

## INSIGHTS

## 9th Circuit Appeals Court: Clean Air Act Permits Must Address Latest EPA Requirements

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On August 12, 2014, the 9th Circuit Court of Appeals overturned a Prevention of Significant Deterioration (PSD) permit issued under the Clean Air Act (CAA) by EPA to the Avenal Power Center. *Sierra Club v. EPA*, No. 11-73342 (9th Cir. Aug. 12, 2014). The PSD permit authorized the construction of a 600 MW natural gas-fired plant located in California's San Joaquin Valley. The plant was required to install state-of-the-art pollution controls for all traditionally regulated pollutants, such as nitrogen oxides, particulate matter, and carbon monoxide. The Court vacated the PSD permit because it found it was improper for EPA to issue a PSD permit that did not address new CAA requirements that were promulgated by EPA after the application was submitted. Although EPA has the authority to grandfather pending applications, it must exercise that authority through regulation by setting an effective date for the new regulation which would make the regulation applicable to permit applications submitted after a given date. When EPA does not address grandfathering in its regulations, the court stated that all PSD permits that are not final prior to the effective date of the new rule must be revised to address any new regulatory requirement, even if the permit had already been through the public comment process. The Court implied that any new assessment would likely need to go through a separate public comment process. Although Bracewell & Giuliani did not represent Avenal in the 9th Circuit proceedings, Bracewell did represent Avenal in the case below. *Avenal Power Ctr. LLC v. EPA*, 787 F. Supp. 2d 1 (D.D.C. 2010). There, the D.C. District Court ruled that EPA must either grant or deny a PSD permit to Avenal within one year of the permit being deemed administratively complete. In order to meet the district court's deadline, EPA used its discretion and did not apply certain new CAA regulations on Avenal. The 9th Cir. agreed with the D.C. District Court that EPA had one year to complete its administrative permitting duties. However, it found that EPA must account for all applicable requirements in effect until the time that a final permit is issued and that EPA must do so within one year of the date the PSD permit application was deemed administratively complete. The 9th Cir. opinion may have broad implications in CAA permitting. On May 30, the [D.C. Circuit directed](#) EPA that it could not limit the impact of a Circuit Court decision on air issues to just the states under the jurisdiction of the given appellate court. *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, No. 13-1035 (D.C. Cir. May 30, 2014) ("NEDA"¶). Rather, the NEDA court stated that EPA's Clean Air Act regulations have to be applied in a fair and uniform matter. As a result, Federal Circuit Court decisions may, in some circumstances, have nationwide impact. One limitation on the NEDA decision is

that it may have little or no impact on States with PSD approved programs under the State Implementation Plans because State law governs those programs.