

**FINDING A DOG THAT WILL HUNT: SOLUTIONS FOR  
INTERAGENCY PERMIT CONSULTATION DELAYS RELATED  
TO PREVENTION OF SIGNIFICANT DETERIORATION  
PERMITS IN THE WAKE OF AVENAL POWER CENTER V.  
EPA**

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INTRODUCTION

The Clean Air Act (CAA) contains numerous requirements and permitting procedures to protect the nation’s ambient air.<sup>1</sup> The Prevention

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of Significant Deterioration (PSD) program is an essential component of the CAA, which is designed to protect and sustain ambient air quality in numerous “attainment” areas throughout the United States where air quality is better than required by applicable standards, such as federal reserves, or bring nonattainment areas into compliance with National Ambient Air Quality Standards (NAAQS).<sup>2</sup> The goals of the PSD program include promoting and insuring that economic growth through industrial and energy development in such areas is consistent with good air quality through careful evaluation and review of any increased emissions.<sup>3</sup> This note will argue that the current procedures and practices under the CAA, Endangered Species Act (ESA), and Administrative Procedure Act (APA) have resulted in permitting and economic inefficiency; Congress, the President, the Environmental Protection Agency (EPA), the Department of Interior (DOI), and the United States Fish and Wildlife Service (USFWS) must quickly move to enter into legislation, an order or agreement that obligates compliance with the PSD statutory deadlines in the CAA.

The International Energy Agency (IEA) has projected a forty percent increase in global electricity demand “between 2009 and 2035.”<sup>4</sup> The IEA also found that “fossil fuels (oil, coal and natural gas) remain the dominant sources of energy in 2035” under all projections.<sup>5</sup> Particularly, “[n]atural gas is projected to play an increasingly important role in the global energy economy. It is the only fossil fuel for which demand rises” in every scenario studied by the IEA.<sup>6</sup> Demand for natural gas from the power sector will make up the “largest share of global gas demand” in 2035.<sup>7</sup> While renewable energy sources are projected to expand rapidly from now until 2035, “in absolute terms total demand is still not close to the level of any single fossil fuel in 2035.”<sup>8</sup> Thus, natural gas generation, and expansion of current infrastructure and capacity will need to grow rapidly in the next

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1. See, e.g., Clean Air Act, 42 U.S.C. §§ 7407–7411, 7661–7661F (2006) (setting forth the air quality control regions, National Primary and Secondary Ambient Air Quality Standards, Performance Standards for New Stationary Sources of air pollution, and permitting requirements for new and modified stationary sources under Title V of the Act).

2. 42 U.S.C. § 7470.

3. *Id.*

4. INT’L ENERGY AGENCY, WORLD ENERGY OUTLOOK 2011, at 69 (2011) [hereinafter ENERGY OUTLOOK], available at [http://www.eia.gov/forecasts/aeo/pdf/0383\(2011\).pdf](http://www.eia.gov/forecasts/aeo/pdf/0383(2011).pdf).

5. *Id.* at 71.

6. *Id.* at 155.

7. *Id.* at 160.

8. *Id.* at 69.

twenty years to effectively and responsibly meet the consumption demand needs of the future.

In the United States, natural gas consumption is projected to grow “by about 0.6 percent per year from 2009 to 2035, as the large amount of shale gas resources . . . keeps natural gas prices from 2009 through 2035 below the levels seen from 2005 to 2008.”<sup>9</sup> Additional new electric generating capacity in the United States through 2035 will be predominately from natural gas and renewable energy sources.<sup>10</sup> Natural gas fired power plants will account for approximately sixty percent “of capacity additions between 2010 and 2035 . . . compared with 25 percent for renewables, 11 percent for coal-fired plants, and 3 percent for nuclear.”<sup>11</sup> Further, concern about greenhouse gases (GHGs) affects the addition of new natural gas and coal capacity.<sup>12</sup> If GHG emissions are subject to limitations, natural gas along with renewables will become the dominant sources of new capacity in the United States between 2011 to 2035.<sup>13</sup> Thus, natural gas is projected to be one of the most important sources of fossil fuel electric generation before renewable energy becomes market viable or captures a large percentage of the electric resource mix. To meet the rise in demand globally, and in the United States, developers, EPA, federal resource agencies, and environmental advocates will have accept the reality that new fossil fuel generation, mainly natural gas, must be permitted and brought online in the next twenty five years to meet projected energy demand and promote cleaner air quality.

In the past, EPA has failed to issue PSD permits within its one-year statutory deadline—as defined in *Avenal Power Center v. EPA*—on several occasions.<sup>14</sup> In 2011 developers of the Avenal Power Center, a proposed natural gas fired power plant located in California, sued EPA for failing to issue a PSD permit within two years of the agency determining that the Center’s application was complete.<sup>15</sup> EPA argued at trial before the United States District Court for the District of Columbia that part of its delay in issuing a final decision on the permit was due to a failure to receive a final

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9. ENERGY INFO. AGENCY, ANNUAL ENERGY OUTLOOK 63 (2011), *available at* <http://www.eia.gov/forecasts/archive/aeo11/index.cfm>.

10. *Id.* at 74.

11. *Id.*

12. *Id.* at 87.

13. *Id.*

14. *See* U.S. ENVTL. PROT. AGENCY, NSR 90-DAY REVIEW BACKGROUND PAPER 7 (2001), *available at* <http://www.epa.gov/NSR/documents/nsr-review.pdf> (showing that while the average timeframe for a decision from EPA, not including reviews before the EAB, have averaged between seven and nine months in the past, the range varied as much as 1.5–35 months, but more recently cut to between three and twelve months).

15. *Avenal Power Ctr., LLC v. U.S. Env'tl. Prot. Agency*, 787 F. Supp. 2d 1, 2 (D.D.C. 2011).

biological opinion under the Endangered Species Act regarding the proposed project from the USFWS.<sup>16</sup> The district court held that EPA must comply with the statutory deadline set forth in section 165(c) of the CAA and that the one-year deadline included a final decision in any appeal of a permit before EPA's Environmental Appeals Board (EAB).<sup>17</sup>

The *Avenal* case raises two issues regarding the efficiency and effectiveness of the PSD permitting program going forward. The first issue is whether greater interagency coordination is required to ensure that EPA complies with its statutory duties under the PSD provisions of the CAA. If true, the second issue is what mechanism can be used to address this deficiency in interagency cooperation, so that EPA can provide for efficient and comprehensive review of PSD permit applications, and fulfill its purpose to protect air quality while ensuring economic growth.

This note argues that while there are several possible mechanisms to solve these issues, a Memorandum of Understanding entered into by EPA and DOI is the most effective and efficient mechanism to ensure that EPA complies with the decision deadline set forth in section 165(c). Part I of the note outlines the relevant sections of the PSD permitting program. Part II discusses the background and holding of *Avenal Power Center v. EPA*. Part III of the article discusses the implications of the *Avenal* decision and reviews possible solutions for the lack of agency coordination in the PSD permitting process. Part IV discusses the various types of solutions the different branches of government can implement to address the interagency issues raised by the *Avenal* case. This note concludes Congress or the President should require, or the executive agencies should agree independently to a Memorandum of Understanding that requires EPA, DOI and USFWS to coordinate and ensure that resource management reviews of PSD permit applications are completed within the statutory deadline of section 165(c) of the CAA.

## I. PSD PERMITTING PROCEDURES

Sections 160 through 169 of the CAA set forth a comprehensive scheme for review and permitting of air pollution sources in areas that meet NAAQS.<sup>18</sup> Section 165 outlines the preconstruction requirements that the developer of a major emitting facility must fulfill before they can break ground on a project.<sup>19</sup> Before construction of a "major" new source or

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16. *Id.*

17. *Id.* at 4.

18. 42 U.S.C §§ 7470–7479.

19. *Id.* § 7475.

“major modification” of a major existing source in a NAAQS attainment area, a developer must obtain a PSD permit.<sup>20</sup>

The CAA defines a major emitting source as:

Any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: *fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input*, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, *fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input*, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. *Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant.*<sup>21</sup>

It is clear that this definition encompasses most types of large industrial, and energy generation projects. Modification is defined as “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.”<sup>22</sup>

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20. *Id.* § 7470 (3)–(5); F. WILLIAM BROWNELL, HUNTON & WILLIAMS, CLEAN AIR ACT HANDBOOK 147 (3d ed. 1998) (citing generally 40 C.F.R. § 52.21 (2012)).

21. 42 U.S.C. § 7479 (2006) (emphasis added).

22. *Id.* § 7411(a)(4).

### A. Permit Applications

An applicant for a PSD permit must submit an assessment of the air quality impacts of the new or modified source.<sup>23</sup> The assessment must demonstrate that emissions from the source will not result in a violation of the NAAQS increment or “any other applicable emission standard” and will not exceed the available PSD increment for the particular area.<sup>24</sup> It must also show that the facility will employ the Best Available Control Technology (BACT), determined on a case-by-case basis for each source.<sup>25</sup>

Once a company submits its application, EPA must determine, within 30 days, whether the application materials are sufficient and if so, it must issue a determination of completeness.<sup>26</sup> The Administrator then must either notify the applicant that the application is complete, or “list the information necessary to make the application complete.”<sup>27</sup> Once the Administrator sends notice to the applicant, the application is deemed effective.<sup>28</sup> Under section 165(c) of the CAA, EPA must grant or deny the permit within one year of determining the application is complete or effective.<sup>29</sup>

### B. EPA’s Internal Review of Permit Applications

Once an application is complete, the appropriate EPA officer or state permitting authority will “develop a draft permit containing all necessary permit terms and conditions”; provide notice and a 30-day comment period to the general public; and mail specific notice to those who have asked to be on the “state mailing list.”<sup>30</sup> The agency must also provide thirty-days notice before a public hearing.<sup>31</sup>

If a state agency is the permitting authority, that agency reviews the public comments and drafts a proposed permit to submit to EPA.<sup>32</sup> Under section 505(b) of the CAA, EPA may object to the proposed permit within forty-five days.<sup>33</sup> EPA must, with any such objection, “include a statement

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23. *Id.* § 7475(a)(2).

24. *Id.* § 7475(a)(3)(c); *see also* § 7473 (setting forth congressionally mandated increments and ceilings for sulfur oxide and particulate matter in attainment areas).

25. *Id.* § 7475(a)(2)–(4).

26. 40 C.F.R. § 124.3(c).

27. *Id.*

28. *Id.* § 124.3(f).

29. 42 U.S.C. § 7475(c).

30. DAVID R. WOOLEY & ELIZABETH MORSS, CLEAN AIR ACT HANDBOOK § 8.32 (21st ed. 2011) [hereinafter CLEAN AIR ACT HANDBOOK].

31. *Id.*

32. *Id.* § 8.34.

33. *Id.* (citing 42 U.S.C. § 7661d(b)).

of the Administrator's reasons for objection and a description of the terms and conditions that the permit must include to respond to the objections.”<sup>34</sup> “The permitting authority then has ninety days from receipt of the objection to submit a revised proposed permit to EPA.”<sup>35</sup> If EPA has no objections, “any person may petition the Administrator within 60 days after the expiration of the 45-day review period” to raise objections to the proposed permit.<sup>36</sup> EPA must grant or deny the petition within sixty days.<sup>37</sup> Once all objections have been reviewed, dispensed of, or incorporated into the permit, EPA must issue a permit decision within one year of the permitting authority determining the permit application is complete.<sup>38</sup>

EPA is required to “consult with the Secretary [of Interior] on any prospective agency action . . . if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.”<sup>39</sup> Further, EPA must confer with DOI on “any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of . . . title [sixteen] or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.”<sup>40</sup> DOI and USFWS have defined agency action to include “the granting of licenses, contracts, leases, easements, rights-of-way, [and] permits.”<sup>41</sup> By statute the consultation period must conclude in ninety days or within a “mutually agreed upon” time frame.<sup>42</sup> In the case of PSD permits, EPA and DOI may not agree upon a consideration period beyond ninety days unless the consultation will take less than 150 days, and the Secretary sets out in writing, the reason for delay, the further information needed, and an estimated date of completion.<sup>43</sup>

After the consultation is completed, the Secretary is required to “promptly” set out his opinion on how the permit will affect endangered species and their critical habitat.<sup>44</sup> If the Secretary believes that the permitted project will have serious adverse affects he is required to suggest

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34. 40 C.F.R. § 70.8.

35. CLEAN AIR ACT HANDBOOK, *supra* note 30, § 8.34.

36. 42 U.S.C. § 7661d(b)(2) (2006).

37. *Id.*

38. *Id.* § 7475(c).

39. Endangered Species Act, 16 U.S.C. § 1536(a)(3) (2006).

40. *Id.* § 1536(a)(4).

41. Interagency Cooperation-Endangered Species Act of 1973, 50 C.F.R. § 402.02 (emphasis added).

42. 16 U.S.C. § 1536(b)(1)(A).

43. *Id.* § 1536(b)(1)(B).

44. *Id.* § 1536(b)(3)(A).

“reasonable and prudent alternatives.”<sup>45</sup> EPA is forbidden from making any “irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2)” of the ESA.<sup>46</sup> Thus, should EPA issue a PSD permit before it has completed an endangered species consultation with the DOI and received an opinion from the Secretary, it takes the risk that the opinion, once issued, may require it to reconsider and ultimately rescind or modify the permit. Further, the penalties or liability on the applicant for violating the ESA by beginning construction could be severe.<sup>47</sup>

However, the statutory provisions for an Endangered Species consultation do not set a definitive deadline for the issuance of an opinion by the Secretary other than that it must be issued “promptly.”<sup>48</sup> Further, without such a deadline, DOI has in some cases delayed issuing an opinion to the extent that EPA has not been able to approve or deny a PSD permit within the one-year deadline specified under section 165(c).<sup>49</sup> It seems plain that EPA is subject to potentially conflicting obligations in the absence of a requirement or duty for DOI to issue an endangered species opinion so as to facilitate EPA’s compliance with section 165(c).

### *C. The Environmental Appeals Board and Permit Appeals*

In 1992 the EPA Administrator created the EAB to exercise the Administrator’s authority to “decide appeals of permit decisions.”<sup>50</sup> The Administrator created the EAB in the interest of efficiently using the Agency’s scarce resources.<sup>51</sup> He set up the EAB as a quasi-judicial body, originally with three Environmental Appeals Judges.<sup>52</sup> The EAB specifically has the authority to hear “[a]ppeals from permit decisions made by Regional Administrators and delegated States under the Clean Air Act (PSD permits).”<sup>53</sup>

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45. *Id.*

46. *Id.* § 1536(d).

47. *Id.*

48. *Id.* § 1536(b)(3)(A).

49. *See, e.g.,* Avenal Power Ctr., LLC v. U.S. Env’tl. Prot. Agency, 787 F. Supp. 2d 1, 2 (D.D.C. 2011); *In re* Desert Rock Energy Corp., LLC., PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06, 8–10 (E.A.B. Sept. 24, 2009) (noting a seven month wait for review of a PSD permit).

50. Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320 (Feb. 13, 1992).

51. *Id.*

52. *Id.*

53. *Id.* at 5321.



In some ways the EAB is similar to the Interior Board of Land Appeals and the Board of Indian Appeals, and sits as the final agency decision maker on agency administrative permit appeals.<sup>54</sup> “The EAB has discretion to accept appeals and will do so only when the petitioner asserts that the decision in question: (1) contains an erroneous interpretation of the law, or (2) implicates important policy considerations.”<sup>55</sup> Petitioners may only raise issues presented in the comments during the permit proceedings.<sup>56</sup> Once the EAB accepts an appeal, the regional office that makes the permit decision, “assembles all documents relevant to the disputed decision and makes a determination whether the appeal petition meets the requirements for EAB review.”<sup>57</sup> The EAB then decides “whether to accept the appeal.”<sup>58</sup> If the Board accepts the appeal, the petitioners must file a brief, and at the discretion of the Board, may be granted a hearing.<sup>59</sup> The EAB does not have any deadline set by regulation for completion of an appeal.<sup>60</sup> Since its creation, the Administrator has at times expanded the membership of the EAB to include five Environmental Appeals Judges.<sup>61</sup> Currently the Board “consists of four Environmental Appeals Judges.”<sup>62</sup>

## II. AVENAL POWER CENTER V. EPA

One of the more recent court decisions involving section 165(c) suggests that applicants may sue EPA to force the Agency and the EAB to act within one year on PSD permits.<sup>63</sup> In *Avenal Power v. EPA*, the Federal District Court for the District of Columbia held that EPA must act on PSD permits within the statutory deadline of section 165(c) and that the creation of the Environmental Appeals Board did not relieve the Administrator of

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54. See Establishing the DOI Office of Hearings and Appeals, 40 C.F.R. § 4.1 (outlining the scope of authority for the Board of Indian Appeals and Board of Land Appeals that—organs of the DOI Office of Hearings and Appeals, may “hear[], consider[], and decide[] matters within the jurisdiction of the Department involving hearings, appeals, and other review functions of the Secretary . . . [and] may hear, consider, and decide those matters as fully and finally as might the Secretary, subject to any limitations on its authority imposed by the Secretary”).

55. CLEAN AIR ACT HANDBOOK, *supra* note 30, at 8.37.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. 40 C.F.R. § 124.19.

61. *Environmental Appeals Board: General Information*, U.S. ENVTL. PROT. AGENCY, [http://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf) (last visited May 13, 2013).

62. *Id.*

63. *Avenal Power Ctr., LLC v. U.S. Env'tl. Prot. Agency*, 787 F. Supp. 2d 1, 1 (D.D.C. 2011).

her duty under section 165(c) to take final action on such permits within one year.<sup>64</sup>

In that case, the plaintiff, Avenal Power Center, LLC (Avenal), sought to build a 600-megawatt natural gas fired power plant in California.<sup>65</sup> Avenal submitted an application for a PSD permit in February of 2008.<sup>66</sup> EPA determined that Avenal's application was complete on March 19, 2008.<sup>67</sup> However, EPA, after exhaustive notice and comment procedures, did not act to grant or deny Avenal's application for nearly two years.<sup>68</sup> In response to EPA's inaction, Avenal filed suit on March 9, 2010 claiming that EPA had violated its statutory duty under section 165(c) of the CAA.<sup>69</sup>

EPA presented two defenses for its failure to act on the permit within one year.<sup>70</sup> First, the agency claimed that it needed "continued consultation with the U.S. Fish and Wildlife Service ("USFWS") to ensure compliance with the Endangered Species Act."<sup>71</sup> Second, EPA claimed that the plaintiff still needed to prove that the project would comply with EPA's new nitrogen oxide standards.<sup>72</sup>

However, later in 2010 the USFWS issued a biological opinion regarding the project that made EPA's first defense moot.<sup>73</sup> Further, EPA later conceded its second defense by issuing a statement that the Avenal project would be "grandfathered" under the old nitrogen oxide standard.<sup>74</sup> EPA's statement and the USFWS opinion, thus, left no further issues with Avenal's permit application and EPA announced that it would be able to issue a final decision on it.<sup>75</sup> However, EPA maintained that this final decision was appealable to the EAB and that the EAB process was not subject to the deadline outlined in section 165(c).<sup>76</sup>

In response to EPA's position, Avenal argued that EPA would in effect be issuing an "interim decision' subject to appeal before the EAB."<sup>77</sup> Avenal further argued that if a permit decision appealable before the EAB would not constitute final action, it had no choice but to seek a judicial order to force EPA to issue a final permit decision within a reasonable

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64. *Id.* at 2.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 3.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

time.<sup>78</sup> EPA defended its position stating that a permit decision appealable to the EAB was “sufficient to satisfy the CAA's one-year deadline” and the court lacked subject matter jurisdiction to issue the order sought by Avenal.<sup>79</sup>

District Judge Richard Leon strongly disagreed with EPA’s position, which he characterized as “oh so clever, but unsupportable.”<sup>80</sup> In his analysis Judge Leon noted that in 1977 Congress explicitly set out that the Administrator of EPA must grant or deny a PSD permit within one year.<sup>81</sup> However, the Administrator retained discretion to delegate his permitting authority.<sup>82</sup> In 1992 the Administrator created the EAB and “delegate[d] to it the final review of a grant or a denial” of a permit application by a delegated officer or employee, e.g., a regional administrator.<sup>83</sup> Judge Leon noted that in creating the EAB the Administrator had not built in a “temporal requirement” to comply with section 165(c) of the CAA with respect to PSD permits.<sup>84</sup> Thus, Judge Leon concluded the Administrator created a process that “can and has, in this case, rendered meaningless this Congressional one-year mandate.”<sup>85</sup>

The district court, therefore, found that under *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*<sup>86</sup> a clear and unambiguous statement of Congressional intent cannot be overridden by a regulatory process.<sup>87</sup> The court strongly chided EPA regarding its interpretation that section 165(c) was in some way ambiguous.<sup>88</sup> Further, Judge Leon found that the regulations, here the EAB enabling provisions, must yield to express Congressional will if the regulatory provisions served to frustrate the statutory mandate.<sup>89</sup> Thus, the court held that while the Administrator

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* (citing 42 U.S.C. § 7475 (2006)).

82. *Id.* (clarifying that section 7601(a) states that the Administrator is authorized to make regulations necessary for him to carry out his duties and he may delegate his authority to grant or deny permits to “any officer or employee of the Environmental Protection Agency”).

83. *Id.* (citing Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320 (Feb. 13, 1992)).

84. *Id.* (citing 40 C.F.R. § 124.19).

85. *Id.* at 3–4.

86. *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

87. *Avenal Power Ctr., LLC v. U.S. Env'tl. Prot. Agency*, 787 F. Supp. 2d 1, 4 (D.D.C. 2011).

88. *See id.*, n.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*. *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.*”) (emphasis added) (internal citations omitted).

89. *Id.*

may “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.”<sup>90</sup> The Court then ordered EPA to immediately issue a final permit decision by May 27, 2011—one day after the decision—and granted a ninety-day extension for the Agency or EAB to review the permit.<sup>91</sup> EPA did not appeal the district court decision, and it issued a PSD permit to Avenal on March 27, 2011.

Within thirty days the EAB received four petitions for review of the permit.<sup>92</sup> The EAB denied these petitions for review on August 11, 2011.<sup>93</sup> EPA issued a final PSD permit to Avenal Power on September 9, 2011.<sup>94</sup> EPA’s final permit action was reviewable before the 9th Circuit Court of Appeals within sixty days of the final action’s publication.<sup>95</sup> The four petitioners denied review of the permit by the EAB filed a petition for review in the Ninth Circuit on Nov. 3, 2011, five days before the deadline for review; the case is now pending before the Ninth Circuit.<sup>96</sup>

### III. IMPLICATIONS OF *AVENAL POWER CENTER V. EPA*

The District Court’s decision in *Avenal Power Center v. U.S. E.P.A.* creates several issues that need to be resolved at the agency and statutory levels to provide for efficient and effective review of PSD permits that complies with the mandate of section 165(c) and goals of the CAA. First, EPA will need greater interagency coordination in receiving environmental or endangered species assessments from other agencies well within the one-year statutory deadline.<sup>97</sup> Second, the role of the EAB in future PSD permit goeregulations set out by the Administrator of EPA.<sup>98</sup> Third, a strictly

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90. *Id.*

91. *Id.*

92. Final Action, 76 Fed. Reg. 55,799 (Sept. 9, 2011) (The four petitioners were (1) El Pueblo Para El Aire y Agua Limpio; (2) Greenaction for Health & Environmental Justice; (3) Sierra Club and Center for Biological Diversity; and (4) Mr. Rob Simpson.).

93. *In Re* Avenal Power Ctr., LLC, 15 E.A.D. 1, 1 (EAB 2011), available at [http://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/Filings%20By%20Appeal%20Number/9B5A05738ABF36D3852578F00071749B/\\$File/Denying%20Review....pdf](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Filings%20By%20Appeal%20Number/9B5A05738ABF36D3852578F00071749B/$File/Denying%20Review....pdf).

94. Approval of Clean Air Act Prevention of Significant Deterioration Permit Issued to Avenal Power Center, LLC to Construct the Avenal Energy Project, 76 Fed. Reg. 55,799 (Sept. 9, 2011).

95. 42 U.S.C. § 7475(c) (2006).

96. *See generally* Sierra Club v. U.S. Env’tl. Prot. Agency, No. 11-73342 (9th Cir. filed Nov. 3, 2011) (as of March 5, 2012 the petitioners have filed their opening brief in the case and Avenal Power Center, LLC has successfully moved to intervene as a respondent in support of EPA and their permit).

97. *See* Avenal Power Ctr., LLC v U.S. Env’tl. Prot. Agency, 787 F. Supp. 2d 1, 2 (D.D.C. 2011) (noting that EPA delayed issuance of a PSD permit because it was waiting for an Endangered Species Act determination from the U.S. Fish and Wildlife Service).

98. *See generally* Environmental Appeal Board Docket of Completed Cases (The average length of EAB proceeding on PSD reviews since 2007 has been approximately seven months, with several

enforced one-year agency review process of PSD permits may limit comprehensive environmental and resource management review if provisions are not adopted to provide for a more efficient and effective agency and interagency review process. Lastly, a strictly enforceable section 165(c) may create more certainty regarding timely PSD permitting decisions for potential developers of industrial and energy projects in National Ambient Air Quality Standard (NAAQS) attainment areas. Legislative, executive, or administrative measures are necessary to address the issues raised by the *Avenal* decision and ensure an efficient and effective agency review process for PSD permits.

#### A. Interagency Coordination

The PSD permit application process may, in many cases, require other agencies to undertake and complete environmental and resource management assessments before EPA can render a decision on a permit application.<sup>99</sup> As was the case in *Avenal*, these assessments can cause a significant delay in the permitting process and possibly force EPA to breach its statutory duty to render a permit decision within one year.<sup>100</sup> The risk of delay to a permitting decision stems from the fact that other agencies have no explicit statutory or regulatory duty to facilitate EPA's compliance with the statutory deadline under section 165(c) of the CAA.<sup>101</sup> Therefore, after the *Avenal* decision clarified that the one-year deadline cannot legally be missed, steps need to be taken to address the interagency inefficiency related to environmental and resource management reviews of PSD permits. The key question is whether a mechanism can be created by which all agencies involved in the PSD permitting process are required to facilitate EPA compliance with the one-year statutory deadline in section 165(c).

The CAA and other federal statutes impose duties on the EPA Administrator and other agency executives to cooperate in implementing

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cases taking over a year. *See, e.g., In re Desert Rock Energy Corp., LLC*, PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06, 8-10 (EAB Sept. 24, 2009); *In re Deseret Power Electric Coop. (Bonanza)*, 14 E.A.D. 1, 1 (EAB 2008)).

99. 50 C.F.R. § 402.02 (2009) (one of the most notable environmental assessments linked to PSD permitting is the Endangered Species Act assessment).

100. *See, e.g., Desert Rock Energy Facility*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/region9/air/permit/desert-rock> (last visited May 13, 2013) (The PSD permit application was completed in 2004, and a final permit was not issued until 2008 at which time a final Biological Opinion resolving ESA issues had not been submitted by the USFWS.).

101. *See generally* 16 U.S.C § 1536 (2006) (Under the ESA agencies do not have an explicit statutory or regulatory duty to facilitate EPA's compliance with its statutory deadline.).

and enforcing air pollution prevention and control programs.<sup>102</sup> Further, Congress has set up interagency committees to coordinate efficient environmental reviews in the context of cross-jurisdictional permitting decisions for natural gas pipelines.<sup>103</sup> The President has also used his executive authority to establish an interagency taskforce to expedite review of energy project permits.<sup>104</sup> The taskforce includes the Administrator of EPA, the Secretary of Interior and the Chairman of the Council on Environmental Quality.<sup>105</sup> EPA has also used memoranda of understanding with other agencies and state governments to ensure interagency cooperation in implementing permitting and enforcement programs under various environmental statutes.<sup>106</sup> The Supreme Court has recognized that federal agencies may enter into memoranda of understanding to address jurisdictional issues between the agencies.<sup>107</sup> Thus, each branch of government has both the authority and the experience to establish a mechanism to provide for interagency cooperation between EPA and other agencies to ensure compliance with section 165(c). The next question that must be addressed is: Which mechanism will be the most efficient and effective measure to ensure EPA complies with section 165(c) and fulfills the purposes of the CAA?<sup>108</sup>

### 1. A Legislative Fix

Congress could amend either the CAA or the ESA to require USFWS and DOI to make reasonable efforts to facilitate EPA compliance with

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102. 42 U.S.C. § 7402(b) (2006); *see also* 16 U.S.C. § 1536 (requiring all federal agencies to cooperate with Secretary of Interior in furthering programs that protect endangered species).

103. 49 U.S.C. § 60133(a) (2006).

104. Amending Exec. Order No. 13,212, 68 Fed. Reg. 27,429 (May 15, 2003).

105. *Id.* § 3(b)(i)(A).

106. *See* Memorandum of Agreement Between the Environmental Protection Agency and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11,202 (Feb. 22, 2001) (providing an agreement between the agencies “to enhance coordination” and obligate the USFWS to promptly issue biological evaluations under the ESA “to enable EPA to meet statutory and regulatory deadlines under the CWA [hereinafter Memo of Agreement]; *see also* Memorandum of Understanding for the Prevention of Significant Deterioration of Air Quality, EPA Region III and Philadelphia, 46 Fed. Reg. 31258-02 (June 15, 1981) (outlining PSD program in Philadelphia, PA which divides the responsibilities for review and decision-making on PSD permit applications between the City of Philadelphia and Region III of EPA) [hereinafter Memo of Understanding]; *see also* L. Poe Leggette & Demetri L. Seletzky, *The Outer Continental Shelf Lands Act Turns Fifty—A Premature Look at the First Half-Century of the OCSLA*, ROCKY MTN. MIN. L. INST. (2002) (Appendix E shows the text of MOU establishing that both EPA and DOI will coordinate studies and related regulatory responsibilities and cooperate to ensure that EPA can issue NPDES permits at the time of the Final Notice of Offering by DOI).

107. *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 122 (2002).

108. 42 U.S.C. § 7470(3)–(5) (2006).

section 165(c) of the CAA. The ESA allows the Secretary of the Interior and the Administrator of EPA to negotiate a reasonable time frame for the conclusion of a consultation under the ESA.<sup>109</sup> However, the Secretary is only required to “promptly” issue an opinion on the project.<sup>110</sup> Congress could fix this gap in legislation by adding language in the ESA that requires the Secretary to issue opinions promptly and within the time period required by statute for the other federal agency to render a decision on the proposed agency action. This language would impose an express duty upon the DOI, and USFWS to consider and issue opinions in cooperation with all other agencies so these agencies can meet their statutory duties in deciding on licenses and permits.

It may be argued that inclusion of such broad language would severely limit the DOI and the USFWS’s discretion in how to allocate the use of their scarce resources. Further, such a requirement could limit the quality of biological assessments or opinions and thereby potentially frustrate the very purpose of the ESA.<sup>111</sup> These objections have merit and show the drawbacks of a broad legislative fix to the interagency coordination issues raised by section 165(c) of the CAA. While imposing a statutory duty on DOI and USFWS to issue an opinion in compliance with the deadline of section 165(c) would help EPA to comply with its duties, many other agency actions are also subject to Endangered Species consultations, assessments, and opinions, and must be considered to determine whether USFWS has the resources to comply with such a broad requirement.<sup>112</sup> A blanket rule would assist agencies in fulfilling their statutory duties, however, it could serve to overwhelm DOI given the broad scope of agency actions that must be reviewed under the ESA.

Congress could alternatively pass legislation that changes the deadline set forth in section 165(c). It could extend the new deadline to require EPA

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109. 16 U.S.C. § 1536(b)(1)(A) (2006).

110. *Id.* § 1536(b)(3)(A).

111. *See* 16 U.S.C. § 1531(b) (“The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species . . .”).

112. *See* 50 C.F.R. § 402.02 (2009). Action under the ESA is defined as:

[A]ctivities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.

*Id.*

to act on a PSD permit within eighteen or twenty-four months.<sup>113</sup> It may be argued that meaningful review of PSD permits is an essential aspect of the CAA and an extension of the deadline in section 165(c) would provide for an enhanced opportunity for qualitative review of permits by both EPA and other cooperating agencies. It could also allow EPA greater flexibility when allocating its funds and scarce labor resources to review permit applications.

Yet, these arguments may prove too much in that they add no additional duty or requirement for EPA to comply with the CAA beyond the current 165(c) deadline they have failed to comply with. They simply suggest that an extension of the deadline to two or three years would provide that much more time for agency review and interagency consultation and even greater flexibility in agency resource allocation. However, there is no assurance that what would remain an essentially inefficient interagency review process would not simply expand to fill the additional time made available. Further, the cooperative federalism provisions of the CAA allow for the Administrator to delegate portions of permitting review responsibilities to state and local permit authorities.<sup>114</sup> Thus, states and local government share in the permitting responsibilities. Therefore, increased work under an effective one-year deadline is not directly proportional to increased stress on EPA's scarce resources. In short, while an expanded deadline would reduce the risk that EPA would violate the section 165(c) deadline, without further procedural safeguards, there is nothing to ensure the effectiveness or efficiency of environmental or resource management reviews of PSD permit applications under an expanded deadline.

More importantly, extending the deadline ignores the linkage between private investment considerations and the Agency's decision-making time frame. Utilities and private investors need the certainty of a timely and effective process for obtaining final decisions on PSD permit applications to incentivize investment in new or updated industrial and electric generating facilities.<sup>115</sup> Given the complex and multi-tiered review that proposed new electric generating units must pass to begin construction on a power plant, a short and discernible timeline regarding PSD permit review is essential to provide developers with a benchmark as to the progress of the project to ensure that financiers and insurers will back the project to its

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113. See 42 U.S.C. § 7661b(c) (2006) (setting out an eighteen month deadline for the delegated permitting authority to either approve or deny a permit application submitted under the New Source Performance Standards set out in sections 7411 and 7412 of the Clean Air Act).

114. See 42 U.S.C. § 7661a(b) (outlining the requirements for state permit programs under Title V of the Clean Air Act).

115. See U.S. ENVTL. PROT. AGENCY, NSR 90-DAY REVIEW BACKGROUND PAPER 11-12 (2001), available at <http://www.epa.gov/NSR/documents/nsr-review.pdf>.



completion.<sup>116</sup> Additionally, a certain and enforceable deadline for a final permit decision gives investors and project developers clear guidance and expectations through which they can manage and plan for risk and uncertainty. Further, after *Avenal*, developers are given greater certainty that their investment will not languish only to finally fail through drawn out regulatory delay. Uncertainty can also be created by market volatility, which can create further disincentives to investment in development if the regulations provide for a long-term preconstruction review process. EPA has already delayed some PSD permit decisions well beyond even a two-year time frame.<sup>117</sup> Thus, it is likely that lengthening the 165(c) deadline would not necessarily improve the quality of EPA's review and action regarding PSD permits and could materially discourage development of industrial and energy facilities in large areas of the United States. Therefore, a legislative fix is not the preferred mechanism to strengthen compliance with section 165(c) of the CAA.

## 2. An Executive Order Fix

The President has the authority to establish interagency taskforces to provide for coordinated and efficient action by federal administrative agencies.<sup>118</sup> Interagency taskforces have been established to promote expedited permitting of energy projects.<sup>119</sup> Executive Order 13212, issued by President George W. Bush, set up a taskforce chaired by the Secretary of Energy, which included the Administrator of EPA and the Secretary of Interior, with the overarching policy goal that “increase[ing] production and transmission of energy in a safe and environmentally sound manner is essential to the well-being of the American people.”<sup>120</sup> The Order directed, “that executive departments and agencies (agencies) shall take appropriate actions, to the extent consistent with applicable law, to expedite projects that will increase the production, transmission, or conservation of energy.”<sup>121</sup> The taskforce had two charges. First, the taskforce was created

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116. See, e.g., *In re Desert Rock Energy Corp., LLC*, PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06, 8–10 (EAB Sept. 24, 2009) (describing a proposed coal-fired power plant that took nearly five years from initial application to have the EAB remand the permit for further considers, after which the financiers of the project canceled the proposed plant).

117. See *id.* (describing the Desert Rock Coal plant, which took five years 2004-2009, for a resolution of their PSD permit); see also *In re Deseret Power Electric Coop.* (Bonanza), 14 E.A.D. 1, 1 (EAB 2008).

118. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952) (holding that an executive order must be based on a constitutional grant of power or execution of congressional policy).

119. Amending Exec. Order No. 13,212, 68 Fed. Reg. 27,429 (2003).

120. Actions to Expedite Energy-Related Projects 66 Fed. Reg. 28,357 § 1 (2001).

121. *Id.* (emphasis added).

“to monitor and assist the agencies in their efforts to expedite their review of permits or similar actions, as necessary, to accelerate the completion of energy-related projects, increase energy production and conservation, and improve transmission of energy.”<sup>122</sup> Second, the taskforce was to “monitor and assist agencies in setting up appropriate mechanisms to coordinate Federal, State, tribal, and local permitting in geographic areas where increased permitting activity is expected.”<sup>123</sup> The Obama administration has also set up interagency taskforces focused on energy development issues.<sup>124</sup>

The President, therefore, has two options. First, he could set up an interagency taskforce chaired by EPA to monitor and ensure timely completion of interagency review and consultation regarding PSD permit applications. Second, he could issue an executive order requiring the DOI and USFWS to comply with statutory deadlines of the CAA when preparing and issuing a Biological Assessment under the ESA.<sup>125</sup> Either approach could serve to facilitate EPA compliance with section 165(c). Further, an executive order would require limited review and formality and thus could quickly address the permitting issues under section 165(c). However, these taskforces are creatures of agency and executive policy through the use of executive order. Presidents retain the power to extend or disband these taskforces.<sup>126</sup> Therefore, the taskforce could be a mechanism to resolve the interagency issues related to PSD permits only so far as a binding or procedural regulatory rule could be promulgated by either agency before a change in administration. Thus, an executive order where the President can effectuate an agreement between the agencies is a more direct and efficient mechanism than legislation.

### 3. An Interagency Memorandum of Understanding Fix

In the event that such an Executive Order, interagency taskforce, or legislative fix is not forthcoming, a memorandum of understanding binding EPA, DOI, and USFWS to strive to complete permit and environmental or resource management reviews within one year is the more effective and efficient mechanism to ensure that EPA complies with section 165(c). A

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122. *Id.* § 3.

123. *Id.*

124. See *Presidential Memorandum—A Comprehensive Federal Strategy on Carbon Capture and Storage*, WHITEHOUSE.GOV (Feb. 3, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-a-comprehensive-federal-strategy-carbon-capture-and-storage> (establishing the Interagency Task Force on Carbon Capture and Storage).

125. Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 291 (2001).

126. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 362 (2006).

memorandum of understanding (MOU) “is a signed agreement between two administrative agencies that establishes a procedural protocol relative to, for example, exchanges of information and consultations on issues of common interest, which issues, to be sure, could precipitate conflicts in jurisdiction between the two agencies.”<sup>127</sup> An MOU is a procedural mechanism and thus is exempt under the APA “from the notice and comment requirements applicable to the promulgation of substantive regulations.”<sup>128</sup> “Because it is a procedural regulation, it is subject to few restrictions on form and content.”<sup>129</sup> Further, the Supreme Court has recognized that “[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”<sup>130</sup> Thus, an MOU is a flexible mechanism that can be agreed upon without excessive delay, procedure, and review. However, MOUs are more akin to a letter of intent rather than a contract and are not enforceable in the courts or as inflexible as the strict terms of a contract.<sup>131</sup>

The ESA allows the Secretary of Interior and other Agency administrators to mutually agree on the time frame within which to conclude an ESA consultation.<sup>132</sup> However, in the contexts of consultations regarding licenses or permits, the Secretary and Administrator generally may not agree to a consultation period that exceeds ninety days.<sup>133</sup> The Secretary and Administrator may agree on a longer consultation period only if: (1) The new period does not exceed 150 days and the agency heads provide a written statement setting out the reasons for the delay; (2) the information is needed “to complete the consultation”; and (3) the estimated date the consultation will be completed.<sup>134</sup> Thus an MOU between EPA, DOI, and USFWS can be based on the interagency cooperation provisions of the ESA and is not inconsistent with the current statutory framework for

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127. James W. Moeller, *Toward an SEC-FERC Memorandum of Understanding*, 15 ENERGY L.J. 31, 57–58 (1994).

128. *Id.* at 58 (citing 5 U.S.C. § 553(a)(2)) (exempting matters “relating to agency management or personnel or to public property, loans, grants, benefits, or contracts” from notice and comment rulemaking procedures).

129. Moeller, *supra* note 127, at 58.

130. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (internal quotations omitted).

131. BLACK’S LAW DICTIONARY 988, 1074 (9th ed. 2009).

132. 16 U.S.C. § 1536(b) (2006).

133. *Id.* § 1536(b)(1)(B).

134. *Id.* § 1536(b)(1)(B)(i).

consultations between EPA and DOI.<sup>135</sup> But, the agencies, especially EPA, must be mindful that while the consultation period is limited by statute, the MOU must address the loose timeframe in which the Secretary or his delegated representative must issue his final biological opinion on the proposed permit.<sup>136</sup> The essential issue that the MOU must address is what the term “prompt” means within the context of endangered species consultations regarding PSD permits.

EPA, DOI, and USFWS have some experience with consultation procedural deadline agreements in the form of an MOU.<sup>137</sup> EPA and USFWS specifically entered into a Memorandum of Agreement in 2001 regarding ESA consultations related to, among other programs, “approval of State National Pollution Discharge Elimination System (NPDES) permitting programs” under the Clean Water Act (CWA).<sup>138</sup> The agreement was made with the specific purpose to “enhance the efficiency and effectiveness of [ESA] consultations on these actions in the future.”<sup>139</sup> The agencies agreed that the goal of the MOA was to make the consultation process “more productive and timely, to the benefit of endangered and threatened species and the aquatic environment generally.”<sup>140</sup> To achieve these goals the agencies provided for: local and regional “coordinating teams”; an “interagency elevation process”; the ability for the lower level permitting and review offices to enter into sub agreements; and “timeliness of actions” regarding ESA consultations.<sup>141</sup> The most important provision of the MOA is outlined under the subheading “Timeliness of Actions.”<sup>142</sup> The EPA and USFWS “agree to adhere to time frames set for in [the ESA interagency cooperation implementing regulations] and supplemental guidance provided in this Agreement, in order to enable EPA to meet statutory and regulatory deadlines under the CWA.”<sup>143</sup> The Agreement further obligates EPA to “strive to provide advance notice to [USFWS] concerning anticipated consultations, to provide thorough consultation.”<sup>144</sup>

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135. See *id.* (setting forth the consultation guidelines that a DOI and other federal agencies will follow when a “prospective permit” reasonably may affect the habitat of an animal protected under the Endangered Species Act).

136. See *id.* § 1536(b)(3)(A) (requiring the Secretary of Interior to “promptly after the conclusion of consultation” issue his opinion of the effects of the proposed agency action on “the species or critical habitat” (emphasis added)).

137. See Memo of Understanding, *supra* note 106; see also Leggette, *supra* note 106, at appendix E.

138. See Memo of Agreement, *supra* note 106

139. *Id.*

140. *Id.*

141. *Id.* at 11,208–11,210.

142. *Id.* at 11,210.

143. *Id.*

144. *Id.*

Additionally, USFWS agreed “to make every effort to provide prompt and responsive communications to ensure . . . permit applicants do not suffer undue procedural delays.”<sup>145</sup> The agreement is a good example of the language that can and has been used to facilitate interagency coordination under the ESA and environmental statutes. This Agreement therefore provides a good metric for creating effective guidelines to push the USFWS to complete all consultation procedures necessary under the ESA in order to facilitate EPA’s compliance with the statutory deadline in section 165(c) of the CAA.

EPA and DOI have also entered into a MOU agreement in the past regarding permitting on the outer continental shelf (OCS) under the CWA.<sup>146</sup> That agreement’s general purpose was to “improve cooperation and coordination” between the agencies regarding “oil and gas lease activities” on the OCS “terms and conditions of NPDES permits and ensure NPDES permit compliance.”<sup>147</sup> The MOU explicitly established that its specific purpose was “that each Agency will coordinate studies and related regulatory responsibilities and cooperate to ensure that EPA can issue NPDES permits at the time of the Final Notice of Offering by DOI.”<sup>148</sup> To achieve this purpose the MOU set out timing requirements for EPA to issue final NPDES permits “no later than the Final Notice of Offering for the lease offering as projected by DOI.”<sup>149</sup> Thus, EPA was obligated by the MOU to make its permit decision within the deadline set by DOI.

Provisions similar to those from both agreements outlined above should be employed in the context of section 165(c). EPA, DOI, and USFWS could enter into a memorandum of understanding with the agreement that the agencies will make all reasonable efforts to facilitate compliance with the deadlines set out in the ESA and section 165(c) of the CAA. Further, EPA must agree to seek ESA consultation at the earliest possible moment and USFWS must agree to quickly provide all information needed for revision or final consideration and drafting of a biological opinion. The agreement should also state that, DOI or USFWS upon receiving a request for an ESA determination, absent extraordinary circumstances, review and issue a biological opinion on the proposed project no later than the expiration of the one year deadline set forth in section 165(c) for the specific project. This timing requirement should be drafted to recognize the consultation timing restriction in section 1536 of the ESA and provide for

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145. *Id.*

146. *See* Leggette, *supra* note 106, at appendix E.

147. *Id.*

148. *Id.*

149. *Id.*

mutual agreement by both agencies that the term “promptly” in section 1536(b)(3)(A) will be understood to require DOI or USFWS to issue its biological opinion within the one year statutory deadline of section 165(c) of the CAA.<sup>150</sup> The MOU should also incorporate a section providing for the “development and exchange of information” to improve cooperation and coordination between the agencies and prevent undue procedural delay as they implement the terms of the MOU.<sup>151</sup>

An MOU is the most effective method, in the short term, to ensure that EPA and the EAB comply with section 165(c) after the *Avenal* decision. The MOU is consistent with the interagency coordination provisions of the ESA and the CAA.<sup>152</sup> Further, the MOU will be more flexible than the legislative or executive actions discussed above, and EPA, DOI, and USFWS (the agencies closest to the pragmatic realities surrounding consultations and permitting procedures) will be able to craft the most effective mechanism to suit the realities of their interagency cooperation.

Lastly, the MOU is the quickest mechanism that can be promulgated or enacted to address EPA’s obligations under section 165(c). A comprehensive legislative fix regarding section 165(c) will have to pass through an increasingly hyper-partisan Congress; and may be high jacked by the extreme wings of either party to be used as a tool to attack EPA or limit all energy development through drawn out permitting requirements. Thus, an MOU will side step many of the political hurdles that would be faced by a comprehensive legislative fix, and it will allow for the most pragmatic solution to provide for efficient and effective environmental and resource management review of proposed PSD permits under the CAA.

#### 4. The Role of the Judiciary Going Forward

The final issue is: What is the role of the courts in the wake of the *Avenal* decision? District Judge Leon’s decision, discussed above, is a reasonable and pragmatic interpretation of EPA’s obligations and required process, i.e., including an EAB final decision in the one year review

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150. See 16 U.S.C. § 1536(b)(1)(B) (2006) (requiring endangered species determination to be completed within ninety days); Leggette, *supra* note 106, at appendix E.

151. See 16 U.S.C. § 1536(b)(1)(B) (providing for interagency participation in relevant permitting and licensing programs; establishing “information requirements”; coordinating and identifying studies; developing criteria for the assessment of areas vulnerable to pollution).

152. See *id.* § 1536 (providing for interagency cooperation in endangered species act consultations); see also 42 U.S.C. § 7402(b) (2006) (“The Administrator [of EPA] shall cooperate with and encourage cooperative activities by all Federal departments and agencies having functions relating to the prevention and control of air pollution, so as to assure the utilization in the Federal air pollution control program of all appropriate and available facilities and resources within the Federal Government.”).

deadline under section 165(c) of the CWA.<sup>153</sup> EPA did not file an appeal or seek review of the D.C. District Court's decision. Future courts hearing challenges by PSD applicants to violations of section 165(c) by EPA should draw upon Judge Leon's reasoning and decision to enforce the one year permit decision deadline on both EPA and the EAB.

Since EPA issued Avenal its final PSD permit in 2011, several environmental groups, including the Sierra Club and the Center for Biological Diversity, have filed a petition for review of the permit decision before the United States Court of Appeals for the Ninth Circuit.<sup>154</sup> The petition for review alleges that, "the PSD permit impermissibly fails to address the recently adopted PSD requirements for greenhouse gas emissions."<sup>155</sup> While the Ninth Circuit could theoretically issue an opinion that could call into question Judge Leon's opinion, the case before the circuit is a review of the qualitative, not procedural, determination made by EPA in issuing the permit.<sup>156</sup> Thus, the procedural determinations regarding the requirements of section 165(c) in Judge Leon's opinion are not technically at issue before the Ninth Circuit.

In short, federal district courts and circuit courts of appeals should follow the reasoning and holding of the D.C. District Court's holding in *Avenal*. Federal courts should not misinterpret the clear and unambiguous language of the CAA and the Regulations implementing the EAB to mean anything other than that EPA and the EAB must comply with the one-year deadline that Congress mandated.<sup>157</sup> If the courts do not rigorously uphold the statutory deadlines set by the CAA and push federal agencies to coordinate and comply with their statutory mandates, then the courts would fail in their duties to uphold the plain language of federal law. Further, precedents that allow EPA and USFWS to circumvent their duties would likely harm investment in and the development of new energy projects to meet the rising demand of energy consumptions. Companies will be less likely to invest because of the longer-term development process and likelihood that their investment may be finally permitted under different rules and regulations, given the delay, and possibly add new compliance

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153. *Avenal Power Ctr., LLC v. U.S. Envtl. Prot. Agency*, 787 F. Supp. 2d 1, 2–5 (D.D.C. 2011).

154. *Petition for Review Sierra Club v. Jackson*, No. 11-73342 (9th Cir. Nov. 3, 2011).

155. *Energy Law Alert: Legal Challenge to Avenal Energy Project's PSD Permit Filed with the Ninth Circuit*, STOEL RIVES, LLP (Nov. 9, 2011), <http://www.lawofrenewableenergy.com/2011/11/articles/litigation/legal-challenge-to-avenal-energy-projects-psd-permit-filed-with-the-ninth-circuit>.

156. *See id.* (discussing the background and implications of the 9th circuit challenge to the Avenal permit).

157. *See Chevron, USA, 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.")

and construction cost not originally contemplated or budgeted by the companies.<sup>158</sup> In sum, the courts must uphold the explicit statutory mandates set by Congress in the CAA.<sup>159</sup> Only a new law passed by Congress amending the CAA or a modification of the EAB's enabling regulations should change the courts' analysis of EPA's duties under section 165(c) of the CAA.

#### CONCLUSION: A PATH FORWARD

EPA and DOI should enter into a MOU that requires all environmental and resource assessments between the agencies be provided to EPA before the statutory deadline for a permit decision as encapsulated in section 165(c) of the CAA. There are several mechanisms through which the different branches of government can force the agencies to enter into an agreement. First, Congress could pass legislation that requires both DOI and EPA to formulate an MOU. Second, the President could either establish an interagency task force with the goal of improving interagency cooperation regarding environmental review of CAA permits; or the President could issue an executive order to compel the agencies to negotiate an MOU. Finally, the agencies could seek an agreement on their own initiatives and terms. The last option is likely the most realistic. However, should the agencies run into disagreement, then either Congress or the President could and should step in to create an obligation to reach an agreement.

Energy development and planning is a key policy concern in the United States.<sup>160</sup> With capacity demand increases and potential cuts in carbon dioxide emissions, natural gas fired power plants will be the key fossil fuel to maintain base load and help the nation bridge the gap to realize a cleaner energy future. The EPA, in administering the CAA, must move toward a more efficient and qualitatively sufficient process to review and render decisions on PSD permit applications for electric generating units. The statutory requirements of the CAA show Congress' intent to create an efficient and certain period for agency review of PSD permit applications. The *Avenal* decision reaffirms Congress' goals in enacting the PSD permit section of the CAA to both promote economic efficiency and environmental

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158. See Gary McCutchen & Colin Campbell, "Horsefeathers!": *Landmark Court Decision Directs EPA to Address Grandfathering, CAA One-Year Permit Processing Mandate*, 21.4 Air Pollution Consultant 5.1 (2011) (discussing EPA's original stance that the Avenal permit should be included under new NO<sub>x</sub> standards to be promulgated after the finalization of the company's permit application).

159. See *Chevron, USA, Inc.*, 467 U.S. at 842-43 (mandating that the courts must follow the clear and unambiguous intent of Congress regarding statutory duties for executive agencies).

160. See *supra* pp. 641-43.



protection.<sup>161</sup> To ensure these goals are met in the future, EPA must enter into agreements with other agencies to ensure the bureaucratic inefficiencies of the past do not delay energy projects in the future. Further, the EPA must be careful to comply with their statutory deadlines while ensuring that environmental and natural resource reviews of projects maintain their quality while also providing compliance with statutory mandates and certainty for investors, utilities, developers, regulators, and environmental NGOs.

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161. See 42 U.S.C. § 7470(1)–(5) (including protecting public health and welfare, economic growth, preserve air quality in parks and reserves, and ensure prevention of significant deterioration within attainment zones).