

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

An Operating Permit for the Columbia Generating
Station, Located at W8375 Murray Road,
Pardeeville, Columbia County, Wisconsin.

Source I.D. 111003090

Permit No. 111003090-P20

Petition No. V-2008-_____

Proposed by the Wisconsin Department of Natural
Resources on July 9, 2009.

PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF
THE PROPOSED TITLE V OPERATING PERMIT FOR THE COLUMBIA GENERATING
STATION

GARVEY MCNEIL & MCGILLIVRAY, SC
David C. Bender
(Wis. Bar No. 1046102)
Carlos A. Pabellon
(Wis. Bar No. 1046945)
634 W. Main St., Ste 101
Madison, WI 53703
Phone: (608) 256-1003
Fax: (608) 256-0933
bender@gmmattorneys.com

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Pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d), the Sierra Club hereby petitions the Administrator (“the Administrator”) of the United States Environmental Protection Agency (“U.S. EPA” or “EPA”) to object to a proposed Title V Operating Permit for the Columbia Generation Station (“CGS”), Permit Number 111003090-P20 (“Permit”). The Permit was proposed to U.S. EPA by the Wisconsin Department of Natural Resources (“DNR”) more than 45 days ago. A copy of the proposed Permit is attached as Exhibit A. Sierra Club provided comments to the DNR on the draft permit and the revised draft permit. A true and accurate copy of Sierra Club’s comments is attached at Exhibit B. DNR responded to Sierra Club’s comments through a memorandum, a copy of which is attached as Exhibit C.

This petition is filed within sixty days following the end of U.S. EPA’s 45-day review period, as required by Clean Air Act (“CAA”) § 505(b)(2). The Administrator must grant or deny this petition within sixty days after it is filed. If the Administrator determines that the Permit does not comply with the requirements of the CAA, or fails to include any “applicable requirement,” he must object to issuance of the permit. 42 U.S.C. § 7661b(b); 40 C.F.R. § 70.8(c)(1) (“The [U.S. EPA] Administrator will object to the issuance of any permit determined by the Administrator not to be in compliance with applicable requirements or requirements of this part.”). “Applicable requirements” include, *inter alia*, any provision of the Wisconsin State Implementation Plan (“SIP”), including Prevention of Significant Deterioration (“PSD”) requirements, any term or condition of any preconstruction permit, any standard or requirement under Clean Air Act sections 111, 112, 114(a)(3), or 504, acid rain program requirements. 40 C.F.R. § 70.2. Notably, “applicable requirements” include any requirement to obtain a

preconstruction permit and comply with New Source Review regulations. *In re Monroe Electric Generating Plant*, Petition No. 6-99-2 at p. 2 (EPA Adm'r 1999).

This petition seeks an objection by the Administrator for four reasons:

- 1) The permit omits applicable PSD requirements based on an erroneous legal interpretation by DNR whereby emission increases for purposes of determining PSD applicability are measured as actual-to-confirmed-actual;
- 2) DNR impermissibly provides only cursory response and avoids responding to the substance of Sierra Club's comments showing factual errors in DNR's determination that PSD is inapplicable to the CGS;
- 3) DNR unlawfully refused to include a schedule of compliance addressing opacity/visible emission violations that DNR agrees are ongoing, based on DNR's erroneous interpretation of law that a violation must be a "high priority violation" according to EPA guidance before a compliance schedule is required; and
- 4) DNR erred by omitting applicable requirements related to hazardous air pollutant emissions from the auxiliary boiler, including the requirement to submit a "MACT Hammer" application pursuant to 42 U.S.C. § 7412(j) and 40 C.F.R. Part 63.

I. THE DNR ERRED IN REFUSING TO REVISIT PRIOR PSD NONAPPLICABILITY DETERMINATIONS THAT WERE WRONG AS A MATTER OF LAW AND AS A MATTER OF FACT.

Every Title V permit must "assure[] compliance by the source with all applicable requirements." CAA § 504(a); 40 C.F.R. § 70.1; Wis. Stat. § 285.64(1); Wis. Admin. Code § NR 407.09(4)(b). As noted above, "applicable requirements" include State Implementation Plan ("SIP") requirements and preconstruction requirements, including the requirement to obtain a PSD preconstruction permit and apply best available control technology ("BACT"). 40 C.F.R. § 70.2; Wis. Stat. § 285.64(1); Wis. Admin. Code § NR 400.02(26); see also *In re Monroe Electric Generating Plant, Entergy Louisiana, Inc.*, Proposed Operating Permit, Petition No. 6-99-2, Order (EPA Adm'r) (objecting to Title V permit that failed to ensure compliance with PSD program).

If the facility is not in compliance with all applicable requirements at the time of permit issuance, the permit must also contain an enforceable schedule to bring the facility into compliance. The U.S. EPA Administrator has described this requirement as follows:

40 C.F.R. § 70.5(c)(8)(iii)(C) and 70.6(c)(3) require that, if a facility is in violation of an applicable requirement and it will not be in compliance at the time of permit issuance, its permit must include a compliance schedule that meets certain criteria. For sources that are not in compliance with applicable requirements at the time of permit issuance, compliance schedules must include 'a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance.' 40 C.F.R. § 705(c)(8)(iii)(C).

In the Matter of Onyx Environmental Services, Petition No. V-2005-1, Order at pp. 6-7 (Adm'r Feb. 1, 2006) (hereinafter "*Onyx*"). The Administrator must object to the permit here because, *inter alia*: (1) it omits applicable PSD requirements; and (2) it omits a schedule of compliance to ensure compliance with applicable PSD requirements.

PSD is an applicable requirement for the CGS because the owners and operators of CGS commenced construction in 2006 of a project to replace the economizer and superheater, and other related components on Unit 1. In its application to the Public Service Commission of Wisconsin ("PSCW"), Wisconsin Power & Light ("WPL") estimated the cost of the project to be \$18.9 million. *See* Application for a Certificate of Authority to Replace the Unit 1 boiler Economizer, Final Superheat, lower one third of the Superheat Pendant Platens and the Superheater Division Panels at the Columbia Energy Center, Columbia County, Wisconsin, PSC Ref # 29541 (March 7, 2005) (attached hereto as Exhibit D, also available at http://psc.wi.gov/apps/erf_share/view/viewdoc.aspx?docid=29541) (hereinafter "*CA Appl.*"). The project included replacement of the economizer, final superheater, superheat division panels and the lower third of the superheater platens. *Id.*

Both the company's application and the Public Service Commission's order identify the need to regain lost operating time as the purpose for the project. CA Appl.; *In re Application for Certificate of Authority to Replace the Unit 1 boiler Economizer, Final Superheat, lower one third of the Superheat Pendant Platens and the Superheater Division Panels at the Columbia Energy Center, Columbia County, Wisconsin*, Docket No. 05-CE-135, Order (Wis.Pub.Serv.Comm. May 3, 2005) (attached as Exhibit E, also available at http://psc.wi.gov/apps/erf_share/view/viewdoc.aspx?docid=33517). The DNR was asked to informally review the project and, in DNR's analysis, it also concurred that the purpose of the plant was to regain lost operating time attributable to the economizer and superheater sections of the boiler. See Ltr. from Roger Fritz, DNR, to Steve Jackson, Alliant Energy/WPL (Oct. 2, 2005) ("The project would result in regaining operating hours previously lost to forced outages.") (hereinafter "Fritz Letter") (attached as Exhibit F).

Based on the company's own projections, the Economizer/Superheater replacement was projected to increase the amount of operating time and, consequently, annual emissions. DNR reviewed the company's projected increases in operating time and emissions and provided the following analysis:

- According to the applicant, past actual emissions (based on 1/2003 - 12/2004 CEM, stack test and for PM₁₀, AP-42 emission factor) are as shown in the following table. Projected future emissions would be limited by the applicant for nitrogen oxides and sulfur dioxide to below the sum of past actual emissions plus the significance threshold. The increase in VOC and lead emissions would be trivial.

Pollutant	Past Actual, tpy	Significance threshold, tpy	Emission increase possible due to regained operating hours, tpy	Projected Future Actual, tpy
CO	3119	100	12	3131
NO _x	3012	40	12	3024
SO ₂	15255	40	61	<15295*
PM	1011	25	4	1015
PM ₁₀	196	15	0.79	197
VOC	-	40	-	<40
Lead	-	0.60	-	<0.6

*The applicant would limit operations to keep emissions below this level for the 5 year period following the project

Fritz Letter at 2. The DNR's file, containing the permittee's projections, shows that the DNR and the permittee expected Unit 1 to regain 35.075 hours annually as a result of the Economizer/Superheater replacement project. See Ltr. from Steve Jackson, WPL, to Steve Dunn, DNR re: Columbia Generating Station Unit 1, FID #111003090, Permit #111003090-P10 Economizer/Final Superheater Replacement Project at Attachment 1 (August 30, 2005) (hereinafter "Jackson Letter") (attached as Exhibit G). The company then multiplied this number of regained hours by the maximum assumed heat rate (4985 MMBtu/hour) and then by the assumed emission rate in pounds per million Btus. *Id.* For SO₂, this formula should result in a 61 ton per year increase:

$$35.075 \text{ regained hours} * 4985 \text{ MMBtu/hr} * 0.698 \text{ lb SO}_2/\text{MMBtu} \\ * 1 \text{ ton}/2000 \text{ lbs} = 61.022 \text{ tons/year}$$

In other words, based on the projected increase in hours and the emission rate per hour assumed by WPL and DNR, the Economizer/Superheater replacement was projected to result in an increase exceeding the threshold for a "major modification." See Wis. Admin. Code § NR

405.02(27)(a)3. (threshold for SO₂ is 40 tons per year). However, the company's calculations state that the increase will be *only 39 tons/year*. See Jackson Letter. This conclusion, which the DNR accepted, is based on an impermissible interpretation of law whereby a projected significant increase can be ignored and, instead, a facility can use confirmed-actual emissions to reevaluate emission increases after the project. This is an erroneous interpretation of law and the Administrator must object.

A. The PSD Program.

The Clean Air Act was passed to protect and enhance the quality of the nation's air so as to promote the public health and welfare and the productive capacity of the United States' population. 42 U.S.C. § 7401(b)(1). Congress intended to "speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again." *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 909 (7th Cir. 1990) (quoting H.R. Rep. No. 91-1146, at 1 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 5356, 5356)). As its name implies, the Prevention of Significant Deterioration program in Part C of the Clean Air Act, 42 U.S.C. §§ 7470-7492, creates a program to prevent those areas currently attaining the minimum national air quality standards from deteriorating. *Alaska Dept. of Env'tl. Conservation v. EPA*, 540 U.S. 461, 470-71 (2004). PSD requirements are not applicable to all facilities, however. Rather, pollution sources that were in existence in 1977 were grandfathered out of compliance with PSD requirements unless and until those sources are modified in ways that increase emissions. 42 U.S.C. § 7475(a), 7479(2)(c), 7411(a)(4); *Alabama Power v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979); *United States v. Murphy Oil USA, Inc.*, 155 F.Supp.2d 1117, 1137 (W.D. Wis. 2001) (*citing WEPCO*, 893 F.2d at 909). Once modified, however, the PSD provisions require each major emitting facility to:

obtain a PSD permit, 42 U.S.C. § 7475(a)(1); undergo review by a permitting agency and through a public hearing, 42 U.S.C. § 7475(a)(2); demonstrate that it will not cause or contribute to a violation of NAAQS or a “maximum allowable increase” over existing pollution levels (“increment”), 42 U.S.C. § 7475(a)(3); and meet pollution limits based on “best available control technology” (“BACT”), 42 U.S.C. § 7475(a)(4). *Alaska Dept. of Env'tl. Conservation*, 540 U.S. at 472. These requirements were intended to eventually apply to all plants; the “grandfathering” was not intended “to constitute perpetual immunity” from all standards under the PSD program. *Alabama Power*, 636 F.2d at 400; *WEPCO*, 893 F.2d at 909 (“But Congress did not permanently exempt existing plants from these [PSD] requirements; section 7411(a)(2) provides that existing plants that have been modified are subject to the Clean Air Act programs at issue here.”); *U.S. v. Ohio Edison Co.*, 276 F.Supp. 2d 829, 850 (S.D. Ohio 2003) (Congress did not intend that existing sources be granted perpetual immunity from installing modern pollution controls).

B. Applying PSD to the Economizer/Superheater Replacement Project on Unit 1.

The PSD program requirements (including permitting, BACT, emission impact analysis, etc.) are “applicable requirements,” for purposes of Title V permitting, for each facility that undergoes a “major modification.” 42 U.S.C. § 7475(a), 7479; Wis. Admin. Code §§ NR 405.07, 405.08, 405.09, 405.11, 405.13- 405.15. A major modification occurs when a facility: (1) undergoes a physical change or change in the method of operation; and (2) the change results in a sufficient increase in air pollution. 42 U.S.C. § 7411(a)(4); 42 U.S.C. § 7475(a); 57 Fed. Reg. at 32,316; Wis. Admin. Code § NR 405.02(21); *WEPCO*, 893 F.2d at 907; *Murphy Oil*, 155 F.Supp.2d at 1137; *In re Tennessee Valley Authority*, 9 E.A.D. 357, 388 (EAB 2000) (citing *WEPCo. v. Reilly*, 893 F.2d 901, 907-09 (7th Cir. 1990)). The Economizer/Superheater replacement was a “major modification” because it is undisputed that it was a “physical change,”

and under the correct interpretation of law, it resulted in a projected significant increase in SO₂ emissions even assuming all of DNR's factual assumptions to be true.

1. The Economizer/Superheater Replacement on Unit 1 Was A Physical Change.

The term "physical change" is very broad. Congress intended that "any physical change" trigger the PSD program requirement, and intended "any physical change" to have an expansive meaning. *New York v. EPA*, 443 F.3d 880, 885-87 (D.C. Cir. 2006) (holding that Congress' use of the phrase "any physical change" was intended to apply to the broadest possible category of changes); *New York v. EPA*, 413 F.3d 3, 40-42 (D.C. Cir. 2005); *WEPCO*, 893 F.2d at 908-10; Memorandum from Don R. Clay, USEPA Acting Assistant Administrator for Air and Radiation, to David A. Kee, USEPA Director of Air and Radiation Division, Region 5, Re: Applicability of Prevention of Significant Deterioration (PSD) and New Source Performance Standards (NSPS) Requirements to the Wisconsin Electric Power Company (WEPCO) Port Washington Life Extension Project 3 (September 9, 1988) ("The clear intent of the PSD regulations is to construe the term "physical change" very broadly, to cover virtually any significant alteration to an existing plant."); *see also* 57 Fed. Reg. 32,314, 32,316 (July 21, 1992) (acknowledging that the broad terms "change" and "modification" "encompass the most mundane activities at an industrial facility (even the repair or replacement of a single leaky pipe, or a change in the way that pipe is utilized."); *United States v. Cinergy Corp.*, Slip Op. (Order on Cross-Motions for Summary Judgment Regarding Fair Notice Defense, ED #940), Case No. 1:99-cv-1693-LMS-JMS at 14 (S.D. Ind. June 18, 2007) ("The CAA defines the term 'modification' broadly as 'any physical change... which increases the amount of any air pollutant emitted...' As the Seventh Circuit has noted, the potential reach of this definition is broad and encompasses even the most trivial of activities." (internal citations omitted)). The Economizer/Superheater replacement

project was unquestionably a “physical change.”¹ These components are large and took many weeks and millions of dollars to replace.

2. The Economizer/Superheater Replacement Was Projected To Result In A Significant Net Emission Increase Under The Correct Legal Test.

The Economizer/Superheater replacement also resulted in a significant emission increase under the correct legal test. To determine if a physical change results in a “significant net emissions increase,” under the Wisconsin SIP, a source’s historical actual emissions are generally compared to its potential to emit. Wis. Admin. Code §§ NR 405.02(1), (24)(a)1. (1998)²; *see also Puerto Rican Cement Co., Inc. v. U.S. Env’tl. Protection Agency*, 889 F.2d 292, 296 (1st Cir. 1989); *Sierra Club v. Morgan*, 2007 WL 3287850 *18, 66 ERC 1717 (W.D. Wis. Nov. 7, 2007); *U.S. v. Murphy Oil USA*, 143 F.Supp.2d 1054, 1104-05 (W.D. Wis. 2001).

However, an electric utility steam generating unit, like the CGS at issue here, has the *option* of

¹ A routine maintenance, repair, or replacement, by itself, is not a modification. However, very few physical changes are routine, and must meet a four-factor test including the nature, extent, purpose, frequency and cost of the work. *WEPCo.*, 893 F.2d at 910 (*quoting* Sept. 9, 1988 Memorandum from Don R. Clay, USEPA, to David A. Kee, “Applicability of Prevention of Significant Deterioration (PSD) and New Source Performance Standards (NSPS) Requirements to the WEPCO Power Company Port Washington Life Extension Project.”). Moreover, “[r]outine maintenance, repair, and replacement occurs regularly, involves no permanent improvements, is typically limited in expense, is usually performed in large plants by in-house employees, and is treated for accounting purposes as an expense. In contrast to routine maintenance stand capital improvements which generally involve more expense, are large in scope, often involve outside contractors, involve an increase of value to the unit, are usually not undertaken with regular frequency, and are treated for accounting purposes as capital expenditures on the balance sheet.” *Ohio Edison*, 276 F.Supp. 2d at 834 (citations omitted). Routine maintenance must be interpreted as very narrow. *U.S. v. So. Ind. Gas & Elec. Co.*, 245 F.Supp.2d 994, 1009 (S.D. Ind. 2003) (“Giving the routine maintenance exemption a broad reading could postpone the application of NSR to many facilities, and would flout the Congressional intent evinced by the broad definition of medication.”). The project at issue was not routine and the applicant has never claimed it was. Permission was required from the Public Service Commission because of the extent of the project, the replacement parts were of a different design, and this is the first-ever project like this in the life of CGS Unit 1.

² The Wisconsin DNR has adopted changes to the Wisconsin PSD program. However, EPA has not adopted them into the Wisconsin SIP. During the relevant periods here, the applicable PSD regulations were the 1998 version of Wis. Admin. Code ch. NR 405, as adopted into the Wisconsin SIP. Wisconsin’s PSD program was approved as a revision to Wisconsin’s SIP in 1999. *Approval and Promulgation of Implementation Plans; Wisconsin*, 64 Fed. Reg. 28,745, 28,746 (May 27, 1999). Prior to June 28, 1999, facilities in Wisconsin were regulated by the PSD regulations adopted in the EPA’s federal PSD program—located at 40 C.F.R. § 52.21. *Id.*; *see also* 43 Fed. Reg. 26,410 (June 19, 1978) (adopting 40 C.F.R. § 52.21 (b) through (w) as applicable to Wisconsin at 40 C.F.R. § 52.2581 (1978)).

comparing its historic “actual” emissions to its future *projected* emissions based on a 1992 rulemaking by EPA (the “WEPCO Rule”). Wis. Admin. Code § NR 405.02(1)(d); *see also* *Murphy Oil*, 143 F.Supp.2d at 1104 (discussing the 1992 WEPCO Rule). The “actual-to-projected-actual” test is, as its name implies, a projection of future emissions. 57 Fed. Reg. at 32,319; *see also* *New York I*, 413 F.3d at 16 (explaining the *WEPCO* rule). Under the WEPCO Rule, and the December 31, 2002 rulemaking expanding the optional WEPCO Rule emission-increase test to all facilities, an emission increase projection is based on the number of hours the unit is projected to operate in the future, multiplied by the emission rate. *Id.* EPA has described this calculation as follows:

This projection of the unit’s annual emissions rate following the change... will be based on your maximum annual rate in tons per year at which you are projected to emit a regulated NSR pollutant, less any amount of emissions that could have been accommodated during the select 24-month baseline period and is not related to the change. Accordingly, you will calculate the unit’s projected actual emissions as the product of: (1) The hourly emission rate, which is based on the emissions unit’s operational capabilities following the change(s), taking into account legally enforceable restrictions that could affect the hourly emissions rate following the change(s); and (2) the projected level of utilization which is based on both the emissions unit’s historical annual utilization rate and available information regarding the emission unit’s likely post-change capacity utilization....

From the initial calculation, you may then make the appropriate adjustment to subtract out any portion of the emissions increase that could have been accommodated during the unit’s 24-month baseline period and is unrelated to the change.

67 Fed. Reg. at 80,186.

Assuming WPL's own figures³, Unit 1's "hourly emission rate, which is based on the emissions unit's operational capabilities following the change" is 3481.5 lb/hour (4985 MMBtu/hour * 0.6984 lb SO₂/MMBtu). Jackson Letter at Attachment 1. Under the actual-to-projected-actual test, this emission rate is to be multiplied by the "projected level of utilization" attributable to the physical change, or the number of regained operating hours after the change, which WPL estimates to be 35.075 hours/year.⁴ *Id.* The resulting projected increase in SO₂ emissions is greater than 61 tons of SO₂ per year, which is a significant net increase. *See* Wis. Admin. Code § NR 405.02(27)(a)3. (a 40 ton-per-year increase is significant for SO₂). This method of calculating a significant increase—a projection based on regained operation hours multiplied by the hourly emission rate-- is the same as the one EPA has used in numerous cases. *See e.g., United States v. Ohio Edison Co.*, 276 F.Supp.2d 829, 869-75 (S.D. Ohio 2003); *In re Tennessee Valley Authority*, 9 E.A.D. 357, 439-52 (EAB 2000).

The DNR did not determine PSD applicability based on the projected-actual test set forth above, however. Instead, DNR accepted the applicant's interpretation of law allowing the facility to ignore the projected significant increase, construct, and then determine PSD applicability after the project based on confirmed post-project emissions. In a footnote to its 39 ton-per-year emission increase projection, the company states: "Plant operations will be managed to ensure Future Emissions are not exceeded above Past Actual emissions plus significant threshold." Jackson Letter at Attachment 1 n.5; Fritz Letter. As Sierra Club noted in its comments, this is an incorrect interpretation of law. *See* Sierra Club Comments at 10-14. DNR

³ As noted below, and in Sierra Club's comments, these figures under-estimate the emissions from the project. The projected increase is actually much larger than DNR's assumptions indicate. However, regardless of DNR's erroneous factual assumptions, the projected increase in SO₂ constitutes a major modification.

⁴ This number is also too low. As shown below, the number of regained hours of operation was actually much greater. However, again, even using the DNR and WPL's low numbers, the change constituted a major modification.

did not respond to Sierra Club's comments substantively. Instead, DNR refused to revisit it prior erroneous interpretation of law, stating:

When DNR made the applicability determinations in question, the Department analyzed the two exemptions based on data available at the time of its review. Sierra Club has not provided a sufficient basis for the Department to reexamine these previous exemptions or to require prevention of significant deterioration (PSD) permitting at this time.

Response to Comments (Ex. C) at 2.

DNR's response is wrong and insufficient, and the Administrator must object. There is no legal basis for the PSD applicability test applied by DNR. The WEPCO Rule did not provide that utility units opting into the actual-to-projected-actual test could ignore a projected significant increase and avoid PSD applicability based on an promise to use actual-to-confirmed-actual post-project emissions to show no increase. Rather, the WEPCO Rule provided that a facility opting into the actual-to-projected-actual test must first project no significant increase and then must keep records and report annually for at least five years following a physical change as a "backstop" to prevent under-projecting increases. 57 Fed. Reg. 32,314, 32,325 (July 21, 1992). The "backstop" recordkeeping and reporting is not a substitute for the first step: projecting future emissions based on emission rate and regained hours of operation. EPA expressly stated that the intent of this backstop provision was to "*confirm* the utility's initial projections rather than *annually revisiting* the issue of NSR applicability." *Id.* (emphasis added). EPA has also said:

In 1992... we promulgated revisions to our applicability regulations creating special rules for physical and operational changes at EUSGUs. [See 57 FR 32314 (July 21, 1992).] In this rule, as noted above, commonly referred to as the 'WEPCO rule,' we adopted an actual-to-future-actual methodology for all changes at EUSGUs except the construction of a new electric generating unit or the replacement for an emission unit. Under this methodology, the actual annual emissions before the change are compared with the projected actual emissions after the change to

determine if a physical or operational change would result in a significant increase in emissions. *To ensure that the projection is valid*, the rule requires the utility to track its emissions for the next 5 years and provide to the reviewing authority information demonstrating that the physical or operational change did not result in an emission increase.

70 Fed. Reg. 61,081, 61,098 (October 20, 2005). In short, the WEPCO-rule was not intended to invite facilities to make changes and later determine, based on confirmed post-project emissions, whether those changes resulted in emission increases. Such an “actual-to-confirmed-actual” test is repugnant to the PSD program and has been rejected by EPA and every court to consider it. *U.S. v. SIGECO*, 2002 WL 1629817 *3 (S.D.Ind. 2002) (holding that post-project data are irrelevant to determining whether a project would cause a significant net emission increase), *10 (holding that a determination of whether PSD applies must be made at the time of the change, based on information available at that time); *United States v. Cinergy Corp.*, 2005 U.S. Dist. LEXIS 28755 (“[F]or NSR purposes the post-project emissions rate is determined before the project begins.”); *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829 (S.D. Ohio 2003) (“*even though actual data exists as to the emissions resulting from the eleven projects, the law does not permit an after-the-fact analysis of the effect of a plant modification, which otherwise was required by law to obtain a pre-construction permit.*” (emphasis added)); Brief of EPA in Support of Plaintiff’s Motion in Limine to Exclude Evidence of Post-Project Actual Emissions, *U.S. v. Cinergy Corp.*, Case No. IP99-1693 C-M/S (S.D.Ind.); Pl’s Proposed Case-Specific Jury Instructions, Instr. No. 6.B at 16, *U.S. v. Cinergy Corp.*, Case No. IP99-1693 C-M/S (S.D.Ind.) (Dkt # 1015-2); Br. of United States, *U.S. v. Duke Energy Corp.* at 14, Case No. 1:00-cv-1262 (M.D.N.C.) (arguing that a plant “cannot ‘wait and see’ whether PSD is triggered, it must determine whether PSD is applicable *before* the modification.”).

Here, the DNR's acceptance of WPL's wait-and-see approach for determining PSD applicability is unlawful. PSD is applicable based on the correct application of the actual-to-projected-actual test and, therefore, the Administrator must object.

It should also be noted that DNR's analysis is especially concerning here, where there is no explanation for WPL's projections. WPL does not describe how it "projected" a 39 ton-per-year increase in SO₂, when the inputs to the equation result in a 61 ton-per-year increase. WPL merely asserts that it will "manage" the unit's operations to prevent an SO₂ increase greater than 39 tons per year. Notably, none of the other pollutants WPL predicts increases for (CO, NO_x, PM) are similarly "managed." Instead, all are projected to increase proportionally based on the emission rates and increased hours of operation. There are no post-combustion pollution controls for SO₂ at the CGS Unit 1 and emissions for all pollutants are directly correlated to total hours of operation. *See* Jackson Letter Attachment 1. Therefore, WPL's assertion that it will attempt to "manage" emissions post-project to limit increases in SO₂ conflicts with its projection of increases for the other pollutants. This incongruity in WPL's projections reinforces why the actual-to-confirmed actual test DNR and WPL rely on for SO₂ (but not other pollutants) should not be countenanced by EPA. EPA must object.

C. DNR Provides No Basis To Ignore The Evidence Sierra Club Provide Showing That WPL Under-Estimated Emission Increases Attributable to the Economizer/Superheater Replacement For Unit 1 Based on Erroneous Heat Rate and Regained Operating Time.

Separate from DNR's erroneous legal interpretation, DNR also unreasonably ignored the evidence Sierra Club provided in its public comments showing that WPL underestimated its emission increases attributable to the 2006 replacement of the economizer and superheater (and other components) of Unit 1. *See* Sierra Club Comments at 14-18. As noted above, future

emissions were projected by WPL, and accepted by DNR, based on the emission rate multiplied by the maximum heat rate and the regained hours of operation (emissions in lb/MMBtu * MMBtu/hour * regained hours). See Jackson Letter at Attachment 1. WPL asserted that 4985 MMBtu/hour represented the “average heat input per hour” for Unit 1, based on “prior 24-month average from CEMS” from January 2003 through December 2004. See Jackson Letter; see also Sierra Club Comments at 15. A simple review of the CEMS data from January 2003 through December 2004 for Unit 1, however, shows that the average hourly heat input for the chosen period of time was actually 5,357.7 MMBtu/hour. See Sierra Club Comments at 16, providing data from EPA’s Acid Rain Database; see also www.epa.gov/airmarkets. EPA’s CEMS data for Unit 1 shows as follows:

<u>State</u>	<u>Facility Name</u>	<u>Facility ID (ORISPL)</u>	<u>Unit ID</u>	<u>Associated Stacks</u>	<u>Year</u>	<u>Operating Time</u>	<u># of Months Reported</u>	<u>SO₂ Tons</u>	<u>Avg. NO_x Rate (lb/mmBtu)</u>	<u>Heat Input (mmBtu)</u>
WI	Columbia	8023	1		2003	8,119	12	15,665.5	0.14	44,060,267
WI	Columbia	8023	1		2004	8,099	12	14,844.1	0.14	43,391,954

Simply dividing the heat input by the operating time provides the average heat rate, which is much higher than the 4985 MMBtu/hour DNR assumed.

DNR responded to Sierra Club’s comments regarding heat rate with a mere conclusory statement that “Sierra Club has not provided a sufficient basis for the Department to reexamine these previous exemptions...” Response to Comments at 2. A meaningful response to comments requires more. Sierra Club showed that the information DNR purported to rely upon was wrong: the EPA database contains *the very CEMS data that DNR purports to rely upon* but shows a significantly higher hourly heat input. DNR cannot refuse to look at this data and, instead, stubbornly assert that it is “insufficient.” Moreover, DNR’s prior so-called “exemption determination” was not publicly noticed and the public was given no opportunity to comment on

it. DNR's refusal during a Title V permitting to "reexamine" a determination it made without notice and comment, outside the Title V process, would negate the opportunity for notice and comment on Title V permits. If allowed by the EPA, such practice would invite DNR to make off-permit determinations, then refuse to "reexamine" those determinations when the public comments on the agency's attempt to rely on them during the Title V permit process. The Administrator must object to DNR's refusal to consider and provide a meaningful response to public comments. The Administrator should also object because the facts are clear—the CEMS data shows that the average heat rate for CGS Unit 1 is much higher than assumed by DNR.

Additionally, Sierra Club pointed out to DNR that WPL's projected increase in hours of operation attributable to the Economizer/Superheater replacement (35.075 hours), for purposes of PSD permitting, was vastly different than the number of hours WPL told the PSCW when attempting to justify the economic benefit of the modification. *See* Sierra Club Comments at 16-17. Specifically, WPL told the PSCW that it suffered 3 tube failures in 2003 and 2 tube failures in 2004, and that the average tube failure forced outage lasted 75.5 hours. *See* CA Appl. (Ex. D) at p. 11. This suggested to the PSCW that the project would allow the unit to regain 188.75 hours, annually, compared to the 30.075 hours WPL represented to DNR. These different representations to the two different state agencies are inconsistent. Moreover, the Generation Availability Data System (GADS) information available publicly also indicates that WPL's 30.075 hours/year representation to DNR omitted an outage in May, 2004, from the calculation without explanation. *Sierra Club Comments* at 17.

DNR's response to these comments was merely to say that DNR did not have "a sufficient basis" to reexamine its prior exemption determination. *Response to Comments* at 2. This response is nothing more than a refusal to respond to comments. *Sierra Club's comments*

were substantive and DNR is required to provide a meaningful, substantive response. *E.g., In re Midwest Generation, LLC, Waukegan Generation Station*, Petition No. V-2004-5, Order at 4 (EPA Adm'r Sept. 22, 2005) (objecting based on permitting agency's failure to respond to significant public comments); *In re Consolidated Edison Co. Hudson Ave. Gen. Station*, Petition No. II-2002-10 at 8 (EPA Adm'r Sept. 20, 2003) (objecting because permitting agency provided only "cursory response" to public comments on new source review applicability).

Further still, Sierra Club's comments showed that if the pre-project "baseline" emissions were calculated from the 24-months immediately preceding the economizer/superheater replacement on Unit 1, as the Wisconsin SIP presumes, the number of regained hours of operation from the replacement would be significantly higher—167.50 hours rather than the 35.075 assumed by DNR. Sierra Club Comments at 17-18; *see also* Wis. Admin. Code § NR 405.02(1)(a) (2004) (providing that the assumed pre-change baseline is the 24-months immediately preceding the change). Again, DNR's blanket refusal to reconsider its prior, off-permit non-applicability determination, was the only response DNR gave to these comments. Response to Comments at 2. This response, which was effectively a refusal to consider the comment, is insufficient and the Administrator must object.

As noted above, a Title V permit must "assure[] compliance by the source with all applicable requirements." CAA § 504(a); 40 C.F.R. § 70.1; Wis. Stat. § 285.64(1); Wis. Admin. Code § NR 407.09(4)(b); *Onyx*, *supra*, at pp. 6-7. "Applicable requirements" include requirements contained in preconstruction permits and the requirement to obtain preconstruction permits, comply with BACT, and undertake air impact analysis. 40 C.F.R. § 70.2; Wis. Stat. § 285.64(1); Wis. Admin. Code § NR 400.02(26). For the foregoing reasons, PSD requirements are applicable requirements for Unit 1 and DNR's failure to assure compliance with PSD for

Unit 1 was based on an erroneous interpretation of law. DNR's analysis also assumed an erroneous heat input for Unit 1 as well as underestimating the regained hours of operation attributable to the Economizer/Superheater replacement. The permit's failure to assure compliance with PSD requirements results in unreviewed emission increases and a failure to ensure BACT emission limits are met. The Administrator must object.

II. THE DNR ERRED IN NOT REQUIRING A COMPLIANCE SCHEDULE FOR ONGOING VIOLATIONS OF VISIBLE EMISSION STANDARDS.

Every Title V permit application must disclose all applicable requirements and any violations at the facility. 42 U.S.C. § 7661b(b); 40 C.F.R. §§ 70.5(c)(4)(i), (5), (8); Wis. Admin. Code § NR 407.05(4)(h). For applicable requirements, for which the source is not in compliance at the time of permit issuance, the source's application must provide a narrative description of how the source intends to come into compliance with the requirements. 42 U.S.C. § 7661b(b); 40 C.F.R. § 70.5(c)(8)-(9); Wis. Admin. Code § NR 407.05(4)(h)2.c.; *In re Midwest Generation, LLC, Waukegan Generating Station*, Order at p. 4 (EPA Adm'r Sept. 22, 2005). The application must further propose a compliance schedule for any applicable requirements for which the source is not in compliance. 40 C.F.R. § 70.5(c)(8)(iii); Wis. Admin. Code § NR 407.05(4)(h)3.c. Additionally, if any statement in the application was incorrect, or if the application omits relevant facts, including the fact that a facility is not in compliance, the applicant has an ongoing duty to supplement and correct the application. 40 C.F.R. § 70.5(b); Wis. Admin. Code § NR 407.05(9). The final Title V permit must contain a compliance schedule for any requirement that the facility is not in compliance with at the time of issuance. 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a), (c).

In its comments, Sierra Club noted that

The plant has unaddressed, continuing opacity violations. Excess emission reporting going back from than eight years show continuing intermittent opacity violations. There have been no changes to the pollution controls or operations at the plant that would address these problems. The most recent excess emission reports confirm that these violations are ongoing:

- Unit 1 violated its visible emission limit for 36 minutes and failed to operate the required continuous opacity monitor for 247 minutes in the second quarter of 2007.
- Unit 2 failed to operate the required continuous opacity monitor for 101 minutes in the second quarter of 2007.
- Unit 1 violated its visible emission limit for 252 minutes and failed to operate the continuous opacity monitor for 172 minutes in the third quarter of 2007.
- Unit 2 failed to operate the required continuous opacity monitor for 74 minutes in the third quarter of 2007.
- Unit 1 violated its visible emission limit for 342 minutes and failed to operate the required continuous opacity monitor for 84 minutes in the fourth quarter of 2007.
- Unit 2 failed to operate the required continuous opacity monitor for 144 minutes in the fourth quarter of 2007.
- Unit 1 violated its visible emission limit for 54 minutes and failed to operate the continuous opacity monitor for 558 minutes in the first quarter of 2008.
- Unit 2 violated its visible emissions limit for 66 minutes and failed to operate the continuous opacity monitor for 78 minutes in the first quarter of 2008.

Comments at 21-22. Sierra Club further attached the most recent excess emission reports, signed by the company attesting to the accuracy, showing these ongoing violations. *Id.* at Ex. C.

DNR responded by agreeing that there are violations at the CGS, but refusing to impose a compliance schedule based on a guidance document from EPA regarding enforcement actions for high priority violations. Response to Comments at 2-3 (“while WPL-Columbia Energy

Center's excess emission reports do show exceedances of the respective opacity limits for each boiler, the duration of the exceedance is not significant enough to warrant a compliance plan in the current permit renewal." This is not a case where the DNR determined that excess emission reports were insufficient to demonstrate non-compliance. *See e.g., In re Midwest Generation, Waukegan Generation, LLC*, Petition No. V-2006-2, Order at 8 (EPA Adm'r June 14, 2007) (finding that the state permitting agency did not make a determination regarding compliance). Nor is this a case where Petitioner is asking the state and EPA to make findings of violations where the "violations are contested by both the permitting authority and the source." *E.g., Citizens Against Ruining the Environment v. EPA*, Case Nos. 07-3197, 07-3198 & 07-3199, Slip. Op. at 14 (7th Cir. July 28, 2008). Rather, here the DNR determined that there *were* violations, but nevertheless relied upon an EPA guidance document titled *The Timely and Appropriate (T&A) Enforcement Response to High Priority Violations (HPVs)* Figure 4-4 (OECA June 23, 1999)⁵ (hereinafter as "HPV Guidance") to determine that *despite* the violations, no compliance schedule was required. The result of DNR's interpretation is to confine the requirement of a compliance schedule in 42 U.S.C. § 7661c(a) and 40 C.F.R. § 70.5(c)(8)(iii) to High Priority Violations under EPA Guidance.

DNR suggests that only violations meeting the definition of a High Priority Violation or HPV, under EPA Guidance, require a compliance schedule in the Part 70 permit. Response to Comments at 2. DNR misinterprets the law. Neither Title V nor Part 70 conditions the requirement of a compliance schedule on a "significance" threshold (whether defined as an HPV or otherwise).

Section 504(a) of the Act, 42 U.S.C. § 7661c(a), provides:

⁵ <http://www.epa.gov/Compliance/resources/policies/civil/caa/stationary/hpvmanualrevised.pdf>

Each permit issued under this subchapter shall include enforceable emission limitations and standards, a *schedule of compliance*, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.

Based on the plain language of the Act, a schedule of compliance is required in each permit.

Similarly, 40 C.F.R. § 70.6(a)(1) requires that “[a]ll part 70 permits shall contain the following elements with respect to compliance... A schedule of compliance consistent with Sec. 70.5(c)(8) of this part.”⁶ See also H.R. Rep. No. 101-490, at 351 (“The permit must include a schedule of compliance.”). The plain language of the regulation also requires a compliance schedule,

⁶ 40 C.F.R. § 70.5(c)(8) provides in relevant part:

A compliance plan for all part 70 sources that contains all the following:

(i) A description of the compliance status of the source with respect to all applicable requirements.

(ii) A description as follows:

...

(C) For requirements for which the source is not in compliance at the time or permit issuance, a narrative description of how the source will achieve compliance with such requirements.

(iii) A compliance schedule as follows:

...

(C) A schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance. Such a schedule shall include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance. This compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. Any such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.

(iv) A schedule for submission of certified progress reports no less frequently than every 6 months for sources required to have a schedule of compliance to remedy a violation.

(v) The compliance plan content requirements specified in this paragraph shall apply and be included in the acid rain portion of a compliance plan for an affected source, except as specifically superseded by regulations promulgated under title IV of the Act with regard to the schedule and method(s) the source will use to achieve compliance with the acid rain emissions limitations.

without exemption. Since DNR agrees that the CGS is not complying with opacity limits at all times (i.e., it has ongoing periods of noncompliance) a compliance schedule is mandatory and DNR's failure to include one in the permit requires an objection by the Administrator.

The Administrator has objected previously based on a petition raising a similar issue. *In re TVA Gallatin Power Plant*, Petition IV-2003-4, Order at 4- 8 (EPA Adm'r July 29, 2004). In the *TVA Gallatin* case, Sierra Club petitioned the Administrator to object to a Title V permit that allowed a facility to rely on emission reports to certify compliance with opacity limits despite the fact that the emission reports showed violations of the opacity standard up to 2% of operating time. *Id.* A state regulation exempted facilities violating the opacity limit less than 2% of the time from immediate enforcement actions and, based on this regulation, the Title V permit allowed reports showing violations up to 2% of the time to be "prima facia evidence of compliance." *Id.* However, because the exception for up to 2% of operating time contradicted the applicable standard in the state implementation plan, EPA objected. *Id.* Although EPA's objection in the *TVA Gallatin* case was based on 40 C.F.R. § 70.6(c)(1), the holding is equally applicable here— exemptions from opacity limits based on enforcement policies that are not included in the approved implementation plan are not a lawful basis for omitting applicable Part 70 requirements.

Moreover, the HPV criteria DNR cites were not intended for purposes of Title V permitting. Figure 4-4 of the HPV policy, which DNR represents as stating that a 20% opacity violation must be exceeded by greater than 10% for a duration of more than 5% of total boiler operating time, corresponds to what the documents terms a High Priority Violation, or HPV. *See* HPV Guidance at p. 4-30. Violations that do not constitute HPVs, however, are not considered compliant with the law. The HPV Guidance is intended to "prioritize[e] violations for

enforcement purposes,” and not to redefine what constitutes a violation. HPV Guidance at p. 1-1. The HPV Guidance, itself, emphasizes that it should not be read, as DNR does here, as excusing violations. *Id.* (“all violations are important, and EPA expects all violations to be addressed in an appropriate manner.”) Specifically, the HPV Guidance states: “[the HPV Guidance] cannot be used to establish new standards or limits, are not binding on any party, and cannot be relied upon to create any rights enforceable by any party.” *Id.* at p. A-1. In short, the Guidance does not define what constitutes a violation, but prioritizes which violations will receive the most attention when spending limited civil and criminal enforcement resources.

Furthermore, DNR should be well-aware that guidance related to how the agency will prioritize enforcement of visible emission/opacity standards does not re-write the regulations establishing standards. At one point, Wisconsin DNR officials were quoted publicly as stating that opacity exceedances were not considered violations if they occurred less than 1% of the time. Wisconsin’s top law enforcement official, the Attorney General, who is charged with enforcing air pollution violations, corrected this interpretation by DNR. *See* Letter from Peggy A. Lautenschlager, Attorney General, to Scott Hassett, Secretary, Dept. of Natl. Resources (September 6, 2005) (attached as Exhibit H). The Attorney General warned:

Our discussions with DNR staff confirm that DNR considers the violations minor (less than 1% of the time), attributable to the plant's old age and equipment breakdowns, and the violations are not worthy of enforcement or referral [to Wisconsin DOJ for enforcement], especially given present budget and staff constraints... I find DNR's publicly described enforcement posture in this case to be troubling, especially if it represents a policy that extends to other or all enforcement decisions.

Although DNR rightfully retains enforcement discretion, DNR appears to the public to have created a "minor violations" exemption in the law that neither exists nor is authorized by law. As reported, the "minor violations" policy appears to be based on infrequency of violation without regard to amounts of pollutants

emitted during the violations. I believe this sends the wrong message to pollution dischargers and to the public alike.

I believe most law abiding citizens understand that the law is the law, that there is no "minor violations" exception in the law, and that violations of the law, no matter how seemingly "minor" in effect, do and should have enforcement consequences commensurate with those violations.

A "minor violations exemption" not only allows and legitimizes so-called "minor violations" that heretofore have been enforceable, but it invites dischargers and the general public to test the boundaries between what DNR considers to be minor and significant violations. I believe defining the area between minor (unenforced) and significant (enforced) violations of law is a steep slippery slope into a quagmire of never-ending debate and disrespect for the bright line standards of legally acceptable conduct. In cases DNR does refer to DOJ for enforcement, the de facto exemption will invite violators to argue a "minor violation" defense based on frequency of occurrence or insignificance of impact. This would be unprecedented and would lead to lengthened and more costly litigation expenses to the State.

While relevant to enforcement penalties or remedies, the severity or frequency of violation has not been, is not, and should not be an invited defense to conviction of the violation itself. Even so, a determination of severity based on frequency of violation, without taking into account the nature and severity of the violation even though it may infrequently occur, fails to account for the true impact and severity of that violation.

I am concerned also that the message sent here is that if big polluters can remain free of enforcement for their relatively "minor violations" on the basis of their frequency or impact, individuals and smaller enterprises will be viewed as being treated unfairly. For example, if for 0.75% of the time a power plant causes 3 more tons of particulates to be emitted into the air than permitted over time, we would expect an illegal burner of a demolition wood pile in a rural area to argue that his violation is both less frequent and less severe than the power plant that enjoys the "minor violation" exemption. Whether true or not, it is a defense to the violation itself that should not be invited.

Let me be clear. I am not questioning the enforcement discretion of the DNR, nor am I questioning the process for determining the severity of punishment or remedies required in response to

violations. Nor am I insensitive to the budget and staff constraints that have been imposed on the DNR over the last few years. However, I am saying that all violations should have appropriate enforcement consequences, which can be selected from a palate of alternative administratively or judicially ordered punishments, compliance schedules, remediation or other remedies.

Id. In short, not only does DNR's decision to sanction excess opacity emissions by refusing to include a compliance schedule conflict with the Clean Air Act, Part 70, and the EPA's prior decisions, it also conflicts with the State of Wisconsin's highest environmental law enforcement official's interpretation of the law and guidance to DNR. The Administrator must object and require DNR to reissue the permit with a compliance schedule, consistent with 40 C.F.R. § 70.5(c)(8), that brings the plant into compliance with visible emission limits.

III. THE PERMIT LACKS APPLICABLE REQUIREMENTS FOR SUBMITTING A PART 2 APPLICATION FOR A CASE BY CASE MACT LIMIT FOR INDUSTRIAL BOILERS.

CGS is a major source of hazardous air pollutants (HAPs) under 42 U.S.C. § 7412. As Sierra Club stated in its public comments to the DNR, the CGS includes an industrial boiler covered by 40 C.F.R. Part 63, Subpart B, Table 1 (Industrial Boilers, Institutional/Commercial Boilers and Process Heaters). *See* Comments at 27-28. The deadline for EPA to promulgate a National Emission Standard for Hazardous Air Pollutants (NESHAP) for that category was April 29, 2004. 40 C.F.R. Part 63, Subpart B, Table 1. Because the D.C. Circuit Court of Appeals vacated the NESHAP for industrial boilers, *Natl. Res. Def. Council v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007)⁷, there is no valid NESHAP and industrial boilers are subject to the "MACT Hammer" provision in 42 U.S.C. § 7412(j). 42 U.S.C. § 7412(j)(2) ("In the event that the

⁷ When the court vacates a rule, it renders the action a nullity—i.e., the rule lacks all legal significance post-spectively as if it never happened. *Env'tl. Def. v. Leavitt*, 329 F.Supp. 2d 55, 64 (D.D.C. 2004) ("When a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect."); *Env'tl. Def. v. EPA*, 489 F.3d 1320, 1325 (D.C. Cir. 2007) (while remanded regulations remain in effect until changed, vacated rules do not); *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 127 (1st Cir. 2002).

Administrator fails to promulgate a standard for a category or subcategory of major sources by the date established pursuant to subsection (e)(1) and (3) of this section, and beginning 18 months after such date... the owner or operator of any major source in such category or subcategory shall submit a permit application under [7412(j)(3)] and such owner and operator shall also comply with [7412(j)(5) and (6)].”; 40 C.F.R. § 63.52(a) (“The requirements of paragraphs (a)(1) and (2) of this section apply to major sources that include, as of the section 112(j) deadline, one or more sources in a category or subcategory for which the Administrator has failed to promulgate an emission standard under this part on or before an applicable section 112(j) deadline.”). Both EPA and DNR have recognized that the MACT Hammer applies to industrial boilers after the D.C. Circuit’s vacatur of the NESHAP. *See* Comments at 30-31 (quoting DNR and EPA statements).

One requirement of the MACT Hammer is the submission of a MACT Hammer Part 2 application. 40 C.F.R. § 63.52(e). Therefore, Sierra Club’s comments to DNR asked that DNR do the following in the permit:

- acknowledge that 112(j) and 40 C.F.R. §§ 63.50-63.56 are applicable requirements, and
- include a schedule of compliance requiring a MACT Part 2 application immediately, and a revised Title V permit within 18 months to incorporate a case-by-case limit.

Comments at 31-32, citing 42 U.S.C. § 7661b(b)(1); 40 C.F.R. §§ 70.6(a)(1), (c)(3); Wis. Admin. Code § NR 407.05(4)(h)3.c. DNR refused, asserting that “[a]t this time there are no specific enforceable requirements that we can include in the operation permit, such as when an application under s. 112(j) needs to be submitted.” Response to Comments at 3. DNR is incorrect. The requirement to apply for a limit under Clean Air Act section 112(j), 42 U.S.C. § 7412(j), is applicable to CGS and must be included in the permit.

The Administrator must object because a case-by-case MACT limit, and the requirements to submit a Part 2 application and obtain a case-by-case MACT limit are applicable requirements that are not included in the permit and for which there is no schedule of compliance. Part 70 requires that each permit contain sufficient standards and requirements to ensure compliance with all “applicable requirements.” 40 C.F.R. § 70.6(a)(1). “Applicable requirements” include “any standard or other requirement under section 112 of the Act.” 40 C.F.R. § 70.2. There is no question that a case-by case MACT pursuant to section 112(j) is a “standard or other requirement[.]” *See also* 40 C.F.R. § 63.52(f). Moreover, 40 C.F.R. § 63.52(e)(1), which is also an applicable requirement, provides that “[e]ach owner or operator who is required to submit to the permitting authority a Part 1 MACT application... must also submit to the permitting authority a timely Part 2 MACT application for the same sources which meets the requirements of Sec. 63.53(b)... *no later than the applicable date specified in Table 1 to this subpart* (emphasis added).” The owners and operators of the CGS submitted a Part 1 application. As noted above, the Table 1 deadline passed on April 28, 2004. Other Wisconsin industrial boilers have submitted Part 2 applications. See We Energies Milwaukee County Power Plant Boiler MACT Part 2, Clean Air Act § 112(j) Permit Application (attached as Exhibit D).⁸ Therefore, the deadline to submit a Part 2 application has also passed and the requirement to apply is not only a current “applicable requirement,” but one that the CGS is not complying with.⁹ Therefore, there is no question that the requirement to apply for a 112(j) limit is an applicable requirement pursuant to 40 C.F.R. § 63.52(e) which must be included in the permit.

⁸ DNR subsequently issued a Title V permit for this plant that includes a CAA § 112(j) limit for industrial boilers. See Permit No. 241027050-P02 (attached in relevant part as Exhibit J).

⁹ In fact, not only did the deadline pass but the D.C. Circuit’s decision vacating the NESHAP occurred approximately six months before a Part 70 application was submitted for the CGS in October, 2007.

The Administrator must object because the CGS permit does not contain the requirement to submit a Part 2 application.

Additionally, Part 70 requires that each permit contains a compliance schedule consistent with 70.5(c)(8), which requires:

- A description of the compliance status of the source with respect to *all applicable requirements*.
- For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis.
- For requirements for which the source is not in compliance at the time of permit issuance, a narrative description of how the source will achieve compliance with such requirements.
- For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis.
- A schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance. Such a schedule shall include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance.
- A schedule for submission of certified progress reports no less frequently than every 6 months for sources required to have a schedule of compliance to remedy a violation.

40 C.F.R. § 70.5(c)(8), 70.6(c)(3). The Administrator must therefore also object because the CGS permit does not contain a schedule of compliance to bring the plant into compliance with:

(1) the obligation to submit a Part 2 application that the CGS failed to meet; (2) the future obligation to comply with a case-by-case section 112(j) limit that will become effective during the permit term (5 years).

Conclusion

For the foregoing reasons, the permit fails to meet federal requirements in numerous ways. These deficiencies require that the Administrator object to issuance of the permit pursuant

to 40 C.F.R. § 70.8(c)(1). Each of the issues raised by Sierra Club in this petition result in a deficient permit. Most of the deficiencies result in unlawful emissions of air pollutants that negatively affect the health and welfare of Sierra Club members. Others result in illegal monitoring and reporting that make it difficult for Sierra Club to monitor and enforce air pollution limits applicable to the plant.

Dated this 3rd day of September, 2008.

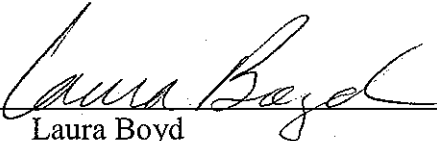
Attorneys for Sierra Club
GARVEY MCNEIL & MCGILLIVRAY, S.C.


David C. Bender

Pardeeville, WI 53954

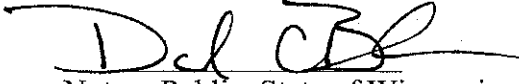
Wisconsin Power & Light
4902 N. Biltmore Lane
Madison, WI 53707

Dated : September 3, 2008.



Laura Boyd

Signed and sworn to before me
This 3rd day of September, 2008.



Notary Public, State of Wisconsin
My commission is permanent.