EPA has issued a controversial decision exempting a new, natural-gas power plant proposed for California's San Joaquin Valley, a region with some of the worst air quality in the country, from the most up-to-date Clean Air Act rules aimed at reducing climate emissions and the pollutants NO2 and SO2. Here's the E&E story, and here's the EPA decision, likely to be appealed within the agency to the Environmental Appeals Board, perhaps by Earthjustice.

The question at the heart of the controversy is this: Should power plants receiving CAA permits be required to satisfy air quality standards in place when their permits are issued? Or should it be enough that they satisfy the rules that *were* in place at the time of their *application* for a permit? The question is especially significant in the CAA Prevention of Significant Deterioration context, where the permit process can take years. This particular power plant permit application, for the Avenal plant, for example, was submitted to EPA in early 2008 and deemed complete later that year. In the intervening years between application and permit approval, EPA put in place more stringent standards for NO2 and SO2 and created standards, for the first time, for the greenhouse gases that cause climate change. (Here was one news story touting the new standards for NO2 and their health benefits.)

In this case, EPA is giving Avenal a pass on the new requirements. And it says that 10 or 20 other power plants nationwide may be in similar situations and also deserve grandfathering exemptions.

No one disputes that the default administrative rule requires that permits apply the law as of the date when the permit issues–that is, the opposite approach from the one taken here. But EPA says that it is departing from this rule for several reasons in this case (this comes from pp.8-9 of the decision):

> (1) the facility that APC proposes to construct will be a well-controlled facility that will apply BACT for NO_2 and achieve the lowest levels of air pollutant emissions achievable in this instance; (2) APC's permit application was deemed complete by EPA more than a year before, and EPA had issued a proposed permit for the project before, the date on which EPA proposed the hourly NO_2 NAAQS; (3) unanticipated delays with the preparation and review of sufficient information to predict the impact of proposed sources on hourly NO_2 concentrations; (4) the delays encountered in supplementing the APC permit application to address the hourly NO_2 NAAQS caused EPA's review of this application to extend

> beyond the dates when the hourly SO_2 NAAQS and greenhouse gas requirements became applicable to PSD permit applications; and (5) court decisions recognize an exception, in cases of significant delay by the administrative agency, to the general rule that an administrative agency should apply the law in effect at the time it issues a permit or license.

Most of which boils down to: Because we took way too long in processing this application, it wouldn't be fair to subject the applicant to the new rules.

I am sympathetic to the plight of the corporate applicant here, as well as to EPA's struggles to meet its workload with increasingly constrained resources. But I'm more sympathetic to the people in the communities near this plant, which include Avenal and Kettleman City, a city of 1,500 off Interstate 5 between Los Angeles and San Francisco "that for decades has endured agricultural sewage, diesel exhaust, pesticides and elevated levels of arsenic in drinking water," and that has suffered a rash of unexplained birth defects and associated deaths suspected, though not proven, to be linked with environmental contamination (LA Times story here). This area is already classified as in "extreme nonattainment" (as bad as it sounds) for ozone pollution and in nonattainment for state or federal particulate matter standards.

The purpose of the permit being issued to the Avenal plant is to help ensure that the risks from other seriously harmful air pollutants, like NO2 and SO2, are minimized using the best pollutant control technology available. At the end of the day, I just don't see how an agency's own administrative failures justify the additional, much more serious failure of applying anything but that best available technology here.