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

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

PETITION FOR REVIEW

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), Sierra Club and Center for Biological Diversity (collectively, "Sierra Club") hereby petition for review of the Prevention of Significant Deterioration ("PSD") Permit Number SJ 08-01 ("Avenal Permit" or "Permit") issued by the U.S. Environmental Protection Agency ("EPA") to Avenal Power Center, LLC ("APC") on May 27, 2011.[1] The Avenal Permit authorizes the construction and operation of a new 600-megawatt natural gas-fired power plant ("Avenal Energy Project" or "Project") in Avenal, California.

In issuing the Permit, EPA erred by: (1) "grandfathering" the Project from the requirements of Clean Air Act ("CAA" or "Act") Section 165 (a) to demonstrate compliance with the National Ambient Air Quality Standards ("NAAQS") for nitrogen dioxide ("NO_2") and sulfur dioxide ("SO_2"), and (b) to require the Best Available Control Technology ("BACT") for emissions of carbon dioxide ("CO_2"); (2) failing to consider less harmful alternatives to the Project; (3) failing to properly analyze environmental justice concerns; and (4) revising its statutory interpretation of Section 165's requirements without undertaking notice and comment rulemaking. EPA's decision to allow a massive new power plant to be built in an area already disproportionately impacted by pollution without requiring the facility to meet current air quality standards is particularly inexcusable given that the Agency, consistent with its long-standing interpretation of the Clean Air Act, recently asserted in federal district court that such an approach violates the explicit statutory requirements for PSD permits. As such, the Avenal Permit is illegal and must be denied.

THRESHOLD PROCEDURAL REQUIREMENTS

Sierra Club satisfies the threshold requirements for filing a petition for review under 40 C.F.R. Part 124. This Petition is filed within 30 days of EPA's issuance of the Avenal Permit on

[1] A copy of the final Avenal Permit, as amended by EPA on June 21, 2011, is attached hereto as Exhibit 1.

May 27, 2011. 40 C.F.R. § 124.19(a). In addition, Sierra Club has standing to petition for review of the Avenal Permit decision because its members participated in the public comment periods for the draft permit, and the issues addressed in this Petition were raised with EPA during the public comment period.[2] *Id.* §§ 124.13, 124.19(a). Thus, the Board has jurisdiction to hear Sierra Club's request for review. *Id.* § 124.19.

FACTUAL BACKGROUND

On February 15, 2009, APC submitted an application for a PSD permit to EPA Region 9 for the Avenal Energy Project, a power plant capable of generating up to 600 megawatts ("MW") of net power to be located in Avenal, California. Avenal Permit at 2. The Project will generate electricity from the combustion of natural gas in two 180 MW combustion turbine generators, with exhaust from each gas turbine flowing through a dedicated heat recovery steam generator to produce steam to power a shared 300 MW steam turbine generator. *Id.* Additional equipment for the Project includes a natural gas-fired auxiliary boiler, a natural gas-fired emergency generator, and a diesel-fired emergency firewater pump engine. *Id.*

EPA Region 9 determined that APC's permit application was administratively complete on March 18, 2009. EPA, Responses to Public Comments on the Proposed Prevention of Significant Deterioration Permit for the Avenal Energy Project (May 2011) ("RTC"), at 3 (attached hereto as Exhibit 5). On June 16, 2009, EPA Region 9 released a Statement of Basis regarding its proposed PSD permit for the Project. *Id.* The initial public comment period on the proposed Permit began on June 16, 2009 and closed on October 15, 2009. *Id.* at 9. Sierra Club submitted comments on the proposed Permit during this period. *See* 2009 Comments. EPA held

[2] Comments on Proposed Prevention of Significant Deterioration Permit for the Avenal Energy Project (Oct. 15, 2009) ("2009 Comments") (attached hereto as Exhibit 2); Comments on Short-term NO_2 NAAQS and the Proposed Prevention of Significant Deterioration Permit for the Avenal Energy Project (Apr. 21, 2010) ("2010 Comments") (attached hereto as Exhibit 3); Comments on Supplemental Statement of Basis: PSD Permit Application for Avenal Energy Project (Apr. 12, 2011) ("2011 Comments") (attached hereto as Exhibit 4).

a public information meeting on September 30, 2009, and two formal public hearings on October 1, 2009 and October 15, 2009 in Avenal, California. RTC at 10.

On February 9, 2010, less than a year after EPA had deemed APC's permit application to be complete, EPA published in the Federal Register a final rule revising the primary NAAQS for NO_2 "in order to provide requisite protection of public health as appropriate under section 109 of the Clean Air Act." 75 Fed. Reg. 6,474, 6,475 (Feb. 9, 2010). This rule set a new 1-hour NO_2 NAAQS at 100 parts per billion ("ppb") to supplement the existing annual standard. *Id*. The new 1-hour standard became effective on April 12, 2010. *Id*. at 6,474. On April 21, 2010, Sierra Club submitted comments regarding the new 1-hour NO_2 standard and its applicability to the Project. *See* 2010 Comments.

On April 2, 2010, EPA issued a rulemaking entitled "Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs." 75 Fed. Reg. 17,004 (Apr. 2, 2010). In the rulemaking, EPA announced that greenhouse gases ("GHGs"), including CO_2, would become "subject to regulation" under the Clean Air Act for purposes of the PSD program on January 2, 2011, the date that EPA determined its regulations to limit GHGs from new motor vehicles would "take effect or become[] operative to control or restrict the regulated activity." *Id.* at 17,016-19.

On June 22, 2010, EPA published a final rule revising the primary NAAQS for SO_2 by establishing a 1-hour standard of 75 ppb in order to protect public health as required by Clean Air Act Section 109. 75 Fed. Reg. 35,520 (June 22, 2010). That rule became effective on August 23, 2010. *Id*.

On March 9, 2010, APC 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). APC did not simply seek an order compelling EPA to act, but instead took the unprecedented step of requesting that the court require EPA to issue its PSD permit based on the now superseded NAAQS. *See* Memo. in Support of APC's Motion for Judgment on the Pleadings Pursuant to Rule 12(c) and Request for Expedited Decision, Case No. 1:10-cv-00383 (RJL), at 26-27 (filed Aug. 25, 2010) (attached hereto as Exhibit 6). 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, e.g.*, Declaration of Deborah Jordan, Case No. 1:10-cv-00383 (RJL), at ¶¶ 13-18 (filed Sept. 17, 2010) (attached hereto as Exhibit 7); 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) (attached hereto as Exhibit 8).

Suddenly, however, in the midst of the litigation and without any explanation, EPA 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 NAAQS. Declaration of Regina McCarthy, Case No. 1:10-cv-00383 (RJL), at ¶ 6 (filed Jan. 31, 2011) (attached hereto as Exhibit 9). Then, in order to carry out the decision to override the Agency's prior sworn testimony and court representations, EPA Administrator Lisa Jackson issued a memorandum granting Ms. McCarthy, the Assistant Administrator in EPA's Office of Air and Radiation, the authority to issue a final permit decision for the Project.

Memorandum from Lisa P. Jackson to Gina McCarthy (March 1, 2011) (attached hereto as Exhibit 10).

On March 4, 2011, EPA released a Supplemental Statement of Basis regarding its proposed issuance of a PSD permit for the Project "to address several considerations that have arisen since the close of the public comment period on the permit." Supplemental Statement of Basis, PSD Permit Application for Avenal Energy Project (March 4, 2011) ("SSB") at 1 (attached hereto as Exhibit 11). Specifically, EPA identified how it would carry out its proposal to "grandfather" the Permit from Section 165's requirements to demonstrate that the Project will not cause or contribute to a violation of the 1-hour NAAQS for NO_2 or SO_2 and to demonstrate BACT for greenhouse gases. *Id*. EPA also stated that it was "appropriate to provide a detailed Environmental Justice Analysis regarding the proposed PSD permit action for this facility for public comment." *Id*. The comment period on the Supplemental Statement of Basis closed on April 12, 2011. RTC at 9. Sierra Club submitted comments on April 12, 2011. *See* 2011 Comments. EPA held an additional public hearing on April 12, 2011 in Avenal, California. RTC at 10.

On May 26, 2011, the district court in the case filed by APC ordered EPA to issue "a final, non-appealable, agency action, either granting or denying plaintiff's permit application, no later than August 27, 2011." Memorandum Opinion, Case No. 1:10-cv-00383 (RJL), at 2, 7-8 (filed May 26, 2011) (attached hereto as Exhibit 12). The following day, EPA issued the final PSD Permit authorizing the construction and operation of the Avenal Energy Project, as well as its Responses to Public Comments on the proposed Permit. In its Responses to Public Comments, EPA noted the May 26, 2011 district court order and stated that 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 C.F.R. 124.19." RTC at 10. For the reasons described below, Sierra Club now files this Petition asking the Board to review the Avenal Permit and to order EPA to issue a final decision denying the Permit application by the August 27, 2011 deadline established by the district court.

STATUTORY BACKGROUND

The Clean Air Act prohibits the construction of new major stationary sources of air pollution in areas designated as in attainment of any NAAQS except in accordance with a PSD permit. CAA § 165(a), 42 U.S.C. § 7475(a); *see also* CAA § 160, 42 U.S.C. § 7470 (defining purposes of PSD permitting program). In order to receive a PSD permit for a major source, applicants must, among other requirements, perform a thorough analysis of the air quality impacts that a proposed project will generate and demonstrate that the proposal will not cause or contribute to an exceedance of any applicable NAAQS. CAA § 165(a)(3), 42 U.S.C. § 7475(a)(3); 40 C.F.R. § 52.21(k). The Act also prohibits the issuance of a PSD permit unless it includes BACT to control emissions of "each pollutant subject to regulation under [the Act] emitted from, or which results from" a proposed facility. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j). Determining BACT requires a comprehensive analysis of all potentially available emission control measures, including input changes (such as the use of clean fuels), process and operational changes, and the use of add-on control technology. CAA § 169(3), 42 U.S.C. § 7479(3); 40 C.F.R. § 52.21(b)(12). The BACT determination is "one of the most critical elements in the PSD permitting process." *In re Vulcan Construction Materials, LP*, PSD Appeal No. 10-11, slip op. at 16 (EAB Mar. 2, 2011); *see also In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, slip op. at 13 (EAB Nov. 13, 2008) ("Determination of the

PSD permit's BACT conditions for control of pollutant emissions is one of the central features of the PSD program").

ARGUMENT

The Board may grant review of a PSD permit when the permits is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion. *See* 40 C.F.R. § 124.19(a); *Vulcan*, slip op. at 6-7. Under this standard, the Board's review of EPA's decision to issue the Avenal Permit is clearly warranted.

First, EPA's determination that it possessed authority to "grandfather" the Project from the requirements of CAA Section 165 to demonstrate compliance with the NAAQS for NO_2 and SO_2 and BACT for CO_2 emissions is contrary to the plain language of the statute and cannot constitute a reasonable interpretation of the Act. *See* 2011 Comments at 1-8; 2010 Comments at 1-2. Second, even if EPA had such authority, "grandfathering" the Avenal Permit from these requirements is not warranted given that EPA has failed to demonstrate the facts necessary to support such an approach here. Specifically, EPA has failed to show that the Agency was responsible for any delay in processing the Avenal Permit that deprived APC of any right to which it was entitled, and cannot justify its decision based on unsubstantiated "complications" with implementation of the applicable NAAQS or waive BACT requirements for pollutants that have long been "subject to regulation" under the CAA. 2011 Comments at 9-13; 2009 Comments at 1-5.

Third, EPA erred in its review of alternatives by failing to consider the fact that APC had received a minor source permit for the Project that, if applied, would result in substantially reduced air pollution emissions. 2011 Comments at 21. Fourth, EPA erred by failing to properly consider the impacts of the Project on affected environmental justice communities by limiting its

examination to the effect on applicable NAAQS. *Id*. at 13-16. For all of these reasons, the Board should grant review of the Avenal Permit. Finally, EPA violated the Administrative Procedure Act ("APA") by failing to undertake notice and comment rulemaking on its decision to "grandfather" the Project and reverse the Agency's longstanding interpretation of the requirements in Section 165. 2011 Comments at 22-23.

I. The Avenal Permit Does Not Satisfy the Statutory Requirements in Section 165 of the Clean Air Act.

Review of EPA's construction of the Clean Air Act follows the two-part test established in *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." *Chevron*, 467 U.S. at 842-43. Only if Congress' intent is uncertain or ambiguous with respect to the specific issue should the Board defer to the Agency's interpretation if it is found to be "a permissible construction of the statute." *Id*. at 843. No deference is owed to agency interpretations that construe the statute "in a way that is contrary to congressional intent or that frustrates congressional policy." *Akhtar v. Burzynski*, 384 F.3d 1193, 1198 (9th Cir. 2004); *see Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 171 (D.C. Cir. 1982) (where "EPA's interpretation is inconsistent with the language of the [statute], as interpreted in light of the legislative history, or if it 'frustrate[s] the policy that Congress sought to implement,' no amount of deference can save it") (citations omitted).

As discussed above, Section 165 of the Clean Air Act requires PSD permit applicants to demonstrate, prior to commencing construction, that a project "will not cause, or contribute to, air pollution in excess of any [NAAQS]" and that the project is "subject to [BACT] for each pollutant subject to regulation" under the Act. CAA § 165(a)(3)-(4), 42 U.S.C. § 7475(a)(3)-(4). Here, EPA admits that the Project will not meet these statutory requirements. RTC at 3 n.1, 8-9.

Rather, because of the alleged "delay" in processing the Avenal Permit application, EPA has decided to "grandfather" the Project from demonstrating that it will not cause or contribute to a violation the 1-hour NO_2 and SO_2 NAAQS or satisfy the BACT requirement for CO_2. *Id*. Because EPA's decision to "grandfather" the Project is contrary to the plain language of the Clean Air Act, and otherwise does not constitute a reasonable interpretation of the statute, the Board must remand the Permit to the Agency.

A. EPA Cannot "Grandfather" the Avenal Permit from Compliance with Applicable NAAQS and BACT Limits.

Under Chevron Step 1, the Board must decide, using the "traditional tools of statutory construction," whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 542-43 & n.9; *see also FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132 (2000). As the Ninth Circuit has stated:

> These tools of construction require us first to engage in a textual analysis of the relevant statutory provisions and to read the words of statutes in their context and with a view to their place in the overall statutory scheme. If the proper interpretation is not clear from this textual analysis, the legislative history offers valuable guidance and insight into Congressional intent.

Resident Councils of Wash. v. Leavitt, 500 F.3d 1025, 1031 (9th Cir. 2007) (citations and quotation omitted); *see also Brown & Williamson Tobacco Corp*., 529 U.S. at 133 (finding that "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme'") (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Applying these standards here, it is clear that the Clean Air Act does not allow EPA to "grandfather" a project from the express requirements of Section 165 in order to approve a PSD permit.

1. The requirements in CAA Section 165 are clear and unambiguous and do not conflict with any other provision of the Act.

The plain and unambiguous language of Section 165 of Clean Air Act does not confer EPA with any authority to "grandfather" the Avenal Permit from the statute's requirements for PSD permits. As Section 165(a) provides:

> *No major emitting facility on which construction is commenced after August 7, 1977, may be constructed* in any area to which this part applies *unless*—
> …
> (3) *the owner or 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*
> (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year,
> (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*; [and]
> (4) *the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter* emitted from, or which results from, such facility….

CAA § 165(a), 42 U.S.C. § 7475(a) (emphasis added). The plain language of Section 165 defines the applicability of these provisions – including the requirements to demonstrate that a facility will not cause or contribute to a violation of *any* NAAQS and is subject to BACT *for each* regulated pollutant – based on *when construction commences*, not the 1-year period from when the permit application is deemed complete. *See* SSB at 10-11; RTC at 25, 53-58. The only major emitting facilities that are exempted by this plain language are those for which construction commenced by August 7, 1977. CAA § 165(a), 42 U.S.C. § 7475(a); *see also* CAA § 168(b), 42 U.S.C. § 7478(b).

In fact, EPA does not contend that this statutory language is uncertain or ambiguous in any way. Moreover, EPA fails to identify any authority in the statute that empowers the agency

to waive these express requirements. *See* SSB at 10 ("The Act does not expressly authorize EPA to waive the substantive permitting criteria when a permit application has not been granted or denied within the one-year deadline").[3] Instead, EPA alleges that "there is a conflict or tension between provisions of the CAA" when the Agency has failed to complete action on a permit within one year as required by Section 165(c) and new requirements have become applicable during that delay, and that "Congress has not precisely spoken to *this issue*." RTC at 54-55 (emphasis added); *see also* SSB at 10 ("EPA must consider how to reconcile what have now become conflicting statutory obligations").

The premise of EPA's argument is false. EPA's failure to meet the deadline in Section 165(c) for acting on the Avenal Permit does not create a "conflict or tension" with the requirements of Section 165(a) to ensure that new sources will not cause or contribute to air pollution problems and will be subject to BACT. If EPA cannot meet the deadline requirement while also meeting its statutory obligations regarding air quality protection, the resolution is to deny the application. EPA's "grandfathering" scheme not only fails to remedy the Agency's inability to meet the 1-year deadline, but it also causes additional violations of statutory obligations, an outcome that defies any logical reading of the statute.

In fact, EPA's faulty line of reasoning has already been considered and rejected by the U.S. Supreme Court in *General Motors Corp. v. United States*, 496 U.S. 530 (1990). In *General Motors*, industry argued that EPA's failure to act on a state implementation plan ("SIP") revision within the statutory period for review in Section 110 of the Act precluded EPA from enforcing

[3] In its Responses to Comments, EPA notes that it "has previously exercised [its] discretion to establish grandfathering provisions in regulations" pursuant to its authority under CAA Section 301(a)(1). RTC at 54. Section 301(a)(1) states that EPA "is authorized to prescribe such regulations as are necessary to carry out [its] functions under [the Act]." CAA § 301(a)(1), 42 U.S.C. § 7601(a)(1). This provision in no way authorizes EPA to revise or ignore the statutory requirements for PSD permits in Section 165 and, in any case, is not applicable here given that EPA has not undertaken notice and comment rulemaking to "grandfather" the Avenal Permit.

the existing provisions of the SIP pursuant to Section 113. *Id*. at 535. The Supreme Court rejected the same contention that there was a necessary conflict in the statute, holding that delay on the part of EPA does not affect the ability or obligation of the Agency to enforce the other requirements of the Act. *Id*. at 539-42. Specifically, the Court found that "because the statute does not reveal any congressional intent to bar enforcement of an existing SIP if EPA delays unreasonably in acting on a proposed SIP revision,…such an enforcement action is not barred." *Id*. at 540. The Court also noted that "other statutory remedies are available when EPA delays action.... Although these statutory remedies may not appear to be so strong a deterrent to EPA delay as would an enforcement bar, these are the remedies that Congress has provided in the statute." *Id*. at 541. Moreover, EPA cannot simply invent a "conflict" between two statutory provisions in order to waive express requirements of the CAA. A fundamental canon of statutory construction is that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal quotation and citation omitted); *see Bernier v. Bernier*, 147 U.S. 242, 245 (1893) ("[I]t is a general rule, without exception, in construing statutes, that effect must be given to all their provisions, if such a construction is consistent with the general purposes of the act, and the provisions are not necessarily conflicting.").

The *General Motors* case is not distinguishable, as EPA contends, on the basis that it "concerned enforcement of a SIP, not issuance of a permit." *See* RTC at 60. The Supreme Court specifically determined that EPA's delay in implementing one provision of the Clean Air Act does not affect the applicability of other requirements *unless* the statute provides otherwise. *General Motors*, 496 U.S. at 540-42*; see also United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) ("We have held that if a statute does not specify a consequence

for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction"). The fact that EPA has missed the statutory deadline for acting on the Avenal Permit does not create a "conflict or tension" with, or in any other way affect, EPA's obligations to enforce other mandatory requirements of the Act, and EPA provides no authority to the contrary. Instead, "the proper recourse for a party aggrieved by delay that violates a statutory deadline is to apply for a court order compelling agency action," a remedy specifically authorized by Section 304(a)(2) of the Act. *See Gottlieb v. Pena*, 41 F.3d 730, 734 (D.C. Cir. 1994). If the Avenal Permit application is inadequate to meet all applicable statutory requirements and EPA is compelled to act on the permit, the plain and unambiguous language of Section 165 of the Clean Air Act requires that the Permit be denied. APC will, of course, be free to submit a new application that includes all of the required demonstrations.

2. "Grandfathering" is contrary to the statutory structure, purposes, and legislative history of the PSD permitting program.

The statutory structure and purposes of the Clean Air Act's PSD permitting program also demonstrate that EPA's decision to "grandfather" the Avenal Permit is not permissible under the Act. In particular, the express purposes of the PSD program include:

> (1) to protect health and welfare from any actual or potential adverse effect which may be reasonably anticipate[d] to occur from air pollution…notwithstanding attainment and maintenance of all national ambient air quality standards;
> (2) to preserve, protect, and enhance air quality in national parks…and other areas of special…value;
> (3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources; [and]
> (5) to assure that any decision to permit increased air pollution…is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

CAA § 160, 42 U.S.C. § 7470. EPA's decision – which would allow the Project to be built without a demonstration that it will not cause or contribute to a violation of air pollution

standards that are designed to protect public health and welfare – cannot be reconciled with any of these stated purposes. *See, e.g.,* CAA § 108, 42 U.S.C. § 7408 (standards for establishing NAAQS for pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare"). "Grandfathering" the Project does not protect public health, preserve air quality, or insure economic growth consistent with the preservation of air resources, and deliberately precludes careful decisionmaking and informed public participation.

It is noteworthy that when EPA adopted regulations implementing the PSD program in 1980, EPA rejected similar requests for "grandfather" exemptions based on these same clearly stated statutory purposes. 45 Fed. Reg. 52,676 (Aug. 7, 1980). Specifically, in its final rule, EPA rejected a commenter's suggestion that EPA "promulgate a grandfather provision that would use the date of complete application instead of the date of permit issuance" in determining the applicability of Section 165's requirements. *Id*. at 52,683. As the Agency noted, the "[u]se of such date, however, might exempt more projects from review" and "fail to give adequate expression to the interests behind Section 165, especially the goal of protecting air quality." *Id*.

In its Responses to Comments, EPA now claims that its decision to "grandfather" the Avenal Permit is consistent with the purpose in Section 160(3) of "insur[ing] that economic growth will occur in a manner consistent with the preservation of existing clean air resources." RTC at 59. However, EPA does not, and cannot, offer any analysis supporting the assertion that "grandfathering" the Avenal Permit (and potentially more projects in the future) is "consistent with the preservation of existing clean air resources." EPA's suddenly cavalier attitude toward the enforcement of clean air standards is particularly egregious given that the Project will be

located among several environmental justice communities that are already disproportionately impacted by pollution sources that are causing serious health consequences, as discussed below.

When Congress adopted the PSD permitting program, it understood that certain sources might get caught by changing permit requirements. *See* H.R. Rep. No. 95-294, 95th Cong., 1st Sess., at 171 (1977) ("Safeguards against moratorium growth"). Consequently, Congress limited the applicability of these new requirements in several ways, such as exempting existing sources and requiring only "major sources of air pollution" to obtain PSD permits. *Id*.; *see* CAA § 165(a), 42 U.S.C. § 7475(a). Congress also provided specific "grandfathering" relief to sources on which "construction had commenced" before the enactment of the 1977 Clean Air Act Amendments. *See* CAA § 168(b), 42 U.S.C. § 7478(b) ("In the case of a facility on which construction was commenced…after June 1, 1975, and prior to August 7, 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to August 7, 1977").

Where, as here, Congress has provided express exemptions and not others, EPA is not free to invent new authority to waive otherwise applicable statutory requirements. *See Andrus v. Glover Constr. Co*., 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); *see also New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006) ("Because Congress expressly included one limitation" on the statute's coverage, "the court must presume that Congress acted intentionally and purposely when it did not include others"). EPA's attempt to distinguish *Andrus* based on the *factual* circumstances in that case misses the point of this fundamental canon of statutory construction. *See* RTC at 56. In particular, it is disingenuous for EPA to claim that the exemption in Section 168(b) does not

"expressly relate" to the application of PSD permitting requirements in Section 165, *see id*., when such provisions were enacted together and are clearly part of the same PSD permitting program. In fact, EPA admits that "[t]he CAA does not contain any express exemption" regarding the requirements in Section 165 that would apply in this case, *id*., and that the Section 168(b) exemption "is clearly different from grandfathering when EPA promulgates a new NAAQS or regulates a new pollutant." *Id*. at 56-57. In the instant situation, EPA has no authority to carve out additional exemptions beyond those provided by Congress absent legislative intent to the contrary. *See New York v. EPA*, 443 F.3d at 889 ("Absent a showing that the policy demanded by the text borders on the irrational, EPA may not 'avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy'") (quoting *Engine Mfrs. Assn. v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)).

The legislative history for the PSD permitting program provides no support for EPA's "grandfathering" approach. In enacting the PSD program, Congress made the fundamental policy choices that (1) it is preferable to *prevent* air pollution from becoming a problem in the first place; and (2) controls should be installed when new sources are being constructed rather than as retrofits on existing sources. *See* S. Rep. No. 95-127, 95th Cong., 1st Sess., at 11 (1977) ("This legislation defines 'significant deterioration' in all clean air areas as a specified amount of additional pollution.... This definition is intended to prevent any major decline in air quality currently existing in clean air areas and will provide a margin of safety for the future."); H.R. Rep. No. 94-1175, 94th Cong., 2d Sess., at 101 (1976) (noting that "'an ounce of prevention is worth a pound of cure.' Permitting unrestricted deterioration of air quality up to ambient standards involves trying to cure a condition after it has developed rather than using practical and currently available means to prevent or minimize the condition in the first place."); *id.* at 108

("Common sense dictates that it is substantially less expensive to prevent air pollution problems – and health problems – before they develop than it is to abate dangerous pollution levels.... This approach will allow us to avoid future massive air pollution concentrations which endanger public health and restrict further economic growth, require expensive retrofitting of pollution control technology and produce demands for economically and socially disruptive restrictions on the use of automobiles and on indirect sources."). EPA's approach here actively defeats both of these policy goals.

By "grandfathering" the Avenal Permit, EPA is allowing the Project to be built even though there has been no demonstration that it will not cause or contribute to a violation of the 1-hour NAAQS for NO_2 or SO_2. If the plant is built and it is subsequently determined that violations are occurring as a result of the substantial emissions from this Project, the State and the local air district will be responsible for developing a plan for controlling emissions to meet the standard. CAA §§ 110, 172, 42 U.S.C. §§ 7410, 7502. Such a plan would require the adoption of reasonably available control technology requirements for existing major sources. CAA § 172(c)(1), 42 U.S.C. § 7502(c)(1). At that point, APC could be required to address these emissions in a much less cost-effective manner through the retrofit of the facility. Thus, "grandfathering" the Permit from Section 165's requirements, and ignoring the foreseeable pollution problems that the PSD program is specifically designed to avoid, clearly undermines the "prevention" purpose of the PSD program and the policy choices made by Congress.

In its Responses to Comments, EPA claims that the legislative history of the PSD program "illustrates Congressional intent to avoid a moratorium on construction and delays in permit processing." RTC at 59. Specifically, EPA cites a single sentence from a House Report which notes that "to prevent disruption of present and planed sources, the committee has

authorized extensive 'grandfathering' of both existing and planned sources." *Id*. (quoting H.R. Rep. No. 95-294 at 171). However, this statement only supports Sierra Club's argument by addressing the specific exemptions that Congress provided when it enacted the PSD permitting program and affirming the narrow scope of those exemptions. *See* H.R. Rep. 95-294 at 171-72. To the extent that EPA is implying that Congress was willing to forgo air quality protection in favor of avoiding disruption, that notion is specifically rejected by the express language of Section 160(3), which requires that economic growth occur in a manner consistent with the preservation of clean air resources. CAA § 160(3), 42 U.S.C. § 7470(3).

The statutory language of Clean Air Act Section 165(a) is plain – a new source cannot cause or contribute to a violation of any NAAQS and must be subject to BACT for all regulated pollutants. Unless the source can meet these criteria, it may not be built. The statute provides no authority for EPA to waive these requirements except in limited circumstances set forth in the Act. Because Congress has spoken directly on the matter, the Board must reject EPA's attempt to avoid these statutory requirements by "grandfathering" the Avenal Permit.

B. EPA's Interpretation of the Clean Air Act's PSD Program Requirements is Unreasonable.

As discussed above, the plain language of the Clean Air Act does not allow EPA to "grandfather" the Avenal Permit from the express statutory requirements of the PSD permitting program. Yet even if the Act were ambiguous in this regard, which it is not, EPA's interpretation cannot constitute a permissible construction of the statute. *Chevron*, 467 U.S. at 843 (explaining that if a court determines that Congress "has not directly addressed the precise question at issue," it then moves to Step 2 of the analysis to determine whether the agency's interpretation "is based on a permissible construction of the statute"); *see also Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1116 (9th Cir. 2006), *cert. denied*, 549 U.S. 1338 (2007) ("This test

is satisfied if the agency's interpretation 'reflects a plausible construction of the statute's plain language and does not otherwise conflict with Congress' expressed intent.'") (quoting *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)).

EPA's "grandfathering" approach conflicts not only with Congress' expressed intent regarding the PSD permitting program, but also with the Agency's own prior interpretations of the requirements in Section 165. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view") (internal quotations omitted); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991) ("As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."). EPA's alleged equitable power to "grandfather" the Project in the absence of any statutory authority has no basis in the Clean Air Act or any relevant case law and must be rejected by the Board.

1. EPA's attempt to resolve an alleged "conflict or tension" in Section 165 is unreasonable and contrary to the purposes of the PSD program and EPA's own prior interpretation of the Act.

In its Responses to Comments, EPA asserts that Section 165 is ambiguous because there is an alleged "conflict or tension" where the agency has not completed action on a permit within one year as set forth in Section 165(c) and new standards under Section 165(a) have become applicable during that time period. RTC at 54-55 (emphasis added); *see also* SSB at 10. Not only has this faulty line of reasoning already been rejected by the Supreme Court in *General Motors*, *see supra* at Part I.A.1, but EPA's proposed solution of "grandfathering" the Avenal Permit from applicable legal requirements clearly undermines the purposes of the PSD program of preventing air pollution problems from occurring and requiring appropriate controls to be

included at the outset of facility construction. *Id*. at Part I.A.2. Simply put, EPA's proposal to address a statutory violation of the Act (*i.e.*, its own delay in acting on a permit under Section 165(c)) by causing *additional violations* of the Clean Air Act (*i.e.*, failure to meet the requirements in Section 165(a)) cannot constitute a reasonable interpretation of the statute.

In addition, EPA's "grandfathering" approach is contrary to the Agency's long held views regarding the requirements of Section 165. As noted above, EPA long ago rejected an approach that would have used the date an application was complete, rather than the date of permit issuance, as the basis for determining Section 165's applicability because "it would fail to give adequate expression to the interests behind section 165, especially the goal of protecting air quality." 45 Fed. Reg. at 52,683. When EPA has regulated pollutants or issued new or revised NAAQS since that time, it has consistently stated that any PSD permit application must meet the standards in effect when the permit is issued. *See, e.g.*, 75 Fed. Reg. 17,004, 17,018-21 (Apr. 2, 2010) (regulation of GHGs) ("in the absence of an explicit transition or grandfathering provision in the applicable regulations…, each PSD permit issued on or after January 2, 2011 would need to contain provisions that satisfy the PSD requirements that will apply to GHGs as of that date); 73 Fed. Reg. 28,321, 28,340 (May 16, 2008) (revised $PM_{2.5}$ standard) ("section 165 of the CAA suggests that PSD requirements become effective for a new NAAQS upon the effective date of the NAAQS"); 70 Fed. Reg. 65,984, 66,043 (Nov. 1, 2005) (same); 52 Fed. Reg. 24,672, 24,684 (July 1, 1987) (revised PM_{10} standard) (finding that "[w]hen the revised NAAQS for particulate matter becomes effective, each PSD application subject to EPA Part 52 regulations, and not eligible to be grandfathered under today's action, must contain a PM10 NAAQS analysis").

EPA also recently issued a memorandum regarding the applicability of PSD requirements to new or revised NAAQS following the issuance of the new 1-hour NO_2 standard. Memo from

Stephen D. Page, Director, OAQPS, EPA, to EPA Regional Air Division Directors (Apr. 1, 2010) ("Page Memo") (attached hereto as Exhibit 16). As EPA explained:

> 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, 614-16 (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.

Id. at 2. EPA concluded that, in the absence of any grandfathering provision adopted by regulation, "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." *Id*. at 3. In the district court litigation brought by APC, EPA again reaffirmed its position that it 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*." Exhibit 8 at 19 (emphasis added). Thus, EPA's decision to "grandfather" the Avenal Permit from Section 165 directly conflicts with its own interpretation of these statutory requirements and is not entitled to deference. *INS v. Cardoza-Fonseca*, 480 U.S. at 446 n.30.

2. EPA's claim that it possesses "equitable" authority to grandfather the Avenal Permit from CAA Section 165 is fundamentally flawed.

Having no statutory authority to "grandfather" the Avenal Permit from the plain statutory requirements of the Clean Air Act, EPA instead attempts to invent new "equitable" authority based on shoddy legal analysis of a single federal district court case from 50 years ago. SSB at

9-10; RTC at 61-65.[4] In so doing, EPA ignores a long line of authority that has addressed this very issue, including decisions by this Board. EPA's analysis is based on a faulty understanding of the fundamental powers of the various branches of government and cannot be sustained.

Courts have consistently recognized that an agency is required to apply the law in effect at the time it renders a decision on a permit application. *See Ziffrin v. United States*, 318 U.S. 73, 78 (1943) (where governing statute is amended after applicant submits his permit application but before agency renders its decision, the agency is "required to act under the law as it existed" at the time of its decision rather than at the time of application). *Ziffrin* involved a challenge to an order issued by the Interstate Commerce Commission denying a company's application for a permit to continue contract carrier obligations. *Id*. at 74. After the company submitted its application but before the agency issued its decision, Congress amended a provision of the statute governing such permits. *Id*. The Court held that, even where the law changes after an applicant files a permit application, the Commission "was required to act under the law as it existed" when it entered its decision on the application. *Id*. at 78. Otherwise, reasoned the Court, "the administrative body would issue orders contrary to the existing legislation." *Id*.

As noted above, EPA has consistently applied this basic rule. Page Memo at 2; *see In re Phelps Dodge Corp.*, 10 E.A.D. 460, 478 n.10 (EAB 2002) (holding that the permit issuer is obligated "to apply the . . . statute and implementing regulations in effect at the time the final permit decision is made" or the standards "in effect at the time of initial permit issuance"); *In re Shell Gulf of Mexico, Inc.*, OCS Appeal Nos. 10-01 through 10-04, slip op. at 9, 67 n.76 (EAB, Dec. 30, 2010) (holding that permit must meet emission limitation standards in effect when EPA

[4] In its Responses to Comments, EPA claims that this "grandfathering action is not based on assertion of equitable power to disregard or override law, but rather on an interpretation of our statutory authority." RTC at 62. However, EPA fails to cite any statutory authority for its approach, relying instead on the case law addressed below applying the equitable principle of *actus curiae neminem gravabit. Id.* at 62-63.

issues its final permit decision); Exhibit 8 at 19 ("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") (citing *Ziffrin*).

Undeterred by its prior pronouncements, EPA now contends that the Latin maxim *actus curiae neminem gravabit*, as applied in the Supreme Court's 1880 decision *Mitchell v. Overman*, 103 U.S. 62 (1880), provides judicial support for EPA's "grandfathering" approach. *See* SSB at 9-10; RTC at 61-65. Translated to "an act of the court shall prejudice no one," this maxim stands for the principle that a *court* has the power to enter a judgment retrospectively when the *court* is responsible for creating a delay in rendering the judgment. *See Mitchell*, 103 U.S. at 64-65. EPA argues that this principle applies equally to administrative agencies and "supports the view that an administrative agency has the power in limited and compelling circumstances to issue a permit decision based on the legal requirements that were applicable at the time the Agency should have taken action." SSB at 10; *see* RTC at 62.

EPA's attempt to rely on *Mitchell* represents a basic misunderstanding of the inherent powers of the government branches. *Mitchell* speaks only to the powers of the judicial branch. *See Mitchell*, 103 U.S. at 64 (noting that because no statute applies, the case "must…be determined by the rules of practice which obtain in courts of justice in virtue of the inherent power they possess"). Article III of the United States Constitution vests the judicial branch with certain inherent powers and duties, including the duty "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803); U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). It has long been understood that "[c]ertain implied

powers must necessarily result to our Courts of justice from the nature of their institution." *United States v. Hudson*, 11 U.S. 32, 34 (1812). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962). The concept of *actus curiae neminem gravabit* is itself founded on this inherent judicial authority to administer justice. *See Mitchell*, 103 U.S. at 65 ("In such cases, upon the maxim *actus curiae neminem gravabit*,…it is the duty of the court to see that the parties shall not suffer by the delay.").

Courts have long held that administrative agencies do not possess the same inherent equitable powers or authority as Article III courts. *See N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) ("The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III"). An administrative agency is "a creature of statute." *Soriano v. United States*, 494 F.2d 681, 683 (9th Cir. 1974). An agency "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). Thus, "if there is no statute conferring authority, a federal agency has none." *Michigan*, 268 F.3d at 1081; *see also Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374-75 (1986) ("An agency may not confer power upon itself."). EPA cannot compensate for its lack of statutory authority by relying on a Latin maxim or a judicial opinion discussing inherent judicial powers to provide itself with "equitable" authority not granted by statute.

In fact, EPA cites only one case for the proposition that *actus curiae neminem gravabit* might be available to an administrative agency. *See* SSB at 10; RTC at 62-64 (citing *Application*

of Martini, 184 F. Supp. 395, 401-02 (S.D.N.Y. 1960)). Yet EPA's reliance on this single district court case is weak and misplaced. *Martini* involved an application for naturalization in accordance with Public Law 114. *See id*. at 398. The petitioner submitted his application but, because of a delay by the agency, was issued a warrant of arrest and ordered deported. *Id*. The agency concluded that naturalization was barred by Section 318 of the Immigration and Nationality Act, which automatically denies naturalization to applicants against whom a deportation order has been issued. *Id.* at 398-99. The court held, however, that Section 318 did not apply to applicants under Public Law 114 and that Congress could not have intended the applicant to lose its rights under Public Law 114 as a result of agency delay. *Id*. at 399-401.

By allowing the applicant to take the necessary steps to attain naturalization, the court in *Martini* in no way permitted the agency to violate any statutory mandates. *See id*. at 399-400. The court reconciled its decision based on an analysis of what Congress intended. Even if EPA possessed equitable powers available only to the judiciary, EPA's use of that authority to waive plain requirements of the Act cannot be reconciled with *Martini*. Congress's intent and purposes in Section 165 of the Clean Air Act are clear: a source cannot be built if it fails to demonstrate that it will not cause or contribute to a violation of any NAAQS or fails to apply BACT for all regulated pollutants. Nothing in *Martini* suggests that equitable considerations can be used to frustrate these express statutory requirements.

The remaining portion of the opinion, on which EPA's proposal relies, is dicta discussing the principle of *actus curiae neminem gravabit* and suggesting that the applicant would be entitled to take the oath of allegiance *nunc pro tunc*. *Id*. at 401-02. The court, however, never stated or implied that an administrative agency has the power to apply this principle or the authority to remedy its own delay by violating additional statutory requirements.

EPA's final thin reed of support is based on *dicta* from a Second Circuit opinion, which the Agency contends confirms "the viability of the principle applied in the *Martini* case where there has been a significant delay by an administrative agency." SSB at 10; *see* RTC at 62-63 (citing *Fassilis v. Esperdy*, 301 F.2d 429 (2d Cir. 1962)). In *Fassilis*, a foreign crewman filed an application for legal permanent resident status under Section 245(a) of the Immigration and Nationality Act after arriving in the U.S. and marrying an American citizen. *Fassilis*, 301 F.2d at 430. After the application was filed but before the ultimate administrative decision on the application, Congress amended Section 245 to limit the discretion of the Attorney General in adjusting the immigration status of an alien crewman. *Id*. at 431. The Second Circuit held, following *Ziffrin*, that the statutory amendment applied and required the denial of the application. *Id*. at 431-33. The court rejected the applicant's assertion that the maxim *actus curiae neminem gravabit* applied in this situation, given that "there were no substantial delays on the part of the administrative agency which operated to deprive the applicants of any right to which any of them was entitled." *Id*. at 434.

EPA incorrectly characterizes the cases cited in *Fassilis*, which it claims the Second Circuit "did not question," in the same way it mischaracterizes *Martini*. *See* SSB at 10. None of the cases referenced in *Fassilis* recognizes the power of an administrative agency to violate statutory mandates, nor do any of these cases speak to the power of an agency to remedy its own delay. Indeed, as EPA argued in response to APC's deadline challenge, the case law, starting with *Ziffrin*, says the exact opposite – that the agency is to comply with the law in effect at the time of the final decision. *See* Exhibit 8 at 19.

In sum, EPA's "grandfathering" approach for the Avenal Permit cannot constitute a permissible construction of the statute given its direct conflict with Congress' expressed intent

regarding the purposes of the PSD permitting program and the Agency's own prior interpretations of Section 165. In addition, EPA's claim of equitable power to "grandfather" the Project lacks any legal basis. Whether under *Chevron* Step 1 or Step 2, the Board must reject EPA's erroneous interpretation of the Clean Air Act.

II. Even if EPA Had Authority to "Grandfather" the Avenal Permit, Such a Waiver of Section 165's Requirements for the Project is Unwarranted.

A. EPA did not Cause Substantial Delay that Deprived APC of Any Right to which it was Entitled, as Required by *Martini* and *Fassilis*.

Relying on the decisions in *Martini* and *Fassilis*, EPA has attempted to craft an equitable test that would allow it to "grandfather" PSD permits from the statutory requirements of the Clean Air Act where EPA has substantially delayed an application decision and allegedly deprived an applicant of a procedural right. *See* SSB at 10; RTC at 64-65. However, EPA fails to demonstrate the facts necessary to support the application of such a standard here, even if one were permitted. First, EPA never establishes that "there were substantial delays on the part of" the Agency. *See Fassilis*, 301 F.2d at 434 (rejecting application of maxim *actus curiae neminem gravabit* when "there were no substantial delays on the part of the administrative agency which operated to deprive the applicants of any right to which any of them was entitled."); *Martini*, 184 F. Supp. at 402 (noting that maxim *actus curiae neminem gravabit* may apply in cases of "delay caused by administrative inaction"). On the contrary, in briefing supported by declarations made under penalty of perjury in the APC deadline litigation, EPA claimed that it:

> [W]orked 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 Headquarters expended significant effort in an attempt to help [Avenal] identify what it needed to do to show compliance with the revised NO2 NAAQS.

Def's Resp. to Pl.'s Supp. Br. Regarding Remedy, Case No. 1:10-cv-00383 (RJL), at 18 (filed Mar. 1, 2011) (attached hereto as Exhibit 13). Indeed, the record demonstrates that the bulk of the delay was the result of the Section 7 consultation required under the federal Endangered Species Act, 16 U.S.C. § 1536, which was not completed until August 9, 2010. *See* Exhibit 8 at 10-11; *id*. at 16 ("[W]hile EPA regularly contacted FWS about the status of the Biological Opinion, EPA does not control the timing of FWS's issuance of its Biological Opinions."). EPA provides no legal basis for its assertion that it "may be appropriate" to grandfather the Avenal Permit "when there has been a substantial delay by…any government agency or multiple agencies that are required to take steps to approve an applica[tion]." RTC at 64-65. Given that the "delay" here was not within the control of EPA, there is no basis for treating it in the same way as the delay in *Martini* and *Fassilis*.

Nor can EPA claim that the delay has "operated to deprive the applicants of any right to which any of them was entitled." *See Fassilis*, 301 F.2d at 434. As EPA has itself recognized, APC has no right to comply with less protective air quality requirements based on the date of its permit application. *See* Exhibit 8 at 20 ("[Avenal] 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 [Avenal] is entitled to a decision on its permit application on the basis of the laws and regulations in effect at the time the permit application was submitted or deemed complete, or indeed that [Avenal] is necessarily entitled to have EPA grant, rather than deny, its application."); *see also American Corn Grower Ass'n v. EPA*, 291 F.3d 1, 12 (D.C. Cir. 2002) (agreeing that "nothing in the CAA provides for issuance of a PSD permit as a matter of right").

In its Responses to Comments, EPA "agrees that a permit applicant does not obtain a right to a PSD permit after the one-year deadline [in] the Act has passed, and that a failure to meet this deadline by EPA does not automatically cut off the obligation to comply with the CAA." RTC at 65. Although EPA admits that APC's failure to meet the requirements in Section 165 provides ample grounds to deny its permit application, it instead claims that denying the Permit in these "extraordinary circumstances" would "frustrate Congressional intent." *Id*.

This claim is absurd and suggests that Congress was more concerned with quick permit review than protection of air quality. Yet nothing in the Act supports EPA's assertion. As discussed above, EPA's "grandfathering" approach in this case is contrary to the express statutory purposes that Congress identified when it established the PSD permitting program. *See supra* at Part I.A. In addition, APC's ability to pursue a permit has not been denied in any way. It is still free to submit the required demonstrations and attempt to show how the Project will comply with the requirements of the Clean Air Act. *Cf. Martini*, 184 F. Supp. at 400-01 ("The filing of the preliminary form…was all that petitioner was able or entitled to do. After that petitioner could only wait to be called to take the oath of allegiance and this was entirely dependent on the speed of the administrative processes of the Naturalization Service."). EPA cannot reasonably claim that the test in *Martini* and *Fassilis* has been met where no rights have been denied as a result of a delay.

B. Complications with Modeling the 1-Hour NO_2 NAAQS do not Provide Any Basis for "Grandfathering" the Avenal Permit.

EPA next tries to justify "grandfathering" the Avenal Permit based on alleged "complications" with the implementation of the 1-hour NO_2 NAAQS. SSB at 7-8; *see* RTC at 77-79. EPA's careful wording of this discussion belies the sincerity of its justification. EPA first states in general language that "some applicants" seeking PSD permits have experienced

unforeseen challenges, and that "many permit applicants" need to conduct a cumulative air quality impact assessment where additional refinements in background concentrations "may also be necessary." SSB at 7-8. Yet without explaining how any of these concerns relate to the Avenal Permit, EPA asserts that "[d]ue in part to these complications," APC's modeling efforts "produced unanticipated delays in the review of the permit application... ." *Id*. at 8. In its Response to Comments, EPA admits that the only "complication" APC experienced was the fact that the statutorily required demonstration "consumed a substantial amount of time," and was not that "the analysis is impossible or that [APC] is unable to complete such an analysis." RTC at 77.

Yet even if such time-consuming "complications" could justify waiving statutory requirements, which they cannot, EPA has not made its case here. While "some applicants" have faced problems, others have been able to model 1-hour NO_2 concentrations in their PSD permit applications including Sunflower Electric Holcomb Station in Kansas, We Energies – Biomass Fueled Cogeneration Facility in Wisconsin, Mississippi Lime Kiln in Illinois, and Detroit Edison in Michigan. 2011 Comments at 11. EPA provides no basis for the conclusion that APC could not have completed its modeling demonstration or even what "part" of the delay was due to modeling complications and what "part" was due to foot-dragging and ineptitude by APC. *See* RTC at 79 (describing EPA's approval of modeling methodology that "may be used successfully to complete an analysis to demonstrate that a proposed facility will not cause or contribute to a violation of the 1-hour NO_2 standard").

Indeed, before EPA invented this justification for "grandfathering" the Avenal Permit, Assistant Administrator Gina McCarthy and Region 9's Air Division Director Deborah Jordan filed declarations under penalty of perjury claiming that "both Region 9 and Headquarters

expended significant effort in an attempt to help [Avenal] identify what it needed to do to show compliance with the revised NO_2 NAAQS." Exhibit 13 at 18. EPA's *post hoc* attempt to excuse the 1-hour NO_2 modeling that it had pushed Avenal to conduct is without record support. To cite unsubstantiated "complications" provides no justification for waiving these statutory requirements.

C. EPA Cannot "Grandfather" the Avenal Permit from a BACT Demonstration for CO_2 Emissions that were Subject to Regulation Prior to March 18, 2009.

As described above, the PSD permitting program requires the use of BACT to limit emissions "for each pollutant subject to regulation under [the Act]." CAA §§ 165(a)(4), 169(3), 42 U.S.C. §§ 7475(a)(4), 7479(3). Even if EPA were to apply only those emission standards in effect on March 18, 2009 (*i.e.*, one year after EPA declared APC's permit application to be complete), the Avenal Permit must still demonstrate the application of BACT to limit CO_2 emissions.[5] This is because CO_2 was a pollutant "subject to regulation" as of March 18, 2009 – and indeed since 1993, when CO_2 monitoring and reporting regulations under the Act became effective.

EPA itself provided a "final" interpretation of the phrase "subject to regulation" as early as 1978 when it stated that "subject to regulation under this Act" means any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type. 43 Fed. Reg. 26,388, 26,397 (June 19, 1978). As EPA is well aware, there are multiple examples of regulations in 40 C.F.R. Subchapter C that specifically apply to CO_2. Specifically, in the 1990 Amendments to the Clean Air Act, Congress added Section 821 requiring EPA to promulgate regulations for the monitoring and reporting of CO_2 emissions. *See* 42 U.S.C. § 7651k note 3, Pub. L. 101-549, 104 Stat. 2699 (1990). EPA promulgated such regulations in 1993 by

[5] The Project is expected to emit 1.71 million metric tons of CO_2 per year. *See* 2009 Comments at 1.

amending Subchapter C of Title 40. *See* 58 Fed. Reg. 3,590 (Jan. 11, 1993); 40 C.F.R. §§ 75.1(b), 75.10(a)(3), 75.33, 75.57, 75.60-64.

In *Deseret*, the Board rejected EPA's position that it had no authority to impose a CO_2 BACT limit because the Agency "historically interpreted the term 'subject to regulation under the Act' to describe pollutants that are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." Slip op. at 35-54. The Board specifically noted that "the 1978 Federal Register Notice augers in favor of a finding that" CO_2 is subject to regulation under the Act. *Id*. at 41. Furthermore, the Board rejected EPA's argument that the regulations promulgated in 1993 did not mean that CO_2 was "subject to regulation under the Act" because Section 821 is not part of the CAA. *Id*. at 55-63. The Board remanded the PSD permit at issue in that appeal to EPA to reconsider whether to impose a CO_2 BACT limit and to develop an adequate record for its decision. *Id*. at 64.

EPA now contends that CO_2 emission limitations did not become effective until January 2, 2011 (and that Avenal therefore can avoid them as a result of the proposed grandfathering) based on its rulemaking entitled "Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs," 75 Fed. Reg. 17,004 (Apr. 2, 2010) ("Reconsideration"). SSB at 8; RTC at 25, 66. In the proposed rulemaking preceding the Reconsideration, EPA claimed that a pollutant does not become "subject to regulation" through monitoring and reporting regulations, but only through some other regulation under the Act promulgated by EPA on a nationally applicable basis that actually controls or restricts the pollutant's emissions. 74 Fed. Reg. 51,535 (Oct. 7, 2009) ("Proposed Reconsideration"). EPA then changed its definition once more by adding that, even after the promulgation of its rulemaking limiting CO_2 emissions from passenger vehicles and light duty

trucks ("Vehicle Rule") in April 2010, CO_2 would still not be "subject to regulation" until the Vehicle Rule had "taken effect" by affecting the "regulated activity" (rather than upon the Vehicle Rule's promulgation or its effective date). 75 Fed. Reg. at 17,016. EPA applied this otherwise incomprehensible definition to CO_2 emissions by announcing that the Vehicle Rule would "take effect" only when the regulated activity (allegedly only the sale of compliant vehicles but not their manufacture) would be affected: on January 2, 2011, the first day when yet another regulation permits vehicles built in compliance with the Vehicle Rule the year before to be sold in commerce. *Id.* at 17,020.

EPA here provides no justification for its increasingly illogical statutory interpretations other than to offer that the "[p]arties that contend EPA's interpretation is arbitrary and capricious had the opportunity to raise that issue in court challenges to the action that are currently pending before the United States Court of Appeals for the District of Columbia Circuit." RTC at 66. In fact, the Petitioners here have brought such a challenge, and the relevant petitions are currently being held in abeyance. *See, e.g., Center for Biological Diversity v. EPA*, Case No. 10-1115 (D.C. Cir.) (filed May 28, 2010). In any case, these strenuous contortions do obvious violence to the straightforward statutory language in the CAA and undermine the fundamental purposes of the PSD permitting program. Under EPA's reading, not even the adoption of a new NAAQS would create a "pollutant subject to regulation" until actual control measures related to the standard become effective. Given the Board's prior admonitions to EPA on this very issue in *Deseret*, it should not allow EPA to use this unsupported interpretation to avoid the application of BACT for CO_2 emissions from the Project.

III. The Avenal Permit Fails To Consider Less Harmful Alternatives to the Project.

Section 165(a)(2) of the Clean Air Act provides that a PSD permit may not 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, *alternatives thereto*, control technology requirements, and other appropriate considerations." CAA § 165(a)(2), 42 U.S.C. § 7475(a)(2) (emphasis added); *see* CAA § 160(5), 42 U.S.C. § 7470(5) (requiring permit decisions to be made only after careful consideration of all consequences of the decision and "after adequate procedural opportunities for informed public participation in the decisionmaking process"). The BACT determination under Section 165(a)(3) also requires the consideration of alternatives based on "energy, environmental, and economic impacts." *See* CAA § 169(3), 42 U.S.C. § 7479(3). Moreover, Congress exempted air permitting and other Clean Air Act actions from the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 *et seq*., on the grounds that the CAA's provisions would serve as a "functional equivalent" of an environmental analysis under NEPA. *See, e.g.*, 15 U.S.C. § 793(c)(1).

Given the refusal by EPA to analyze or assess the significant air quality impacts resulting from its approval of the Avenal Permit, it is imperative that EPA explore alternatives to the Project as required by the Act. In comments on the proposed Permit, Sierra Club asserted that EPA should consider, as an alternative, the fact that APC has applied for and received a minor source permit from the San Joaquin Valley Unified Air Pollution Control District ("Air District") that would reduce air emissions so as to avoid the necessity for a major source PSD permit. 2011 Comments at 21. Although this specific, feasible alternative to the proposed Project was developed by APC itself, EPA refused to consider the Project operating with a minor source permit as an alternative to the version that the Agency ultimately approved.

In its Responses to Comments, EPA states that the comments submitted by Sierra Club "merely identified the minor source project as a potential alternative" but "provided no analysis or additional information" regarding such an alternative, and that EPA is "not required to conduct further analysis" of alternatives suggested by commenters pursuant to the Board's decision in *In re Prairie State Generating Company*, PSD Appeal No. 05-05 (EAB Aug. 24, 2006). RTC at 100-101. In that case, however, the Board rejected petitioners assertion that the agency should have provided a detailed analysis of several suggested alternatives, finding that such "a rigorous and robust analysis would be time-consuming and burdensome for the permit issuer." *In re Prairie State Generating Company*, 13 E.A.D. 1, 33 (EAB 2006). Here, EPA is well aware of the minor source permit issued by the Air District and, in fact, has already submitted detailed comments on the draft permit. EPA Comments on Project Number C-1100751 for Avenal Power Center LLC (08-AFC-01) (Sept. 13, 2010) (attached hereto as Exhibit 14). APC has acknowledged the alternative's feasibility and the reduced emissions are clearly environmentally superior to the limits EPA has approved. EPA's refusal to consider this fully developed, less-polluting alternative is a plain violation of the Act.

IV. The Avenal Permit Fails to Properly Analyze Environmental Justice Concerns.

As this Board has previously held, pursuant to Executive Order 12898, "environmental justice issues must be considered in connection with the issuance of PSD permits." *Shell*, slip op. at 63-64; Executive Order 12898, 59 Fed. Reg. 7,629 (Feb. 16, 1994) ("each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."); *see also* CAA § 160(1), 42 U.S.C. § 7470(1) (noting purpose of PSD program is to protect public

health and welfare...notwithstanding attainment and maintenance of all national ambient air quality standards). In its Supplemental Statement of Basis, EPA attempts to address its initial failure to consider environmental justice issues. However, the analysis offered by the Agency is inadequate in substance and effect and, even in its incomplete state, shows that there will be disproportionate impacts on surrounding environmental justice communities.

The Avenal Energy Project is proposed to be built and operated in Avenal, California, just a few miles from the environmental justice communities of Avenal, Huron, and Kettleman City. SSB at 16-17. EPA admits that all three of these communities include "populations of interest" for the purposes of analyzing impacts on overburdened communities. *Id*. As EPA explains in its analysis, these communities have a very high (more than 85 percent) minority population, are highly linguistically isolated, and are predominately low-income. *Id*. at 17. Even without a new fossil fuel-fired power plant, residents in these communities are already disproportionately impacted by pollution sources and suffer from, among other harms, higher-than-average asthma rates, asthma-related hospitalizations, and emergency room visits.

In conducting its environmental justice analysis, however, EPA limits its examination of impacts from the Project to the effect that such emissions will have on the applicable NAAQS. For example, the Project is expected to emit 144.3 tons of NO_2 per year. Although EPA decided to "grandfather" the facility from demonstrating compliance with the newly adopted 1-hour NO_2 NAAQS, it recognized that the existing annual NO_2 standard alone was not sufficient to protect public health against adverse respiratory effects associated with short-term NO_2 exposure, especially in vulnerable groups such as children, the elderly, and asthmatics. *Id*. at 19; *see* 75 Fed. Reg. at 6483-90. As such, EPA attempted to examine whether short-term NO_2 exposure from the Project will disproportionately impact local communities. SSB at 26-27. Yet in doing

so, EPA ultimately determined that because the modeled results for the projected air emissions are below the new 1-hour standard, there will be no adverse impacts and the Agency has satisfied its environmental justice obligations.

In making this determination, EPA reviewed only limited data indicating that background levels of 1-hour NO_2 concentrations "in the general area" are not disproportionately high as compared with the rest of the State. *Id*. at 19, 26-27. This information comes from monitors in Hanford (50 ppb) and Visalia (61 ppb), approximately 28 and 46 miles away (respectively) from where the facility will be located. EPA also examined an assessment conducted by the local air district, which shows the maximum hourly NO_2 impact expected from the plant would be 44 ppb. *Id*. at 26-27.

Even assuming the concentrations of NO_2 in Hanford or Visalia adequately represent the background NO_2 levels in the Project vicinity, the added burden of the facility would exceed or very nearly exceed the new 1-hour NO_2 standard. However, it is not reasonable to assume that these background levels are representative of levels in the Project vicinity. As EPA points out, the largest source of NO_2 is from mobile sources and "NO_2 concentrations on or near major roads are appreciably higher than those measured at monitors in the current network…. [N]ear-roadway concentrations have been measured to be approximately 30 to 100% higher than those measured away from major roads." *Id*. at 19. Kettleman City is directly adjacent to Interstate 5 – one of the State's main commerce freeways – and therefore should reasonably be expected to have background levels of NO_2 of at least 65 ppb (30 percent greater than Hanford's 50 ppb background level). In a "worst case" scenario, background levels in Kettleman City could be 130 ppb (100 percent greater than Visalia's 65 ppb). Based on even the very limited information EPA provides in its environmental justice analysis, there is no reasonable basis for believing that

environmental justice communities in the vicinity of the Project will be protected from unsafe 1-hour NO_2 levels caused by emissions from the facility.

In its Responses to Comments, EPA does not challenge these numbers, but instead offers only that it has "insufficient information" regarding the short-term impacts of NO_2 emissions on these local communities. RTC at 91-92. EPA claims that these concerns can nonetheless be ignored because Executive Order 12898 does not require it "to reach a definitive determination that the Project will not result in disproportionate adverse impacts with respect to short-term NOx emissions." *Id.* at 87-88, 91. However, the explicit language of Executive Order 12898 requires EPA to "address[]…disproportionately high and adverse *human health or environmental effects* of its programs, policies, and activities *on minority populations and low-income populations*." 59 Fed. Reg. at 7,629 (emphasis added). EPA provides no support for the contention that it can simply disregard this requirement whenever it finds that "the available data are limited," RTC at 87, 91, especially given that the alleged "limited" data in this case resulted from EPA's own decision to "grandfather" the Project from the required demonstrations under Section 165. *See Shell*, slip op. at 63 n.71 (finding that EPA should "examine any 'superficially plausible' claim that a minority or low-income population may be disproportionately affected by a particular facility") (citations omitted).

More importantly, it is simply not the case that the impacts here are unknown. The record shows that these communities, as a result of background levels in the horribly polluted San Joaquin Valley, are already experiencing NO_2 exposures near the NAAQS limit. SSB at 18-19; 2011 Comments at 14-15. When these background levels are combined with the impacts that result from being located near a major highway and the additional impacts from this facility, it is no longer deniable that EPA's approval of this Project will disproportionately impact these

environmental justice communities. Simply put, this is the wrong project in the wrong location. EPA's refusal to address these issues cannot fulfill the directive of this Board in *Shell*. As such, APC's application for a PSD permit should be denied.

V. EPA's Changed Interpretation of the Statutory Requirements in Section 165 Must Be Subject to Notice and Comment Rulemaking.

In its Supplemental Statement of Basis, EPA acknowledges that it seeks to reverse various long-standing Agency interpretations regarding the requirements of CAA Section 165 and its own regulations announced in prior rulemakings. SSB at 11. As discussed above, these requirements derive from the plain language of the statute and therefore cannot be changed by EPA at all. Yet even assuming these requirements were open to reinterpretation, EPA's attempt to do so without undertaking notice and comment rulemaking under the APA, 5 U.S.C. § 553, is improper and illegal.

EPA acknowledges that public comment is necessary to reverse its prior pronouncements, but asserts that all that is required is an opportunity for public comment on the Avenal Permit decision. SSB at 11. This is directly contrary to the rule articulated in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). As that court explained, "Once an agency gives its regulations an interpretation, it can only change that interpretation as it would modify the regulation itself: through notice and comment rulemaking." *Id*. at 586; *see also* 5 U.S.C. § 553 (requiring notice and comment procedures for rulemaking). EPA's circulation of a Supplemental Statement of Basis on a specific PSD permit for public comment does not satisfy APA rulemaking requirements and thus is insufficient to revise the Agency's previously announced interpretations of Section 165 requiring compliance with the 1-hour NO_2 and SO_2 NAAQS and the application of BACT for CO_2.

In its Responses to Comments, EPA attempts to claim that this case presents "a unique and unforeseen circumstance" that allows it to act without notice and comment rulemaking to address this "particular, unforeseeable" situation. RTC at 67-68. However, EPA provides no evidence that the Avenal Permit actually presents such a unique situation. In fact, EPA's claim that it has the authority to waive statutory requirements is a legal conclusion, not a factual determination limited to this permit. Like the adjudication in *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 628 (5th Cir. 2001), where the court found the Agency's decision "was the result of a departure from previous [agency] practice" and where the agency "did not apply a general regulation to the specific facts of [the] case" but instead "established a new policy" and then applied that to the case before it and others, EPA here has acknowledged that this new interpretation will apply to many facilities.[6] As EPA admits in the Responses to Comments, it is "considering how the Agency should extend the grandfathering approach for the Avenal permit application to other proposed sources that may be experiencing circumstances similar to Avenal." RTC at 69.

EPA also contends that notice and comment rulemaking is not required because the Agency is not changing its "overall interpretation" of the CAA but only its recent interpretation in April 2010 "that the regulation at 40 CFR 52.21(k) applies to 'any NAAQS' in effect on the date a permit issued unless EPA has established an express exemption by rule to allow grandfathering." *Id.* at 69-71 (citing *MetWest Inc. v. Secretary of Labor*, 560 F.3d 506 (D.C. Cir. 2009)). As discussed above, EPA's attempt to "grandfather" the Avenal Permit is a clear departure from the plain language of Section 165 and EPA's long-standing interpretations

[6] *See* "EPA Plan to 'Grandfather' Key Air Permit Raises Major Legal, Policy Queries," Inside EPA (Mar. 4, 2011) (available at: http://insideepa.com/Inside-EPA/Inside-EPA-03/04/2011/epa-plan-to-grandfather-key-air-permit-raises-major-legal-policy-queries/menu-id-153.html) (reporting that "[Assistant Administrator] McCarthy noted EPA would apply the policy to other permits in similar situations but has not yet identified them, except to say it expects it will affect 10 to 20 permits nationwide") (attached hereto as Exhibit 15).

regarding those *statutory* requirements. There is simply no merit to EPA's contention that it is only changing the interpretation of a regulation that directly follows from this plain statutory language. *See* 40 C.F.R. § 52.21(k) ("The owner or operator of the proposed source…shall demonstrate that allowable emission increases from the proposed source…would not cause or contribute to air pollution in violation of (1) Any national ambient air quality standard in any air quality control region….").

In any event, EPA cannot avoid notice and comment rulemaking by claiming that it is simply altering a "recent interpretation" of the Part 52 regulations. RTC at 69-70. EPA's so-called "recent interpretation" in April 2010 that the phase "any NAAQS" covers any standards "in effect at the time of a final permit decision" is entirely consistent with the Agency's long-standing interpretation of these requirements. *See, e.g.*, 52 Fed. Reg. 24,672, 24,684 (July 1, 1987) (finding that "[w]hen the revised NAAQS for particulate matter becomes effective, each PSD application subject to EPA Part 52 regulations, and not eligible to be grandfathered under today's action, must contain a PM10 NAAQS analysis."). Industry groups and the public have long relied on EPA's uniform interpretation that Section 165 requirements apply at the time that a PSD permit is issued and are entitled to "know the rules by which the game is played." *See Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) (change to agency interpretation of exemption from regulatory requirements subject to APA notice and comment rulemaking). Consequently, the rule in *Paralyzed Veterans*, which was been expressly adopted by the Board, *see Deseret*, slip op. at 62-63, applies here and notice and comment rulemaking is required.[7]

[7] EPA's additional claim that "the United States Court of Appeals for the Ninth Circuit, which would have jurisdiction over any appeal of this permitting decision, does not follow the reasoning of *Paralyzed Veterans*," RTC at 71, is incorrect for two important reasons. First, nowhere in the case cited by EPA, *Miller v. California Speedway Corp*., 536 F.3d 1020, 1033 (9th Cir. 2008), did the Ninth Circuit decline to follow *Paralyzed Veterans*. Second,

CONCLUSION

For the foregoing reasons, Sierra Club respectfully requests that the Board remand the Avenal Permit to EPA and order EPA to issue a final decision by August 27, 2011 denying the Permit application.

Dated: June 27, 2011

Respectfully submitted,

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given that the final Avenal Permit was issued by the Assistant Administrator for Air and Radiation in Washington, D.C., as well as the broad-ranging issues involved in this Petition, it is not clear that the Ninth Circuit would have jurisdiction over any appeal of the decision.

LIST OF EXHIBITS

1. Prevention of Significant Deterioration Permit Number SJ 08-01, Amended (June 21, 2011)

2. Sierra Club Comments on Proposed Prevention of Significant Deterioration Permit for the Avenal Energy Project (Oct. 15, 2009)

3. Sierra Club Comments on Short-term NO_2 NAAQS and the Proposed Prevention of Significant Deterioration Permit for the Avenal Energy Project (Apr. 21, 2010)

4. Sierra Club Comments on Supplemental Statement of Basis: PSD Permit Application for Avenal Energy Project (Apr. 12, 2011)

5. EPA, Responses to Public Comments on the Proposed Prevention of Significant Deterioration Permit for the Avenal Energy Project (May 2011)

6. APC, Memo. in Support of APC's Motion for Judgment on the Pleadings Pursuant to Rule 12(c) and Request for Expedited Decision, Case No. 1:10-cv-00383 (RJL) (filed Aug. 25, 2010)

7. EPA, Declaration of Deborah Jordan, Case No. 1:10-cv-00383 (RJL) (filed Sept. 17, 2010)

8. EPA, 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) (filed Sept. 17, 2010)

9. EPA, Declaration of Regina McCarthy, Case No. 1:10-cv-00383 (RJL) (filed Jan. 31, 2011)

10. Memorandum from Lisa P. Jackson to Gina McCarthy (March 1, 2011)

11. EPA, Supplemental Statement of Basis, PSD Permit Application for Avenal Energy Project (March 4, 2011)

12. Memorandum Opinion, Case No. 1:10-cv-00383 (RJL) (filed May 26, 2011)

13. EPA, Def's Resp. to Pl.'s Supp. Br. Regarding Remedy, Case No. 1:10-cv-00383 (RJL) (filed Mar. 1, 2011)

14. EPA Comments on Project Number C-1100751 for Avenal Power Center LLC (08-AFC-01) (Sept. 13, 2010)

15. "EPA Plan to 'Grandfather' Key Air Permit Raises Major Legal, Policy Queries," Inside EPA (Mar. 4, 2011)

16. Memo from Stephen D. Page, Director, OAQPS, EPA, to EPA Regional Air Division Directors (Apr. 1, 2010)

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

Pursuant to the Board's April 19, 2011 Order Governing Petitions for Review of Clean Air Act New Source Review Permits, I hereby certify that this Petition for Review, including all relevant portions, contains 13,850 words.

Dated: June 27, 2011

/s/ George Torgun
George Torgun

CERTIFICATE OF SERVICE

I hereby certify, pursuant to the Rules of the Environmental Appeals Board of the U.S. Environmental Protection Agency, that on June 27, 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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