

AVENAL POWER CENTER, LLC,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION

AGENCY, *et al.*,

Defendants.

MEMORANDUM OPINION

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

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concedes could take anywhere from six to eighteen months, or longer, to complete. In effect, the EPA contends that this subsequently-enacted regulatory review process *trumps* Congress' one-year statutory deadline and, as such, the most that this Court can do is require the agency to issue an appealable interim decision within the one-year statutory period. Upon consideration of the parties' pleadings, including parties' supplemental briefs on this question, oral argument, and the record herein, the Court disagrees with the defendants' position and, therefore, GRANTS, in part, plaintiff's Motion for Judgment on the Pleadings, and DENIES defendants' Motion for Summary Judgment. Accordingly, it is ORDERED that the EPA Administrator issue a final, non-appealable, agency action, either granting or denying plaintiff's permit application, no later than August 27, 2011.¹

BACKGROUND

Avenal Power Center, LLC currently seeks to develop and build a state of the art 600 megawatt natural gas-fired power plant, the Avenal Energy Project. *Jt. Stips.* ¶¶ 1-3, *Jt. Stmt. Re. Case Mgmt. and Sched., Ex. 1* [#11]. To this end, plaintiff submitted, in February 2008 to the EPA, a Prevention of Significant Deterioration ("PSD") permit application. The application was deemed complete on March 19, 2008. *Id.* ¶¶ 3-5.

Almost *two years later*, however, after an elaborate and exhaustive EPA administrative process, which included a notice and comment period and public hearing, the plaintiff

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

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

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

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

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

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

ANALYSIS

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

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

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

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

It is axiomatic that an act of Congress that is patently clear and unambiguous – such as this requirement in the CAA² – cannot be overridden by a regulatory process created for the convenience of an Administrator, no matter how much notice and comment preceded its creation. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”); *Ernst & Ernst v. Hochfelder*, 425 U. S. 185, 213-14 (1978) (“The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.” (internal quotations omitted)). Administrators of regulatory agencies derive their power from Congress's statutory enactments – not from their own discretionary regulatory pronouncements that are drafted for their assistance and convenience. *See North*

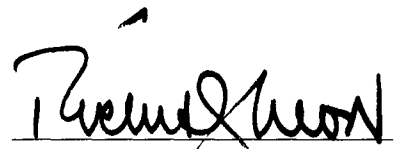
² The EPA has labored mightily to convince this Court that the temporal requirement enacted by Congress is somehow ambiguous and, therefore, this Court should defer to its interpretation under *Chevron*. *See* Defs.' Resp. to Pl.'s Supp. Br. at 13-17. Horsefeathers! The EPA's self-serving misinterpretation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

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

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

CONCLUSION

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



RICHARD J. LEON
United States District Judge