BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

In re Avenal Power Center, LLC	)	PSD Appeal No. 11-03
PSD Permit No. SJ 08-01	)	

MOTION FOR LEAVE TO FILE REPLY BRIEF

Sierra Club and Center for Biological Diversity (collectively, "Sierra Club") hereby move for leave to file the accompanying reply to the brief submitted by Avenal Power Center, LLC ("Avenal") in the above-captioned matter. Sierra Club filed its Petition for Review on June 27, 2011. Avenal filed its response on July 11, 2011.

In support of its motion, Sierra Club states that Avenal's response raises a new issue that Sierra Club did not previously have the opportunity to address. Specifically, Avenal contends that this Board "does not have authority" to review the "grandfathering" issue raised in Sierra Club's Petition because this issue has allegedly been "resolved" in the U.S. District Court for the District of Columbia. *See* Permittee's Response to Petitions for Review of EPA's Decision to Grant the Avenal Energy Project a PSD Permit at 8-13. As explained in Sierra Club's proposed reply, this position is both factually and legally unsupported and should be rejected by the Board.

Dated: July 19, 2011

Respectfully submitted,

/s/ George Torgun

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PETITIONERS' [PROPOSED] REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

In its Response to the Petition for Review filed by Sierra Club and Center for Biological Diversity (collectively, "Sierra Club") in this action, Avenal Power Center, LLC ("Avenal") contends that this Board "does not have authority" to review the U.S. Environmental Protection Agency's ("EPA") decision to "grandfather" the Avenal Energy Project from the requirements of Section 165 of the Clean Air Act ("CAA" or "Act"). *See* Permittee's Response to Petitions for Review of EPA's Decision to Grant the Avenal Energy Project a PSD Permit (filed July 11, 2011) ("Avenal Response") at 8-13. Specifically, Avenal asserts that (1) "this issue has already been resolved in a related proceeding before the U.S. District Court for the District of Columbia and is not properly before the Board," and (2) the Board "does not have authority to review decisions already made by EPA." *Id*. at 8-9. For the reasons discussed below, Avenal's contentions are both factually and legally unsupported and must be rejected.

ARGUMENT

I. The Grandfathering Issue Has Not Been "Resolved" in U.S. District Court.

On March 9, 2010, Avenal filed a lawsuit in the United States District Court for the District of Columbia alleging that EPA violated Section 165(c) of the CAA, 42 U.S.C. § 7475(c), by failing to render a decision on the Avenal Permit within one year of determining the permit application to be complete. *Avenal Power Center, LLC v. U.S. EPA, et al.*, Case No. 1:10-cv-00383 (RJL) (D.D.C. filed Mar. 9, 2010). While EPA admitted the 1-year period in Section 165(c) had passed, it declared, correctly, that it could not issue a PSD permit that did not comply with all air quality standards in effect at the time of the final permit issuance. *See* Declaration of Deborah Jordan, Case No. 1:10-cv-00383 (RJL), at ¶¶ 13-18 (filed Sept. 17, 2010) ("Jordan Declaration") (Exhibit 7 to Sierra Club's Petition for Review); Memo. in Opp. to Pls.' Motion

for Judgment on the Pleadings and in Support of Defs.' Cross-Mot. For Summ. J., Case No. 1:10-cv-00383 (RJL), at 19-20 (filed Sept. 17, 2010) (Exhibit 8 to Sierra Club's Petition for Review). However, in the midst of litigation and without any explanation, EPA later reversed its position and asserted that the Agency had "determined that it is appropriate, under certain narrow circumstances, to grandfather certain PSD applications from the requirement to demonstrate that the proposed facility will not cause or contribute to a violation" of the applicable standards. Corrected Second Declaration of Regina McCarthy, Case No. 1:10-cv-00383 (RJL), at ¶ 6 (filed Feb. 4, 2011) ("McCarthy Decl.") (Exhibit B to Avenal Response).

In its Response, Avenal contends that there is nothing for this Board to review because, in the McCarthy Declaration, EPA "resolved what had been the key issue in the case." Avenal Response at 10. However, the McCarthy Declaration did not resolve the grandfathering issue and certainly did not constitute a final EPA decision. As Ms. McCarthy states in her sworn declaration (in portions not cited by Avenal):

> This determination represents a change in the position EPA has taken in this matter and in previous interpretive statements issued by EPA, including statements cited by EPA to support its Cross Motion for Summary Judgment in this litigation….Because this change in position requires that EPA modify or narrow previous interpretations of EPA regulations and the position EPA has taken in public statements to this court regarding this permit*, the Agency reads applicable regulations and case law to require that the EPA provide the public with an opportunity to comment on this proposed action before the Agency can issue a final decision* on the pending permit application that exempts Avenal from these additional requirements….After consideration of public comments the Agency may receive in response to this public notice, EPA will be able to issue a final permit decision *in accordance with 40 CFR 124.15* on this permit application by May 27, 2011, as I have previously testified.

McCarthy Decl., ¶¶ 6-7, 13 (emphasis added). The McCarthy Declaration was simply one wrong step along EPA's tortured path toward a permit decision in this case, but by no means a final resolution of the issue.

Avenal further contends that "the District Court relied on the Agency's sworn statement that it could remedy its violation by grandfathering Avenal's permit application" in its May 26, 2011 opinion. Avenal Response at 10-11; *see* Memorandum Opinion, Case No. 1:10-cv-00383 (RJL), at 2, 7-8 (filed May 26, 2011) ("Memorandum Opinion") (Exhibit 12 to Sierra Club's Petition for Review). That is not so. The opinion, while recounting the various rationales offered by EPA for failing to meet the Section 165(c) deadline, did *not* authorize, much less require, EPA to "grandfather" the Avenal permit. To the contrary, it simply ordered the Agency to issue "a final, non-appealable, agency action, either granting or denying plaintiff's permit application, no later than August 27, 2011." Memorandum Opinion at 3-4, 8. In fact, the opinion was issued *prior to* EPA's final decision on the grandfathering issue, and thus plainly did not rely on the McCarthy Declaration as constituting the Agency's final position, either on the merits or in determining the procedural steps EPA should follow in sorting out how to proceed with the Avenal Permit. *Id*.

Thus, there is no factual basis for Avenal's contention that the grandfathering issue "has already been resolved" in its deadline suit in U.S. District Court. Plainly, the District Court has made no finding of fact and entered no conclusion of law on the grandfathering issue that could deprive this Board of jurisdiction to review the Avenal Permit.

II. This Board Has The Authority To Review EPA's Decision To Grandfather The Avenal Permit.

There are three fundamental flaws with Avenal's contention that, with regard to the grandfathering issue, the Board "does not have authority to review decisions already made by EPA." *See* Avenal Response at 9. First, Avenal's selective quotations from the McCarthy Declaration ignore the fact that Ms. McCarthy herself stated that EPA's decision would not become final until the Agency provided an opportunity for public comment, after which "EPA

will be able to issue a final permit decision *in accordance with 40 CFR 124.15*." McCarthy Decl., ¶¶ 7, 13 (emphasis added). As the Board is well aware, that section of the regulations specifically provides that:

> (b) A final permit decision … shall become effective 30 days after the service of notice of the decision unless:
> …
> (2) Review is requested on the permit under §124.19.

40 C.F.R. § 124.15. *See also* Amended Final Permit (June 21, 2011) (Exhibit 1 to Sierra Club's Petition for Review) at 1 ("Per 40 CFR § 124.15(b), this PSD Permit becomes effective 30 days after the service of notice of the final permit decision on May 27, 2011 unless review is requested on the permit pursuant to 40 CFR § 124.19"). Given that review of the Avenal Permit has been requested under Section 124.19, which governs the appeal of PSD permits to this Board, it is clear that EPA's decision to "grandfather" the Avenal Permit is not final and review by the Board is entirely appropriate.[1]

Second, Avenal provides no authority for its contention that the McCarthy Declaration "is binding on EPA" because "no government agency can make a sworn representation to a federal court in a specific case and then reverse itself in that same case." Avenal Response at 11-12. Were it but so, since if Avenal's position were correct, then the earlier Jordan Declaration would constitute EPA's final, binding decision on the grandfathering issue, and Avenal would be required to meet the air quality standards in effect at the time that the permit was issued. *See* Jordan Declaration, ¶¶ 13-18. In fact, neither declaration could, or did, constitute the Agency's

[1] In ordering EPA to make a final decision on the Avenal Permit by August 27, 2011, the District Court explicitly left open the availability of review by this Board. *See* Memorandum Opinion at 7 ("recognizing that the Administrator might need a brief additional period of time to determine how to best proceed vis-a-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."). EPA has also interpreted the District Court's order to allow for EAB review. *See* EPA, Responses to Public Comments on the Proposed Prevention of Significant Deterioration Permit for the Avenal Energy Project (May 2011) (Exhibit 5 to Sierra Club's Petition for Review), at 10 ("EPA believes that there remains an opportunity under this order for parties to petition the Environmental Appeals Board to review the Assistant Administrator's permit decision in accordance with 40 CFR 124.19.").

final position on the grandfathering issue. Indeed, by citing 40 C.F.R. § 124.15, the McCarthy Declaration explicitly provided for the availability of review by this Board. The cases cited by Avenal in support of its position, *see* Avenal Response at 12 (citing *General Electric Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002); *Croplife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003); *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000)), all address whether agency guidance documents or directives constitute binding regulations that should have been subject to notice and comment rulemaking under the Administrative Procedure Act ("APA"). These cases do not support Avenal's assertion that a declaration by an EPA official during the permitting process precludes Board review of the permit decision.

Third, there is no authority to support Avenal's assertion that "the Board does not have authority to review a key representation that EPA has made to a federal court." Avenal Response at 11, 13. Again, this point conveniently overlooks the fact that EPA actually made two such "key representations . . . to a federal court," only one of which contemplates the result Avenal seeks. But in any event, Avenal is simply wrong. While Avenal cites the basic principle that "an agency must follow its own *rules*," *id*. at 13 (emphasis added), it ignores the fact that EPA's decision to grandfather the Avenal Permit was not a rulemaking under the APA. Avenal also appears to find it significant that the McCarthy Declaration was submitted "on behalf of the Environmental Protection Agency-not simply [the Office of Air and Radiation] or Region 9 or any other component of EPA," and contends that "this Board cannot now establish a[n] interpretation of the relevant statute different than the one clearly established *by the Administrator*." *Id*. at 11, 13 (emphasis added) (citing *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991)). Of course, the Jordan Declaration was also submitted on behalf of the EPA and the Administrator, the two named Defendants in the deadline litigation.

See Jordan Declaration. Avenal fails to explain why the Administrator's delegation of authority regarding PSD permit applications to the Assistant Administrator for Air and Radiation (McCarthy), as compared to the Director of the Air Division, Region 9 (Jordan), should make the McCarthy Declaration alone "binding on EPA," especially given the fact that the declaration itself clearly demonstrates EPA's understanding that its position as expressed therein was neither final nor non-reviewable.

Moreover, under EPA's own regulations, the Board is explicitly authorized to review the Agency's issuance of a PSD permit upon a showing that the permit conditions are based on "[a] finding of fact or conclusion of law which is clearly erroneous," or "[a]n exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review." 40 C.F.R. § 124.19(a). Not surprisingly, the Board frequently reviews EPA's interpretation of the Clean Air Act and other statutes in fulfilling its duties under this provision. *See, e.g., In re Shell Gulf of Mexico, Inc.*, OCS Appeal Nos. 10-01 through 10-04, slip op. at 20-63 (EAB, Dec. 30, 2010); *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, slip op. at 23-64 (EAB Nov. 13, 2008). Finally, given that the Administrator has delegated to this Board the authority "to issue final decisions" in PSD permit appeals, *see* 40 C.F.R. §§ 1.25(e), 124.2, the *Martin* case is inapplicable on its face.

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CONCLUSION

For the foregoing reasons, Sierra Club respectfully requests that the Board reject Avenal's contention that the Board "does not have authority" to review EPA's decision to "grandfather" the Avenal Permit from meeting the explicit requirements of the Clean Air Act.

Dated: July 19, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to the Rules of the Environmental Appeals Board of the U.S. Environmental Protection Agency, that on July 19, 2011, the foregoing was filed electronically with the Clerk of the Environmental Appeals Board using the Central Data Exchange. The foregoing will be served by Federal Express as paper copies on interested parties in this matter, who are listed below.

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