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Federal Judge Rebukes EPA

By Kathleen Hartnett White

June 13, 2011 1:13 P.M.

At last, a federal court has sharply rebuked the EPA for exceeding its statutory authority. On May 26, 2011, Judge Richard Leon of the federal district court for the District of Columbia ruled that the agency's regulatory process cannot trump a clear Congressional mandate, nor override judicial authority to compel EPA's compliance with the law.

The issue at stake is the statutorily maximum timeframe for EPA's final decision to issue a Prevention of Significant Deterioration air-quality permit, a fundamental authorization for large industrial sources such as [power](#) plants and refineries. The 1977 amendments to the Clean Air Act (CAA) added what is now Sec. 165(c), which requires that EPA either grant or deny a permit "not later than one year after the date of filing such a completed application." In a 1992 agency rulemaking, the EPA added to the permitting process by creating an Environmental Appeals Board (EAB) for appellate review and final decision on permits. EPA admitted in its filings to the federal court that the appellate process of the EAB increases the timeframe from six months to over two years.

Averse to antagonizing the decision-maker, permit applicants are rarely willing to [hau](#)l the EPA into court before the EPA makes its final decision. Thankfully, Avenal Power Center, L.L.C., an electric utility in California, was willing to stand up to the EPA. After waiting over two years on a permit for its planned state-of-the-art combined-cycle natural-gas-fired power plant, and before the EAB process had even begun, Avenal sued. It challenged EPA's delay in granting the permit under section 165(c) of the CAA.

EPA readily admitted that it had violated the one-year statutory deadline but argued that the most the court could do was to order EPA to issue an interim decision, still subject to review by the EAB. Brazenly, the agency told the court that the EAB process established by the EPA created an administrative right to the additional review that cannot effectively be nullified by a court order to issue a final decision.

"How absurd!" responded Judge Leon. "It is axiomatic that an act of Congress that is patently clear and unambiguous — such as this requirement in the CAA — cannot be overridden by a regulatory process created for the convenience of the Administrator. . . . 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."

Judge Leon quoted the seminal administrative law case *Ernst & Ernst v. Hoshfelder* (1978), in which the Supreme Court reasserted the separation of powers between legislative and executive branches: "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."

Judge Leon responded to the EPA's claim that the statute's one-year deadline was ambiguous with deft nonchalance: "Horsefeathers!" Calling the EPA's argument "too clever by half," he noted simply, "That dog won't hunt." Mark one for limited government under the rule of law.

Judge Leon ordered the EPA to issue a final decision to grant or deny Avenal's PSD permit by Aug. 27, 2011 "with our without EAB's involvement."

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Permit timeframes may seem a humdrum matter, but it is through clever procedural maneuvering that agencies continually expand their powers well beyond the confines of their enabling statutes. The EPA's forced-march to regulation of greenhouse gasses in January 2011 was such an administrative tour de force – an activist regulator for which self-proclaimed noble ends justify any means to assert authority. Congress and courts may frown but all too often they defer to the admittedly broad discretion typically granted to agencies in their enabling laws and of which federal [environmental](#) laws may have granted the most.

The administrative probity by which federal power is asserted makes all the difference between regulation by fiat *a la* Venezuela or limited government under the rule of law. Administrative rules carry the force of law, ostensibly as the actions that implement law. When the rules are promulgated or implemented without the limits of enabling laws, however, the administrative state perilously tilts toward totalitarianism.

Under the Obama administration, EPA is acting on an expansive interpretation of its already expanded regulatory authority, an overreach perhaps unmatched in the 40-year history of the agency. Businesses long reluctant to fight with the environmental gorilla that is the EPA have taken to the courts, as have many state governments. The stakes are too high, and EPA's recent actions far too legally questionable, not to challenge the agency. May Judge Leon's stout riposte to the EPA be one of many decisions to come in what now may be over 500 lawsuits challenging EPA decisions over the last two years.

— *Kathleen Hartnett White, a former chairman of the Texas Commission on Environmental Quality, is senior fellow and director of the Armstrong Center for Energy and the Environment at the Texas Public Policy Foundation. She previously served, for six years, as Chairman of the Texas Commission on Environmental Quality. Her article, "The Fracas about Fracking," appears in the current issue of NR.*

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Coach Springer
06/14/11 09:08
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Now if the regulators (I'm a recently retired regulator) can find a way to con passage of a law to create a Judicial Protection Agency, the circle will be complete. Regulatory agencies make, enforce and adjudicate and are therefore guaranteed to be blind to their excesses or the original intent in creating them.

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Jack in Silver Spring
06/13/11 22:02
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Zexufang - Spot-on!! I've been saying exactly the same thing whenever I have had the chance. Congress cannot be allowed to abdicate its role as the sole legislative body of the United States, and the Executive cannot be allowed to usurp the legislative role the Constitution has given solely to Congress.

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Robert
06/13/11 20:19
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RE: Bob Ennis

I second the motion. Representing private landowners and developers for over fifteen years has taught me the dirty little secret that excessive permitting timeframes are THE central issue in an overarching bureaucracy. Extortionate review fees, voluminous codes, and redundant permitting agencies are the norm now, and all can be overcome with a good engineer, contractor, and an assertive owner. Not so the permit review timeframe monster - this beast slays all who venture in. In Florida, government subdivision permit reviews which take routinely two years or more were a PRIMARY cause for the oversupply and subsequent housing market crash. The pipeline was full of projects trying to get through, and rather than expedite project reviews, the government caused the pipeline to choke with its policy of non-vested development rights, which is code for "You can't do anything to improve your property unless we bless it first". When the housing downturn became obvious, thousands of subdivisions were still stuck in the cue waiting for approvals which in many cases were several YEARS off. Having invested tens and hundreds of thousands of dollars for the high privilege of trying to get a permit, owners had little choice but to stay the course.

We need immediate top-down regulatory reform of federal, state, and local permit review agencies, and the EPA is a great target for the first salvo.

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JohnnyG
06/13/11 16:14
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I'm of the opinion the private sector selectively weeds out employees who aren't accountable or able to produce valuable work within a specific timeline. Those employees make their way into government where they can continue to be employed without consequences of their inaction.

This decision is really a fatherly lecture on work ethic, disguised as a judicial ruling.

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Bob Ennis
06/13/11 15:05
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As someone who requires EPA permits for virtually every project I undertake at my firm, I can state unequivocally that EPA permit timeframes are no humdrum matter. They can make or break a company.

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Zexufang
06/13/11 14:51
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All proposed federal regulations issued by the EPA (or FDA, SEC, FCC, etc... and nauseum) should be submitted to Congress and the President for a public up or down vote.

This way smarmy politicians - and Presidents - cannot hide behind anonymous bureaucrats.

As an American citizen I do NOT condone nor support government by continuous unchecked over-zealous regulation that has the force of LAW.

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Zexufang
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This way smarmy politicians - and Presidents - cannot hide behind anonymous bureaucrats.

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DorsaiGuy
06/13/11 13:37
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Maybe this is why the EPA feels the need to start arming their agents ...

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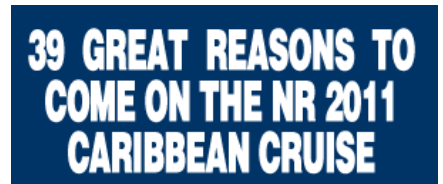
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