

EXHIBIT 2

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

July 10, 2008

Mr. Peter Cross
U.S. Fish and Wildlife Office
2800 Cottage Way, W-2605
Sacramento, CA 95825

Re: Request for Formal Consultation under Section 7 of Federal Endangered Species Act for Proposed Avenal Energy Project

Dear Mr. Cross:

By this letter, the United States Environmental Protection Agency, Region 9 ("Region 9") requests initiation of formal consultation under Section 7 of the federal Endangered Species Act ("ESA") for the proposed Avenal Energy Project ("AEP") located in the City of Avenal, Kings County, California. Avenal Power Center, LLC ("APC") has applied to Region 9 for a Prevention of Significant Deterioration ("PSD") permit as required by Part C of the Clean Air Act and regulations at 40 C.F.R. §52.21. Region 9 is responsible for complying with ESA Section 7 requirements with respect to federal PSD permitting, and must ensure that issuance of the PSD permit to AEP is not likely to jeopardize the continued existence of endangered or threatened species, or result in the destruction or adverse modification of critical habitat of such species.

The applicant and the Region have participated in informal consultation with U.S. Fish and Wildlife Service ("FWS") regarding AEP. This request for formal consultation is made in accordance with our discussions with Ms. Shelly Buranek of your staff. In discussions among the Region, APC, and FWS, FWS indicated that formal consultation would be required because the AEP may affect the federally listed San Joaquin Kit Fox (SJFK).

APC, acting through its authorized representatives including TRC Solutions ("TRC"), compiled and submitted a Biological Assessment (BA) to the Region in the form of a Consultation Initiation Package ("Package") dated May 12, 2008. The BA is based on information in APC's Application for Certification submitted to the California Energy Commission in February 2008; specifically, Sections 2.0 (Project Description and Engineering) and 6.6 (Biological Resources) were submitted for the BA. The Package provides information about the project and its effects on listed species, as well as proposed mitigation and minimization measures. Because we understand that the FWS also received a copy of the Package, a copy of this information is not enclosed in this request for formal consultation.

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In summary, pursuant to Section 7 of the ESA, we request the initiation of formal consultation for AEP to address potential impacts to the SJKF. We further request preparation of a Biological Opinion by FWS and concurrence in writing that the project is not likely to adversely affect the other federally listed endangered plant and wildlife species identified in Section 6.6 of the Biological Assessment (i.e., San Joaquin wollythreads, California jewel flower, blunt-nosed leopard lizard, tipton kangaroo rat). We also request that we receive a copy of the draft Biological Opinion for our review.

We look forward to working with you on this matter. If you have any questions, please have your staff contact Shirley F. Rivera of the Air Permits Office at (415) 972-3966; or you may contact me at (415) 972-3974.

Sincerely,

Gerardo C. Rios
Chief, Air Permits Office

cc: Susan Jones, FWS (via email)
Shelley Buranek, FWS (via email)
Jim Rexroad, Avenal Power Center, LLC (via email)
Joe Stenger, TRC Solutions (via email)
Eric Walther, Sierra Research (via email)
Michelle Woods, California Energy Commission (via email)

EXHIBIT 3

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

August 16, 2010

Gerardo C. Rios
Chief, Air Permits Section
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Subject: Inclusion of Biological Opinion in PSD Permit for the Avenal Energy Project

Dear Mr. Rios,

I am writing on behalf of Avenal Power Center, LLC ("Avenal Power") to request that additional terms and conditions be added to the Prevention of Significant Deterioration ("PSD") permit for the proposed Avenal Energy Project in order to ensure compliance with the Endangered Species Act ("ESA"). Although there are other ways of ensuring ESA compliance, the inclusion of additional terms and conditions in the final PSD permit would be the most straightforward way of doing so in this case and is acceptable to Avenal Power.

As you know, the Fish and Wildlife Service ("F&W") of the U.S. Department of the Interior recently concluded formal consultation under Section 7 of the ESA on the proposed Avenal Energy Project ("Project"). *Letter from Susan K. Moore, Field Supervisor, Fish and Wildlife Service, to Gerardo C. Rios, Chief, Air Permit Office, U.S. Environmental Protection Agency, Region IX* (August 9, 2010) (copy attached). F&W concluded the consultation process by issuing a biological opinion that will require Avenal Power to take certain reasonable and prudent measures to minimize the effects of the Project on the San Joaquin kit fox. These measures are set forth as terms and conditions in the biological opinion. Id. at 29-30.

F&W has also requested that these terms and conditions be included as PSD permit requirements in order to ensure that Avenal Power and any subsequent owners or operators of the Project are required "to adhere to those terms and conditions to remain in compliance with the PSD permit requirements." *Id.* at 29. Although there is nothing in either the Clean Air Act or the ESA that requires conditions in a biological opinion to be treated as PSD permit requirements, nor is there any legal impediment to such an approach, given that the PSD permit has not yet been issued, Region IX can simply incorporate the requirements of the biological opinion into the final PSD permit.

Avenal Power recognizes that it is sometimes necessary to go through public notice and comment in order to add additional permit conditions that were not included in a draft permit. Thankfully, it is not necessary in this case because all the necessary procedural steps have already been taken in the ESA process. Moreover, because the inclusion of the additional terms and conditions would place additional restrictions on Avenal Power, Avenal Power is the only party that could object to their inclusion in the final permit, and Avenal Power will not object to such action.

Thus, Avenal Power requests that EPA incorporate the terms and conditions from the August 9th biological opinion into the final PSD permit for the Avenal Energy Project and then issue such permit as quickly as possible. If you have any questions about this request, please contact me at 713-275-6147.

Sincerely,

J.P. Rexroad
Vice President

Enclosure: Letter from Susan K. Moore, Field Supervisor, Fish and Wildlife Service, to Gerardo C. Rios, Chief, Air Permit Office, U.S. Environmental Protection Agency, Region IX (August 9, 1010)

cc: Jeffrey Holmstead, Bracewell & Giuliani LLP w/o enclosure
Gary Rubenstein, Sierra Research, Inc. w/o enclosure

EXHIBIT 4

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

September 1, 2010

VIA E-MAIL AND U.S. MAIL

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

Re: Final Biological Opinion for the Proposed Avenal Energy Project (SJ 08-01)

Dear Mr. Rexroad:

Thank you for your letter of August 16, 2010 concerning the biological opinion ("BO") issued by the U.S. Fish and Wildlife Service ("FWS" or "Service") on August 9, 2010 for Avenal Power Center, LLC's ("Avenal") proposed Avenal Energy Project.

The August 9, 2010 BO was issued at the conclusion of formal consultation between EPA and FWS in accordance with Section 7 of the federal Endangered Species Act ("ESA"). This consultation was conducted in conjunction with EPA's Clean Air Act ("CAA") Prevention of Significant Deterioration ("PSD") permit decision-making action for the proposed Avenal Energy Project. This letter will clarify the remaining few steps that we have determined are necessary and appropriate to ensure that EPA's PSD permitting decision for the proposed Avenal Energy Project pursuant to 40 C.F.R. § 52.21 is consistent with the requirements of the ESA and consistent with the BO.

The BO provides the FWS' opinion on the Avenal Energy Project's effects on a number federally-listed endangered species. The Service concurs in the BO with EPA's determination that the project is not likely to adversely affect the federally-endangered San Joaquin woolly-threads (*Monolopia congdonii*), blunt-nosed leopard lizard (*Gambelia sila*), Tipton kangaroo rat (*Dipodomys nitratoides nitratoides*), and the California jewelflower (*Caulanthus californicus*).

In addition, the BO concludes that the construction, operation and maintenance of the proposed project will result in incidental take of the federally-endangered San Joaquin kit fox (*Vulpes macrotis mutica*), in the form or harm and harassment, and provides an incidental take statement to authorize that incidental take provided certain specified conditions are met, as

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explained in more detail below. The BO also concludes that the proposed project is not likely to jeopardize the continued existence of the San Joaquin kit fox.

In order for the exemption for incidental take of the San Joaquin kit fox to apply, the BO imposes specified reasonable and prudent measures ("RPMs") to minimize incidental take, and a set of terms and conditions to implement these measures. As outlined in the BO, the applicant is responsible for directly implementing these reasonable and prudent measures and terms and conditions, while EPA is responsible for ensuring that the applicant comply with them. The BO states that EPA must ensure that the applicant undertakes these measures or makes them binding conditions of any authorization provided to contractors for the exemption under 7(o)(2) to apply. The BO further states that if the applicant (1) fails to adhere to the terms and conditions of the incidental take statement (consistent with revisions to its PSD permit application incorporating these terms and conditions), and/or (2) EPA fails to retain oversight to ensure compliance with these terms and conditions, the protective coverage of section 7(o)(2) may lapse.

The RPMs in the Avenal BO (p. 29) include the following:

2. Prior to PSD permit issuance, the applicant will submit a revised PSD permit application that includes the terms and conditions contained within this biological opinion. Including the terms and conditions of the biological opinion within the applicant's PSD permit application requires the applicant to adhere to those terms and conditions to remain in compliance with the PSD permit requirements.

3. The EPA shall forward to the Service a copy of the applicants' revised application containing the provisions of the biological opinion for the Service to review.

Your August 16 letter indicated Avenal's intent to comply with the terms of the BO, and suggested that EPA modify the Avenal PSD permit terms to incorporate the BO's requirements. Consistent with the requirements of the BO and with EPA practice, to document that Avenal agrees to implement the RPMs and terms and conditions included in the BO, and to clarify that EPA's permit decision is based in part on the applicant's representations that it will, in fact, implement these requirements, we request that Avenal update its PSD permit application to state that, as part of this project, it will implement all RPMs, terms and conditions and reporting requirements contained in the BO (pp. 29-31). We believe that a letter from the applicant that states that it is an addendum to the permit application and that includes the information requested immediately above would suffice for this purpose. (The letter should specifically refer to the BO as part of the addendum; however, an additional copy of the BO need not be submitted.) Please note that neither EPA's request for, nor Avenal's submittal of, this additional documentation concerning Avenal's ESA commitments affects the completeness status of Avenal's permit application, nor would it necessitate the need for additional public notice and comment.

We appreciate your cooperation and assistance in this matter. If you have any questions, please contact Shirley Rivera of my staff at (415) 972-3966, or have your counsel contact Julie Walters, with our Office of Regional Counsel, at (415) 972-3892.

Sincerely,

Gerardo C. Rios
Chief, Air Permits Office

cc: (via e-mail and U.S. mail)
Susan Moore, U.S. FWS
Jeffrey R. Holmstead, Bracewell & Giuliani LLP
Gary Rubenstein, Sierra Research

EXHIBIT 5

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;

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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

EXHIBIT 6

BRACEWELL
&GIULIANI

Texas
New York
Washington, DC
Connecticut
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Jeffrey R. Holmstead
Partner

202.828.5852 Office
202.857.4812 Fax

jeff.holmstead@bgllp.com

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

August 17, 2010

VIA ELECTRONIC AND OVERNIGHT MAIL

Gerardo C. Rios
Chief, Air Permits Section
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Subject: Submission of Additional Information to Support 1-Hour NO2 Modeling Analysis

Dear Mr. Rios:

I am writing on behalf of Avenal Power Center, LLC (APC) to reply to your letter to Jim Rexroad of APC dated August 12, 2010, which we received by email that evening. Your letter asks APC to provide you with a written response by August 17th "confirming that [APC] intends to provide additional information and justification that fully addresses EPA's remaining concerns" with an air quality modeling study that APC has submitted to demonstrate that the proposed Avenal Energy project ("Project") will not cause or contribute to an exceedance of EPA's new 1-hour national ambient air quality standard (NAAQS) for nitrogen dioxide (NO2).

I want to confirm that APC does intend to provide the information and justification that EPA requests and has already asked its consultants and outside experts to pull together this information as quickly as possible.

EPA's "remaining concerns" are discussed in a 20-page attachment to your August 12th letter. Your letter also states that, if APC intends to provide any additional information on its NO2 modeling, such information should "fully address" EPA's concerns and be submitted by September 13, 2010. We very much appreciate EPA's interest in deadlines that might move the permitting process along, even though the rationale for these deadlines is unclear.

Again, I want to confirm that APC does intend to provide the additional information and justification requested in your August 12th letter and has already asked its modeling consultant to develop this information by September 13th. As you are aware, we are currently engaged in litigation with EPA regarding EPA's delay in processing our PSD permit application, and your letter requests that we respond by August 17th, the day before the parties are scheduled to appear before the judge for the first time. Thus, the timing of your letter and response deadline is curious and somewhat concerning. Nevertheless, we intend to continue working with EPA as we have done since we first submitted our PSD application in February 2008 and as we have done during the pendency of this litigation, which began in March of this year.

Although we intend to submit the additional information and justification that EPA is seeking, we want to reiterate our position regarding the applicability of EPA's new 1-hour NO2 standard. APC believes, based on the language of the Clean Air Act and various court decisions, that EPA is required to evaluate a PSD permit application and make its final permit decision based on the legal requirements in effect as of the date the Agency has received a complete application. Thus, we do not believe that the new 1-hour standard applies to our permit application.

We recognize that EPA disagrees with us on this issue and that EPA is the only authority that can issue a PSD permit for the Project. APC long ago obtained all the other government approvals needed for the Project and simply wants to get its final PSD permit. Given these circumstances, APC is willing to develop and provide the additional data and information sought by EPA.

We would, however, like to make two requests of the Agency. First, it would be helpful if EPA could provide us with copies of any modeling studies that EPA has found to be acceptable in showing that a proposed project meets the new 1-hour standard. We are aware of many proposed projects with pending PSD permit applications, but we have not been able to identify anyone who has obtained a PSD permit from EPA since the new standard came into effect. If there is a modeling study that EPA has approved for purposes of the new 1-hour standard, we would very much like to obtain a copy of it.

Second, we would like to know whether there is any way to obtain a final PSD permit for the Project before the end of the year, when EPA believes that carbon dioxide (CO2) will become a "regulated pollutant" under the Clean Air Act. EPA has stated that, if a permit applicant is unable to obtain its final PSD permit by the end of the year, then the applicant must go back through the permitting process to obtain a permit limit for CO2, and that this limit must be based on the "best available control technology" (BACT) for controlling CO2. This is a daunting prospect, given the uncertainty as to what CO2 BACT might be for any type of plant and the backlog of pending permit applications that will need to go back through the permitting process.

As you know, APC first approached your office about the Project in August of 2007 and then submitted its permit application in February 2008 with the expectation that it would receive its final permit within about a year, as required under the Clean Air Act. It now appears, however, that if APC is not able to obtain a final PSD permit before the end of the year, the Project is likely to be held up for several more years because of prospect of dealing with CO2. We have raised this issue repeatedly with EPA officials over the last few months in the hope of getting some assurance that we will be able to avoid additional delays, but we have still not received any concrete response.

If you or anyone else from EPA would like to discuss any of these issues, please contact me at 202-828-5852 or Jim Rexroad from APC at 713-275-6147.

Sincerely,

Jeff Holmstead
Of Bracewell & Giuliani LLP

Cc: Stephanie Talbert, DOJ (by electronic mail)
Brian Doster, EPA OGC (by electronic mail)
Julie Walters, EPA Region 9 (by electronic mail)
Anna Wood, EPA OAQPS (by electronic mail)
Deborah Jordan, EPA Region 9 (by electronic mail)
Shirley Rivera, EPA Region 9 (by electronic mail)

EXHIBIT 7

BRACEWELL
&GIULIANI

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Jeffrey R. Holmstead
Partner

202.828.5852 Office
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jeff.holmstead@bgllp.com

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

September 13, 2010

Gerardo C. Rios
Chief, Air Permits Section
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Subject: Avenal Power Center – Additional Information for 1-Hour NO2 Modeling Analysis

Dear Mr. Rios:

I am writing on behalf of the Avenal Power Center, LLC (APC) to reply to your letter to Jim Rexroad of APC dated August 12, 2010, in which you request additional information regarding the air quality modeling study that APC submitted on May 13th to demonstrate that the proposed Avenal Power Center ("Project") will not cause or contribute to an exceedance of EPA's new 1-hour national ambient air quality standard (NAAQS) for nitrogen dioxide (NO2). The additional information you requested was discussed in a lengthy attachment to your letter.

APC immediately replied (in a letter dated and sent by electronic mail on August 17, 2010) to inform you that that it would develop and submit the additional information you requested, and that it would do so by September 13, 2010, as requested in your August 12th letter. In subsequent discussions, EPA has indicated that the September 13th deadline was intended to ensure that EPA would have sufficient time to review the additional information and issue the PSD permit for the Project before the end of this year.

Over the last month, air quality modeling experts from Sierra Research have worked assiduously to prepare the additional information sought by EPA. I am pleased to be able to submit the attached report prepared by Sierra Research, which addresses all the issues raised in your August 12th letter and the accompanying attachment. As we discussed by phone last week, Sierra Research will be providing you with a hard drive containing the underlying modeling files and other data discussed in the attached report. We believe that the report (along with the technical information on the hard drive) fully addresses EPA's remaining concerns and should be sufficient to ensure that the final PSD permit for the Project is issued by the end of the year.

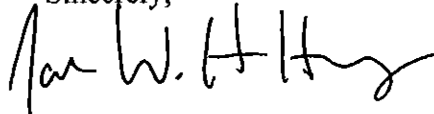
Along with this submittal, however, we must again reiterate our position regarding the applicability of EPA's new 1-hour NO2 standard. As a legal matter, EPA is required to evaluate a PSD permit application and make its final permit decision based on the legal requirements in effect as of the date the Agency received the completed application. When APC submitted its PSD permit application and EPA formally determined, under its own regulations, that the application was complete, EPA had not even proposed, much less finalized, the 1-hour NO2 standard. In fact, the Agency had not even proposed the new standard as of the date by which EPA had a statutory obligation to issue the permit.

We continue to believe that the new 1-hour standard is not relevant to this permitting action. In the unlikely event that the San Joaquin Valley does not meet the new 1-hour standard, then California will obviously need to develop regulations to bring the area into attainment. This is the course of action that Congress has provided. It is improper to use the new standard as a justification for refusing to grant a permit that, by law, should have been granted before the new standard was even proposed.

We recognize that EPA disagrees with us on this issue and that EPA is the only authority that can issue a PSD permit for the Project. As a result, we submit the attached information in the hope of obtaining our permit by the end of the year.

If you or anyone else from EPA would like to discuss any of these issues, please contact me at 202-828-5852 or Jim Rexroad from APC at 713-275-6147. If there are any questions about the modeling study or other technical issues, questions should be directed to Gary Rubenstein of Sierra Research at 916-444-6666.

Sincerely,



For: Jeff Holmstead
Of Bracewell & Giuliani LLP

Cc: Stephanie Talbert, DOJ (by electronic mail)
Brian Doster, EPA OGC (by electronic mail)
Julie Walters, EPA Region 9 (by electronic mail)
Anna Wood, EPA OAQPS (by electronic mail)
Deborah Jordan, EPA Region 9 (by electronic mail)
Shirley Rivera, EPA Region 9 (by electronic mail)

Response to EPA Comments of August 12, 2010 1-Hour NO_2 NAAQS Compliance Demonstration Avenal Energy Project PSD Permit Application

September 13, 2010

Introduction

On August 12, 2010, EPA sent a letter to Avenal Power Center, LLC (Avenal) regarding the February 2008 application to EPA Region 9 for a PSD permit for the Avenal Energy Project. EPA's letter contains comments that describe EPA's remaining concerns about Avenal's analysis of the Project's compliance with the new 1-hour NO_2 standard. This document contains Avenal's responses to those comments and information to address EPA's remaining concerns.

Revised Modeling Results

Modeling was conducted in accordance with the September 13, 2010 modeling protocol.[1] Screening runs were conducted to determine which operating conditions resulted in peak one-hour impacts. These runs were also used to identify areas where a fine grid of receptors would be located for refined modeling. Results of these screening runs are shown in Table 1.

Table 1. Screening Results Avenal Energy Project	
Operating Scenario	Maximum 1-hour NO_2 impact ($\mu g/m^3$)
Startup/shutdown	508
Full load, high ambient temp with duct firing	38.9
Minimum load, high ambient temp, unfired	23.1
Full load, annual average ambient temp, with duct firing	40.6
Minimum load, annual average ambient temp, unfired	25.4
Full load, low ambient temp, with duct firing	36.9
Minimum load, low ambient temp, unfired	26.4

[1] Sierra Research, *Air Dispersion Modeling Protocol, Revised Supplemental NO2 Air Quality Impact Analysis, Avenal Energy Project*, September 13, 2010.

The full load, high ambient temperature case with duct firing was selected to represent normal operations, even during seasons where those ambient conditions do not apply. Because the normal operation 1-hour impacts are so much lower than startup/shutdown 1-hour impacts, the case selected to represent normal operation has no effect on demonstration of compliance.

Normal operations

Refined modeling runs were conducted for each of the 5 years of meteorological data. The project impacts for each hour were added to the corresponding background ambient concentration to obtain the predicted concentration for comparison with the National Ambient Air Quality Standard (NAAQS).

For each year, the eighth highest value (98th percentile) was determined for each receptor in the modeling domain. These five values were averaged for each receptor. The highest result out of all of the receptors was selected for comparison with the NAAQS. The results are presented in Table 2.

Startup/shutdown

Refined modeling runs were conducted for each of the 5 years of meteorological data. The project impacts for each hour were added to the corresponding background ambient concentration to obtain the predicted concentration for comparison with the NAAQS.

For each year, the eighth highest value (98th percentile) was determined for each receptor in the modeling domain. These five values were averaged for each receptor. The highest result out of all of the receptors was selected for comparison with the NAAQS. The results are presented in Table 2.

Table 2. Refined Results
Avenal Energy Project

Operating Scenario	Highest Result for comparison with NAAQS ($\mu g/m^3$)	Highest Result for comparison with NAAQS (ppb)	1-hour NO_2 Standard (ppb)
Startup/shutdown	150.3	80	100
Normal operation	108.3	57	100

The modeling demonstrates that the project will comply with the federal 1-hour standard for NO_2.

Responses to EPA Comments

General Comments

EPA COMMENT: *As a technical and a legal matter, the information, data, protocols and analyses previously provided by Avenal to EPA and/or other regulatory agencies for the purposes of demonstrating compliance with the Federal annual NO_2 standard or the State 1-hour NO_2 standard cannot simply be assumed to demonstrate the AEP's compliance under the Clean Air Act PSD program with the Federal 1-hour NO_2 standard. Further, EPA did not previously accept or approve Avenal's use of such information, data, protocols and analyses for the purposes of demonstrating compliance with the Federal 1-hour NO_2 standard; indeed, that standard had not been finalized at the time such information was initially submitted and thus would not have been reviewed for that purpose.*

RESPONSE:

Avenal understands that the data and analysis it previously submitted to demonstrate compliance with EPA's annual NO_2 standard and California's 1-hour NO_2 standard cannot be assumed to demonstrate compliance with EPA's new 1-hour NO_2 standard. As a technical matter, however, much of the information, data, and analysis that Avenal previously submitted necessarily serves as the starting point for evaluating compliance with the new 1-hour NO_2 standard. Avenal simply notes that significant portions of the underlying information necessary to complete the new analytical requirement were previously submitted to EPA. These include ambient background data for use in modeling, discussions of the process used to identify nearby sources, and other materials. In fact, much of the information previously submitted is as relevant to an analysis of 1-hour NO_2 impacts as it is to analyses of the Project's impacts on 1-hour and 8-hour average CO, 24-hour and annual average PM_{10}, and annual average NO_2 ambient air quality standards.

It is misleading to suggest that "Avenal chose to forego EPA input on the protocol" that Avenal used to analyze the project's 1-hour NO2 impacts, when Avenal specifically sought EPA's input but did not receive it. On May 5, 2010, shortly after EPA notified Avenal that it would not issue the permit until APC could demonstrate compliance with the new NO_2 standard, APC resubmitted to EPA the Project's August 2007 modeling protocol and specifically sought EPA concurrence to use four elements of that prior protocol in the supplemental analysis of the 1-hour average NO_2 standard:

- Emission sources to be included in the analysis
- Meteorological data
- Background ozone concentrations
- Background NO_2 concentrations

Because EPA did not respond to or comment on the submitted protocol requests, APC proceeded with its analysis of the Project's impacts on the 1-hour NO_2 standard based on existing EPA guidance documents (which are clearly relevant even though they do not deal specifically with the new standard) and protocols that California agencies have accepted for modeling 1-hour NO_2 impacts. Since that time, EPA has requested additional analyses, discussion, and documentation in order to allow it to complete its review of the Project's compliance with the 1-hour NO_2 standard. Although EPA's requests seek additional information, these requests lack specific guidance on how such analyses should be prepared. At the same time, several of the requests appear to include a scope and breadth never before seen in a PSD review.

Because EPA has only provided general guidance and has not addressed a number of key details as to the criteria it will apply in its review, we have based the following responses on two basic sources: (1) existing, written EPA guidance documents; and (2) past PSD permits issued by EPA or EPA delegates. For some issues, we have not been able to find relevant guidance from either source. In those cases, we propose criteria and explain why we believe those criteria should be used.

Nearby Sources

EPA COMMENT: *Avenal's May 13, 2010 1-hour NO_2 submittal did not include necessary information indicating which, if any, nearby sources were modeled or the process used to determine which nearby sources should be included.*

RESPONSE: The May 13, 2010 submittal was a supplement to previous submittals. It described in detail the additional work that was done to demonstrate compliance with the 1-hour NO_2 NAAQS. As a supplemental analysis, it built on previously submitted information. The process used to determine which nearby sources to include in the modeling was described in the original (February 2008) application.

EPA COMMENT: *Please provide a description of the process used for determining which nearby sources should be included in the modeling, as well as the modeling analysis for any such sources.*

RESPONSE: The process that was used to make that determination was described in previous documents. EPA accurately described the process in its August 12, 2010 letter and attachments:

> "The applicant's June 28, 2010 response states that APC Section 6.2.7.1.2 (Localized Impacts) thoroughly discussed the criteria used to evaluate whether any stationary sources existed within six miles that would qualify to be explicitly included in a cumulative air quality modeling impact analysis. None were identified by either the Applicant or the SJVAPCD.
>
> "APC Section 6.2.7.1.2 (Localized Impacts) is presented here:

> "6.2.7.1.2 Localized Impacts
>
> "The CEC has defined this local analysis as "a cumulative air quality modeling impacts analysis of the project's typical operating mode in combination with other stationary source emissions sources within a six-mile radius which have received construction permits but are not yet operating, or are in the permitting process."[footnote omitted] Within the distance of six miles, three categories of projects with combustion sources were evaluated:
>
> - Existing projects that have been in operation since at least January 2006.
> - Projects for which air pollution permits to construct have been issued and that began operation after 2006.
> - Projects for which air pollution permits to construct have not been issued, but are reasonably foreseeable.
>
> "Existing projects that have been in operation since at least January 2006 are reflected in the ambient air quality data that have been used to represent background concentrations for the proposed project; consequently, no further analysis of the emissions from this category of facilities was performed.
>
> "The District was requested on July 19, 2007, to provide information on any sources that might be appropriate (i.e., within 6 miles and with an emission increase of at least 5 tons per year for a criteria pollutant) for a cumulative air quality impact analysis, but has not identified any. Consequently, no localized cumulative impact modeling analysis was performed for the proposed project."[2]

The same screening process was used to identify nearby sources for the Class II impacts analysis.

The applicant screened nearby sources for the purpose of preparation of a cumulative impact analysis as part of its application for a license from the California Energy Commission (CEC). Because the purpose and elements of the CEC analysis are similar to elements of the PSD compliance demonstration, the CEC analysis was submitted to EPA as part of its PSD application.

The portion of that analysis that is relevant here is the identification of sources that are not adequately represented by ambient monitoring data, and must therefore be explicitly modeled. The applicant contacted the District and requested a list of all projects within 6

[2] Gerardo Rios letter to Jim Rexroad, Attachment 1, August 12, 2010. p. 3:

miles of the project site[3] for which permits had been requested or issued that had not begun operating prior to January 2006. This date was selected because impacts from sources operating before that date were presumed to be reflected in the ambient monitoring data. Sources with permitted emissions of less than 5 tons per year were also excluded.[4]

No nearby sources were identified using this approach that were not already included in the underlying ambient monitoring data. Because no nearby sources were identified, no nearby sources were modeled in either our original February 2008 application nor in our May 2010 supplemental submission.

EPA COMMENT: *The sources to be considered for inclusion in the PSD nearby source analysis are not limited to a six mile radius.*

RESPONSE: EPA has not established any clear guidance as to the relevant distance to be considered in evaluating the potential for nearby sources to contribute to impacts associated with a proposed project. The sources to be considered for inclusion in the PSD nearby source have, in most previous permit reviews, been limited to the impact area itself.[5,6,7,8,9,10,11,12,13] At the time that the PSD application was submitted, all offsite

[3] CEC staff has determined, based on its modeling experience, that there is no statistically significant concentration overlap for non-reactive pollutant concentrations between two stationary emission sources beyond six miles. See, for example, CEC, *Hanford Energy Park Peaker Staff Report*, Oct. 2009, p. 4.1-25.
[4] CEC staff has determined, based on its modeling experience, that emission sources with emissions below 5 tons per year are unlikely to significantly contribute to cumulative air quality emission impacts. See, for example, CEC, *Modesto Irrigation District Woodland Generation Station 2 Commission Decision*, Sep. 2001, p. 4-24.
[5] Russell City, (BAAQMD Additional Statement of Basis, August 2009, p.87): only sources within a radius of six miles around the facility that had been permitted since January 1, 2007 were considered.
[6] Sierra Pacific Loyalton (SPI-Loyalton Ambient Air Quality Impact Report 3/19/10): No comparison of annual or 1-hour impacts with SIL; therefore no impact area determined; no nearby sources reviewed
[7] Navajo Generating Station (Statement of Basis October 2008): CO impacts above SIL. Sources within 100 km of the project were considered for modeling. Largest source identified in that area was 0.04 tpy (Applicant's Modeling Protocol and Report p. 25); no additional sources were modeled.
[8] Morro Bay (Ambient Air Quality Impact Report, May 2006): 24-hour and annual PM_{10} impacts were above the SIL. No existing nearby sources were considered for inclusion in the modeling.
[9] Calpine-Sutter (Ambient Air Quality Impact Report, July 2009): Annual NO_2 impacts exceeded the SIL. The adjacent Greenleaf facility was included in the modeling. EPA's analysis is silent as to whether any other sources were modeled, as well as the process used to screen nearby facilities for inclusion.
[10] Avenal (Statement of Basis, June 2009): 1-hour CO impacts exceeded SIL; EPA accepted the applicant's analysis (using the CEC cumulative impact procedure) for identification of nearby sources; no existing sources were considered, and only sources within 6 miles were considered.
[11] Colusa Generating Station (Ambient Air Quality Impact Report, May 2008): 24-hour PM_{10} impacts were above the SIL. All major and minor sources within 54 km (i.e., distance to edge of impact area plus 50 km) of the project were screened for inclusion in cumulative impact modeling. The only nearby source that was identified was the adjacent Delevan Compressor Station. This source was included in the cumulative impact modeling performed for the PSD application. See email from Mark Strehlow (URS) to Scott Bohning (EPA), *Re: Colusa Generating Station PSD Application*, 9/20/2007.
[12] Big West (Statement of Basis November 2007): No impacts above SIL, therefore no further consideration of nearby sources

impacts from the Project were below the relevant SILs with the exception of the 1-hour CO standard EPA accepted the APC's analysis, based on the CEC methodology, for concluding there were no nearby sources that needed to be added to the analysis of the Project's impacts on the 1-hour CO standard. (Both CO and NOx emissions are almost exclusively associated with combustion sources; hence a conclusion that there are no nearby sources of CO that warrant analysis would logically extend to NOx sources as well.)

No SIL has been promulgated for the 1-hour NO_2 NAAQS.[14] At the time that EPA first requested that APC conduct an analysis of the new standard, no guidance existed as to how such an analysis should be performed, and an interim SIL had not been proposed. However, while EPA contemplates a proposal for a SIL, on June 28, 2010, the agency suggested use of an interim level of 4 ppb (maximum predicted 1-hour concentration) as a SIL.[15] Using this level, the Project's impact area extends to 50 km.[16]

The 1990 Draft Guidance recommends extending the search for nearby sources beyond the impact area.[17] However, as discussed above, EPA Region 9 has frequently excluded consideration of point sources outside of the impact area as "nearby sources."

To respond to EPA's most recent request, and to be even more conservative in approaching this issue, we have performed a new analysis considering point sources within 100 km of the project site for inclusion in the NAAQS inventory for the 1-hour NO_2 standard.

EPA has considered and accepted several methods for screening sources for inclusion in the NAAQS inventory. These are summarized in the meeting notes for an EPA/State/Local PSD Workshop held in New Orleans in May 2005.

As discussed in the workshop notes:

> "The concept of "significant concentration gradient" is used to catch all instances not represented by "regional" monitored concentrations, added to the combined sources' impacts to determine total impacts, which could interact with the proposed source's impacts. However, without some practical limitations, such gradients can occur anywhere in the "vicinity" of the sources defined by the SIA and could lead to a large and, at times, unnecessary resource expenditures. Thus,

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[13] Victorville 2 (Statement of Basis June 2008): No impacts above SIL, therefore no further consideration of nearby sources

[14] 75 FR 6525

[15] EPA. "General Guidance for Implementing the 1-hour NO_2 National Ambient Air Quality Standard in Prevention of Significant Deterioration Permits, Including an Interim 1-hour NO_2 Significant Impact Level". June 28, 2010.

[16] "The impact area is a circular area with a radius extending from the source to (1) the most distant point where approved dispersion modeling predicts a significant ambient impact will occur, or (2) a modeling receptor distance of 50 km, whichever is less." EPA, *New Source Review Workshop Manual (Draft),* October 1990 p. C-26. For the Project, this is based on all post-commissioning emission scenarios.

[17] EPA, *New Source Review Workshop Manual (Draft),* October 1990 p. C-32

> in order to balance the need for identifying all sources which meet the criteria in the Guideline and also to achieve a workable inventory of sources, various permitting agencies have developed and used objective tools to assist in the determination of an emission inventory. A 1992 EPA/States modelers workgroup considered some of these approaches and concluded that all such tools should be used by the reviewing authority on a case by case basis to compliment [sic] their professional judgment in developing an inventory of nearby sources."[18]

The "20D Method", developed by North Carolina and discussed at the May 2005 PSD Workshop, is one regulatory method developed for identifying nearby sources with the potential to result in impacts not captured by regional monitoring. The method relies on a formula derived as 20 times the distance to the source. The method suggests including those sources within the screening area for which Q > 20D, where Q is the maximum emission (in tons per year) for the source being screened, and, for short-term analyses, D is the distance (in kilometers) from the source being screened to the PSD source.. For the purposes of this method, the source is defined as the facility or complex, not an individual stack or other emission point; therefore, cumulative emissions of each pertinent pollutant go through the screening process.

We considered using the PSD definition of a significant emissions increase for NOx emissions (40 TPY) as the *de minimis* threshold for excluding a source from consideration. However, we chose to use a much lower threshold of 5 TPY in order to be consistent with the CEC criteria for cumulative impact analyses, and to ensure that the analysis was sufficiently conservative to address EPA's concerns. This value is consistent with past guidance from EPA Region 9.[19]

Emission sources were located using the California ARB CHAPIS web site (www.arb.ca.gov/chapis), which graphically displays all sources that met one or more of the following in 2001:

> a. Sources that emitted at least 10 tons of VOC, NOx, SOx, CO, or PM10;
> b. Power plants rated at 50 MW or greater; or
> c. Air Toxic "Hot Spots" facilities in the categories of 1) metal fabrication; 2) aerospace/electronics; and 3) chemical plants.

ARB's Facility Search Tool (http://www.arb.ca.gov/app/emsinv/facinfo/facinfo.php?dd) was used to determine whether any relevant sources in the 2008 inventory had been overlooked.

The results of this analysis are shown in Table 3.

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[18] PSD Modeling Workgroup. EPA/State/Local Workshop. New Orleans, May 17, 2005.
[19] Memo Scott Bohning (EPA) to Mark Strehlow (URS), *CGS status note*, October 3, 2007.

Table 3
Identification of Potential Sources Considered for Inclusion in the 1-hour NO_2 Impact Analysis

Facility	2008 NOx emissions (TPY)	Distance from Project Site (km)	Q/D (TPY/Km)	Include as Nearby Source?*
PG&E	25.2	3	8.4	No
Avenal State Prison	9.3	14	0.7	No
Los Gatos Tomato	9.7	13	0.7	No
NAS Lemoore	30.9	24	1.3	No
Shell Pipeline Co.	16.1	27	0.6	No
Aera Energy LLC	66.6	29	2.3	No
Coalinga Cogen	23.8	29	0.8	No
Chevron USA Inc.	169.5	31	5.5	No
Paramount Farms	11.0	34	0.3	No
Del Monte Corporation	11.4	40	0.3	No
Hanford L P	36.5	42	0.9	No
Nichols Pistachio	5.8	43	0.1	No
Samson Resources Company	15.7	42	0.4	No
Sources > 50 km and < 100 km and > 100 TPY				
Madera County				
No sources				
San Benito County				
No sources				
Monterey County				
No sources				
Fresno County				
Guardian Industries	193.2	66	2.9	No
PPG Industries	280.9	73	3.8	No
Tulare County				
No sources				
Kern County				
AERA Energy	386.9	78	5.0	No
Chevron USA	370.4	100	3.7	No
Chevron USA	104.9	80	1.3	No
Covanta Delano	169.9	84	2.0	No
La Paloma Generating Co.	135.6	98	1.4	No
Plains Exploration & Production	228.2		<4.6	No
Rio Bravo Jasmin	140.6	62	2.3	No
Rio Bravo Poso	143.9	62	2.3	No

* Sources are included as a nearby source if Q/D > 20, which is mathematically identical to Q > 20D.

Table 1 shows that there are no facilities both large enough and close enough to the project to be included in the NAAQS inventory. All sources are far enough away that it is unlikely that impacts will interact appreciably with project's short term impacts.

EPA COMMENT: *The sources to be considered for inclusion in the PSD nearby source analysis are not limited to new sources (i.e., sources not constructed or operated during the period that monitoring data were collected).*

RESPONSE: As discussed above, the PSD nearby source analysis has been revised to include existing point sources.

EPA COMMENT: *The sources to be considered for inclusion in the PSD nearby source analysis are not limited to stationary sources.*

RESPONSE: This comment is puzzling and appears to be inconsistent with EPA's long-standing written guidance and practice. Nor can we discern any reason why the 1-hour NO_2 standard would warrant a departure from the Agency's long-standing approach to PSD modeling. For many years, there has been a 1-hour CO standard, and mobile source emissions in most parts of the county represent the largest portion of the CO emissions inventory. Yet, to the best of our knowledge, EPA does not require, and has not required, modeling of mobile source CO emissions for PSD compliance determinations. This is obviously sensible, as the impact of mobile sources is already reflected in the monitoring data. Whether the pollutant at issue is CO or NOx is not relevant to this matter.

In addition, the Draft NSR Workshop Manual provides the following guidance on determining the ambient background concentration for PSD compliance determinations:

> "The Modeling Guideline defines a "nearby" source as any **point source** expected to cause a significant concentration gradient in the vicinity of the proposed new source or modification."[20] (emphasis added)
>
> "Also, if the location of the proposed source or modification is not affected by other **major stationary point sources**, the assessment of existing ambient concentrations may be done by evaluating available monitoring data. It is generally preferable to use data collected within the area of concern; however, the possibility of using measured concentrations from representative "regional" sites may be discussed with the permitting agency. The PSD Monitoring Guideline provides additional guidance on the use of such regional sites."[21] (emphasis added)

Appendix W contains the following requirement to include nearby sources in modeling to demonstrate compliance with ambient standards: "For compliance with the short-term and annual ambient standards, the nearby sources as well as the primary source(s) should

[20] EPA, *New Source Review Workshop Manual (Draft),* October 1990 p. C.32
[21] EPA, *New Source Review Workshop Manual (Draft),* October 1990 p. C.18

be evaluated using an appropriate Appendix A model with the emission input data shown in Table 8-1 or 8-2."[22]

Table 8-1 is entitled "Model Emission Input Data for **Point** Sources" [emphasis added].[23] Table 8-2 is entitled "**Point** Source Model Input Data for NAAQS Compliance in PSD Demonstrations" [emphasis added].[24]

EPA recently issued guidance on how to address the new 1-hour NO_2 standard in PSD permit applications.[25] This guidance includes an extensive discussion on construction of the inventory for PSD analysis. There is nothing in this discussion to suggest an expansion of the PSD NAAQS modeling requirements to include non-point sources.

In addition to this guidance, we can find no evidence that EPA Region 9 has included sources other than stationary sources in an analysis of "nearby sources" for a NAAQS inventory

EPA COMMENT: *In addition, background monitoring data may not reflect existing sources operating at their full operating capacity. 40 CFR Part 51, Appendix W, Subsection 8.2.1.c. states that "[s]ince sources don't typically operate at their maximum allowable capacity (which may include the use of 'dirtier' fuels), modeling is necessary to express the potential contribution of background sources, and this impact would not be captured via monitoring. Background concentrations should be determined for each critical (concentration) averaging time."*

RESPONSE: The language cited by EPA refers to the operating parameters that should be modeled **once a point source has been determined to be a nearby source,** not the basis for determining whether the point source is a nearby source in the first place. This therefore becomes an issue only after an existing point source has been identified to be a nearby source, due to its potential to create a significant concentration gradient in the impact area.

For example, the modeling protocol for the Colusa Generating Station first identified the adjacent Delevan Compression Station as an existing major source, containing three gas turbine-driven compressors licensed for full-year operation. Historical usage records for the turbines were used to estimate past actual emissions. Because impacts from past actual emissions were included in ambient monitoring data, the cumulative modeling included the difference between estimated past actual emissions and the maximum potential emissions allowed by permit.[26]

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[22] *Guideline on Air Quality Models* (40 CFR Part 51, Appendix W), Section 8.2.3.c
[23] *Guideline on Air Quality Models* (40 CFR Part 51, Appendix W), Table 8-1
[24] *Guideline on Air Quality Models* (40 CFR Part 51, Appendix W), Table 8-2
[25] EPA. "General Guidance for Implementing the 1-hour NO_2 National Ambient Air Quality Standard in Prevention of Significant Deterioration Permits, Including an Interim 1-hour NO_2 Significant Impact Level". June 28, 2010
[26] URS, *Modeling Protocol for the Colusa Generating Station,* July 12, 2006, p. 4-12

As discussed above, there are no nearby sources relevant to the analysis of AEP's impacts on the 1-hour NO_2 standard.

EPA COMMENT: *Adequate documentation of the District's response [to the request for information about local sources] is not provided.*

RESPONSE: The inventory data for the few sources in the vicinity of the proposed project site identified by the District are attached as Attachment 1, along with the letter requesting the information and the District's response (the last three pages of the attachment). This attachment formed Appendix 6.2-6 in the original February 2008 submittal of the application for a PSD permit.

Modeling

Responses to EPA's comments on the justification for use of the non-regulatory-default PVMRM option in AERMOD are provided below.

Provision i

EPA COMMENT: *The model has received a scientific peer review: This provision is adequately addressed.*

RESPONSE: Noted.

Provision ii

EPA COMMENT: *The model can be demonstrated to be applicable to the problem on a theoretical basis: This provision is not adequately addressed. That the project is located in an area of high ozone concentrations does not necessarily justify the use of PVMRM, nor does it necessarily imply a particular bias or lack of bias in the results.*

RESPONSE: AERMOD without PVMRM is a dispersion model. It predicts ground-level concentrations based on distribution of emissions from the sources being modeled. However, the NOx emitted at the stack is a mixture of (primarily) NO and NO_2. If conversion of stack NO to NO_2 in the atmosphere is not taken into account, the model will underpredict NO_2 impacts. At the same time, if the unrealistic assumption is made that 100% of stack NO is converted to ground-level NO_2 at all receptors, regardless of transport time, transport distance, or ambient ozone concentrations, the dispersion model will overpredict NO_2 impacts. Conservative assumptions are initially used in compliance screening methodologies in order to assure compliance. As the compliance evaluation methodology becomes more sophisticated, the greater accuracy continues to assure compliance while allowing less conservative assumptions. EPA addresses this process, in the context of the 1-hour NO_2 standard, through increasingly sophisticated (and less conservative) tiers of analysis.

The regulatory default modeling methodologies for the 1-hour NO_2 standard are screening methodologies.[27]

> Tier 1: Assume full conversion of NO to NO_2 based on application of an appropriate refined modeling technique under Section 4.2.2 of Appendix W to estimate ambient NOx concentrations.
>
> Tier 2: Multiply Tier 1 result by empirically-derived NO_2/NOx ratio, with 0.75 as the annual national default ratio.
>
> Tier 3: Detailed screening methods may be considered on a case-by-case basis, with the Ozone Limiting Method (OLM) identified as a detailed screening technique for point sources. PVMRM is also considered by EPA to be in this category at this time.[28]

Consistent with USEPA guidelines, the District has issued more detailed guidance that provides a four tier approach to modeling that tests compliance with the 1-hour NO_2 NAAQS. The District applied Tiers I through III to the Project's emissions during normal operation and startup to demonstrate compliance with the 1-hour NO_2 NAAQS, and also applied Tier IV to commissioning emissions to demonstrate compliance. The detailed descriptions of the tiered approaches follow:[29]

1. Tier I
    a. The maximum 1-hour NO_2 concentration is modeled from all sources in a project using AERMOD, five years of meteorological data, and the assumption of complete conversion of NO to NO_2. The maximum modeled concentration is added to the representative background concentration provided by the District.
        i. If the maximum combined concentration is less than the 1-hour NO_2 NAAQS, the analysis is complete and compliance with the standard has been demonstrated.
        ii. If the maximum combined concentration exceeds the 1-hour NO_2 NAAQS, then the maximum modeled concentration alone is compared to the interim SIL of 4 ppb.
            1. If the maximum modeled concentration is less than the SIL, then the analysis is complete and compliance with the standard has been demonstrated.
            2. If the maximum modeled concentration exceeds the SIL, then the analysis must continue as described next using the

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[27]EPA, Appendix W Section 5.2.4. See also Memorandum from Wood to Regional Air Division Directors, *General Guidance for Implementing the 1-hour NO_2 Standard in Prevention of Significant Deterioration Permits*, June 28, 2010, p.14.

[28] Memorandum from Wood to Regional Air Division Directors, *Applicability of Appendix W Modeling Guidance for the 1-hour NO_2 NAAQS*, June 28, 2010, p.2

[29] SJVAPCD. *Assessment of Non-Regulatory Options in AERMOD, Specifically OLM and PVMRM,* August 19, 2010. Appendix A, Modeling Protocol.

Ambient Ratio Method (ARM) value of 0.9 for the conversion of NO to NO_2.

b. The maximum 1-hour NO_2 concentration is modeled from all sources in a project using AERMOD, five years of meteorological data, and the application of a default Ambient Ratio Method (ARM) value of 0.9 instead of complete conversion of NO to NO_2. Again, the maximum modeled concentration is added to the representative background concentration provided by the District.
   i. If the maximum combined concentration is less than the 1-hour NO_2 NAAQS, the analysis is complete and compliance with the standard has been demonstrated.
   ii. If the maximum combined concentration exceeds the 1-hour NO_2 NAAQS, then the maximum modeled concentration alone is compared to the interim SIL of 4 ppb.
      1. If the maximum modeled concentration is less than the SIL, then the analysis is complete and compliance with the standard has been demonstrated.
      2. If the maximum modeled concentration exceeds the SIL, then the analysis must continue as described next using AERMOD PVMRM or OLM.

c. The maximum 1-hour NO_2 concentration is modeled from all sources in a project using AERMOD PVMRM or OLM, and five years of meteorological data. The maximum modeled concentration is added to the representative background concentration provided by the District.
   i. If the maximum combined concentration is less than the 1-hour NO_2 NAAQS, the analysis is complete and compliance with the standard has been demonstrated.
   ii. If the maximum combined concentration exceeds the 1-hour NO_2 NAAQS, then the maximum modeled concentration alone is compared to the interim SIL of 4 ppb.
      1. If the maximum modeled concentration is less than the SIL, then the analysis is complete and compliance with the standard has been demonstrated.
      2. If the maximum modeled concentration exceeds the SIL, then the analysis must continue as described next in Tier II.

2. Tier II: The Tier II method is identical to Tier I except that the 8th highest modeled concentration replaces the maximum modeled concentration in the analysis.
3. Tier III: The 98th percentile 1-hour predicted concentration is determined using the post-processor developed by the District, third-party software developers,[30] or an EPA-revised version of AERMOD. This concentration is used in the same stepwise approach described for Tier I above.

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[30] Sierra Research developed and used such a post-processor in preparing the May 13, 2010 submittal to EPA.

4. Tier IV: The predicted 1-hour NO_2 concentrations from the model are paired in time with the monitored 1-hour NO_2 concentrations. The same approach as identified above for Tier III is used to calculate a final concentration to compare with the standard.

The Project's May 13, 2010 submittal of the supplemental 1-hour NO_2 air quality impact analysis used a Tier IV approach. The only difference between the May 13, 2010 submission and the enclosed, revised submission is that meteorological and background ozone and NO_2 data are based on more recent data prepared (and required) by the SJVAPCD, reflecting an updated data substitution methodology that complies with EPA and District requirements.

Under EPA's interim guidance for evaluating compliance with the 1-hour NO_2 NAAQS, the SIL-equivalent is so low that almost any moderate-to-large combustion source will have difficulty passing a screening assessment. It is therefore necessary to use more sophisticated analytical tools, as provided for in EPA guidance. One such tool identified by both EPA and the District, and selected for use with the Project, is the PVMRM option within AERMOD.

AERMOD-PVMRM has been tested specifically for its ability to compute unbiased results. One of the key studies was conducted by a senior modeler currently in OAQPS at EPA, and conducted on large natural gas-fired power plants.[31] The study concluded the following: "Based on all of the data available, the AERMOD-PVMRM algorithm is judged to provide unbiased estimates of the NO_2/NO_x ratio based on criteria that are comparable to, or more rigorous than, evaluations performed for other dispersion models that are judged to be refined,"

In addition, the District conducted a careful review of both the PVMRM and OLM options in the implementation of AERMOD to demonstrate regulatory compliance of new sources.[32] The District evaluation took into account and described compliance of the PVMRM option with the following five requirements[33] for approval to use an "alternative refined model", as PVMRM is defined by EPA:

> "i. The model has received a scientific peer review;
> ii. The model can be demonstrated to be applicable to the problem on a theoretical basis;
> iii. The data bases which are necessary to perform the analysis are available and adequate;
> iv. Appropriate performance evaluations of the model have shown that the model is not biased toward underestimates; and

[31] Brode, Roger W. *Final Report, Evaluation of Bias in AERMOD-PVMRM,* MACTEC report on Alaska Department of Environmental Conservation Contract No. 18-9010-12, June 2005.
[32] SJVAPCD. *Assessment of Non-Regulatory Options in AERMOD, Specifically OLM and PVMRM,* August 19, 2010.
[33] USEPA. *Guideline on Air Quality Models* (40 CFR Part 51, Appendix W), Section 3.2.2.e

v. A protocol on methods and procedures to be followed has been established."[34]

The District evaluation of AERMOD-PVMRM concluded the following: "Based on the information provided above, the District has determined that the method for determining hourly NO_2 concentrations using AERMOD in conjunction with the non-regulatory OLM or PVMRM options is acceptable based on the requirements in 40 CFR Part 51, Appendix W, 3.2.2(e)…"[35]

For all of the above reasons, the PVMRM option within AERMOD is demonstrably applicable to a refined analysis of 1-hour average NO_2 impacts from the Project on a theoretical basis.

Provision iii

EPA COMMENT: *The data bases which are necessary to perform the analysis are available and adequate: The information provided in paragraph 2 in Avenal's June 28, 2010 letter discusses the use of the ozone data submitted by Avenal in the PVMRM option within AERMOD, but does not provide adequate justification for use of the ozone data in this context for purposes of the PSD program.*

RESPONSE: This comment is addressed in the discussion of ambient monitoring data, below.

EPA COMMENT: *"This analysis should include a discussion of the representativeness of the surface characteristics. The surface characteristics input to AERMET should be based on the land cover characteristics in the vicinity of the meteorological tower. The information provided in the response does not adequately address EPA's comment. The response does not provide (1) information about the surface characteristics at the project site, (2) specific information about the surface characteristics for the meteorological station that were computed by the District, or (3) a discussion of how the specific surface characteristics at the meteorological station are representative of the specific surface characteristics at the project site. Avenal should provide this information.*

RESPONSE: As stated in our May 13, 2010 submittal of the Supplemental NO_2 Air Quality Impact Analysis, the District required use of, and the analysis used, meteorological data collected and prepared by the District from their Hanford monitoring station. The District, not the applicant, preprocessed the meteorological data using AERMET for use in AERMOD. As stated in the May 13 submittal, "The surface characteristics appropriate for the land uses surrounding the meteorological station at Hanford—namely surface roughness length, albedo, and Bowen Ratio—were computed by the District. The meteorological data set used for this analysis is unchanged from that

[34] SJVAPCD. *Assessment of Non-Regulatory Options in AERMOD, Specifically OLM and PVMRM,* pp. 2-6, August 19, 2010.
[35] SJVAPCD. *Assessment of Non-Regulatory Options in AERMOD, Specifically OLM and PVMRM,* p. 5, August 19, 2010.

used to develop the air quality impact analysis in the February 2008 PSD and FDOC permit applications."

The District has provided the detailed surface characteristic information EPA requests for the Hanford meteorological station on pages 37-47 and 96 in Version 1.2 of their August 2006 *Guidance for Air Dispersion Modeling.* (The indicated pages are attached to this submittal as Attachment 2.) The District believes that, the procedure and resulting surface characteristic information for AERMET "in the vicinity of the meteorological tower" described therein was fully compliant with USEPA requirements existing in 2006 for the 2000-2004 meteorological data used in the project modeling and ambient air quality impact analysis.[36] The meteorological tower is located near the center of the north-northwest south-southeast aligned runway. Roughly two-thirds of the area surrounding the tower is agriculture as can be seen in the aerial image on page 96 of the attached District guidance pages.

The District believes that the surface characteristics (surface roughness, albedo and Bowen ratio) near the project site are similar to those around the meteorological tower because the area on and around the project site is agricultural in use, as is the dominant portion (i.e., two-thirds) of the area around the meteorological tower. The similarity between the two locations, in terms of the three basic parameters required by AERMET, increased for the processing of the more recent meteorological data (i.e., 2005-2009) provided by the District because USEPA reduced the radius for the evaluation of surface characteristics from the 3 km used in processing the original, 2000-2004 meteorological data set to 1 km, which was used to process the revised 2005-2009 meteorological data set. This reduction in radius removed much of the land use that was different between the two locations (i.e., suburban and urban land use).[37]

Both locations have similar seasonal distributions of rainfall as shown in Table 4, with the maximum monthly rainfall occurring in January and no monthly rainfall in July and August.

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[36] The District informed Carol Bohnenkanp of EPA Region 9 about its methodology through several telephone conversations with Leland Villalvazo during the period of May through December 2006 (SJVAPCD. Email from Glenn Reed to Eric Walther of Sierra Research, August 30, 2010.)
[37] SJVAPCD. Telephone conversation between Leland Villalvazo and Eric Walther of Sierra Research, August 30, 2010.

Table 4 Average Rainfall[a] (inches)		
Month	Avenal [b]	Hanford [c]
January	1.6	1,6
February	1.4	1.6
March	1.0	1.4
April	1.1	0.8
May	0.6	0.2
June	0.0	0.1
July	0.0	0.0
August	0.0	0.0
September	0.1	0.1
October	0.2	0.4
November	0.6	0.8
December	0.3	1.3
Year	6.9	8.4

[a] Correlation coefficient = 0.99
[b] Avenal rainfall data (National Climatic Data Center [NCDC] Cooperative Stations, 1955-1961, http://www.worldclimate.com/cgi-bin/data.pl?ref=N35W120+2200+040398C).
[c] Hanford rainfall data (NCDC Cooperative Stations, 1931-1995, http://www.worldclimate.com/cgi-bin/data.pl?ref=N36W119+2200+043747C).

EPA COMMENT: *The response does not provide an analysis supporting the conclusion that the project site and the Camp Pendleton meteorological monitoring station are climatologically similar; this analysis should be provided.*

RESPONSE: The sentence at the top of page 222 in the applicant's June 28, 2010 submittal erroneously referred to Camp Pendleton. The sentence should have said "Hanford meteorological data", not "Camp Pendleton meteorological data".

Relative to the Hanford meteorological monitoring site, the climatology of Hanford and the Avenal Energy Project site are closely similar because of the following:

1. Both sites are in the same county (Kings County) and the same flat Central Valley, separated by only 28 miles.
2. Both sites are accurately described by the same climatology contained in the original February 2008 application submitted to the USEPA, CEC and SJVAPCD, as follows:

   "USEPA defines the term 'on-site data' to mean data that would be representative of atmospheric dispersion conditions at the source and at locations where the source may have a significant impact on air quality. Specifically, the meteorological data requirement originates in the Clean Air Act at Section 165(e)(1), which requires an 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 [the Act] which will be emitted from such facility.'

"This requirement and USEPA's guidance on the use of on-site monitoring data are also outlined in the '*On-Site Meteorological Program Guidance for Regulatory Modeling Applications*' (1987a). The representativeness of the data depends on (a) the proximity of the meteorological monitoring site to the area under consideration, (b) the complexity of the topography of the area, (c) the exposure of the meteorological sensors, and (d) the period of time during which the data are collected. The District's Hanford meteorological data are representative of conditions at the project site relative to these four factors as follows:

a) The meteorological monitoring station is 28 miles from the project site on a flat valley;
b) The topography at and between the two sites is flat;
c) The meteorological sensors are located near the center of the north-northwest/south-southeast aligned runway at the Hanford airport, giving them the same unobstructed exposure to wind that would be experienced at the Project site; and
d) The five years of meteorological data used in the original supplemental modeling submissions (2000-2004) were coincident with the ambient ozone data used therein, and the five years of meteorological data used in the new modeling submittal herein (2005-2009) is coincident with the ambient ozone and NO_2 data used for the 1-hour NO_2 analysis.

"Representativeness has also been defined in the '*Workshop on the Representativeness of Meteorological Observations*' (Nappo et. al., 1982) as 'the extent to which a set of measurements taken in a space-time domain reflects the actual conditions in the same or different space-time domain taken on a scale appropriate for a specific application.' Representativeness is best evaluated when sites are climatologically similar, as are the project site and the Hanford meteorological monitoring station. Representativeness has additionally been defined in the PSD Monitoring Guideline (USEPA 1987b) as data that characterize the air quality for the general area in which the proposed project would be constructed and operated. Because of the relative proximity of the Hanford meteorological data site to the proposed project site, the same large-scale topographic features that influence the meteorological data monitoring station also influence the proposed project site in the same manner. "[38]

[38] Sierra Research. *Air Dispersion Modeling and Health Risk Assessment Protocol, Avenal Energy Project, Kings County, California,* Section 5, p. 5, August 2007.

Further to the EPA question about the climatological similarity of the project site and the meteorological monitoring site is the following climate information, taken from Section 6.2.1.2 of the February 2008 application:[39]

> "The climate of the San Joaquin Valley is characterized by hot summers, mild winters, and small amounts of precipitation. The major climatic controls in the Valley are the mountains on three sides and the semi-permanent Pacific High pressure system over the eastern Pacific Ocean. The Great Basin High pressure system to the east also affects the Valley, primarily during the winter months. These synoptic scale influences result in distinct seasonal weather characteristics, as discussed below.
>
> "The Pacific High is a semi-permanent subtropical high pressure system located off the Pacific Coast. It is centered between the 140°W and 150°W meridians, and oscillates in a north-south direction seasonally. During the summer, it moves northward and dominates the regional climate, producing persistent temperature inversions and a predominantly southwesterly wind field. Clear skies, high temperatures, and low humidity characterize this season. Precipitation rarely occurs during summer months, because migrating storm systems are blocked by the Pacific High. Occasionally, however, tropical air moves into the area and thunderstorms may occur over the adjacent mountains.
>
> "In the fall, the Pacific High weakens and shifts southwestward toward Hawaii, and its dominance is diminished in the San Joaquin Valley. During the transition period, the storm belt and zone of strong westerly winds also moves southward into California. The prevailing weather patterns during this time of year include storm periods with rain and gusty winds, clear weather that can occur after a storm or because of the Great Basin High pressure area, or persistent fog caused by temperature inversion. The average annual rainfall at the site is approximately 7 inches, of which approximately 70% falls in the four months of December through March. Temperature, winds, and rainfall are more variable during the fall and winter months, but also stagnant conditions occur more frequently than during summer. (*Climates of the States – California, U.S. Department of Commerce, Weather Bureau*, 1959.)
>
> "Wind and mixing height are two key meteorological parameters that govern the potential for air pollution problems. The predominant winds in California are shown in Figures 6.2-1 through 6.2-4. (*The Uses of Meteorological Data in Large-Scale Air Pollution Surveys*, Stanford Research Institute, 1958). As the figures indicate, winds in California are generally light and easterly in the winter, but strong and westerly in the spring, summer, and fall.
>
> "Wind patterns in the general area of the project site are presented in Figures 6.2-5a through 5y, which show annual and quarterly wind roses for the Hanford,

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[39] *Application to the U.S. EPA for a Prevention of Significant Deterioration Permit, Avenal Energy Project, Kings County, California.* Section 6.2.1.2, pp. 6.2-2 through 6.2-4, February 2008.

> California monitoring station. Hanford is approximately 28 miles northeast of the site, and is the closest station for air quality and meteorological monitoring (discussed in more detail in Sections 6.2.3 and 6.2.5, respectively. Approximately half of all winds come from the northwest quadrant, and calm winds occur approximately one-quarter of the time.
>
> "Concerning mixing heights, inland areas, where marine influence is weak or nonexistent, experience strong ground-based inversions, which inhibit mixing and can result in high pollutant concentrations. An example case available from the central part of the San Joaquin Valley is Fresno. Smith, et al (1984), reported that at Fresno, 50th percentile morning mixing heights for the period 1979-80 were 115-150 meters (approximately 375-495 feet) in the fall and winter, 230 meters (755 feet) in the spring, and 175 meters (575 feet) in the summer. Such low morning mixing heights trap pollutants, at least during the morning. The 50th percentile afternoon mixing heights, however, were unlimited in spring and summer, 1135 meters (3,725 feet) in the fall, and 630 meters (2,065 feet) in the winter. Such mixing heights provide generally favorable conditions for the dispersion of pollutants."

EPA COMMENT: *Since the spatial scope of each variable could be different, representativeness should be judged for each variable separately. For example, for a variable such as wind direction, the data may need to be collected very near plume height to be adequately representative, whereas, for a variable such as temperature, data from a station several kilometers away from the source may in some cases be considered to be adequately representative. Avenal should address this issue in its analysis.*

RESPONSE: The representativeness of the Hanford meteorological data was justified in the discussion contained in the air dispersion modeling protocol submitted to Region 9 in August 2007. Please refer to that document for details. The analysis is summarized below.

> "The meteorological data from the Hanford monitoring station are representative of conditions at the Project because the area is extremely flat both between the two locations and over a much larger area to the northwest and southeast along the alignment of the San Joaquin Valley. Air flow in the valley (including both locations) can be characterized by up-valley and down-valley winds. The down-valley winds are generally a result of airflow into the Valley from the Carquinez Strait and the Altamont Pass that then flow south. Strong diurnal wind regimes markedly affect the horizontal transport of air in the project area. This results in a pronounced north-northwest component to the wind roses shown in Figures 2A through 2E for 2000-2004, respectively. Modeling for each of the five years of

available data[40] will not vary much because the meteorological data are so constant between the years." [41]

Because of the relative proximity of the Hanford meteorological data site to the proposed project site, the same large-scale topographic features that influence the meteorological data monitoring station also influence the proposed project site in the same manner.

The upper air data is necessarily representative of a large geographic domain because of the large distances between upper air meteorological monitoring stations. The upper air data also reasonably represents conditions at the higher altitudes of plumes from large sources such as the proposed F-Class combustion gas turbines.

This analysis, and the use of the Hanford station meteorological data as representative of the Project site, was accepted by EPA for purposes of analysis of the Project's impacts on the 1-hour and 8-hour CO standards, the 24-hour and annual average PM_{10} standards, and the annual average NO_2 standard. We are unaware of any scientific reason why meteorological data which are acceptably representative for these pollutants would not also be representative in the context of a 1-hour NO_2 standard.

Provision iv

EPA COMMENT: *Appropriate performance evaluations of the model have shown that the model is not biased toward underestimates: This provision is adequately addressed.*

RESPONSE: Noted.

Provision v

EPA COMMENT: *A protocol on methods and procedures to be followed has been established: This provision is not adequately addressed, and was not approved in the previous submittals. Please provide a protocol that is consistent with the comments stated above.*

RESPONSE: The August 2007 modeling protocol for the project was resubmitted to EPA on May 5, 2010, with a request for EPA comments regarding four elements of that protocol proposed to be carried forward to the 1-hour NO_2 analysis. EPA did not respond to that request. Nonetheless, a supplemental protocol for demonstration of compliance with the 1-hour NO_2 standard is attached.

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[40] SJVAPCD. Hanford meteorological data in AERMOD-compatible format, *http://www.valleyair.org/busind/pto/Tox_Resources/AirQualityMonitoring.htm*

[41] Sierra Research. *Air Dispersion Modeling and Health Risk Assessment Protocol, Avenal Energy Project, Kings County, California,* Section 4, p. 4, August 2007.

Scenario Selection

EPA COMMENT: *We note that the 1-hour scenario is based on a combination of the following: (a) Case 4 (from vendor data) that represents 50% load and 101 degrees F; and (b) a cold start estimate of 80 lbs/hour (each), which appears to be based on a compilation of other facilities' cold start data. The information provided to date is insufficient and should demonstrate why the parameters for the proposed 50% load and 101 degrees F case represent the worst-case 1-hour NOx scenario; i.e., why other loads (e.g., 60%, 75%) and other ambient conditions were not considered or demonstrative of the worst-case 1-hour NOx emission rate.*

RESPONSE: The worst-case 1-hour NOx emission rate from the Project was shown in the February 2008 PSD application to be 160 lbs/hr per unit during a turbine startup.[42] The analysis in the February 2008 PSD application went beyond identification of the worst-case 1-hour emission rate to identify combinations of emission rates and operating scenarios that result in the worst case 1-hour impacts. The demonstration of the worst-case scenarios for the 1-hour NOx analysis was contained in the February 2008 PSD application. The maximum 1-hour NOx emission case for one turbine occurs during a cold startup.[43] The maximum 1-hour NOx emission case for two turbines occurs during the simultaneous cold startup of two turbines.[44] A screening air dispersion modeling analysis was conducted to determine the combination of turbine operation and ambient temperature which resulted in the maximum impact. In this analysis, the following combinations were evaluated:

- 100% and 50% load (i.e., these two loads bracket the infinite number of possible intermediate loads; there are no known non-linearities in turbine emissions characteristics which would render these two conditions unrepresentative of extremes in project operations)
- With and without duct burner firing
- Three bracketing ambient temperatures:
  - Extreme hot (101F)
  - Annual average (63°F)
  - Extreme cold (32°F)

EPA correctly notes that the maximum startup impact occurred with the combination of 50% load (startup conditions) and extreme hot ambient temperature.

Note that the use of cold startup emission characteristics (abnormally high emission rates, low stack velocity, low stack temperature) results in a significantly conservative estimation of the 98th percentile ground level impact. A cold startup is a rare event

[42] *Application to the U.S. EPA for a Prevention of Significant Deterioration Permit, Avenal Energy Project, Kings County, California,* Table 6.2-23. February 2008.
[43] *Application to the U.S. EPA for a Prevention of Significant Deterioration Permit, Avenal Energy Project, Kings County, California,* Appendix 6.2-1 Table 6.2-1.8 and Appendix 6.2-2 Table 6.2-2.5,February 2008.
[44] Id.

relative to other operating conditions. The compliance demonstration assumes that both turbines are in cold startup mode at the same time, and not merely during the worst possible hour of the year from the standpoint of project impact; this operating condition is assumed to occur during each of the next 6 or 7 worst possible hours of the year when, in fact, it is unlikely that such an event would occur more than once or twice per year.

The suitability of this screening analysis for defining worst case emission rates and dispersion characteristics was accepted by EPA for purposes of analysis of the Project's impacts on the 1-hour and 8-hour CO standards, the 24-hour and annual average PM_{10} standards, and the annual average NO_2 standard. We are unaware of any scientific reason why the worst case emission rates and dispersion characteristics which are acceptably representative for these pollutants would not also be representative in the context of a 1-hour NO_2 standard.

Stack NO_2/NOx ratios

EPA COMMENT: *Avenal has selected the in-stack NO_2/NOx ratio for the two combustion turbines as follows: equal to 0.25 for normal operations and equal to 0.4 for startup and commissioning operations. Avenal did not provide the specific background information cited for EPA in support of the selection process. Avenal stated that the ratios were "derived from source test data." EPA needs to confirm the proposed conservative ratios for use in the 1-hour NO_2 NAAQS air quality modeling.*

The applicant should provide the source test data, which the SDAPCD furnished, that Avenal has relied upon to develop the 0.25 and 0.4 ratios. This should include, at a minimum, source test results, source test support information to confirm test conditions and equipment operations, and the source test methodology. The applicant should confirm if the source test data relied upon is a result of emissions compliance testing or a result of other circumstances. Based on this information, the applicant should provide a discussion that demonstrates the representativeness and comparability of this information for Avenal's selection of the proposed ratios for normal, startup and commissioning operations.

RESPONSE: The SDAPCD based its recommendation regarding NO_2/NOx ratios on the results of source tests conducted under SDAPCD supervision at the Palomar Energy Center. The emission compliance tests conducted on January 25 and 27, 2006 for Units 2 and 1, respectively (see Attachment 3) provided the basis for the recommended ratio of 0.25 during normal operation of F-Class gas turbines burning natural gas and equipped with dry low-NOx combustors, selective catalytic reduction and oxidation catalysts. The SDAPCD analyzed the results of startup tests at the same facility conducted on May 3, 4, 18, and 23, 2006 (see Attachment 4) to develop the recommended ratio of 0.40 during startup operation. These recommendations were contained in a November 13, 2006 internal email from Steve Moore of the SDAPCD (Attachment 5). A later, confirming source test (Attachment 6), which was focused on the first hour of startup, indicated a lower NO_2/NOx ratio of close to 5% but the District decided to keep their conservative

recommendation of 0.40 for the NO_2/NOx ratio during startups.[45] The latter test was specifically requested by the SDAPCD to determine emissions during the first hour of a cold start, which would produce the highest hourly NOx emission rates. All of these tests were performed on a GE F-Class turbine, essentially identical to the gas turbines proposed for the Avenal Energy Project.

Estimates of impacts during commissioning activities were performed in support of the application for certification from the CEC. Commissioning impacts are not reviewed as part of the PSD permit process.[46]

EPA COMMENT: *If the development of the normal, startup, and commissioning ratios also were based on another method other than source testing, the applicant should provide the information that Avenal has relied upon. For instance, if continuous emissions monitoring also was relied upon, please provide a discussion that also demonstrates the representative and comparability of this information for Avenal's selection of the proposed ratios.*

RESPONSE: The ratios were developed by the SDAPCD from the indicated source tests, not from another method.

EPA COMMENT: *San Diego APCD Recommendations: Avenal stated that the proposed instack ratio values of 0.25 and 0.4 were"... recommended by San Diego Air Pollution Control District for the modeling on another large-scale combined-cycle gas turbine project." The applicant should include the SDAPCD's recommendation and rationale.*

RESPONSE: The SDAPCD rationale was that the performance of the Palomar Energy Center GE F-Class gas turbines would be indicative of the performance of F-Class turbines proposed for other projects. The November 13, 2006 internal email from Steve Moore, Senior Engineer at the SDAPCD, recommending use of the indicated NO_2/NOx ratios is attached as Attachment 5.

Ambient Monitoring Data

Responses to EPA’s comments on the representativeness of ambient monitoring data are presented below.

General

EPA COMMENT: *The statements that the source is 28 miles northeast of the project site, is the closest source, and is adequately close, are not sufficient to show that the data*

[45] SDAPCD. Telephone conversation between Steven Moore, Senior Engineer, and Eric Walther of Sierra Research, August 26, 2010.

[46] See, e.g., memorandum from P. Culver, EPA to file dated 9/25/1978 indicating that “boil-out” of a coal-fired steam generator was a part of source construction, and did not constitute startup for purposes of PSD. The high-emission rate aspects of commissioning a combined cycle power plant are analogous to boiler “boil-out”. Air quality impacts during commissioning were not addressed in EPA’s June 2009 Statement of Basis and Air Quality Impact Report for the Project.

is representative. The discussion of representativeness for ambient air quality data should be specific to the pollutant for the appropriate averaging time.

RESPONSE: In addition to the factors already listed in EPA's comment (i.e., that the monitoring stations used are the closest stations, and are adequately close, to the Project site), we have discussed above the similarity between the sites with regard to land use, and the presence of nearby sources of pollutants that might affect one site but not the other.

Furthermore, EPA had previously accepted this discussion as adequate justification for the use of representative background air quality data from the Corcoran and Hanford sites for purposes of evaluating compliance with the 1-hour and 8-hour average CO standards, the 24-hour average PM_{10} standard, and the annual average NO_2 standard. We are unaware of any scientific reason why data that are acceptably representative for these purposes would not also be representative with respect to the 1-hour NO_2 standard.

<u>*Ozone*</u>

EPA COMMENT: *The discussion of representativeness for hourly ozone data in the San Joaquin Valley should consider the regional pattern of ozone in the San Joaquin Valley. The effect of local sources on the formation and destruction of ozone should be considered. For example, is the monitoring station near a roadway that may be a local sink of ozone? Conditions at the project site should be compared to conditions at monitoring sites in the San Joaquin Valley.*

RESPONSE: Section 5 of the SJVACPD *Extreme Ozone Attainment Demonstration Plan* describes the modeled pattern of future ozone impacts in the San Joaquin Valley.[47] These predictions form the basis of the District's SIP for attainment of the federal ozone NAAQS. Figure 5-2 of the Plan shows the peak ozone distribution in the base case for the plan, July/August 2000. The predicted ozone concentrations throughout Kings County are similar; predicted concentrations at Hanford and at the project site are within 10% of each other. Projections of future ozone concentrations are shown in Figure 5-4, and again the peak ozone concentrations at the two sites are expected to be with 10% of each other. Because the conditions that give rise to peak ozone concentrations feature low wind speeds, comparison of peak ozone concentrations would be expected to maximize the isolation of the two sites and emphasize differences between the two sites. Consequently, we believe the ozone data from the Hanford monitoring station are reasonably representative of concentrations at the Project site. With respect to roadway traffic, the Hanford monitoring station is located near to California Route 43, but it is located approximately 12 miles from the nearest major freeway, California Route 99. In comparison, the Project site is located approximately two miles from Interstate 5. Thus, with respect to this one narrow issue, ozone concentrations at the Hanford site would be expected to be less impacted by roadway traffic than the Project site, and hence ozone concentrations would be expected to be slightly lower (all else being equal) at the Project

[47] SJVAPCD, *Extreme Ozone Attainment Demonstration Plan*, October 8, 2004.

site. In the context of the ozone limiting functions of AERMOD, this means that the use of ozone data from Hanford is health-conservative.

EPA COMMENT: *The method for substituting missing ozone concentrations should be replaced with a clearly defined approach that includes a reasonable assurance that substituted values will not result in underestimates of ambient NO_2 concentrations. Avenal has not provided reasonable assurance that the method used—substituting concentrations with "hour-appropriate" values (e.g., from the previous day, or the next day, for the same hour)—will not result in underestimates of ambient NO_2 concentrations. For example, Avenal has not indicated whether there were instances in which there were "hour appropriate" data for both the day before and day after the date on which data was missing, and whether in any such cases it took the higher of the two values.*

RESPONSE: In general, the ozone concentration substituted for a missing hourly value was the arithmetic mean of the ozone concentrations measured during the hour before and the hour after the missing value. In a few cases, the ozone concentration substituted for a missing hourly value was the arithmetic mean of the ozone concentrations measured during the same hour on the previous and following days. Because ozone is generated by reactions that depend on incoming solar energy, ambient temperature, and the availability of nitric oxide, nitrogen dioxide, and other reactive molecules, resulting in a typical diurnal pattern of growth in the morning hours and loss after sunset, the choice of the best value for substitution depends on the time of day of the missing concentration and the relative magnitude of the ozone concentrations successfully measured during the same hour on the previous and following days, and the ozone concentrations measured during the hour before and the hour after the missing value.

The revised supplemental 1-hour NO_2 impacts analysis enclosed with this submission relies on background ozone concentrations provided by the District.

NO_2

EPA COMMENT: *The discussion on representativeness presented by Avenal, i.e., that there is a lack of any large local industrial sources in the Hanford area, and that the Hanford site is nearest to the facility, is not an adequate discussion of representativeness. The discussion of representativeness for ambient air quality data should include a discussion of why the ambient pollution levels monitored at the Hanford monitoring station represent area-wide ambient conditions, not simply that they do not represent localized impacts.*

RESPONSE: As EPA noted in its comment, ambient monitoring data is assumed to represent regional concentrations. One element of this assumption is that the monitor is not impacted significantly by local sources of emissions. EPA accepted the background ambient monitoring data from Corcoran and Hanford in the context of the 1-hour and 8-hour CO standards, the 24-hour PM_{10} standard, and the annual average NO2 standard.

Since both the CO and NO_2 concentrations are principally influenced by combustion sources, we are unaware of any scientific reason why data from these two monitoring sites would not also be representative of regional background concentrations for purposes of the 1-hour NO_2 standard.

EPA COMMENT: *The discussion should be appropriate for the pollutant for the appropriate averaging time. For example, the discussion of representativeness for hourly* NO_2 *data in the San Joaquin Valley should include a discussion of the sources and conditions likely to contribute to high hourly levels of* NO_2 *in the San Joaquin Valley. The project site should be compared to various monitoring sites in the San Joaquin Valley. This type of information has not been provided.*

RESPONSE: The Hanford site was selected for background NO_2 concentrations for several reasons:

- It is the closest NO_2 monitor to the project site.
- The nearby land use is similar at the Hanford site and the Project site;
- The topography near both sites is similar
- The climatology affecting both sites is similar.

In contrast with the Hanford site, urban monitoring sites in the District have very different surrounding sources. The other rural sites in the area have characteristics similar to those of Hanford and the Project site, but all are farther away from the project than Hanford. Hanford thus provides the best available characterization of project conditions

The question of whether there are sources that might impact the project site, but are not adequately represented by the ambient data, is essentially the same as the analysis for nearby sources that must be modeled.

Table 5 lists point sources and NOx emissions for sources in the vicinity of the project and the Hanford monitor. This table shows that the there are no major sources, and few large sources, in the vicinity of either location. Because there are more NOx emissions in the immediate vicinity of Hanford, using ambient data from that site to represent the regional background is conservative, to the extent that the monitor site is directly impacted by nearby sources.

Table 5
Comparison of NOx Sources Around Project and Monitoring Sites

Range	Project		Hanford Monitoring Site	
	Facilities	2008 NOx emissions (TPY as NO_2)	Facilities	2008 NOx emissions (TPY as NO_2)
<= 5 km	PG&E	25.2	Hanford LP Samson Resources	52.2
<= 10 km	PG&E	25.2	Hanford LP Samson Resources	63.6

EPA COMMENT: *The NO_2 ambient data used for the annual NO_2 NAAQS analysis were not evaluated by EPA in that context in light of the fact that the analysis did not use ambient NO_2 data, and the fact that the analysis had a project impact below the monitoring de minimis level. These factors are not present in the context of the 1-hour NO_2 NAAQS. Thus, EPA did not review or approve the information submitted at that time with respect to representativeness for the 1-hour NO_2 NAAQS.*

RESPONSE: In light of Avenal's reference to the use of previously submitted information in the NO_2 analysis, Avenal assumes that EPA will review the previously submitted data as referenced and modified by this and other recent submissions.

Compliance Demonstration

EPA COMMENT: *We note that the EPA guidance document issued by EPA's Office of Air Quality Planning and Standards entitled General Guidance for Implementing the 1-hour NO_2 National Ambient Air Quality Standard in Prevention of Significant Deterioration Permits, Including an Interim 1-hour NO_2 Significant Impact Level, dated June 28, 2010, provides a recommended interim as for the 1-hour NO_2 NAAQS of 4 ppb.*

RESPONSE:

The June 28th guidance document was not issued until after EPA requested that the applicant conduct an analysis to demonstrate compliance with the new 1-hour NO2 standard, and after the requested analysis had been submitted. In light of EPA's new guidance on this issue, Avenal has used the interim suggested level of 4 ppb as a SIL-equivalent to determine the impact area for the 1-hour NO_2 standard, and to determine whether impacts are significant for the purposes of this analysis.

EPA COMMENT: *EPA's June 28, 2010 NO_2 clarification memorandum acknowledges that some level of temporal pairing of modeled and monitored NO_2 concentrations may be appropriate in some situations, the justification regarding pairing on an hour-by-hour basis provided in Avenal's response, which states that the "approach guarantees*

meteorological consistency for each pair of background and modeled concentrations combined in each hour of the year," does not provide a sufficient rationale to support that approach in this case. There may be sound technical arguments to account for consistency in terms of the meteorology affecting both background and modeled concentrations, but the justification also needs to consider the spatial representativeness of the monitored data as well, which is not addressed in Avenal's response to this comment.

RESPONSE: The spatial representativeness of the ambient monitoring data used to assess the Project's impacts on the 1-hour NO_2 standard is discussed above.

EPA COMMENT: *The aspect of temporal pairing of modeled and monitored concentrations is also acknowledged in EPA's March 23, 2010 memorandum from Stephen Page regarding Modeling Procedures for Demonstrating Compliance with PM2.5 NAAQS, where EPA indicates on page 8 that a Second Tier approach for combining modeled and monitored $PM_{2.5}$ concentrations on a seasonal or quarterly basis may be considered when the modeled primary $PM_{2.5}$ impacts and background $PM_{2.5}$ levels (including secondary $PM_{2.5}$ formation) are not correlated on that time scale. Although the March 23, 2010 memo does not provide details regarding the recommended method for combining modeled and monitored $PM_{2.5}$ concentrations on a seasonal or quarterly basis, the recent draft $PM_{2.5}$ Hot Spot Conformity Guidance (EPA, 2010) recommends combining the average of the highest modeled 24-hour concentrations within each season/quarter to each of the eight highest 24-hour monitored background concentrations for that season/quarter, and then sorting the combined distribution to determine the cumulative design value (see Appendix K of the draft Hot Spot guidance). Note that the modeled and monitored concentrations are not paired on a day-by-day (or hour-by-hour) basis in this Second Tier approach for $PM_{2.5}$, even though the spatial homogeneity of background levels of $PM_{2.5}$ on a daily basis is likely to be much greater than the spatial homogeneity of background levels of NO_2 on an hourly basis.*

RESPONSE: The example cited by EPA is a screening level analysis applicable to 24-hour average concentrations of a pollutant other than NO2. EPA has argued extensively in its Aug. 12, 2010 comments that guidance and analyses relative to other pollutants and/or averaging periods are not relevant to a discussion of the new 1-hour NO2 standard, so we are uncertain as to why EPA believes, in this particular instance, that guidance relative to the 24-hour PM2.5 standard is relative to the 1-hour NO2 standard. Nonetheless, with respect to the substance of EPA's comment, the statistical form of the 1-hour NO2 standard does not lend itself to the approach proposed for the 24-hour PM2.5 standard. Such an approach would invariably result in a predicted violation of the 1-hour NO2 standard when, in fact, none would be expected. The existence of a more conservative mathematical approach for combining modeled and background concentrations should not preclude the use of technically defensible, less conservative approach.

EPA COMMENT: *Pairing the monitored background values with modeled concentrations on an hour-by-hour basis implies an assumption that the monitored*

concentrations are equally representative at each location within the modeling domain for each hour of the simulation.

RESPONSE: Avenal would propose the following clarification to EPA's comment: the monitored concentrations are equally representative of the **regional background** concentration at each location within the modeling domain for each hour of the simulation. This assumption is inherently conservative. As discussed previously, we assume that every point in the region is impacted by the same regional background concentration plus the impact of local sources. Any monitor will reflect that background plus the local sources that impact it.

Because the monitor data is the sum of regional background plus local impacts, any monitor's data from the region can never be lower than the background. Because the monitor's data must, by definition, be as high as or higher than the regional background, the assumption that the monitor data is equally representative at each location within the modeling domain is a conservative one. EPA's concern about "spatial representativeness" (that is, local sources that impact the modeling domain) is addressed through the nearby source analysis.

EPA COMMENT: *There is no technical or even rational basis to support such a degree of representativeness in this case or any other case.*

RESPONSE: This comment is puzzling, because there is no basis to distinguish between the use of ambient monitoring data in this case and its use in other cases. The approach used in our analysis is consistent with the approach that EPA and other environmental agencies have used for many years, and the assumption is the same for all uses of ambient monitoring data in compliance determination. The technique used to combine background and modeled concentrations on an hourly basis for the Project is the same as that used by the District.

EPA COMMENT: *Such a degree of representativeness would also be unreasonable to impose as a general requirement for use of background monitored data, given the limited number of monitors available. However, any modeling approach developed regarding the use of monitored background concentrations as part of a cumulative impact assessment must take into account these limitations of monitored data.*

RESPONSE: It is unnecessary to attempt to distinguish between "degrees of representativeness." As discussed above, given an adequate demonstration that the monitor and the impact area are in the same region, subject to the same regional background, then the assumption that the monitor represents regional background is necessarily conservative. The possible effects of local sources on the impact area are addressed by the nearby source analysis.

EPA COMMENT: *The results from the 1-hour NO_2 CAAQS comparison summarized in Table 6.2-31 (6.2-66) of the APC show maximum 1-hour Avenal facility impacts of 190 µg/m3, combined with a background concentration of 137.2 $\mu g/m^3$ to give a total impact of 327.2 $\mu g/m^3$. This cumulative 1-hour NO_2 impact is well above the EPA 1-hour NO_2*

standard, although we recognize that the 1-hour modeled NO_2 concentration documented in the APC is likely to be higher than the 98th-percentile of the annual distribution of maximum daily 1-hour values used as the form of the 1-hour EPA standard. However, the AFC results are also about 2.7 times higher than the cumulative 1-hour NO_2 impact reported in the May 13, 2010 submittal, which serves to highlight the significance of the issue raised by EPA in this comment, and to emphasize the importance of having clear justification and documentation of the approach taken for combining modeled and monitored concentrations for comparison to the NAAQS.

RESPONSE: On the contrary, the extremely high values predicted by a screening analysis emphasize the conservative nature of such an analysis, and justify the level of comfort that a demonstration of compliance using such a method provides. It says nothing, however, about the significance of the issue raised by EPA in its comment, because it says nothing about the degree of conservatism represented by the more realistic model. As shown in the supplemental 1-hour NO_2 impact analysis submitted on May 14, 2010, as well as the revised supplemental 1-hour NO_2 impact analysis enclosed herewith, the Project will not cause or contribute to violations of this new standard, even if such a requirement were applicable to the Project.

EPA COMMENT: *EPA disagrees that it is suitable to apply the currently available monitoring guidance for the 1-hour NO_2 standard to modeling applications, as suggested by Avenal. EPA's comment objects to discarding valid modeled data. The applicant should choose a method for combining modeled and monitored data that does not discard valid modeled data and which is consistent with Appendix W. EPA's guidance entitled Applicability of Appendix W Modeling Guidance for the 1-hour NO_2 National Ambient Air Quality Standard (June 28, 2010) may be useful in preparing an analysis of the 1-hour NO_2 NAAQS.*

RESPONSE: We have reviewed The Appendix W modeling guidance document again, and it does not provide useful guidance to address this issue. This is because the modeling guidance document only describes compliance demonstrations using screening approaches, and not a full compliance demonstration that simulates siting a NAAQS compliance monitor at every single point in the modeling domain.

Because the compliance demonstration uses all available data in a way that replicates exactly the way those data would be used to determine the region’s attainment status, it is the most direct demonstration of compliance with the NAAQS.

Nonetheless, in the revised supplemental 1-hour NO_2 impact analysis provided with this response, background concentrations were provided by the District, and were not developed using the method objected to by EPA.

Conclusion

We believe that this document and the attached materials address all of EPA's remaining concerns. If there are any questions, they can be directed to Gary Rubenstein of Sierra Research at (916) 273-5126.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

NOTICE TO THE COURT REGARDING TIMING OF EPA ACTION ANTICIPATED IN DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants wish to notify the Court that EPA believes that the date by which EPA said it could act on Plaintiff's permit application in Defendants' Memorandum in Support of Cross-Motion for Summary Judgment (and Opposition to Plaintiff's Motion for Judgment on the Pleadings) and Reply Brief is no longer attainable. Defendants state as follows:

1. The Complaint alleges that EPA failed to grant or deny Plaintiff's Clean Air Act ("CAA") Prevention of Significant Deterioration ("PSD") permit application as mandated by CAA § 165(c), 42 U.S.C. § 7475(c), and seeks declaratory and injunctive relief and costs and attorneys' fees.

2. On August 25, 2010, Plaintiff filed a Motion for Judgment on the Pleadings. On September 17, 2010, Defendants cross-moved for summary judgment, specifying December 31, 2010, as the date by which EPA could act on Plaintiff's permit application. The motions were fully briefed on October 22, 2010. See Docket entries 12-24.

3. In Defendants' Memorandum in Support and Reply Brief, Defendants explained that Plaintiff must demonstrate compliance with the recently-promulgated 1-hour nitrogen dioxide national ambient air quality standard ("hourly NO2 standard") before EPA can issue Plaintiff a PSD permit, and that EPA was reviewing technical information received from Plaintiff on September 13, 2010, to determine its adequacy.

4. In the briefs, EPA stated that if Plaintiff submitted significant additional information later than September 13, 2010, EPA would need to request an extension from the Court for issuing a final permit decision.

5. EPA has determined and informed Plaintiff that the information submitted by Plaintiff on September 13, 2010, is not sufficient to demonstrate compliance with the hourly NO2 standard.

6. In mid-November, EPA met with Plaintiff in person and over the phone to discuss what additional information is necessary.

7. Plaintiff recently stated that it is willing to continue working with EPA to demonstrate compliance with the hourly NO2 standard. However, Plaintiff has also stated that it is unwilling to consent to a stay of the litigation while EPA and Plaintiff attempt to resolve this issue.

8. Accordingly, EPA is evaluating its options and has not yet decided how to proceed with respect to Plaintiff's permit application. Defendants will alert the Court of its new plan as soon as possible, but no later than December 17, 2010.

Dated: November 30, 2010

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division
________/S/________________________
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing NOTICE TO THE COURT with the clerk of the court for the United States District Court for the District of Columbia using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record:

LaShon K. Kell
Jeffrey R. Holmstead
BRACEWELL & GIULIANI LLP
2000 K Street, NW, Suite 500
Washington, DC 20006

/s/ *Stephanie J. Talbert*
STEPHANIE J. TALBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

NOTICE TO THE COURT AND SUPPLEMENTAL DECLARATION REGARDING REMEDY

On December 20, 2010, the Court granted the parties' joint motion to stay the instant matter until January 7, 2011, to allow the parties time to discuss settlement. Settlement discussions have not been successful thus far. Accordingly, Defendants state as follows:

1. The Complaint alleges that EPA failed to grant or deny Plaintiff's Clean Air Act ("CAA") Prevention of Significant Deterioration ("PSD") permit application as mandated by CAA § 165(c), 42 U.S.C. § 7475(c), and seeks declaratory and injunctive relief and costs and attorneys' fees.

2. On August 25, 2010, Plaintiff filed a Motion for Judgment on the Pleadings. On September 17, 2010, Defendants cross-moved for summary judgment, specifying December 31, 2010, as the date by which EPA could act on Plaintiff's permit application. The motions were fully briefed on October 22, 2010. See Docket entries 12-24.

3. On November 30, 2010, Defendants notified the Court that EPA believed that it could

no longer act on Plaintiff's permit application by December 31, 2010, and committed to inform the Court of EPA's new plan for action on December 17, 2010. See Docket entry 25.

4. On December 17, 2010, the parties jointly moved to stay all proceedings, including Defendants' obligation to notify the Court of its new plan for action, until January 7, 2011, so that the parties could pursue settlement discussions. The Court granted the parties' joint motion on December 20, 2010. See Docket entry 28 and 12/20/2010 Minute Order.

5. Settlement discussions have not been successful thus far. Accordingly, EPA hereby notifies the Court that it plans to move forward with Plaintiff's permit application, including providing the public an opportunity to comment on the Agency's proposed decision pursuant to the applicable legal procedures. As detailed in the supporting declaration by Regina McCarthy, Assistant Administrator of the Office of Air and Radiation for EPA, EPA believes that the earliest it could issue a decision on Plaintiff's permit application, pursuant to 40 C.F.R. § 124.15, is May 27, 2011.

Accordingly, Defendants request that the Court deny Plaintiff's motion for judgment on the pleadings and grant Defendants' cross-motion for summary judgment for all the reasons stated in Defendants' Memorandum in Support, and order EPA to act on the permit application, pursuant to 40 C.F.R. § 124.15, by May 27, 2011. We have filed a revised proposed order with this notice.

Dated: January 7, 2011

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division
/S/
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing NOTICE TO THE COURT AND SUPPLEMNTAL DECLARATION REGARDING REMEDY with the clerk of the court for the United States District Court for the District of Columbia using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record:

LaShon K. Kell
Jeffrey R. Holmstead
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Washington, DC 20006

/s/ *Stephanie J. Talbert*
STEPHANIE J. TALBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF REGINA MCCARTHY

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

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

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

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

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

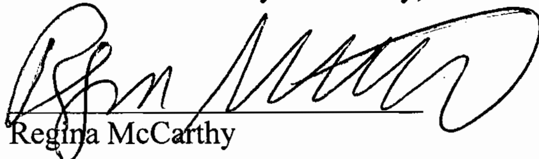
5. EPA has approved an air quality model called "AERMOD" for use by permit applicants to demonstrate that the sources they propose to build will not cause or contribute to violation of the hourly NO2 standard. EPA has also established guidelines on the application of this and other air quality models, which are reflected in 40 C.F.R. Part 51, Appendix W. In addition, EPA has issued a supplemental memorandum providing additional guidance on using the AERMOD model to demonstrate that proposed construction of a stationary source will not cause or contribute to a violation of the hourly NO2 standard.

6. Despite these actions, EPA and applicants seeking PSD permits to construct stationary sources of air pollution have experienced some unforeseen challenges with the preparation and review of information to predict the impact of proposed sources on hourly NO2 concentrations. As a result of the concerns expressed by permit applicants, EPA began a policy review to determine whether additional action by EPA is necessary to facilitate the preparation of information to predict hourly NO2 concentrations and to enable EPA and other permitting authorities to complete action on pending PSD permit applications in a timely manner.

7. Due to this ongoing review in EPA, Region 9 was unable to proceed with the public notice process on the Avenal permit that EPA anticipated taking at the time it filed its Cross Motion for Summary Judgment in this matter. EPA consulted with Avenal in November to determine if the company would be able to provide additional analysis to enable EPA to make a permitting decision based on existing EPA guidelines before the Agency made further progress on the ongoing policy review. Avenal did not respond with any additional analysis regarding the impact of the proposed facility on hourly NO2 concentrations.

8. EPA's policy review has now proceeded to the point that the agency can move forward with action on the Avenal permit application. Prior to issuing a final permit decision, EPA must provide the public with the opportunity to comment on its proposed action under applicable legal procedures. EPA needs 20 weeks to prepare the necessary documents and complete the notice and comment process. Thus, EPA will be able to issue a final permit decision pursuant to 40 C.F.R. § 124.15 by May 27, 2011.

Executed this 7th day of January, 2011.



Regina McCarthy

Assistant Administrator
Office of Air and Radiation
United States EPA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Having received DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT on September 17, 2010, the Court hereby grants such motion. EPA must grant or deny Plaintiff Avenal's PSD permit application, pursuant to 40 C.F.R. § 124.15, no later than May 27, 2011. Plaintiff's MOTION FOR JUDGMENT ON THE PLEADINGS is denied.

So ordered.

Dated:_______________

____
The Honorable Richard J. Leon
United States District Judge

Permenter, Teresa

From:	DCD_ECFNotice@dcd.uscourts.gov
Sent:	Thursday, February 03, 2011 10:41 AM
To:	DCD_ECFNotice@dcd.uscourts.gov
Subject:	Activity in Case 1:10-cv-00383-RJL AVENAL POWER CENTER, LLC v. U.S. ENVIRONMENTAL PROTECTION AGENCY et al Set/Reset Deadlines/Hearings

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U.S. District Court

District of Columbia

Notice of Electronic Filing

The following transaction was entered on 2/3/2011 at 10:40 AM EDT and filed on 2/3/2011

Case Name:	AVENAL POWER CENTER, LLC v. U.S. ENVIRONMENTAL PROTECTION AGENCY et al
Case Number:	1:10-cv-00383-RJL
Filer:	
Document Number:	No document attached

Docket Text:
Set/Reset Deadlines/Hearings: Plaintiff's Motion due by 2/15/2011.Defendants Opposition due by 3/1/2011. Plaintiff's Reply due by 3/8/2011. Oral Argument Hearing set for 3/16/2011 at 03:00 PM in Courtroom 18 before Judge Richard J. Leon. (kc)

1:10-cv-00383-RJL Notice has been electronically mailed to:

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Stephanie J. Talbert stephanie.talbert@usdoj.gov

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OPINION
(May 26 2010) [##12, 14]

Avenal Power Center, LLC ("plaintiff") brings this action against the U.S. Environmental Protection Agency ("EPA") and Lisa P. Jackson, Administrator of the EPA ("Administrator" and collectively "defendants") for violation of Section 165(c) of the Clean Air Act ("CAA"). Section 165(c) requires the EPA to grant or deny specified permit applications within one year. While the parties agree that the EPA has violated its duty to render a final decision within one year under Section 165(c), the parties disagree as to the appropriate remedy that the Court can, and should, impose. On March 16, 2011, the Court heard oral argument on this question. The EPA, in essence, argues that notwithstanding Congress' one-year statutory time limit (established in 1977) for a final agency action, the most the Administrator could now be required to do is issue a decision that is appealable to the Environmental Appeals Board ("EAB"): a review process enacted by regulation in 1992 for the assistance of the Administrator, that the EPA freely

concedes could take anywhere from six to eighteen months, or longer, to complete. In effect, the EPA contends that this subsequently-enacted regulatory review process *trumps* Congress' one-year statutory deadline and, as such, the most that this Court can do is require the agency to issue an appealable interim decision within the one-year statutory period. Upon consideration of the parties' pleadings, including parties' supplemental briefs on this question, oral argument, and the record herein, the Court disagrees with the defendants' position and, therefore, GRANTS, in part, plaintiff's Motion for Judgment on the Pleadings, and DENIES defendants' Motion for Summary Judgment. Accordingly, it is ORDERED that the EPA Administrator issue a final, non-appealable, agency action, either granting or denying plaintiff's permit application, no later than August 27, 2011.[1]

BACKGROUND

Avenal Power Center, LLC currently seeks to develop and build a state of the art 600 megawatt natural gas-fired power plant, the Avenal Energy Project. Jt. Stips. ¶¶ 1-3, Jt. Stmt. Re. Case Mgmt, and Sched., Ex. 1 [#11]. To this end, plaintiff submitted, in February 2008 to the EPA, a Prevention of Significant Deterioration ("PSD") permit application. The application was deemed complete on March 19, 2008. *Id.* ¶¶ 3-5. Almost *two years later*, however, after an elaborate and exhaustive EPA administrative process, which included a notice and comment period and public hearing, the plaintiff

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

still had no final or foreseeable resolution to its application. As such, the plaintiff brought this action on March 9, 2010, seeking judicial relief to deal with EPA's continued violation of Congress's one-year deadline under Section 165(c) of the CAA. Compl. ¶ 28.

Initially, the EPA defended its delay by citing two unresolved issues with plaintiff's application: (1) the EPA required continued consultation with the U.S. Fish and Wildlife Service ("USFWS") to ensure compliance with the Endangered Species Act; and (2) the EPA required that plaintiff show that the Project would meet a new EPA standard for nitrogen dioxide ("NO2 Standard"). *See* Answer at 4. On September 1, 2010, however, USFWS issued a Biological Opinion that effectively mooted the first issue. Pl.'s Br. Re. Remedy, Feb. 15, 2011, ("Pl.'s Supp. Br.") at 5, n. 2 [#34]. Meanwhile, the NO2 Standard had gone into effect on April 12, 2010, and plaintiff, therefore, argued that the EPA could no longer withhold its decision on plaintiff's permit because of this new requirement. *See* Pl. Mot. J. on Pleadings at 11. Ultimately, the EPA conceded this point as well.

Indeed, on February 4, 2011, in a declaration by Regina McCarthy, Assistant Administrator of the EPA's Office of Air and Radiation, the EPA *reversed* its position on the NO2 Standard and announced that "[t]he PSD permit application submitted by Avenal in 2008 is among those PSD permit applications that EPA believes it is appropriate to grandfather from these additional [NO2 Standard] requirements, particularly in light of EPA's statutory obligation to grant or deny a complete PSD permit

application within one year . . . ." Corr. 2d Decl. of Reginal McCarthy ("McCarthy Decl.") ¶ 6. As such, the EPA announced that it would "be able to issue a final permit decision in accordance with 40 C.F.R. § 124.15 on [plaintiff's] permit application by May 27, 2011." *Id.* ¶ 13. Unfortunately, that offer was *not* what it appeared to be!

As plaintiff appropriately points out, EPA's promise of a "final permit decision" under 40 C.F.R. § 124.15 was inherently disingenuous. It actually was only a promise to render, in effect, an "interim decision" subject to appeal before the EAB. Pl. Supp. Br. at 7. Plaintiff, as a result, was left with no choice but to seek an order from the Court imposing a deadline, no later than May 27, 2011, by which defendants would be required to render a decision on plaintiff's permit application that would constitute an actual *final* agency action, allowing plaintiff to either begin construction on the Avenal Energy Project or seek judicial review in the Federal Courts pursuant to 42 U.S.C. § 7607. *See id.* at 17. Undaunted, defendants argued that an appealable decision by a Regional Administrator is sufficient to satisfy the CAA's one-year deadline and, in any event, this Court lacks jurisdiction to impose the relief being sought by the plaintiff. *See generally* Defs.' Response to Pl. Supp. Br. For the following reasons, I disagree with the defendants' oh so clever, but unsupportable, position.

ANALYSIS

In 1977, Congress required the Administrator of the EPA to grant or deny a permit application, filed under the CAA, within one year. 42 U.S.C. § 7475(c). The Administrator retained discretion, however, as to the procedural process that an applicant

had to comply with during that one-year period. *See* 42 U.S.C. § 7601(a). For example, the Administrator could delegate his or her ultimate decision on the application to a Regional Administrator, or an Assistant Administrator, or even require an interim decision by one of her subordinates prior to making the ultimate decision herself. *See, e.g.*, 40 C.F.R. §§ 124.15, 124.19; Mar. 1, 2011, Temporary Delegation, Defs.' Resp. to Pl.'s Supp. Br., Ex. 1. In 1992, however, the Administrator decided to create an Environmental Appeals Board and delegate to it the final review of a grant or a denial of such application by a Regional Administrator. *See* 57 Fed. Reg. 5320 (Feb. 13, 1992). Unfortunately, when the Administrator created that process she failed to build into it the temporal requirement that the EAB's decision be completed within the CAA's statutorily mandated one-year period. *See* 40 C.F.R. § 124.19. As a result, the EPA put in place a review process that can and has, in this case, rendered meaningless this Congressional one-year mandate.

Unfazed, the EPA argues, in effect, that this regulatory process trumps Congress's mandate and relieves the Administrator of complying with it until the EAB renders the Agency's final decision. *See* Defs.' Resp. to Pl. Supp. Br. at 5, 9-12; *see also* Tr. 3/19/11 at 31:17-21. Indeed, EPA contends, further, that this regulatory review process creates a right to this additional level of review that cannot be – effectively – denied by a Court order that requires the Administrator to issue a final – non-appealable – decision within the Congressionally mandated one-year period. *See* Defs.' Resp. to Pl. Supp. Br. at 5, 9-12; *see also* Tr. 3/19/11 at 36:3-6. In essence, the EPA contends that Congress's

statutory mandate is subservient to EPA's regulatory review process, and as such this Court has *no* authority to require the Administrator to comply with this statutory requirement. *See* Defs.' Resp. to Pl. Supp. Br. at 9-12; *see also* Tr. 3/19/11 at 36:3-6. How absurd!

It is axiomatic that an act of Congress that is patently clear and unambiguous – such as this requirement in the CAA[2] – cannot be overridden by a regulatory process created for the convenience of an Administrator, no matter how much notice and comment preceded its creation. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Ernst & Ernst v. Hochfelder*, 425 U. S. 185, 213-14 (1978) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." (internal quotations omitted)). Administrators of regulatory agencies derive their power from Congress's statutory enactments – not from their own discretionary regulatory pronouncements that are drafted for their assistance and convenience. *See North*

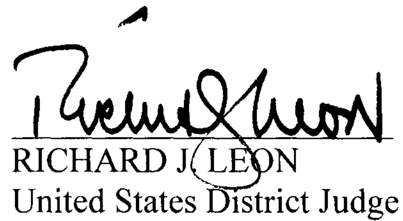
[2] The EPA has labored mightily to convince this Court that the temporal requirement enacted by Congress is somehow ambiguous and, therefore, this Court should defer to its interpretation under *Chevron*. *See* Defs.' Resp. to Pl.'s Supp. Br. at 13-17. Horsefeathers! The EPA's self-serving misinterpretation of Congress's mandate is too clever by half and an obvious effort to protect its regulatory process at the expense of Congress's clear intention. Put simply, that dog won't hunt.

Carolina v. EPA, 531 F.3d 896, 922 (D.C. Cir. 2008) (citing *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)). To the extent that a regulatory process frustrates or renders meaningless a Congressional statutory mandate, it must yield to Congress's will. *See Ernst & Ernst v. Hochfelder*, 425 U. S. at 213-14; *Fed. Maritime Com. v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973); *see also Southland Royalty Co. v. Fed. Energy Admin.*, 512 F. Supp. 436, 446 (N.D. Tex. 1980). Thus, while the Administrator is welcome to avail herself of whatever assistance the EAB can provide her *within the one-year statutory period*, she cannot use that process as an excuse, or haven, to avoid statutory compliance.

Accordingly, the Administrator, in this Court's judgment, must issue a truly final decision, either granting or denying the permit in question as soon as possible. Regrettably her offer to issue an interim appealable decision by May 27, 2011 is patently inadequate as it has already exceeded Congress's mandate by some three years and undoubtedly would attenuate the process for yet another six to eighteen months. However, recognizing that the Administrator might need a brief additional period of time to determine how to best proceed vis-à-vis the existing EAB review process, the Court will extend the Administrator an additional 90 days to issue her final decision, either with or without the EAB's involvement.

CONCLUSION

Accordingly, for the foregoing reasons, it is ORDERED that the Administrator of the EPA issue a final decision granting or denying the plaintiff's permit no later than August 27, 2011. An order consistent with this decision accompanies this Memorandum Opinion.



RICHARD J. LEON
United States District Judge

Permenter, Teresa

From: DCD_ECFNotice@dcd.uscourts.gov
Sent: Tuesday, January 25, 2011 9:41 AM
To: DCD_ECFNotice@dcd.uscourts.gov
Subject: Activity in Case 1:10-cv-00383-RJL AVENAL POWER CENTER, LLC v. U.S. ENVIRONMENTAL PROTECTION AGENCY et al Notice of Hearing

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

District of Columbia

Notice of Electronic Filing

The following transaction was entered on 1/25/2011 at 9:41 AM EDT and filed on 1/25/2011

Case Name:	AVENAL POWER CENTER, LLC v. U.S. ENVIRONMENTAL PROTECTION AGENCY et al
Case Number:	1:10-cv-00383-RJL
Filer:	
Document Number:	No document attached

Docket Text:
NOTICE of Hearing: Status Conference set for 2/1/2011 at 11:00 A.M. in Courtroom 18 before Judge Richard J. Leon. (jth)

1:10-cv-00383-RJL Notice has been electronically mailed to:

Jeffrey R. Holmstead jeff.holmstead@bgllp.com, john.harding@bgllp.com

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Stephanie J. Talbert stephanie.talbert@usdoj.gov

1:10-cv-00383-RJL Notice will be delivered by other means to::

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

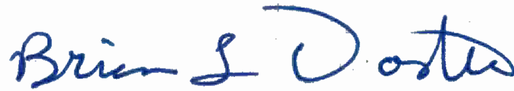
In re: Avenal Power Center, LLC PSD Permit No. SJ 08-01	PSD Appeal Nos. 11-02, 11-03, 11-04 & 11-05

NOTICE OF FILING OF CERTIFIED INDEX TO THE ADMINISTRATIVE RECORD

Notice is hereby provided of the filing of the Certified Index to the Administrative Record for the Prevention of Significant Deterioration permit issued to Avenal Power Center, LLC, which is the subject of the above-captioned petition for review.

Date: July 6, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Notice and the Certified Index to the Administrative Record were served on the following persons by U.S. Mail and electronic mail (to the extent an email is provided below).

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

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

CERTIFIED INDEX TO THE ADMINISTRATIVE RECORD

I, Scott Mathias, am the Acting Director of the Air Quality Policy Division of the Office of Air Quality Planning and Standards within the Office of Air and Radiation of the U.S. Environmental Protection Agency ("EPA").

I certify that the attached index lists the documents constituting the administrative record required by 40 C.F.R. 124.18 for EPA's final Prevention of Significant Deterioration permit issued to Avenal Power Center, LLC, which is the subject of the above-captioned petitions for review.

In witness whereof, I have signed my name this 5th day of July, 2011 at Research Triangle Park, North Carolina.

Scott Mathias
Office of Air Quality Planning and Standards
U.S. Environmental Protection Agency

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ADMINISTRATIVE RECORD INDEX

AVENAL ENERGY PROJECT
PSD PERMIT (SJ 08-01)
Docket No. EPA-R09-OAR-2009-0438

Index #	Record Section or Item	Date of Item	FDMS ID#*
	I. PSD Permit Application and Related Documents		
	▪ Application submitted by Sierra Research, Inc. (SRI) to EPA	(for this application package, items 1-17, dates in this column reflect the date submitted to EPA)	
1.	o Application Submission Letter from Sierra Research to EPA	2/15/2008	0003.1
2.	o Application Submission Letter from Avenal to EPA	2/15/2008	0007 0149
3.	o PSD Application Cover Page	2/15/2008	0007.1
4.	o 2.0 Project Description and Engineering	2/15/2008	0055
5.	o 6.2 Air Quality	2/15/2008	0008
6.	o Appendices 6.2: Air Quality ▪ 6.2-1 Emissions and Operating Parameters ▪ 6.2-2 Modeling Analysis ▪ 6.2-3 Construction Phase Impacts ▪ 6.2-4 Best Available Control Technology Analysis ▪ 6.2-5 Offset Requirements ▪ 6.2-6 Cumulative Impacts Analysis	2/15/2008	0014
7.	o 6.4 Agriculture and Soils	2/15/2008	0009
8.	o 6.6 Biological Resources	2/15/2008	0010
9.	▪ Appendix 6.6-1	2/15/2008	0056
10.	▪ Appendix 6.6-2	2/15/2008	0057
11.	▪ Appendix 6.6-3	2/15/2008	0058
12.	▪ Appendix 6.6-4	2/15/2008	0059
13.	▪ Appendix 6.6-5	2/15/2008	0060

* FDMS docket ID numbers are provided for reference purposes only. Due to a recent modification to the FDMS system, documents with ID numbers containing a decimal (i.e. 003.1) are now displayed as "attachments" under the docket entry identified by the number in front of the decimal point.

Index #	Record Section or Item	Date of Item	FDMS ID#*
14.	o 6.9 Land Use	2/15/2008	0011
15.	o 6.10 Socioeconomics	2/15/2008	0012
16.	o 6.16 Public Health	2/15/2008	0013
17.	o 6.16 Appendix 6.16-1: Health Risk Assessment	2/15/2008	0015
18.	▪ PSD Application Information Sheet	undated	0003
19.	▪ Email Transmittal from EPA to AEP of Region 9 PSD Permit Application Guidelines	2/22/2008	N/A
20.	▪ EPA – Region 9 PSD Permit Application Guidelines	10/30/2007	N/A
21.	▪ Email from EPA to E. Walther – Provides Initial Observations of PSD Application	3/7/2008	0066
22.	▪ Email Transmittal (03/11/2008) from EPA to Avenal/Sierra Research - Telephone Call Summary, including email thread (03/07/2008, 03/10/2008)	3/11/2008	0150
23.	▪ Email Transmittal (03-11-2008) from EPA to Avenal/Sierra Research – PSD review for PM (non-criteria pollutant)	3/11/2008	N/A
24.	▪ Email Transmittal (03/11/2008) from EPA to Avenal/Sierra Research – ESA and Additional Impacts	3/11/2008	N/A
25.	▪ Letter from Avenal/Sierra Research to EPA – Additional information re PSD Permit Application	3/13/2008	0067
26.	▪ Email from EPA to Avenal – Request for Additional Information	3/14/2008	0068
27.	▪ Letter from Avenal/Sierra Research to EPA – Additional information re PSD Permit Application	3/17/2008	0069
28.	▪ Letter from EPA to Avenal – Administrative Completeness Letter	3/19/2008	0070
29.	▪ Email Transmittal (03/20/2008) from AEP to EPA of Avenal – LLC Agreement and Responsible Official	3/20/2008	0151
30.	▪ Attachment to 03/20/2008 Avenal email – LLC Agreement	undated	0152
31.	▪ Attachment to 03/20/2008 Avenal email – Responsible Official cover letter	2/15/2008	0153
32.	▪ Email Transmittal (03/20/2008) from EPA to Avenal/Sierra Research – “Heads Up” List of clarification items	3/20/2008	N/A
33.	▪ Email Transmittal (03/26/2008) from Avenal/Sierra Research to EPA - SJVAPCD Forms	3/26/2008	0154
34.	▪ Attachment (2/14/2008) to Transmittal of 03/26/2008 SJVAPCD Forms	3/26/2008 (date submitted to EPA)	0155
35.	▪ Letter from EPA to Avenal – Requests Additional Information (Batch 1 Request for Clarification)	3/31/2008	0071
36.	▪ Letter from Avenal to EPA – Response to EPA Comments Batch #1 on PSD Application	4/10/2008	0072

Index #	Record Section or Item	Date of Item	FDMS ID#*
37.	▪ Email Transmittal from EPA to Avenal/Sierra Research – Heads up on PM (vs. PM_{10}) & Batch #2	5/22/2008	N/A
38.	▪ Email from EPA to Avenal – Requests Additional Information re Startup/Shut Down	6/6/2008	0073
39.	▪ Avenal - Acid Rain Permit Application Submittal with attachment dated 7/16/2008	7/28/2008	0156
40.	▪ EPA – Avenal Map of Project Location	9/2008	0157
41.	▪ Email Transmittal (10/15/2008) from Avenal to EPA - Possible updates to Sections 2.0 and 6.6	10/15/2008	0158
42.	o Referenced in Email (10/15/2008) – Supplement to AFC (specifically, section 3.0 Bio Resources)	3/27/2008	0159
43.	o Referenced in Email (10/15/2008) – Response to CEC Data Requests #1-74 (specifically #10, 33-35)	6/24/2008	0160
44.	o Referenced in Email (10/15/2008) – Response to CEC Data Requests #75-94 (Specifically #83-88, Supplemental Disturbance Information)	9/24/2008	0161
45.	o List of 5 other documents attached to email (10/15/2008) located elsewhere in Administrative Record	undated	N/A
46.	▪ EPA – Meeting with Applicant - Agenda	11/17/2008	0167
47.	▪ Email transmittal (12/01/2008) from EPA to Avenal - Other EPA permits and Avenal working draft approach	12/1/2008	0162
48.	▪ Attachment to 12/01/2008 email transmittal - Table of working permit draft approach	12/1/2008	0163
49.	▪ Email from EPA to Avenal dated 2/23/2009 re Avenal: Status and Follow-up	2/23/2009	0074
50.	▪ Email from Avenal to EPA – Submits to EPA Additional Info requested 2/23/09	3/11/2009	0075
51.	▪ Avenal to EPA – Additional Impacts Analysis (Visibility Impairment)	3/11/2009	0075.1
52.	▪ Transmittal Letter from Avenal to EPA re Corrected Avenal Supplemental BACT Analysis with attached corrected page (including CD)	10/16/2009	0164
53.	▪ Corrected Avenal Supplemental BACT (CD)	10/16/2009	CD Available in Office Only
54.	▪ EPA Meeting with Applicant – Meeting Agenda	2/23/2010	0165
55.	▪ Email Cover Transmittal on behalf of Avenal to EPA for Modeling Protocol	5/5/2010	0045.1
56.	o Transmittal Letter from Avenal to SJVAPCD - Protocol	8/14/2007	0166
57.	o Air Dispersion Modeling and Health Risk Assessment Protocol	8/2007	0045
58.	▪ Letter from Avenal/Sierra Research to EPA re Info to Support Finalization of PSD Permit	5/11/2010	0046

Index #	Record Section or Item	Date of Item	FDMS ID#*
59.	▪ Transmittal Letter from Avenal/Sierra Research to EPA – Digital Modeling Files for 1hr- NO2 NAAQS	5/13/2010	0047
60.	o Digital Modeling Files for 1-Hr NO2 NAAQS	5/13/2010	In Office Only
61.	▪ Email Transmittal Letter from Avenal to EPA – Supplemental NO2 Air Quality Impact Analysis	5/14/2010	0197
62.	o Transmittal Letter from Avenal to EPA	5/14/2010	0120
63.	o Supplemental NO2 Air Quality Impact Analysis	5/13/2010	0121
64.	▪ Transmittal Letter from EPA to Avenal – EPA Comments on Supp. NO2 AQIA	6/15/2010	0048
65.	o Attachment A: EPA Comments on Supplemental NO2 AQIA	6/15/2010	0048.1
66.	▪ Letter from Avenal to EPA – Additional Info re NO2 Analysis	6/28/2010	0053
67.	o Attachments to 06/28/10 Avenal Letter re NO2 Analysis	6/28/2010	0054
68.	▪ Letter from Avenal to EPA and U.S.DOJ – re NO2 1-hr NAAQS	7/13/2010	0077
69.	▪ Memo from Sierra Research to EPA re NO2 1-hr NAAQS	7/13/2010	0077
70.	▪ Email Transmittal Letter of EPA Letter to Avenal	8/12/2010	0078.1
71.	▪ Letter from EPA to Avenal – re NO2 1-hr NAAQS	8/12/2010	0078
72.	▪ Letter from Avenal to EPA – Response to EPA's 8/12/10 Letter re NO2 1-hr NAAQS	8/17/2010	0080
73.	▪ Letter from Avenal to EPA – Additional Info for 1-hr NO2 Modeling Analysis (including attached response to EPA comments)	9/13/2010	0082
74.	▪ Attachment to Letter from Avenal to EPA - Additional Info for 1-hr NO2 Modeling Analysis	9/13/2010	0083
	II. Endangered Species Act (ESA) Section 7 Consultation Related Documents		
75.	▪ Letter from Avenal to USFWS – Transmittal of Letter to EPA requesting initiation of ESA Section 7 formal consultation	5/12/2008	0061
76.	▪ TRC – EPA - Consultation Initiation Package	5/12/2008	In Office Only
77.	▪ Letter from EPA to USFWS – Request for initiation of ESA Section 7 formal consultation	7/10/2008	0049
78.	▪ Letter from Avenal to USFWS – Re migratory buffer request	8/15/2008	0062
79.	▪ Migratory Buffer (DWG)	8/15/2008	N/A
80.	▪ Letter from USFWS to EPA – Response to formal consultation request under ESA Section 7	9/8/2008	0050
81.	▪ Letter from Avenal to EPA – Response to USFWS's 9/2/2008 letter to EPA (including attachment and	10/1/2008	0063

Index #	Record Section or Item	Date of Item	FDMS ID#*
	enclosure)		
82.	▪ Letter from Avenal to CEC – Supplemental Information re migratory buffer with attachment	10/6/2008	0189
83.	▪ Letter from EPA to USFWS – Submittal of Additional Info for Request for Formal Consult under ESA Section 7	10/22/2008	0051
84.	▪ Transmittal Letter from USFWS to EPA including Draft Biological Opinion	7/1/2009	0052
85.	▪ Email from Avenal to EPA – Provides Comments re Draft Biological Opinion	7/14/2009	0064
86.	▪ Meeting Overview (7/22/09) EPA/AVENAL teleconference to Discuss Avenal's Comments on Draft BO	7/22/2009	0065
87.	▪ Email Transmittal (10/22/2009) from EPA to USFWS - Comments on USFWS Draft Biological Opinion	10/22/2009	0190
88.	o Attachment to 10/22/2009 Transmittal from EPA to USFWS (memorandum dated 10/22/2009 and attached table)	10/22/2009	0190.1
89.	▪ Email Transmittal (12/22/2009) with email thread (12/02/2009) Prep for 12/23/3009 Teleconference Meeting with USFWS, EPA, Avenal	12/22/2009	0191
90.	o Attachment to 12/22/2009 Transmittal - Avenal Redline of Draft Biological Opinion	12/2/2009	191.1
91.	o Attachment to 12/22/2009 Transmittal - EPA Update of Summary Table dated 10/22/2009 of Comments on Draft Biological Opinion	12/22/2009	191.2
92.	▪ EPA – Teleconference Meeting Overview with USFWS, EPA and Avenal to Discuss Draft BO	12/23/2009	0174
93.	▪ USFWS to EPA – Biological Opinion	8/9/2010	0079 0085
94.	▪ Letter from Avenal to EPA – Inclusion of BO in PSD Permit Application	8/16/2010	0186
95.	▪ Letter from EPA to Avenal (09/01/2010) – Final Biological Opinion	9/1/2010	0081
96.	▪ Letter from Avenal (09/27/2010) to EPA – Addendum to PSD Permit, including BO (Attachment 8/9/2010 Biological Opinion omitted -- see Index No. 95 above and Docket ID #0085 for BO)	9/27/2010	0175
	III. Federal Land Manager/Class I/Air Quality Modeling Related Documents		
97.	• Email from M. McCorison to E. Walther dated 11/21/2007 re Avenal Class I Impact Analysis with attached email messages dated 11/21/07 and 11/13/07	11/21/2007	0187
98.	• Email from D. Morse to E. Walther dated 11/21/2007	11/21/2007	0188

Index #	Record Section or Item	Date of Item	FDMS ID#*
	re Avenal Class I Impact Analysis with attached email messages dated 11/13/07		
	IV. Proposed Permit and Related Documents		
99.	▪ First Public Notice	6/16/2009	0002
100.	▪ Statement of Basis and AAQIR	6/2009	0004
101.	▪ Proposed Permit	6/2009	0001
	▪ Second Public Notice – 9/30/09 Public Info Meeting and 10/1/09 Public Hearing		
102.	o English version	8/27/2009	0005
103.	o Spanish version	8/27/2009	0005
	▪ Newspaper Text of Second Public Notice – 9/30/09 Public Info Meeting and 10/1/09 Public Hearing - Avenal Chimes		
104.	o English version	8/27/2009	0141
105.	o Spanish version	8/27/2009	0141.1
	▪ Newspaper Text of Second Public Notice – 9/30/09 Public Info Meeting and 10/1/09 Public Hearing – Fresno Bee		
106.	o English version	8/29/2009	0142
107.	o Spanish version	8/29/2009	0142.1
108.	▪ Clarification for Aug. 29 Public Notification	8/29/2009	0006
	▪ Third Public Notice –10/15/09 Public Hearing		
109.	o English version	9/9/2009	0016
110.	o Spanish version	9/9/2009	0017
	▪ Newspaper Text of Third Public Notice –10/15/09 Public Hearing – Vida en el Valle		
111.	o Spanish version	9/9/2009	0017
	▪ Newspaper Text of Third Public Notice –10/15/09 Public Hearing – Avenal Chimes		
112.	o English version	9/10/2009	In Office Only (Non-standard size)
113.	o Spanish version	9/10/2009	In Office Only (Non-standard size)
	▪ Supplemental Statement of Basis		
114.	o English version	3/2011	0088 0143
115.	o Spanish version	3/2011	0089 0144
116.	▪ EPA - Letter from Lisa Jackson to Gina McCarthy re Avenal Delegation 03/01/2011	3/1/2011	0091
117.	▪ EPA – Avenal Procedural Rule Memo EPA - Delegation of PSD Permit Authority to Assistant Administrator	3/3/2011	0092
	▪ Newspaper Text of Supplemental Public Notice –		

Index #	Record Section or Item	Date of Item	FDMS ID#*
	4/12/11 Public Hearing – Fresno Bee		
118.	o English version	3/4/2011	N/A
119.	o Spanish version	3/4/2011	N/A
120.	▪ Errata Notice for EPA website (English and Spanish)	3/7/2011	0146
	▪ Supplemental Public Notice (Corrected) – 4/12/11 Public Hearing		
121.	o English version	3/7/2011	0093 0147
122.	o Spanish version	3/7/2011	0094 0147.1
	▪ Newspaper Text of Supplemental Public Notice (Corrected) – 4/12/11 Public Hearing – Vida en el Valle		
123.	o Spanish version	3/9/2011	N/A
	▪ Newspaper Text of Supplemental Public Notice (Corrected) – 4/12/11 Public Hearing – Avenal Chimes		
124.	o English version	3/10/2011	N/A
125.	o Spanish version	3/10/2011	N/A
126.	▪ Errata Notice for mailing (English and Spanish)	3/10/2011	0095 0148
	▪ Newspaper Text of Supplemental Public Notice (Corrected) and Errata Notice – 4/12/11 Public Hearing -Fresno Bee		
127.	o English version	3/11/2011	N/A
128.	o Spanish version	3/11/2011	N/A
129.	o Errata Notice – English and Spanish	3/11/2011	N/A
	▪ Public Hearing Handouts		
130.	▪ Public Involvement Process (English and Spanish)	10/2009	N/A
131.	▪ Summary of the Proposed Permit (English and Spanish)	10/2009	N/A
132.	▪ Overview of Avenal PSD Permit Presentation	10/2009	N/A
133.	▪ Other Agency Contacts (English)	10/2009	N/A
134.	▪ How to Comment (English and Spanish)	4/12/2011	N/A
135.	▪ What We're Taking Comments On (English and Spanish)	4/12/2011	N/A
136.	▪ Hearing Agenda (English and Spanish)	4/12/2011	N/A
137.	▪ Other Agency Contacts (English)	4/12/2011	N/A
	V. Public Comments		
138.	▪ Comments from Greenaction (email)	6/17/2009	0076.1
139.	▪ Comments from Ruthie Gilmore, USC (email)	6/17/2009	0176 0176.1
140.	▪ Comments from CRPE/Ingrid Brostrom (email)	7/1/2009	0177 0177.1
141.	▪ Comments from Rob Simpson (email with previous	7/2/2009	0178

Index #	Record Section or Item	Date of Item	FDMS ID#*
	email discussion thread deleted; attachment included)		0178.1
142.	▪ Comments from Sierra Research (U.S. Mail)	7/15/2009	0028.1
143.	▪ Comments from Greenaction (email)	8/13/2009	0179 0179.1
144.	▪ Comments from the City of Coalinga (U.S. Mail)	8/19/2009	0021.1
145.	▪ Comments from Greenaction (email)	8/28/2009	0180 0180.1
146.	▪ Comments from Kings County Economic Development Corporation (U.S. Mail)	8/31/2009	0022.1
147.	▪ Comments from County of Kings Board of Supervisors (U.S. Mail)	9/1/2009	0025.1
148.	▪ Comments from the City of Avenal (U.S. Mail)	9/3/2009	0023
149.	▪ Comments from State Assemblyman Danny Gilmore (U.S. Mail)	9/30/2009	0024.1
150.	▪ Transcript from First Public Hearing	10/1/2009	0018
151.	▪ Comments from CRPE with attachment (U.S. Mail and email)	10/14/2009	0027.1
152.	▪ Transcript from Second Public Hearing	10/15/2009	0037
	▪ Comments from Earthjustice (U.S. Mail)		
153.	o Comment Letter	10/15/2009	0019.1
154.	o Exhibits	10/15/2009	0019.1
155.	▪ Comments from Greenaction (email)	10/15/2009	0026.1
156.	▪ Comments from Pacific Environment (U.S. Mail)	10/15/2009	0020.1
	▪ Letter from Avenal to EPA – Documents for EPA's Response to Comments (U.S. Mail)		
157.	o Transmittal Letter with attached letter dated 10/14/2009 and index of documents	10/15/2009	0029.1
158.	o Exhibits	10/15/2009	0029.1
	▪ Comments from Rob Simpson (email)		
159.	o Comment Letter	10/15/2009	0030.1
160.	o Exhibit – CEC Evidentiary Hearing Transcript	10/15/2009 (for this set of exhibits, dates in this column reflect the date submitted to EPA)	0030.2
161.	o Exhibit A – Email from Doug Kirk re Russell City (1/17/2009)	10/15/2009	0030.5
162.	o Exhibit B – Letter from Anthony Iton re Russell City (1/21/2009)	10/15/2009	0030.6
163.	o Exhibit C – Email from Maureen Barrett re Russell City (1/9/2009)	10/15/2009	0030.7
164.	o Exhibit D - Statement to BAAQMD from Diane Zuliani (1/21/2009)	10/15/2009	0030.8
165.	o Exhibit E - Email from Michael Perlmutter re	10/15/2009	0030.9

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	Russell City (1/22/09)		
166.	o Exhibit H – Email from Mathias Kiel re Russell City (1/22/09)	10/15/2009	0030.10
167.	o Exhibit I - Letter to BAAQMD from D. Weiss re Russell City (1/23/2009)	10/15/2009	0030.11
168.	o Exhibit J – Letter to BAAQMD from Bayview Hunters Point Comm. Advocates re Russell City (2/4/2009)	10/15/2009	0030.12
169.	o Exhibit K – Letter to BBAQMD from Golden Gate University School of Law re Russell City (2/5/2009)	10/15/2009	0030.13
170.	o Exhibit L – Comments from CARE and Rob Simpson re Russell City (2/5/2009)	10/15/2009	0030.14
171.	o Exhibit M – Letter to BAAQMD from CBE re Russell City (2/6/2009)	10/15/2009	0030.15
172.	o Exhibit N – Letter to BAAQMD from Pete Stark re Russell City (2/6/2009)	10/15/2009	0030.16
173.	o Exhibit O – Letter from Timothy K. Devine et al. to BAAQMD re Russell City	10/15/2009	0030.17
174.	o Exhibit P - Comments from Robert Sarvey re Russell City with attachments	10/15/2009	0030.18
175.	o Exhibit Q – Objection to Fossil Fuel Fired Power Plants (petition)	10/15/2009	0030.19
176.	o Exhibit R - Letter to BAAQMD from Ohlone Audubon re Russell City (12/27/2008)	10/15/2009	0030.20
177.	o Exhibit S - Letter to BAAQMD from EBCNPS re Russell City (2/6/2009)	10/15/2009	0030.21
178.	o Exhibit T –NRDC, Sierra Club Petition (7/15/2008)	10/15/2009	0030.22
179.	o Exhibit U – Letter to Earthjustice from EPA re 2/10/09 Petition	10/15/2009	0030.23
180.	o Exhibit V – Energy Efficiency, Innovation, and Job Creation in CA paper	10/15/2009	0030.24
181.	o Exhibit W – Avenal Testimony	10/15/2009	0030.25
182.	o Exhibit X – Email to BAAQMD from Citizens Against Pollution re Russell City (4/30/2009)	10/15/2009	0030.26
183.	o Exhibit Y – Article on carbon dioxide and air pollution mortality, Mark Jacobson	10/15/2009	0030.27
184.	o Exhibit Z – Paper on urban CO2 domes, M. Jacobson	10/15/2009	0030.28
185.	o Exhibit AA – Article on Natural Gas Power Plants, Robert Freehling	10/15/2009	0030.29
186.	o Exhibit BB – Memorandum to Sierra Club CA from Energy-Climate Committee, Sierra Club CA	10/15/2009	0030.30
187.	o Exhibit CC – Letter from Pacific Environment to CEC re Avenal (6/8/2009)	10/15/2009	0030.31

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188.	o Exhibit DD – Letter from Sierra Club to BAAQMD re Russell City (1/22/2009)	10/15/2009	0030.32
189.	o Exhibit EE – Appeal of Decision; Rebuttal Testimony from Rob Simpson	10/15/2009	0030.33
190.	o Exhibit FF - CEC Preliminary Staff Assessment/Staff Report	10/15/2009	0030.4
191.	▪ Written Comment from Donna Curty (public hearing)	10/15/2009	0031.1
192.	▪ Written Comment from E. L. Ivans (public hearing)	10/15/2009	0032.1
193.	▪ Written Comment from Nick Ivans (public hearing)	10/15/2009	0033.1
194.	▪ Written Comment from Cheryl Taylor (public hearing)	10/15/2009	0034.1
195.	▪ Written Comment from Jeanne Tillotson (public hearing)	10/15/2009	0035.1
196.	▪ Written Comment from Cheryl Tuttle (public hearing)	10/15/2009	0036.1
197.	▪ Comments from Jim Costa, U.S. House of Representatives (U.S. Mail)	10/29/2009	0124
198.	▪ Comment from Arthur Unger (1) (email)	3/10/2011	138.1
199.	▪ Comment from Arthur Unger (2) (email)	4/5/2011	138.2
200.	▪ Email Transmittal from Georgia Dept. of Natural Resources	4/5/2011	0101 0132
201.	o Written Comment Letter from Georgia Dept. of Natural Resources to EPA	4/5/2011	0101 0133
202.	▪ Transcript from Third Public Hearing	4/12/2011	0098 0140
203.	▪ Written Comment from Jianne Tillotson (received at public hearing)	4/12/2011	0139
204.	▪ Comment from Bianca Aranda (email)	4/12/2011	0136
205.	▪ Comment from Miguel Ayala (email)	4/12/2011	0136.1
206.	▪ Comment from Leonel Campos (email)	4/12/2011	0136.2
207.	▪ Comment from Jose Castro (email)	4/12/2011	0136.3
208.	▪ Comment from Helen Chavarria Palmer (email)	4/12/2011	0136.4
209.	▪ Comment from Fred Jones/Jose Cruz (email)	4/12/2011	0137
210.	▪ Comment from Antony Lopez (email)	4/12/2011	0138.3
211.	▪ Comment from Francisco Lopez (email)	4/12/2011	0137.2
212.	▪ Comment from Leticia Lopez (email)	4/12/2011	0137.3
213.	▪ Comment from Alicia Solorio (email)	4/12/2011	0116.1
214.	▪ Email Transmittal Letter from CRPE to EPA	4/12/2011	0104 0129
215.	o Written Comment Letter from CRPE to EPA (email)	4/12/2011	0104 0130
216.	▪ Email Transmittal Letter from EarthJustice to EPA	4/12/2011	0103 0131
217.	o Written Comment Letter from EarthJustice to EPA	4/12/2011	0103 0133.1
218.	▪ Email Transmittal Letter from SC DHEC to EPA	4/12/2011	0102

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			0134
219.	o Written Comment Letter from SC DHEC to EPA	4/12/2011	0102 0134.1
220.	▪ Email Transmittal Letter from UARG to EPA	4/12/2011	0100 0135
221.	o Written Comment Letter from UARG to EPA	4/12/2011	0100 0135.1
222.	▪ Email Transmittal from Avenal to EPA re Avenal Comments on EPA's SSB	4/12/2011	0128
223.	▪ Letter from Avenal (via Downey Brand) to EPA re Avenal Comments on EPA's SSB	4/12/2011	0099 0127
224.	o Attachments from Avenal to EPA re Avenal Comments on EPA's SSB	4/12/2011	0099 And CD - In office
225.	▪ Email Transmittal Letter from Rob Simpson via April Rose Sommer to EPA	4/13/2011	0105.2
226.	o Written Comment Letter from Rob Simpson via April Rose Sommer to EPA	4/13/2011	0105.1
	VI. Other Correspondence / Miscellaneous Documents		
227.	US Census Bureau, 2000 Data, Summary File 3 (3 files)	2000	N/A
228.	California Breathing Report (California Department of Public Health): The Burden of Asthma: A Surveillance Report (2007)	2007	N/A
229.	Investigation of Birth Defects and Community Exposures in Kettleman City, California, California EPA and California Department of Public Health, December 2010	2010	N/A
230.	Kings County Community Health Status Report 2008-2009	2008-2009	N/A
231.	California Health Interview Survey Data	2007	N/A
232.	California Environmental Health Tracking Program Information (3 files)	Printed 5/25/2011	N/A
233.	HRSA Data re: Professional Health Shortage Areas	Printed 5/25/2011	N/A
234.	CEPAM: 2009 Almanac - Standard Emissions Tool, Emission Projections by Summary Category, Base Year: 2008 (page updated April 13, 2009)	Printed 5/25/2011	N/A
235.	CEC Report CEC-700-2009-004 - Committee Guidance on Fulfilling California Environmental Quality Act Responsibilities for GHG Impacts in Power Plant Siting Applications	3/2009	N/A
236.	Kings County Community Development Agency: Recirculated Portions of Draft Subsequent Environmental Impact Report	5/2009	N/A
237.	CT DEP Kleen Energy Permit, 104-0131	6/15/2009	N/A
238.	CT DEP Kleen Energy Permit, 104-0133	6/15/2009	N/A
239.	Email from Rob Simpson to EPA – Permit process clarification request	6/27/2009	N/A
240.	Email from EPA to Rob Simpson – Response to questions about permit process	7/6/2009	N/A

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241.	Email from Greenaction to EPA - Confirm receipt of EPA renoticing	7/14/2009	N/A
242.	Transcript from Kettleman City Listening Session (English)	8/12/2009	0038
243.	Transcript from Kettleman City Listening Session (Bilingual)	8/12/2009	0039
244.	Transcript from Kettleman City Listening Session (Spanish)	8/12/2009	0040
245.	Letter from Avenal to EPA – re Earthjustice comments	11/16/2009	0194
246.	CEC Consultant Report: Framework for Evaluating GHG Implications of Natural Gas-Fired Power Plants in CA	12/2009	N/A
247.	Letter from Avenal to EPA – Notice of Intent to Sue EPA	12/21/2009	0041
248.	Complaint against Lisa P. Jackson, USEPA, with two attachments	3/9/10	0042 0043
249.	Letter from Earthjustice to EPA – NO2 1-Hr NAAQS	4/21/2010	0044
250.	Letter from EPA OCR to Bradley Angel/Greenaction re Greenaction's Title VI complaint	8/6/2010	0126
251.	Virginia DEQ - PSD Permit for Warren County Power Station (Dominion Power)	12/21/2010	N/A
252.	Declaration by EPA Assistant Administrator Regina McCarthy filed in U.S. District Court for District of Columbia	1/31/2011	0192
253.	Email dated 2/17/2011 from CDPH-EHIB to EPA concerning Kettleman City Asthma Rates	2/17/2011	0193
254.	Email Transmittal Letter from Sierra Club to EPA re Avenal Power Plant	2/25/2011	0122
255.	Letter from Sierra Club re Avenal Power Plant	2/25/2011	0090 0123
256.	Excerpts from Transcript of Meeting between Administrator Jackson and Regional Administrator Blumenfeld with members of the Central Valley Air Quality Coalition	3/23/2011	0125
257.	EPA (S. Rivera) Memo to File - Final Permit Requirements – Selected Background Information	5/26/2011	0198
	VII. Final PSD Permit and Related Documents		
258.	▪ Cover Letter from EPA to Avenal	5/27/2011	0171
259.	▪ Final PSD Permit (clean version)	5/27/2011	0169
260.	▪ Final PSD Permit (red-lined unofficial version)	5/27/2011	0168
261.	▪ Response to Public Comments	5/27/2011	0170
262.	• Public Announcement of Final PSD Permit Decision (English)	5/27/2011	0172
263.	• Public Announcement of Final PSD Permit Decision (Spanish)	5/27/2011	0173
	VIII. California Energy Commission (CEC) Related Documents		
264.	• CEC – Preliminary Staff Assessment	2/2/2009	N/A
265.	• CEC – Data Adequacy Worksheet - Socioeconomics	2/26/2008	N/A
266.	• CEC – Data Adequacy Worksheet – Biological	2/26/2008	N/A

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	Resources		
267.	• CEC – Data Adequacy Worksheet – Public Health	2/27/2008	N/A
268.	• CEC – Data Adequacy Worksheet – Land Use	3/1/2008	N/A
269.	• CEC – Data Adequacy Worksheet – Air Quality	3/10/2008	N/A
270.	• CEC – Data Adequacy Worksheet - Soils	3/11/2008	N/A
271.	• Transmittal from Avenal to CEC – Supplement to the AFC	3/27/2008	N/A
272.	• Final Staff Assessment for 08-AFC-1	6/2009	N/A
273.	• CEC – Final Commission Decision	12/2009	0185
	IX. Preliminary Determination of Compliance (PDOC) / Final Determination of Compliance (FDOC) Related Documents (San Joaquin Valley Air Pollution Control District or SJVAPCD)		
274.	• Avenal to SJVAPCD – ATC Application	2/14/2008	N/A
275.	• SJVAPCS – ERC Certificates	3/3/2008	N/A
	• Transmittal of PDOC from SJVAPCD to CEC		N/A
276.	o Submittal letter	7/11/2008	N/A
277.	o Preliminary Determination of Compliance (PDOC) – Public Package	7/11/2008	0181
278.	• Email from SJVAPCD to EPA – PDOC correction to NOx Offset section	7/14/2008	N/A
279.	• CEC Comments/District Responses to PDOC	8/12/2008	N/A
280.	• CURE Comments on PDOC	8/14/2008	N/A
281.	• EPA Comments	8/15/2008	0182
282.	• Public Comments/District Responses to PDOC	8/18/2008	N/A
283.	• Transmittal Letter from SJVAPCD to Avenal of FDOC	10/30/2008	N/A
284.	o Email Transmittal from SJVAPCD to EPA on FDOC and Comments and Responses	11/4/2008	0183
285.	o Attachment to 11/04/2008 Transmittal – SJVAPCD Final Determination of Compliance (FDOC)	10/30/2008	0183.1
286.	o Attachment to 11/04/2008 Transmittal - SJVAPCD Kings-Tulare Interpollutant Analysis	11/4/2008	N/A
287.	o Attachment to 11/04/2008 Transmittal - SJVAPCD FDOC for Avenal	11/4/2008	N/A
288.	o Attachment to 11/04/2008 Transmittal - SJVAPCD Response to EPA Comments	11/4/2008	0184
289.	o Attachment to 11/04/2008 Transmittal - SJVAPCD Response to CEC Comments	11/4/2008	N/A
290.	o Attachment to 11/04/2008 Transmittal - SJVAPCD Response to CURE Comments	11/4/2008	N/A
291.	o Attachment to 11/04/2008 Transmittal - SJVAPCD PM10 Interpollutant Offset Ratio Analysis	11/4/2008	N/A

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292.	• Letter from SJVAPCD to CEC – Interpollutant Offset Ratio Development	5/27/2009	N/A
293.	• Email Transmittal of PDOC, FDOC and SOx:PM ratio from Avenal to EPA	9/1/2009	N/A
294.	• Email Transmittal of AAQA Modeling from Avenal to EPA (1 of 2)	9/15/2009	N/A
295.	o AAQA Modeling	9/15/2009	N/A
296.	• Email Transmittal of AAQA Modeling from Avenal to EPA (2 of 2)	9/15/2009	N/A
297.	o Toxics Modeling	9/15/2009	N/A
	X. Administrative Amendment to PSD Permit		
NOTE: In this Section X only, FDMS ID # Refers to Docket No. EPA-R09-OAR-2011-0559			
299.	Cover Letter - EPA to Avenal Power Center	6/21/2011	0003
300.	Final Amended PSD Permit	6/21/2011	0002
301.	Final Amended PSD Permit (unofficial red-lined version)	6/21/2011	0001
302.	Email Transmittal of Amended PSD Permit to Applicant	6/22/2011	N/A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG - 6 2010

OFFICE OF
CIVIL RIGHTS

RETURN RECEIPT REQUESTED
Certified Mail #7009-2820-0002-1759-4019

In Reply Refer to:
EPA File No. 11R-09-R9

Mr. Bradley Angel
Executive Director
Greenaction for Health and Environmental Justice
703 Market Street
Suite 501
San Francisco, California 94103

Re: Partial Acceptance and Referral of Administrative Complaint

Dear Mr. Angel:

This letter is in reference to the administrative complaint you filed with the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) on October 15, 2009, on behalf of Greenaction for Health and Environmental Justice (Greenaction). Your complaint alleges that the California Energy Commission (Energy Commission) and the San Joaquin Valley Air Pollution Control District (APCD) violated Title VI of the Civil Rights Act of 1964, as amended (Title VI), 42 U.S.C. §§ 2000d *et seq.*, and EPA's nondiscrimination regulations implementing Title VI, found at 40 C.F.R. Part 7. OCR is partially accepting your complaint for investigation and partially referring your complaint to the U.S. Department of Energy (DOE). We are referring the allegations against the Energy Commission to DOE for its consideration because the Energy Commission receives financial assistance from DOE and not from EPA.

Pursuant to EPA's nondiscrimination regulations, OCR conducts a preliminary review of discrimination complaints to determine acceptance, rejection, or referral. 40 C.F.R. § 7.120(d)(1). To be accepted for investigation, a complaint must meet the jurisdictional requirements described in EPA's nondiscrimination regulations. First, it must be in writing. Second, it must describe an alleged discriminatory act that, if true, may violate EPA's nondiscrimination regulations (*i.e.*, an alleged discriminatory act based on race, color, national origin, sex, age, or disability). Third, it must be filed within 180 calendar days of the alleged discriminatory act. 40 C.F.R. § 7.120(b). Finally, the complaint must be filed against an applicant for, or a recipient of, EPA financial assistance that allegedly committed the discriminatory act. 40 C.F.R. § 7.15.

After careful consideration, OCR is accepting the following allegations against APCD.

1. **APCD intentionally discriminated against Avenal and Kettleman City residents of color and Spanish-speakers by failing to notify or involve residents (*e.g.*, failing to publish information in Spanish, failing to hold public hearings) during the decision-making process prior to APCD issuing the corrected Notice of Final Determination of Compliance (FDOC) for the proposed Avenal power plant on November 4, 2008.**

On January 14, 2010, OCR sent you a letter requesting additional information regarding the dates associated with each alleged discriminatory act described in your complaint. Your March 3, 2010 response states that you did not learn of the corrected notice of FDOC until June 2009.

This allegation is accepted for investigation. The complaint is in writing and states an alleged discriminatory act that would violate EPA's nondiscrimination regulations (*i.e.*, discrimination from lack of public participation during the approval process). Additionally, APCD is a recipient of EPA financial assistance. Although the complaint was filed more than 180 days after the date of the alleged discriminatory act, OCR has the authority to waive the 180-day time limit for good cause. 40 C.F.R. § 7.120(b)(2). Based on the jurisdictional review, OCR is waiving the 180-day timeliness requirement because the complainant could not reasonably be expected to have known about the alleged discriminatory act within the 180-day period in light of the circumstances.[1] Waiving the timeliness requirement is a jurisdictional decision and does not constitute a finding of fact or violation of EPA's nondiscrimination regulations. No substantive determination about this allegation will be made until the completion of a full investigation.

2. **The operation of the proposed Avenal power plant will result in additional adverse health impacts on the residents of color of Avenal and Kettleman City, who are already impacted by multiple pollution sources.**

The complaint and your March 3, 2010 response to our request for clarification letter state that the proposed Avenal power plant will have an adverse disparate impact on the Avenal and Kettleman City residents of color living near the proposed Avenal power plant.

This allegation is accepted for investigation because it meets EPA's jurisdictional requirements, but the investigation is being held in abeyance. The complaint is in writing, and states an alleged discriminatory act that would violate EPA's

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[1] Guidance from the U.S. Department of Justice provides that agencies may waive the timeliness requirement in a number of situations, including cases where "[t]he complainant could not reasonably be expected to know the act was discriminatory within the respective filing period." U.S. Dep't of Justice, *Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statues*, Sept. 1998 at 35.

nondiscrimination regulations (*i.e.*, adverse disparate health impacts from the upcoming operation of the Avenal power plant). Additionally, APCD is a recipient of EPA financial assistance and the complaint was timely filed. However, OCR will hold the investigation of this allegation in abeyance because the Clean Air Act Prevention of Significant Deterioration pre-construction permit application for the Avenal power plant is pending approval from EPA and, thus, the allegations are not yet ripe for review.

Remaining Allegations

1. California Energy Commission

Your complaint asserts that the Energy Commission failed to provide meaningful opportunities for public comment in the approval of the proposed power plant and failed to conduct a thorough environmental review of the health impacts on nearby residents.

A complaint must be filed against an applicant for, or a recipient of, EPA assistance to be accepted by EPA for investigation. 40 C.F.R. § 7.15. The Energy Commission does not receive EPA assistance. Therefore, OCR does not have the authority to accept the allegations against this entity for investigation. Because OCR has determined that the Energy Commission receives financial assistance from DOE, EPA is forwarding this allegation to DOE.

2. Executive Order 12898 and Environmental Law

Finally, your complaint raises allegations related to Executive Order 12898, including discrimination on the basis of income, and allegations related to violations of environmental laws. OCR does not have authority over these matters, but EPA's Office of Environmental Justice and Region 9 are currently engaged in these issues in Kettleman City and Avenal. OCR, therefore, defers to them with respect to these concerns.

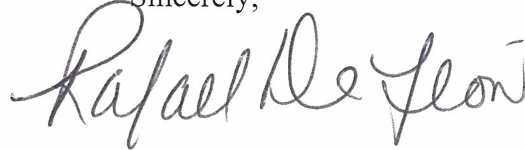
Pursuant to EPA's nondiscrimination regulations, APCD is being notified of the acceptance of this complaint. APCD may respond to the notice of acceptance of this complaint within 30 calendar days of receiving it. EPA's nondiscrimination regulations provide that OCR must attempt to resolve complaints informally, whenever possible. 40 C.F.R. § 7.120(d)(2). Accordingly, OCR may discuss, at any point during the process, offers to informally resolve the complaint, and may, to the extent appropriate, facilitate an informal resolution process with the involvement of affected stakeholders.

You should be aware that no one may intimidate, threaten, coerce, or engage in other retaliatory conduct against anyone because he or she has either taken action or participated in an action to secure rights protected by the nondiscrimination statutes EPA enforces. Any individual alleging such harassment or intimidation may file a complaint with EPA.

If you have any questions or need clarification regarding this letter, please contact Anthony Napoli of the OCR External Compliance and Complaints Program via Federal

Relay Service 866-377-8642, and provide the relay operator his telephone number 202-233-0651. He may also be reached via electronic mail at Napoli.Anthony@epa.gov, or by mail at: U.S. EPA, Office of Civil Rights (Mail Code 1201A), 1200 Pennsylvania Ave., N.W., Washington, D.C. 20460-1000.

Sincerely,



Rafael DeLeon
Acting Director

cc: Stephen G. Pressman, Associate General Counsel
Civil Rights and Finance Law Office (2399A)

Charles Lee, Director
Office of Environmental Justice

Jo Ann Asami, EPA Region 9

Seyed Sadredin, Air Pollution Control Officer
San Joaquin Valley Air Pollution Control District

Karen Douglas, Chair
California Energy Commission

William A. Lewis, Jr., Acting Director
Office of Economic Impact and Diversity
U.S. Department of Energy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' RESPONSE TO PLAINTIFF'S SUPPLEMENTAL BRIEF REGARDING REMEDY

The appropriate remedy in this case is the one proposed by EPA in its Cross-Motion for Summary Judgment, as modified by the McCarthy Declarations: an order requiring the Administrator's delegate to grant or deny Plaintiff's permit application by May 27, 2011, in accordance with the procedures set forth in 40 C.F.R. Part 124. Such an order is sufficient to discharge EPA's nondiscretionary duty under Section 165(c) of the Clean Air Act ("CAA") to "grant or deny" the permit application at issue in this matter and is otherwise consistent with the CAA and EPA's regulations.

In its motion for judgment on the pleadings, Plaintiff asks the Court to, among other things, order EPA to "[g]rant the PSD permit application for the Project" and order EPA to "[t]ake other appropriate actions to remedy, mitigate, and offset the harm to Plaintiff caused by [EPA's] disregard of their statutory duty . . . ." Plaintiff's Proposed Order, Docket Entry 12-1. In its most recent brief, however, Plaintiff appears to concede that requiring EPA to grant Plaintiff's permit and ordering other declaratory relief are not appropriate remedies in a deadline

suit like this one. Instead, Plaintiff asks the Court to order the EPA Administrator to take final agency action on the permit application by May 27, 2011, thereby cutting off the public's opportunity to petition the Environmental Appeals Board ("EAB") for review of the permit decision, as provided in EPA's regulations. Plaintiff's Brief Regarding Remedy at 3. Yet such a remedy is not an appropriate remedy either, because the Court has no jurisdiction to order it. First, Plaintiff's requested relief amounts to a challenge to EPA's regulations, which provide a specific permit review process culminating in a permit grant or denial by the Administrator's delegate, not a final agency action by the Administrator herself. Such a challenge is time-barred under the CAA. Second, Plaintiff's requested relief would require the Court to direct the manner in which the Administrator uses her discretion, which is prohibited under the body of case law governing deadline suit remedies. In any event, EPA's interpretation of its Section 165(c) duty is reasonable and should be afforded deference by the Court.

STATUTORY AND REGULATORY BACKGROUND[1]

Part C of Subchapter I of the Clean Air Act provides the Act's Prevention of Significant Deterioration of Air Quality ("PSD") Program. *See generally* 42 U.S.C. §§ 7470-7479. Congress's purpose in enacting the PSD Program was, *inter alia*, "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." *Id.* § 7470(5). CAA Section 165 provides statutory requirements for issuing such permits, including that "[any proposed permit be] subject to a review in

[1] Defendants direct the Court's attention to Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Judgment on the Pleadings and In Support of Defendants' Cross-Motion for Summary Judgment ("Defendants' Memorandum in Support") and supporting materials (Jordan Declarations and McCarthy Declarations), as well as the parties' Joint Stipulation of Facts, for a summary of the facts of this case. *See* Docket Entries 11, 14, 24, 30.

accordance with this section, the required analysis [be] conducted *in accordance with regulations promulgated by the Administrator*, and a public hearing [be] held with opportunity for interested persons . . . to appear and submit written or oral presentations on the air quality impact of such source . . . ." *Id.* § 7475(a)(2) (emphasis added). Section 165(c) provides that a completed PSD permit application must be "granted or denied not later than one year after the date of filing of such completed application." *Id.* § 7475(c).

CAA Section 301(a)(1) authorizes the Administrator to "prescribe such regulations as are necessary to carry out his [or her] functions [and] delegate to any officer or employee of the Environmental Protection Agency such of his [or her] powers and duties under this chapter, except the making of regulations . . . , as he [or she] may deem necessary or expedient." *Id.* § 7601(a)(1). Pursuant to such authority, and the authority to promulgate regulations governing the PSD permit review process explicitly mentioned in CAA Section 165, *id.* § 7475(a)(2), EPA promulgated 40 C.F.R. Part 124 to provide a very specific process for the review and analysis of PSD permit applications. *See* 40 C.F.R. Part 124. PSD permit applications are reviewed under one of three methods—by EPA, by states with delegated authority to apply federal law, or by states approved to issue permits under state law incorporated into an EPA-approved State Implementation Plan. 40 C.F.R. §§ 52.21(a), 52.21(u), 51.166(a)(7). The first method, which is the one at issue here, is governed by the procedures set forth in 40 C.F.R. Part 124. The Administrator is bound to follow the Part 124 procedures. 40 C.F.R. § 52.21(q). Indeed, in a paragraph entitled "Public participation," EPA's PSD regulations explicitly state that "[t]he Administrator *shall follow* the applicable procedures of 40 C.F.R. Part 124 in processing applications under this section." *Id.* (emphasis added).

In Part 124, the Administrator delegated authority to review PSD permit applications to

the Director, who is defined in Part 124 as the Regional Administrator, *see id.* §§ 124.2, 124.41. After receiving a PSD permit application, the Regional Administrator must first determine whether the applicant has complied with the applicable requirements so that the application can be deemed complete. *Id.* § 124.3. Next, the Regional Administrator tentatively decides whether to prepare a draft permit or issue a notice of intent to deny the permit application. *Id.* § 124.6. If the Regional Administrator decides to prepare a draft permit, he or she must also prepare a statement of basis or fact sheet. *Id.* §§ 124.7, 124.8. The Regional Administrator must also provide the public with notice of the tentative decision and an opportunity to provide comments on it, as well as a public hearing if requested. *Id.* § 124.10-12. Finally, the Regional Administrator issues a final permit decision. *Id.* § 124.15. [2]

Section 124.19 provides anyone who commented on the proposed permit during the comment period, including the permit applicant, the right to petition the Environmental Appeals Board ("EAB") for review of the Regional Administrator's final permit decision within thirty days of the decision. *Id.* § 124.19. The permit decision becomes final agency action for purposes of appeal to a federal court of appeals only after the administrative appeal process is exhausted. *See id.* §§ 124.6(e), 124.19(e)-(f). A petition for review by the EAB under Section 124.19 is a prerequisite to seeking judicial review of the final agency action. *Id.* § 124.19(e).

The right to file an administrative petition for review of final permit decisions was first established in 1980 when EPA promulgated Part 124, including Section 124.19. *See* 45 Fed.

[2] Although Part 124 refers to the Regional Administrator, the Administrator has temporarily changed her delegation of authority to issue a final permit decision here. *See* March 1, 2011, Temporary Delegation, Exhibit A. Because of the national implications of the Agency's changed position on the applicability of the revised NO2 NAAQS, the Assistant Administrator for the Office of Air and Radiation, Regina McCarthy, will stand in the shoes of the Regional Administrator to issue the permit decision in accordance with the procedures set forth in Part 124. *Id*; *see also infra* n.5.

Reg. 33,405, 33,412 (May 19, 1980). This rule, which was properly adopted through a notice-and-comment procedure, is a legislative rule that cannot be changed without completing a notice-and-comment rulemaking because the rule establishes the right of private parties to request such review. *See Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) ("Substantive rules are ones which grant rights, impose obligations, or produce other significant effects on private interests . . .") (quotations and citation omitted); *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980). From 1980 to 1992, Section 124.19 provided that the Administrator would hear petitions for review of PSD permit decisions. 45 Fed. Reg. at 33,412; *see also* 57 Fed. Reg. 5320 (Feb. 13, 1992) (describing the administrative appeal process between 1980 and 1992). In 1992, EPA created the Environmental Appeals Board, and the Administrator then delegated to the Board authority to hear petitions for review brought pursuant to Section 124.19. *See* 57 Fed. Reg. 5320-1.[3]

Since 1992, the Environmental Appeals Board has issued sixty-one published opinions on petitions for review of PSD permits. *See* Published Decisions: PSD Permit Appeals (CAA), http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/PSD%20Permit%20Appeals%20(CAA)!OpenView&Start=1 (last visited Mar. 1, 2011). Only four of the EAB's decisions on review of PSD permits have been appealed to the United States Courts of Appeals. *See Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007); *Santa Teresa Citizen Action Group v. Envtl. Appeals Bd.*, No. 01-71611, 51 Fed. Appx. 702 (9th Cir. 2002); *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443

[3] EPA adopted this rule without following the APA's notice-and-comment procedures under the APA's exemption for "rules [of] agency organization, practice or procedure." 57 Fed. Reg. at 5322. The applicability of this exemption is preserved under the CAA. 42 U.S.C. § 7607(d)(1). The 1992 rulemaking did not alter the rights of parties to petition for review, but required parties to present their petitions to the EAB rather than the Administrator. *See Batterton*, 648 F.2d at 707 ("a useful articulation of the exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.")

(1st Cir. 2000); *Chabot-Las Posita Cmty. Coll. Dist. v. EPA*, Petition for Review filed Jan. 13, 2011, No. 10-73870 (9th Circuit). To date, no court has granted a petition for review of an EAB PSD decision.

When the EAB was created, the Administrator delegated exclusive authority to hear petitions for review of permit decisions and explicitly denied herself the authority to consider appeals filed directly with the Administrator or to review decisions by the EAB. *See* 40 C.F.R. §§ 124.2 (The definition of the EAB provides that "[a]n appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered."); 40 C.F.R. § 124.19(g) ("Motions for reconsideration directed to the administrator, rather than to the Environmental Appeals Board, will not be considered . . . ."); s*ee also* 57 Fed. Reg. 5321 ("[T]he delegation of authority does not preclude the Board from referring a particular case or motion to the Administrator for decision when the Board deems it appropriate to do so. The language of the provisions makes clear, however, that an appeal or motion for reconsideration of a Board decision must be directed to the Board. An appeal or motion for reconsideration directed to the Administrator will not be considered. One of the goals of the Board is to relieve the Administrator of the responsibility for responding to appeals."). Since delegating authority to hear appeals to the EAB, the Administrator has repeatedly declined to review the conditions of PSD permits in the context of petitions to object to CAA operating permits that incorporate conditions from PSD permits, explaining that authority to hear PSD permit appeals rests exclusively with the EAB under 40 C.F.R. § 124.19. *See In re Louisville Gas & Electric Co.*, Petition No. IV-2008-3 (Order on Petition) at 4 n.5 (Aug. 12, 2009), *available at* http://www.epa.gov/region07/air/title5/petitiondb/petitions/lg_e_2nddecision2006.pdf (last visited Mar. 1, 2011) (citing *In re Kawaihae Cogeneration Project*, Petition No. 0001-01-3

(Order Responding to Petitioner's Request that the Administrator Object to Issuance of a State Operating Permit) (Mar. 10, 1997), *available at* http://nlquery.epa.gov/epasearch/epasearch (search Kawaihae Cogeneration Project) (last visited Mar.1, 2011). Indeed, the only role Part 124 provides for the Administrator for review of PSD permitting decisions is the review of cases or motions referred to the Administrator by the EAB when the EAB deems it appropriate to do so. *See* 40 C.F.R. § 124.2 (definition of EAB). The EAB has not done so here.

ARGUMENT

I. THE COURT HAS NO JURISDICTION TO ORDER PLAINTIFF'S REQUESTED RELIEF.

A. PLAINTIFF'S CHALLENGE TO EPA'S REGULATIONS IS UNTIMELY.

As an initial matter, Plaintiff's challenge to the process EPA has prescribed in its regulations is untimely. Although Plaintiff contends in a footnote that it is not challenging EPA's regulations, *see* Plaintiff's Brief Regarding Remedy at 8 n.4, Plaintiff has asked the Court to set aside the EAB review process and the right of third parties to administrative appeal as provided in Part 124 and order the Administrator to take final agency action on its permit application. *Id.* at 3, 8-9, 11, 17. Plaintiff argues repeatedly that nothing in the CAA mandates the procedures provided in Part 124, and that the Administrator cannot use the regulations to avoid her mandatory duty under Section 165(c) of the Act. *Id.* at 3, 12, 17. These arguments are plainly challenges to the validity of the regulations in the first instance.

First, contrary to Plaintiff's arguments, the Administrator must follow the Agency's regulations. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) (articulating what has come to be known as the *Accardi* doctrine—"as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board [of Immigration Appeals] or dictate its decision in any manner"); *AFL-CIO v. Fed. Labor Relations*

Auth., 777 F.2d 751, 759 (D.C. Cir. 1985) (describing as a fundamental principle of administrative law that "unless and until [an agency] amends or repeals a valid legislative rule or regulation, [the] agency is bound by such a rule or regulation"), *see also* 40 C.F.R. § 52.21(q) (explicitly requiring the Administrator to follow the Part 124 procedures).

Second, the regulations at issue here were first promulgated in 1980. *See* 45 Fed. Reg. 33,290-91. In that rulemaking, EPA received public comments expressing concern that establishing a right to an administrative appeal of PSD permits under Section 124.19 would cause delay. *Id.* at 33,412. Additionally, EPA received comments expressing concern that Part 124's provisions for consolidating review of PSD permit applications with other environmental permit applications would run afoul of the obligation in CAA Section 165(c). *Id.* at 33,407-08. EPA explained in response that the Agency believed the appeal process was necessary to ensure consistency, and neither the appeal process nor permit consolidation would cause delay. *Id.* at 33,407-08, 33,412. No party, including Avenal, sought judicial review of the adoption of Section 124.19 on the basis of CAA Section 165(c) or other authority within the sixty-day time period provided by the Act to challenge newly-promulgated regulations. *See* 42 U.S.C. § 7607(b) (stating that any petition for review of any nationally applicable regulations must be filed "within sixty days from the date notice of such promulgation . . . appears in the Federal Register"). Accordingly, Plaintiff is time-barred from challenging Section 124.19 here. *See, e.g., Hawaiian Elec. Co., Inc. v. EPA*, 723 F.2d 1440, 1447 (9th Cir. 1984) (finding that the plaintiff was time-barred from challenging the definition of "major modification," which was also promulgated in 1980, through its petition for review of EPA's determination that plaintiff must comply with PSD requirements applying to major modifications).

"[T]emporal limitations on judicial review are jurisdictional in nature." *Nat'l Mining*

Ass'n. v. U.S. Dep't of Interior, 70 F.3d 1345, 1350, 1350 (D.C. Cir. 1995) (holding arguments that were available at the time the rule was adopted were time-barred and noting similar limitations on jurisdiction in other environmental statutes including the CAA). Like similar provisions found in other environmental statutes that narrowly limit the time within which regulations can be challenged, the purpose of the CAA's limitation is to "bring[] finality to the administrative process and reflects 'a deliberate congressional choice to impose statutory finality on agency [action], a choice [the courts] may not second-guess.'" *See W. Neb. Res. Council v. EPA*, 793 F.2d 194, 198 (8th Cir. 1986) (quoting *Eagle-Picher Indus.*, 759 F.2d at 911, and citing *Cerro Copper Prods. Co. v. Ruckelshaus*, 766 F.2d 1060, 1069 (7th Cir. 1985) (Clean Water Act); *Eagle-Picher Indus.*, 759 F.2d at 911 (Comprehensive Environmental Response, Compensation and Liability Act); *Selco Supply Co. v. EPA*, 632 F.2d 863, 865 (10th Cir. 1980) (Federal Insecticide, Fungicide and Rodenticide Act), *cert. denied*, 450 U.S. 1030 (1981); *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 892 (8th Cir. 1977) (Clean Air Act)).

Accordingly, the Court does not have jurisdiction to order the remedy Plaintiff requests because it is not consistent with the Agency's regulations—regulations the Administrator must follow. Instead, the Court should order EPA's proposed remedy—a grant or denial of Plaintiff's permit application by the Administrator's delegate by May 27, 2011, in accordance with 40 C.F.R. § 124.15.

B. THE COURT'S JURISDICTION TO ORDER A REMEDY IS LIMITED IN DEADLINE SUITS.

The Court also lacks jurisdiction to order the remedy Plaintiff requests under the body of case law governing deadline suits like this one. Indeed, contrary to Plaintiff's contention, *see* Plaintiff's Brief Regarding Remedy at 3, EPA did not concede that the Court has jurisdiction to order the Administrator to take final agency action during the February 1, 2011, status

conference. Defendants have consistently argued that this Court's jurisdiction to grant equitable relief in this matter is limited. *See, e.g.,* Defendant's Memorandum in Support at 12-15; Defendant's Reply at 11-16. Under the Clean Air Act, the citizen suit provision provides a waiver of sovereign immunity for claims alleging that the agency has failed to perform a nondiscretionary duty under the Act. 42 U.S.C. § 7604(a). The Supreme Court has repeatedly held that "[w]aivers of immunity must be construed strictly in favor of the sovereign . . . and not enlarged beyond what the language requires." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983) (quoting cases). Where the United States has consented to be sued, the terms of that waiver of sovereign immunity define the extent of the Court's jurisdiction." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). In fashioning a remedy in a deadline suit, district courts do not have jurisdiction to review the substance of the agency's decisionmaking, or "direct the manner in which any discretion given the Administrator . . . should be exercised." *NYPIRG v. Whitman*, 214 F. Supp. 2d 1, 3 (D.D.C. 2002). "Notably, the CAA does not allow district courts to address the content of EPA's conduct, issue substantive determinations on its own, or grant other forms of declaratory relief." *Sierra Club v. Browner*, 130 F. Supp. 2d 78, 90 (D.D.C. 2001).

Here, Plaintiff brought suit alleging that EPA failed to perform a nondiscretionary duty under CAA Section 165(c).[4] *See* Complaint at ¶¶ 27-30. The CAA provides the Administrator the authority to delegate that duty, *see* 42 U.S.C. § 7601(a)(1), and the Administrator has

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[4] Plaintiff also refers to the Agency's "unreasonable delay." Plaintiff's Brief Regarding Remedy at 14-15. An "unreasonably delay claim" is a separate and distinct claim from a "nondiscretionary duty claim." *See Sierra Club v. Thomas*, 828 F.2d 783, 788, 791-92 (D.C. Cir. 1987). Plaintiff did not plead an unreasonable delay claim in the Complaint. *See* Plaintiff's Complaint at ¶¶ 27-30.

exercised her discretion to do so here.[5] *See* March 1, 2011, Temporary Delegation, Exhibit A; *see also* 40 C.F.R. § 124.15. Likewise, EPA long ago exercised its rulemaking authority to provide third parties and applicants the right to petition for an administrative appeal of permit decisions. 40 C.F.R. § 124.19(a). Contrary to Plaintiff's contention that the Part 124 procedures "only apply when decisions are made by a subordinate EPA official," Plaintiff's Brief Regarding Remedy at 8, the Part 124 regulations expressly require a process in which permitting decisions are made by subordinate EPA officials *with* an opportunity to petition for review of such decisions. *See* 40 C.F.R. §§124.2, 124.15, 124.19. Indeed, even if the EAB were to refer an appeal to the Administrator, Section 124.19 would continue to apply to the Administrator. *See* 40 C.F.R. § 124.2 (The definition of the EAB provides that "[w]hen an appeal or motion is referred to the Administrator . . . the rules in this subpart referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator."). Accordingly, Part 124 provides for a specific permit review process. While the Administrator retains the discretion to amend or revoke Part 124, she has not done so and the Court lacks the jurisdiction in this matter to order the Administrator to exercise her discretion to do so. *United States v. Nixon*, 418 U.S. 683, 694-96 at (1974) ("So long as this regulation [establishing the powers of the Watergate special prosecutor] remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.").

By requesting that the Court order the Administrator to issue a permit decision bypassing

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[5] As noted *supra*, the Administrator has temporarily changed her delegation of authority to issue a final permit decision here. *See* March 1, 2011, Temporary Delegation, Exhibit A. Unlike withdrawing the right of appeal to the EAB, which is a substantive right, EPA is not required to complete a notice-and-comment rulemaking process to change the Administrator's delegation since such a change is a procedural rule that does not alter the rights or interests of parties. *See* 5 U.S.C. § 553(b)(A) (exempting "rules of agency organization, procedure, or practice" from the Administrative Procedure Act's notice-and-comment requirement for substantive rules). *See also Batterton*, 648 F.2d at 707.

the EAB review process, Plaintiff urges this Court to dictate the procedure by which the Agency reaches a permit decision in this case. Plaintiff's only support for its request is CAA Section 304(a), which provides the Court with jurisdiction to order the "Administrator" to act. *See* 42 U.S.C. § 7604(a). Yet nothing in Section 304 authorizes the Court to order EPA to act inconsistently with its delegations or regulations. *See id.* Indeed, even where the CAA specifies that the "Administrator" must take a certain action, authority to perform such action may be delegated. *See* 42 U.S.C. § 7601(a)(1); *see, e.g.*, Delegation 7-10, Exhibit B (delegating to the Regional Administrator the Administrator's duty to propose or take final action on any State Implementation Plan under Section 110 of the CAA, which requires, *inter alia*, that the "Administrator" determine whether a submitted state implementation plan is complete, *see* 42 U.S.C. § 7410(k)(1)(B)). Thus, since Congress explicitly authorized the Administrator to delegate any of her duties except the promulgation of regulations, the reference to the "Administrator" in Section 304(a) has no bearing with regard to which official in the Agency must fulfill any particular nondiscretionary duty.

Furthermore, Plaintiff's proposed remedy would lead to an absurd and unjust result since parties who seek judicial review of permit decisions must first petition the EAB to review the decision as a prerequisite to judicial review of the final agency action. 40 C.F.R. § 124.19(e); *see also* 42 U.S.C. § 7607(b) (limiting judicial review to "final agency actions"); 5 U.S.C. § 704 (requiring "appeal to a superior agency authority" if the agency's rules so require prior to judicial review). Indeed, under the administrative waiver doctrine, parties must first raise each of their arguments before the EAB before the arguments can be considered by a federal court. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that

courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."); *see also Vidiksis v. EPA*, 612 F.3d 1150, 1158-59 (11th Cir. 2010) (finding arguments not raised before EAB were waived). Thus, as Plaintiff would have it, third parties who plan to appeal the Avenal permit decision to the EAB would not only lose their right to appeal to the EAB, but such parties *and Avenal itself* would be precluded from seeking judicial review before a federal court of appeals because they would not have exhausted their administrative remedies as required by EPA's regulations, the CAA, and the APA. The Court should not order a remedy that would lead to such an absurd and unjust result, nor should the Court order a remedy that dictates the Agency's discretion or conduct. Rather, the Court should order a remedy consistent with the Administrator's delegations and regulations—an order allowing the Administrator's delegate until May 27, 2011, to issue a final permit decision in accordance with 40 C.F.R. § 124.15.

II. A FINAL PERMIT DECISION UNDER 40 C.F.R. § 124.15 DISCHARGES EPA'S DUTY UNDER CAA SECTION 165(c).

Even if the Court determines that it has jurisdiction to consider Plaintiff's arguments in the context of this deadline suit, the action EPA has committed to complete by May 27, 2011, will discharge EPA's nondiscretionary duty in this matter. Section 165(c) of the Clean Air Act obligates EPA to "grant or deny" a complete permit application within one year, and does not plainly require that the permit become effective or "final agency action" for purposes of judicial review within this time period. *See* 42 U.S.C. § 7475(c). A final permit decision under 40 C.F.R. § 124.15 is a decision to "grant or deny" the permit application. The Court should defer to EPA's long-standing interpretation that its obligation under CAA Section 165(c) is satisfied by a permit "grant" or "denial" under 40 C.F.R. § 124.15.

A. EPA HAS INTERPRETED CAA SECTION 165(c) TO REQUIRE PERMIT ISSUANCE OR DENIAL BY THE ADMINISTRATOR'S DELEGATE SINCE 1980.

EPA has construed Section 165(c) as requiring a permit issuance or denial under 40 C.F.R. § 124.15 within one year since 1980, when it promulgated 40 C.F.R. Part 124. As mentioned *supra*, EPA's Part 124 rules provide the option to consolidate the processing of PSD permits with additional permits required under other environmental laws. *See* 40 C.F.R. § 124.4. However, in recognition of CAA Section 165(c), 40 C.F.R. § 124.4(e) specifically provides the following: "Except with the written consent of the permit applicant, the Regional Administrator shall not consolidate processing a PSD permit with any other permit . . . when to do so would delay issuance of the PSD permit more than one year from the effective date of the application under 124.3(f)." *Id.* § 124.4(e); *see also*, 45 Fed. Reg. at 33,407-08 (referencing Section 165(c) of the CAA). Part 124 defines the effective date of the application as the date when EPA notifies the applicant that the application is complete. 40 C.F.R. § 124.3(f). The "issuance of a PSD permit" is accomplished when EPA takes the step described in Section 124.15 of the regulations. *Id.* § 124.15. The fact that Section 124.4(e) is focused on the "issuance of the PSD permit" within one year and Section 124.15 uses the term "issue" to describe a final decision to grant a permit application, illustrates that, in promulgating Part 124, EPA interpreted Section 165(c) to require that the Administrator's delegate make a final permit decision under Section 124.15 within the statutory time period. The Court should defer to EPA's interpretation because it is supported by the statute and its legislative history.

B. EPA'S INTERPRETATION IS ENTITLED TO DEFERENCE BECAUSE IT IS SUPPORTED BY THE STATUTE AND ITS LEGISLATIVE HISTORY.

EPA's interpretation of CAA Section 165(c) as requiring a final permit decision by the

Administrator's delegate, rather than a final agency action after administrative appeal, within one year should be given controlling weight under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). "[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." *Id.* at 844. Under the familiar *Chevron* two-step approach, when evaluating an agency's interpretation of the statute it administers, the court must first ask "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If it has, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If not, then the court must proceed to the second step. Under the second step, the court must determine if Congress has explicitly or implicitly delegated authority to the agency to "elucidate a specific provision of the statute." *Id.* at 843-44. Where there is an explicit delegation of authority, the agency's interpretations are given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* Where there is an implicit delegation, the court must uphold the agency's interpretation if it is reasonable. *Id.* at 844.

Here, the precise question is whether Congress intended the grant or denial of the permit application described in CAA Section 165(c) to mean "final agency action" for purposes of appeal to a federal court. Neither the plain language of the statute nor its legislative history provides an answer to this question; thus, the statute is ambiguous. Furthermore, because Congress provided EPA with authority to promulgate regulations governing the permitting process, *see* 42 U.S.C. §§ 7475(a)(2), 7601(a)(1), Congress explicitly provided EPA with the authority to elucidate what Congress meant by "[a] completed permit application . . . shall be granted or denied not later than one year after the date of filing of such completed application."

Id. § 7475(c). Accordingly, this Court must give EPA's interpretation of CAA Section 165(c) controlling weight unless arbitrary, capricious, or manifestly contrary to the statute. As explained below, EPA's interpretation is consistent with the CAA and its legislative history.

First, the plain language of Section 165(c) simply requires that a completed PSD permit application be "granted or denied not later than one year after the date of filing of such completed application." *Id.* Section 165(c) does not identify any particular official that must take such action or otherwise suggest that the action must be a final agency action. *Id.* Moreover, although Plaintiff repeatedly states that Congress "clearly" intended Section 165(c) to require final agency action, *see* Plaintiff's Brief Regarding Remedy at 3, 8-11, Plaintiff provides no support for this proposition. Rather, Plaintiff solely relies on the fact that the regulations at issue and the EAB were not in existence at the time Section 165(c) was enacted. *See id.* at 8-11. But the CAA, including parts of the PSD Program, was extensively amended in 1990, long after Part 124 was promulgated and the administrative appeal process was applied by regulation to PSD permits, and Congress failed to amend Section 165(c) at that time. *Compare, e.g.*, 42 U.S.C. §§ 7474, 7475 (1977) *with* 42 U.S.C. §§ 7474, 7475 (1990). Had Congress believed that EPA had inappropriately used its rulemaking authority to define its Section 165(c) duty as one requiring issuance by the Administrator's delegate and to provide for an administrative appeal of PSD permit grants or denials, Congress would have amended Section 165(c) at that time. Thus, there is no reason to think Congress intended Section 165(c) to require completion of administrative appeals within the one year period.

Furthermore, in setting forth the framework of the PSD Program in the CAA, Congress emphasized the importance of public participation in PSD permit decisionmaking. Specifically, in describing the Program's purposes, Congress made clear that it intended the PSD Program to

assure that decisions to permit increased air pollution (through permits issued under the program) be 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(5). Likewise, in addressing the PSD permitting process specifically, Congress mandated that no permit be issued unless "a public hearing has been held with opportunity for interested persons . . . to appear and submit written or oral presentations on the air quality impact of such source . . . [or] other appropriate considerations." *Id.* § 7475(a)(2). The opportunity to petition the EAB for review of a permit decision under Section 124.19 serves an important role in satisfying the Congressional goal that EPA provide "adequate procedural opportunities for informed public participation in the decisionmaking process." While Section 124.11 provides for public comment on a draft permit and supporting statement of basis, Section 124.19 provides an opportunity for the public to review the entire administrative record, as supplemented by the Agency's response to public comments on the draft permit, and identify any clear error in the final permit decision. *See* 40 C.F.R. §§ 124.11, 124.17(b), 124.19. By ensuring both a public notice-and-comment process prior to the final permit decision by the Administrator's delegate and an opportunity to request review by the EAB after the final permit decision, the procedures in Part 124, as applied to PSD permit applications, embody Congress's intent that the public have ample opportunity to take part in PSD permit decisionmaking.

Thus, EPA's long-standing interpretation of CAA Section 165(c) as requiring a final permit decision by the Administrator's delegate, rather than final agency action, is reasonable and entitled to deference in the context of determining a remedy in this case. Accordingly, the Court should enter an order consistent with EPA's interpretation.

III. EPA'S PROPOSED SCHEDULE REPRESENTS THE REASONABLE MINIMUM TIME NECESSARY TO COMPLETE THE REQUIRED ACTION.

In a suit alleging violation of a Congressionally mandated duty, the district court exercises its discretion to fashion a remedy by considering whether "the official involved . . . has in good faith employed the utmost diligence in discharging his statutory responsibilities." *NRDC v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1975). In setting a deadline for action, the Court should not order EPA to do an impossibility. *Id.*

Contrary to Plaintiff's contention, EPA is entitled to its proposed remedy because it has demonstrated that it has exercised utmost diligence and good faith in processing Plaintiff's permit application. As the Jordan Declaration and Joint Stipulation make clear, EPA Region 9 worked tirelessly to review materials submitted by the applicant before and after Region 9 deemed the application complete. *See* Joint Stipulation ¶ 6; Jordan Decl. ¶¶ 9-11. Region 9 also regularly contacted the U.S. Fish and Wildlife Service regarding the status of the Biological Opinion, which identified measures necessary to be incorporated into the permit to ensure the protection of the San Joaquin kit fox, an endangered species under the Endangered Species Act. *Id.*

Additionally, both Region 9 and EPA Headquarters expended significant effort in an attempt to help Plaintiff identify what it needed to do to show compliance with the revised NO2 NAAQS. *See* Joint Stipulation ¶ 6; Jordan Decl. ¶¶ 13-17; McCarthy Declaration ¶¶ 5-7. While the Agency recently changed its position regarding Plaintiff's need to show compliance with the revised NO2 NAAQS, the Agency's change in position does not indicate that the Agency engaged in "foot-dragging" or acted in bad faith. To the contrary, EPA promulgated the revised NO2 NAAQS in order to comply with a court-ordered deadline. *See* Defendant's Memorandum in Support at 7 n.1. EPA's original position requiring Avenal and others similarly situated to

demonstrate compliance with the revised NO2 NAAQS was supported by the plain language of the CAA and EPA's regulations. *See id.* at 19-20; Defendant's Reply at 12-16. In order to revise its position, EPA has determined that it must provide public notice and an opportunity for comment on its change in position and has spent significant Agency resources to support this effort. *See* Corrected McCarthy Declaration ¶¶ 6-13. In summary, while EPA understands Plaintiff's frustration with the lengthy permitting process thus far, the record demonstrates that the EPA has worked with utmost diligence and good faith to review Plaintiff's permit application in accordance with the applicable regulations. As explained by Ms. McCarthy, May 27, 2011, is the earliest the Agency can issue a decision on Plaintiff's permit application in accordance with 40 C.F.R. § 124.15. *See id.* ¶¶ 11, 13. Because Plaintiff has requested relief that exceeds the scope of remedy authorized by the citizen suit provision, and EPA's proposed remedy reflects the reasonable minimum time necessary to complete EPA's Section 165(c) duty, EPA respectfully requests that the Court grant EPA until May 27, 2011, to grant or deny Plaintiff's permit application in accordance with 40 C.F.R. § 124.15.

CONCLUSION

For the foregoing reasons, the Court should deny the relief requested by Plaintiff and instead grant EPA's motion for summary judgment on remedy, ordering EPA to issue a final permit decision in accordance with 40 C.F.R. § 124.15 by May 27, 2011.

Dated: March 1, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing DEFENDANT'S RESPONSE TO PLAINTIFF'S SUPPLEMENTAL BRIEF REGARDING REMEDY with the clerk of the court for the United States District Court for the District of Columbia using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record:

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