

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

Wisconsin Public Service Corporation
700 N. Adams Street
Green Bay, Wisconsin 54307,

Plaintiff,

v.

Case No. 15-cv-337

Gina McCarthy, in her official capacity as
Administrator of the United States
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460,

Defendant.

COMPLAINT

NOW COMES Plaintiff Wisconsin Public Service Corporation (“WPSC”), and as and for its Complaint against the above-captioned defendant, alleges as follows:

INTRODUCTION

1. The basis for this lawsuit is straightforward. On three separate occasions—first in July 2011, then in October 2013, and finally in November 2014—WPSC petitioned the Administrator of the United States Environmental Protection Agency (“U.S. EPA”). In each petition, WPSC requested that the Administrator object to certain provisions of the Title V permits that the Wisconsin Department of Natural Resources (“WDNR”) issued to WPSC’s De Pere and Weston power plants. The Clean Air Act requires the Administrator to grant or deny each petition within 60 days after its filing. 42 U.S.C. § 7661d(b)(2). As of the date of this Complaint, the Administrator has not responded to any of these petitions, in violation of a mandatory and nondiscretionary duty under the Clean Air Act. Accordingly, WPSC requests that

this Court issue an order (1) declaring that the Administrator is in violation of the Clean Air Act; (2) requiring the Administrator to respond to WPSC's petitions; and (3) awarding WPSC all costs and attorneys' fees incurred in initiating this proceeding.

JURISDICTION AND VENUE

2. The claims in this Complaint arise from the Administrator's repeated failure to perform a non-discretionary duty. The Clean Air Act's citizen-suit provision provides that "[t]he district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties . . . to order the Administrator to perform such [non-discretionary] act or duty." *See* 42 U.S.C. § 7604(a). Accordingly, this Court has subject-matter jurisdiction over this Complaint.

3. The Clean Air Act is a federal statute. *See* 42 U.S.C. § 7401 *et seq.* Accordingly, this Court also has subject matter jurisdiction over this Complaint because it raises a federal question.

4. Venue is proper in this judicial district because a substantial part of the property that is the subject of this action is situated in the Western District of Wisconsin. Specifically, WPSC's Weston power plant is located in the Village of Rothschild, Wisconsin, which is in this district. *See id.*

NOTICE

5. On March 16, 2015, WPSC sent written notice to the Administrator ("Notice of Intent to Sue") of the violations alleged in this Complaint, and informing the Administrator of WPSC's intent to bring a lawsuit to remedy these violations. A true and correct

copy of the Notice of Intent is attached to this Complaint as Exhibit A.¹ A true and correct copy of the certified mail return receipt, indicating that the Administrator received the Notice of Intent on March 20, 2015, is attached to this Complaint as Exhibit B. The pre-suit notice period expired on May 19, 2015. The Administrator still has not granted or denied any of WPSC's petitions. Accordingly, WPSC has complied with the pre-suit notice requirements of the citizen's suit provision of the Clean Air Act. *See* 42 U.S.C. § 7604(b)(2).

THE PARTIES

6. WPSC is a Wisconsin corporation with its corporate headquarters located at 700 N. Adams St., Green Bay, WI 54307. WPSC is engaged in the business of generating, purchasing, distributing, and selling electricity, as well as transporting, distributing, and selling natural gas, in central and northeastern Wisconsin.

7. WPSC is a "person" within the meaning of 42 U.S.C. § 7602(e), and therefore may commence a civil action under 42 U.S.C. § 7604(a).

8. Gina McCarthy is the Administrator of the U.S. EPA, and at all times relevant to this action was acting within the scope of her employment and under color of law in her capacity as Administrator of the U.S. EPA. She is responsible for implementing the Clean Air Act, including the requirement to grant or deny WPSC's petitions within 60 days of when they were filed. WPSC is suing Ms. McCarthy in her official capacity. In this capacity, she is responsible for her actions and those of her predecessors.

LEGAL REQUIREMENTS UNDER THE CLEAN AIR ACT

9. In 1990, Congress amended the Clean Air Act to create the Title V program. Under this program, major sources of air pollution must apply for and obtain a Title V

¹ Because of the large size of the attachments to the original versions of Exhibits A, C, D, and E to this Complaint, WPSC has included the primary documents referenced in its allegations as exhibits and omitted the attachments to those documents.

operating permit. *See* 42 U.S.C. §§ 7661-7661f. Generally speaking, Title V permits incorporate all of the state and federal pollution control requirements for a major source into a single document.

10. States are generally charged with implementing the Title V program within their borders. States must submit a plan to the Administrator to implement the Title V program. This plan must meet certain statutory requirements and is subject to the Administrator's approval. *See* 42 U.S.C. §§ 7661a(b), (d).

11. In 2001, the Administrator approved Wisconsin's Title V operating permit program. *See Clean Air Act Final Full Approval of Operating Permit Program*, 66 Fed. Reg. 62,951 (Dec. 4, 2001).

12. The Wisconsin Department of Natural Resources ("WDNR") is the state agency that is responsible for issuing Title V permits in Wisconsin. *See* 40 C.F.R. Part 70, Appx. A; *see also Implementation Agreement Between the Wisconsin Department of Natural Resources and the United States Environmental Protection Agency Region V*, available at http://www.epa.gov/reg5oair/permits/oper/pdfs/ia_wi.pdf.

13. Before a state with an approved Title V program can issue a Title V operating permit, it must submit the proposed permit to the Administrator. *See* 42 U.S.C. § 7661d(a)(1)(B). The Administrator then has 45 days to review the permit. If the Administrator determines that the permit contains provisions that are not in compliance with the requirements of the Title V program, then the Administrator can object to the permit. 42 U.S.C. § 7661d(b)(1)(A).

14. If the Administrator does not object to a proposed permit within the 45-day review period, then any person may, within 60 days of the expiration of that review period, petition the Administrator to object to the proposed permit. *Id.* § 7661d(b)(2).

15. If a petition is timely filed, then the Administrator has a non-discretionary duty to grant or deny the petition within 60 days after it is filed. *Id.*

WPSC'S TITLE PERMITS AT ITS WESTON AND DE PERE FACILITIES

The De Pere Title V Permit

16. This case involves Title V permits that the WDNR issued to two of WPSC's power plants: the De Pere facility and the Weston facility.

17. The De Pere facility is a 187 megawatt ("MW") natural gas/fuel oil-fired power plant located in De Pere, Wisconsin.

18. The WDNR submitted a proposed Title V operating permit for the De Pere facility ("De Pere Title V Permit") to the U.S. EPA on April 18, 2011. The Administrator had 45 days—until June 2, 2011—to object to this permit, but did not do so.

19. WPSC submitted a petition to the Administrator on July 29, 2011, requesting that the Administrator object to the De Pere Title V Permit ("De Pere Petition"). A true and correct copy of the De Pere Petition is attached to this Complaint as Exhibit C and is incorporated herein by reference.

20. WPSC requested in the De Pere Petition that the Administrator object to the De Pere Title V Permit on the grounds that (1) various emissions limitations in the permit were vague and unenforceable because they did not identify the applicable averaging time periods, and (2) WDNR did not adequately respond to WPSC's comments on the latter issue.

21. The Administrator had 60 days—or until September 27, 2011—to respond to the De Pere Petition. As of the date of this Complaint, the Administrator has failed to respond to the De Pere Petition.

The Weston Title V Permit

22. The Weston facility is a 985 MW coal-fired power plant located in Rothschild, Wisconsin.

23. The WDNR submitted a proposed Title V operating permit for the Weston facility (“Weston Title V Permit”) to the U.S. EPA on July 13, 2013. The Administrator had 45 days—until August 27, 2013—to object to this permit, but did not do so.

24. WPSC submitted a petition to the Administrator on October 16, 2013, requesting that the Administrator object to the Weston Title V Permit (“2013 Weston Petition”). A true and correct copy of the 2013 Weston Petition is attached to this Complaint as Exhibit D and is incorporated herein by reference.

25. WPSC requested in the 2013 Weston Petition that the Administrator object to the Weston Title V Permit on the grounds that (1) the permit impermissibly imposes new or modifies preexisting requirements as part of the Title V permitting process; (2) the permit imposes vague and unenforceable emissions limitations and monitoring provisions because these limitations and provisions do not identify appropriate average time periods; (3) WDNR failed to incorporate adequate averaging periods into the permit’s compliance assurance monitoring provisions; (4) WDNR failed to incorporate the provisions, including the affirmative defense provisions, of the Mercury and Air Toxics Standard for Power Plants; and (5) WDNR failed to adequately respond to WPSC’s comments on the permit.

26. The Administrator had 60 days—or until December 16, 2013—to respond to the 2013 Weston Petition. As of the date of this Complaint, the Administrator has failed to respond to the 2013 Weston Petition.

The Weston Permit Revisions

27. On August 1, 2014, the WDNR submitted proposed revisions for the Weston Title V Permit to the U.S. EPA (“Weston Permit Revisions”). The Weston Permit Revisions resolved only one of the issues that WPSC raised in its 2013 Weston Petition to the Administrator. Specifically, WDNR incorporated all applicable provisions of the Federal Mercury and Air Toxics Standard for Power Plants into the Weston Title V Permit (point (4) in paragraph 25, above).

28. The Administrator had 45 days—until September 15, 2014—to object to the Weston Permit Revisions, but did not do so.

29. WPSC submitted a petition to the Administrator on November 14, 2014, requesting that the Administrator object to the Weston Permit Revisions (“2014 Weston Petition”). A true and correct copy of the 2014 Weston Petition is attached to this Complaint as Exhibit E and is incorporated herein by reference.

30. The grounds for the 2014 Weston Petition were identical to issues (1), (2), (3), and (5) identified in Paragraph 25 of this Complaint.

31. The Administrator had 60 days—until January 13, 2015—to respond to the 2014 Weston Petition. As of the date of this Complaint, the Administrator has failed to respond to the 2014 Weston Petition.

32. WPSC raised the objections identified in the De Pere Petition, the 2013 Weston Petition, and the 2014 Weston Petition to the WDNR during the public comment period on each proposed permit.

33. WPSC provided copies of the De Pere Petition, the 2013 Weston Petition, and the 2014 Weston Petition to the WDNR after submitting those petitions to the Administrator.

COUNT I: FAILURE TO RESPOND TO THE DE PERE PETITION

34. Plaintiff re-alleges and incorporates by reference Paragraphs 1 through 33 of this Complaint as though fully set forth here.

35. The Administrator had a mandatory, non-discretionary duty to grant or deny the De Pere Petition within 60 days of when it was filed by WPSC. *See* 42 U.S.C. § 7661d(b)(2).

36. It has been more than 60 days since WPSC filed the De Pere Petition with the Administrator.

37. As of the date of this Complaint, the Administrator has failed to respond to the De Pere Petition.

38. Accordingly, the Administrator is in violation of her mandatory, non-discretionary duty to respond to the De Pere Petition within 60 days of when it was filed.

39. This violation constitutes a “a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2). The Administrator’s violation will continue unless remedied by this Court.

COUNT II: FAILURE TO RESPOND TO THE 2013 WESTON PETITION

40. Plaintiff re-alleges and incorporates by reference Paragraphs 1 through 39 of this Complaint as though fully set forth here.

41. The Administrator had a mandatory, non-discretionary duty to grant or deny the 2013 Weston Petition within 60 days of when it was filed by WPSC. *See* 42 U.S.C. § 7661d(b)(2).

42. It has been more than 60 days since WPSC filed the 2013 Weston Petition with the Administrator.

43. As of the date of this Complaint, the Administrator has failed to respond to the 2013 Weston Petition.

44. Accordingly, the Administrator is in violation of her mandatory, non-discretionary duty to respond to the 2013 Weston Petition within 60 days of when it was filed.

45. This violation constitutes a “a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2). The Administrator’s violation will continue unless remedied by this Court.

COUNT III: FAILURE TO RESPOND TO THE 2014 WESTON PETITION

46. Plaintiff re-alleges and incorporates by reference Paragraphs 1 through 45 of this Complaint as though fully set forth here.

47. The Administrator had a mandatory, non-discretionary duty to grant or deny the 2014 Weston Petition within 60 days of when it was filed by WPSC. *See* 42 U.S.C. § 7661d(b)(2).

48. It has been more than 60 days since WPSC filed the 2014 Weston Petition with the Administrator.

49. As of the date of this Complaint, the Administrator has failed to respond to the 2014 Weston Petition.

50. Accordingly, the Administrator is in violation of her mandatory, non-discretionary duty to respond to the 2014 Weston Petition within 60 days of when it was filed.

51. This violation constitutes a “a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2). The Administrator’s violation will continue unless remedied by this Court.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief from this Court:

1. A judgment that the Administrator has violated her mandatory, non-discretionary duty to respond to the De Pere Petition, the 2013 Weston Petition, and the 2014 Weston Petition;
2. A judgment compelling the Administrator to respond to the De Pere Petition, the 2013 Weston Petition, and the 2014 Weston Petition in accordance with an expeditious schedule prescribed by this Court, and compelling the Administrator to publish in the Federal Register a notice of its decision to grant or deny these petitions within 10 working days of the Administrator’s decision on each petition;
3. An order awarding the Plaintiff the costs associated with initiating this action, including reasonable attorneys’ fees, pursuant to 42 U.S.C. § 7604(d); and
4. Such other and further relief as the Court deems just and proper.

Dated this 3rd day of June, 2015.

s/Matthew D. Lee

Brian H. Potts (WI Bar No. 1060680)
Matthew D. Lee (WI Bar No. 1061375)
FOLEY & LARDNER LLP
150 E. Gilman Street
P.O. Box 1497
Madison, WI 53701-1497
(608) 257-5035 (telephone)
(608) 258-4258 (facsimile)

*Attorneys for Plaintiff,
Wisconsin Public Service Corporation*

EXHIBIT A

Certified Article Number

7196 9008 9111 2355 0443

SENDERS RECORD

March 16, 2015

**VIA CERTIFIED MAIL
 AND ELECTRONIC MAIL**

Ms. Gina McCarthy, Administrator
 United States Environmental Protection Agency
 Ariel Rios Building
 1200 Pennsylvania Avenue, N.W.
 Mail Code 1101A
 Washington, D.C. 20460

Re: Notice of Intent to Sue Pursuant to Section 304(b)(2) of the
 Clean Air Act for Failure to Grant or Deny Wisconsin Public
 Service Corporation's Petitions Filed Pursuant to §505(b)(2)

Dear Administrator McCarthy:

Pursuant to Clean Air Act § 304(b)(2), 42 U.S.C. § 7604(b)(2) and 40 C.F.R. Part 54, Foley & Lardner LLP, on behalf of our client Wisconsin Public Service Corporation ("WPSC"), hereby provides formal notice that WPSC intends to file a citizen suit against the United States Environmental Protection Agency ("U.S. EPA") Administrator in accordance with Clean Air Act § 304(a)(2), 42 U.S.C. § 7604(a)(2). The Clean Air Act permits any person to commence a civil action on its own behalf "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. § 7604(b)(2).

WPSC intends to file a citizen suit related to a petition WPSC submitted to the U.S. EPA Administrator on July 29, 2011. WPSC petitioned the U.S. EPA Administrator, pursuant to Clean Air Act § 505(b)(2) and 40 C.F.R. § 70.8(d), to object to the proposed Title V Operating Permit for WPSC's De Pere Energy, LLC plant, Permit No. 405170920-P10 ("De Pere Permit"). The Wisconsin Department of Natural Resources ("WDNR") proposed the De Pere Permit to U.S. EPA on April 18, 2011. A copy of WPSC's petition related to the De Pere Permit (without attachments¹) is attached as Exhibit A. WPSC requested the U.S. EPA Administrator to object to the De Pere Permit because (i) various emission limits in the permit are vague and unenforceable as they

¹ Due to the large size of the attachments to the petition related to the De Pere Permit and the fact that they were previously provided to U.S. EPA, they are not reattached here. WPSC will provide copies of these attachments upon request.



FOLEY & LARDNER LLP

Ms. Gina McCarthy
March 16, 2015
Page 2

do not identify the applicable averaging time periods and (ii) WDNR did not adequately respond to WPSC's comments on this issue.

WPSC also intends to file a citizen suit related to a petition WPSC submitted to the U.S. EPA Administrator on October 16, 2013 ("2013 Weston Petition"), in which WPSC requested that the U.S. EPA Administrator object to the proposed Title V Operating Permit for WPSC's Weston plant, Permit No. 737009020-P-10 (the "Weston Permit"). 42 U.S.C. § 7661d(b); 40 C.F.R. § 70.8(d). The WDNR proposed the Weston Permit to U.S. EPA on July 13, 2013, and a copy of the 2013 Weston Petition (without attachments²) is attached as Exhibit B. WPSC requested the U.S. EPA Administrator to object to the Weston Permit for five reasons: (1) the Weston Permit impermissibly imposes new or modifies preexisting requirements as part of the Title V permitting process; (2) various emission limits and monitoring provisions are vague and unenforceable as they do not identify appropriate averaging time periods; (3) WDNR failed to incorporate proper and adequate averaging periods into the compliance assurance monitoring provisions contained in the Weston Permit; (4) WDNR failed to incorporate the provisions, including the affirmative defense provisions, of the Mercury and Air Toxics Standard for Power Plants³; and (5) WDNR did not adequately respond to WPSC's comments on the Weston Permit.

WPSC further intends to file a citizen suit related to a petition WPSC submitted to the U.S. EPA Administrator on November 14, 2014 ("2014 Weston Petition"), in which WPSC requested that the U.S. EPA Administrator object to the proposed Title V Operating Permit revisions for WPSC's Weston plant, Permit Revision Nos. 737009020-P13 and 737009020-P16 ("Weston Permit Revision"). 42 U.S.C. § 7661d(b); 40 C.F.R. § 70.8(d). The WDNR proposed the Weston Permit Revision to U.S. EPA on August 1, 2014, and a copy of the 2014 Weston Petition related to this permit (without attachments⁴) is attached as Exhibit C. WDNR issued the Weston Permit Revision in 2014 only to revise several of the terms from the Weston Permit that are the subject of an ongoing state administrative challenge by WPSC. As a result, the Weston Permit Revision resolved only one of the issues raised by WPSC in the 2013 Weston Petition. The remaining issues from the 2013 Weston Petition (which WPSC reasserted in the 2014 Weston Petition) are (i) the Weston Permit impermissibly imposes new or modifies preexisting requirements as part of the Title V permitting process, (ii) various emission limits and monitoring provisions are vague and

² Due to the large size of the attachments to the petition related to the Weston Permit and the fact that they were previously provided to U.S. EPA, they are not reattached here. WPSC will provide copies of these attachments upon request.

³ As noted below, this issue was subsequently resolved with the issuance of a revised version of the Weston Permit in 2014, and so will not be included in the lawsuit WPSC intends to file related to the Weston Permit.

⁴ Due to the large size of the attachments to the petition related to the Weston Permit Revisions and the fact that they were previously provided to U.S. EPA, they are not reattached here. WPSC will provide copies of these attachments upon request.



FOLEY & LARDNER LLP

Ms. Gina McCarthy
March 16, 2015
Page 3

unenforceable as they do not identify appropriate averaging time periods, (iii) WDNR failed to incorporate proper and adequate averaging periods into the compliance assurance monitoring provisions contained in the Weston Permit, and (iv) WDNR did not adequately respond to WPSC's comments on the Weston Permit.

According to Clean Air Act § 505(b)(2), 42 U.S.C. § 7661d(b)(2), "[t]he Administrator shall grant or deny [a] petition within 60 days after the petition is filed." To date, the Administrator has not responded to any of WPSC's petitions. Therefore, WPSC hereby gives notice of its intent to file a citizen suit based upon the Administrator's failure to perform the non-discretionary duty to grant or deny WPSC's petitions within 60 days as required by the Clean Air Act § 505(b)(2), 42 U.S.C. § 7661d(b)(2).

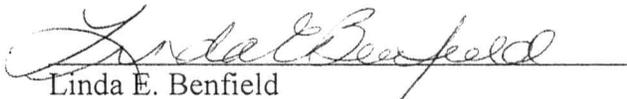
Pursuant to the requirements of 40 C.F.R. § 54.3, the person giving notice is:

Wisconsin Public Service Corporation
700 North Adams Street
Green Bay, WI 54307

As counsel for WPSC, I respectfully request that you direct all correspondence to Foley & Lardner LLP, c/o Linda E. Benfield, at the address shown in the letterhead.

Sincerely,

FOLEY & LARDNER LLP

By 

Linda E. Benfield
Brian H. Potts
777 East Wisconsin Avenue
Milwaukee, WI 53202-5306
414.271.2400
414.297.4900 (facsimile)
lbenfield@foley.com
bpotts@foley.com

Attorneys for Wisconsin Public Service Corporation



FOLEY & LARDNER LLP

Ms. Gina McCarthy
March 16, 2015
Page 4

cc: Cathy Stepp, Secretary
Wisconsin Department of Natural Resources
101 South Webster Street (AD/8)
Madison, WI 53703

Certified Article Number

7196 9008 9111 2355 0450

SENDERS RECORD

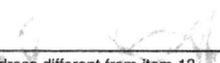
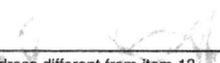
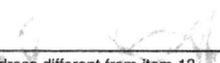
Susan Hedman
Regional Administrator
United States Environmental Protection Agency-Region 5
Mail Code R-19J
77 West Jackson Boulevard
Chicago, IL 60604-3507

Certified Article Number

7196 9008 9111 2355 0467

SENDERS RECORD

EXHIBIT B

<p>2. Article Number</p>  <p>7196 9008 9111 2355 0443</p>	<p>COMPLETE THIS SECTION ON DELIVERY</p> <table border="1"><tr><td data-bbox="812 315 1144 367">A. Received by (Please Print Clearly)</td><td data-bbox="1144 315 1323 367">B. Date of Delivery 5/20</td></tr><tr><td colspan="2" data-bbox="812 367 1323 451">C. Signature X </td></tr><tr><td colspan="2" data-bbox="812 451 1323 609">D. Is delivery address different from item 1? If YES, enter delivery address below: 086120-0125-5427-Thorson-Louis -</td></tr></table>	A. Received by (Please Print Clearly)	B. Date of Delivery 5/20	C. Signature X 		D. Is delivery address different from item 1? If YES, enter delivery address below: 086120-0125-5427-Thorson-Louis -	
A. Received by (Please Print Clearly)	B. Date of Delivery 5/20						
C. Signature X 							
D. Is delivery address different from item 1? If YES, enter delivery address below: 086120-0125-5427-Thorson-Louis -							
3. Service Type CERTIFIED MAIL™							
4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes							
1. Article Addressed to: Gina McCarthy U.S. EPA 1200 Pennsylvania Avenue NW Mail Code 1101A Washington, DC 20460 US	 <p>CERT00474413</p>						

2. Article Number



7196 9008 9111 2355 0467

3. Service Type **CERTIFIED MAIL™**

4. Restricted Delivery? (Extra Fee) Yes

1. Article Addressed to:

Susan Hedman
U.S. EPA-Region 5
77 West Jackson Boulevard
Mail Code R-19J
Chicago, IL 60604-3507
US

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print Clearly)

B. Date of Delivery

C. Signature

L. Owens

X L. Owens

Agent
 Addressee

D. Is delivery address different from item 1?
If YES, enter delivery address below:

Yes
 No

086120-0125-5427-Thorson-Louis -



CERT00474418

2. Article Number



7196 9008 9111 2355 0450

3. Service Type **CERTIFIED MAIL™**

4. Restricted Delivery? (Extra Fee) Yes

1. Article Addressed to:

Cathy Stepp
Wisconsin DNR
101 South Webster Street (AD/8)
Madison, WI 53703
US

COMPLETE THIS SECTION ON DELIVERY	
A. Received by (Please Print Clearly)	B. Date of Delivery
C. Signature <i>Jeffrey D. Taylor</i>	
<input type="checkbox"/> Agent <input type="checkbox"/> Addressee	
<input checked="" type="checkbox"/> D. Is delivery address different from item 1? If YES, enter delivery address below:	
<input type="checkbox"/> Yes <input type="checkbox"/> No	
MAR 19 2015	

086120-0125-5427-Thorson-Louis -



CERT00474415

EXHIBIT C

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

An Operating Permit for Wisconsin Public
Service Corp-De Pere Energy, LLC Plant,
Brown County, Wisconsin

Source I.D. 405170920

Permit No. 405170920-P10

Proposed by the Wisconsin Department of
Natural Resources on April 18, 2011

Petition No. _____

**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE
OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE WISCONSIN
PUBLIC SERVICE CORP-DE PERE ENERGY, LLC PLANT**

FOLEY & LARDNER LLP
LINDA E. BENFIELD
BRIAN H. POTTS
777 East Wisconsin Avenue
Milwaukee, WI 53202-5306
414.271.2400 Telephone
414.297.4900 Facsimile
Email: lbenfield@foley.com
bpotts@foley.com

Date: July 29, 2011

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FBI

Pursuant to Clean Air Act (“CAA”) § 505(b)(2) and 40 C.F.R. § 70.8(d), Wisconsin Public Service Corporation (“WPSC”) petitions the Administrator of the United States Environmental Protection Agency (“EPA”) to object to the proposed Title V Operating Permit for WPSC’s De Pere Energy, LLC plant (“De Pere”), Permit No. 405170920-P10 (“Permit”). The Wisconsin Department of Natural Resources (“WDNR”) proposed the Permit to EPA on April 18, 2011. A copy of the proposed Permit is attached as Exhibit A.

WPSC provided comments to the WDNR on the draft permit on May 14, 2010. A true and accurate copy of WPSC’s comments is attached as Exhibit B. WDNR’s response to comments is attached as Exhibit C.

This petition is filed within sixty days of the end of 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, she must object to issuance of the permit. 42 U.S.C. § 7661d(b); 40 C.F.R. § 70.8(c)(1).

The petition seeks an objection by the Administrator for the following reasons:

(1) Various emission limits in the Permit are vague and unenforceable because they do not identify the applicable averaging time periods; and

(2) WDNR did not adequately respond to WPSC’s comments on this issue.

I. VARIOUS EMISSION LIMITS IN THE PERMIT ARE VAGUE AND THEREFORE UNENFORCEABLE

Both courts and the EPA have routinely recognized that an agency cannot issue permit terms that are vague and therefore unenforceable. *See, e.g., Ariz. Cattle Growers’ Ass’n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1233, 1250-51 (9th Cir. 2001) (finding that it was arbitrary and capricious for the Fish and Wildlife Service to issue terms and conditions so vague

as to preclude compliance therewith); *ConocoPhillips Co.*, 13 E.A.D. 768, 2008 WL 2324133, *15-18 (Envtl. Appeals Bd. 2008) (remanding PSD air permit for state agency to consider and explain why certain provisions were not vague and therefore unenforceable). The Clean Air Act expressly provides that each Title V permit “issued . . . shall include *enforceable* emission limitations and standards . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter . . .” 42 U.S.C. § 7661c(a). U.S. EPA has interpreted this provision and clearly stated that to be enforceable, Title V permits must include averaging periods:

Title V Conditions must assure compliance with all applicable requirements. To assure that emission limits will be complied with, the limits must be written in a practically enforceable way. The title V permit must clearly include each limit and associated information from the underlying applicable requirement that defines the limit, *such as averaging time* and the associated reference method. . . . *When reviewing an emission limit, [the state agency must] make sure that . . . [t]he averaging time is included*

Title V Permit Review Guidelines: Practical Enforceability at III-57 (September 9, 1999)

(emphasis added) (Exhibit D-1).¹ U.S. EPA has also noted that for a permit to be enforceable, “it must contain emissions limits with a reasonable averaging period (usually not exceeding three hours), a method for determining compliance on a regular basis (annual stack tests are the minimum here) and adequate record keeping.” Letter from Thomas W. Rarick, Chief, Air Operations Branch, Air Mgmt. Div., U.S. Env’tl. Prot. Agency, Region IX to James D. Boyd, Air Pollution Control Officer, Cal. Air Res. Bd. (Dec. 17, 1985) (emphasis added) (Exhibit D-2).

¹ A copy of all of the relevant excerpts from the EPA guidance referenced in this petition is included in Exhibit D.

An averaging period is the time period component of a particular emission limit, and if the underlying regulatory provision requiring the limit expressly includes an averaging period, then that period should be used in the permit. However, if the underlying provision does not specifically include an averaging period, then EPA has directed states to use an averaging period that coincides with the sampling time periods used for stack testing purposes. *See* Credible Evidence Rule Revisions at 58 (Exhibit D-3) (“Note, however, that in the absence of a clearly specified averaging time, the time for conducting the reference test is generally the averaging time for compliance.”); *see also* Letter from Winston A. Smith, Dir., Air, Pesticides & Toxics Mgmt. Div., U.S. Env’tl. Prot. Agency, Region IV to Howard L. Rhodes, Dir., Air Mgmt. Div., Fla. Dep’t of Env’tl. Prot at Enclosure 1, pg. 3 (Dec. 11, 1997) (Exhibit D-4) (“In instances where the SIP regulations do not indicate an averaging time for the standard, the permit must include one to determine compliance with the applicable requirement.”). As a result, even for the emission limits in the Permit that do not have an underlying averaging period specified in the regulations, the WDNR, as the expert agency charged with implementing the CAA in Wisconsin, must establish an averaging period in the Permit for such limits.²

A. EPA Has Objected To Title V Permits In The Past That Do Not Contain Averaging Periods

EPA has consistently stated that permit terms must specify the applicable averaging periods to be enforceable, and it should do so again in this case. For example, provided below are excerpts from two other EPA objections to Title V permits (from Florida and Mississippi), which clearly mandate the inclusion of averaging periods:

² The specific emission limits at issue are identified on Exhibit E. When issuing the Permit, WDNR should have examined each of the sampling periods for each of these limits, determined the appropriate averaging period, and included that averaging period in the Permit for each limit.

Appropriate Averaging Times: In order for the emissions standard for particulate matter (conditions A.4, B.4, D.5, D.6, D.12 and E.4), sulfur dioxide (conditions A.5 and D.7), carbon monoxide (condition A.8), TRS (condition C.4), VOC's (condition A.7) and nitrogen oxides (condition A.6) contained in the permit to be practicably enforceable, the appropriate averaging time must be specified in the permit. An approach that can be used to address this deficiency is to include general language in the permit to indicate that the averaging times for all specified emission standards are tied to or based on the run time of the test method(s) used for determining compliance.

Letter from Region 4, United States Env'tl Prot. Agency to Howard L. Rhodes, Director, Div. of Air Resources Mgmt., Fla. Dept. of Env'tl Prot. at 4 (June 5, 2000) (Exhibit D-5).

Appropriate Averaging Times: In order for the emissions standards to be practicably enforceable, the appropriate averaging time must be specified in the permit. One approach that can be used to address this deficiency is to include general language in the permit to indicate that the averaging times for all specified emission standards are tied to or based on the run time of the test method(s) used for determining compliance. . . .

Letter from Winston A. Smith, Director, Air, Pesticides, & Toxics Mgmt. Div., United States Env'tl Prot. Agency to Dwight K. Wylie, Chief, Air Div., Miss. Dept. of Env'tl Quality at 5-6 (Dec. 23, 1999) (Exhibit D-6).

During the public comment period and in the permit application, WPSC asked WDNR to include averaging period language for all the emission limits in the Permit and to clarify that the time period component was a three-hour average (or longer). Ex. B at 1-2. For example, WPSC requested the following underlined language for particulate matter emissions: "Emission Limitations: (a) 0.10 lb/mmBTU; and (b) 219.0 lb/hr, based on any three consecutive hours . . ." Compare Ex. A at 7 with Ex. B, Attachment A at 1. The suggested language clarifies that the time period component of the two emission limitations is a three-hour average, and is

consistent with the language included in permits issued by other states, including Indiana, Illinois, Minnesota, Michigan and Ohio, all states within U.S. EPA Region 5.³

B. WDNR's Regulations Also Recognize That The Emission Limits Should Be Tied To Averaging Periods

WDNR regulations also specifically recognize that the emission limits set forth in the Permit are tied to averaging periods. For example, the particulate matter limits at issue stem from WIS. ADMIN. CODE § NR 415. Part I.A.1.a of the Permit contains the 0.10 lb/mmBTU particulate matter emission limit and identifies WIS. ADMIN. CODE § NR 415.06(2)(c) as the authority for the limit. WIS. ADMIN. CODE § NR 415.06(2)(c) requires certain facilities, like the De Pere plant, to meet an emission limitation “of 0.10 pounds of *particulate matter* per million Btu heat input.” (emphasis added). “Particulate matter” is further defined as “all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air *as measured by an applicable reference method or an equivalent or alternative method specified by the department.*” WIS. ADMIN. CODE § NR 400.02(119) (emphasis added). Read together, WIS. ADMIN. CODE § NR 415.06(2)(c) and WIS. ADMIN. CODE § NR 400.02(119) state that the permittee shall meet an emission limitation of “0.10 pounds of all finely divided solid or liquid material . . . emitted to the ambient air as measured by an applicable reference method per million BTU heat input.” The applicable reference method for particulate matter is an average of

³ Examples of such permits include: (1) Indiana Department of Environmental Management Part 70 Operating Permit Renewal for Duke Energy, Inc. Cayuga Generating Station, T165-27260-00001; (2) Illinois EPA Division of Air Pollution Control Clean Air Act Permit Program (CAAPP) Renewal for Ameren Energy Generating Company, Elgin Energy Center, ID No 031438ABC; (3) Minnesota Pollution Control Agency Air Emission Permit issued to Otter Tail Power Company, Hoot Lake Plant, Permit No. 11100002-004; (4) Michigan Department of Environmental Quality Renewable Operating Permit issued to Alpena Power Generation, Inc. Calcite Road Site, Permit No 200000022; and (5) Ohio Environmental Protection Agency Title V Permit issued to E.I. Du Pont, Fort Hill Plant, Permit No P0099754. Copies of relevant portions of all these Permits are included in Exhibit F.

three one hour tests, and as such, WDNR's own regulations require that the particulate matter emission limit must be measured the same way, over a three hour average.

C. WDNR's Failure To Include Averaging Periods Makes The Permit Vague And Unenforceable

Despite WPSC's comments, WDNR issued the permit without including averaging times for these and other limits in the Permit. As a result, WPSC as the permittee, the WDNR as the agency charged with enforcement of the Permit, and members of the public who may have rights to enforce certain provisions of the Permit,⁴ are left with no clear language in the Permit as to what averaging periods apply (*i.e.*, a three hour average, a one-hour average or even an instantaneous limit).⁵ Moreover, WPSC is obligated under state and federal law and the Permit's terms to certify on an annual basis that the plant is in compliance with the terms of the Permit. *See* 42 U.S.C. § 7661b(b)(s); WIS. ADMIN. CODE § 407.09(4)(a)3; Permit Part I.D.1.a.(2). By not addressing the averaging period issue directly, the WDNR has placed WPSC in an untenable situation because the company will be asked to certify compliance with vague and ambiguous terms that other parties may interpret differently.

As a result, EPA should object to the issuance of the Permit with ambiguous and vague language, particularly in light of EPA's express direction to address the averaging period issue in Title V permits in order to ensure their enforceability.

⁴ Under the Clean Air Act, citizens may initiate actions for alleged violations of the terms of a permit if they meet certain conditions. 42 U.S.C. § 7604.

⁵ WPSC currently has a contested case hearing related to this issue pending in Wisconsin for its J.P. Pulliam Plant. In that case, WDNR failed to include averaging periods in the Pulliam Title V permit, and Sierra Club is arguing that the limits are therefore instantaneous.

II. WDNR'S RESPONSE TO COMMENTS WAS DEFICIENT

WDNR has an obligation to respond adequately to significant comments on the draft Permit. CAA § 502(b)(6) requires that all Title V permit programs include adequate procedures for public notice regarding the issuance of Title V permits, "including offering an opportunity for public comment." 42 U.S.C. § 7661a(b)(6); *see also* 40 C.F.R. § 70.7(h). It is a general principal of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments. *See, e.g., Home Box Office v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977). In fact, EPA has objected to numerous WDNR-issued Title V permits recently due to WDNR's failure to adequately respond to comments. *See* Order Granting Petition for Objection to Permit Issued to Wisconsin Public Service Corporation's J.P. Pulliam Power Plant at 5 (Exhibit G); Order Granting in Part and Denying in Part Petition for Objection to Permit Issued to Alliant Energy WPL Edgewater Generating Station at 8 (Exhibit H); Order Granting in Part and Denying in Part Petition for Objection to Permit Proposed to be Issued to WE Energies Oak Creek Power Plant at 10 (Exhibit I).

Here, WPSC provided extensive comments to the WDNR during the public comment period related to the averaging period issue, including numerous citations to EPA guidance and prior objections stating that averaging periods should be included. The following was WDNR's response, in its entirety:

The New Source Performance Standards (NSPS) do not specify an averaging period for the emission limits that apply to the combustion turbine. Instead, these rules require the use of specific test methods and specify the manner in which the results of the testing are used to demonstrate compliance with the emission limit (i.e., the average emission rate from three one-hour test runs). The 0.10 lb PM/mmBTU particulate matter emission limit is an instantaneous limit but compliance is demonstrated through test methods that include averaging periods. This does not mean that

the emission limit has an averaging period incorporated into the limit; in order for that to occur an averaging period needs to be expressly stated in administrative code or statute. The emission limits will not be changed in the proposed permit as a result of this comment. The Department is working on developing a broad systematic approach to deal with these concerns which may result in permit revisions.

Ex. C at 1.

WDNR's response is deficient in a number of ways. First, it seems to assume that all of the emission limits in question stem from the NSPS, when in fact most of them do not. See Ex. E. Second, WDNR provides no legal justification for any of its positions. For example, WDNR states that the 0.10 lb/mmBTU PM limit is an instantaneous limit without providing any authority for that proposition (presumably because there is none). WDNR also states that it can only include an averaging period if such period is expressly included in the administrative code or statute at issue but again it provides no legal or policy justification for its position. Third, WDNR does not address or even mention any of the EPA guidance documents or past objections that were referenced in WPSC's comments. And finally, WDNR does not explain why it has included averaging periods for similar limits in other Title V permits it has issued.

CONCLUSION

For the foregoing reasons, the emission limits in WPSC's Permit do not comply with the CAA or EPA guidance because they are not enforceable, and WDNR failed to adequately respond to WPSC's comments on this issue. EPA should therefore object to the Permit pursuant to 40 C.F.R. § 70.8(c)(1).

Dated this 29th day of July, 2011.

FOLEY & LARDNER LLP



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CERTIFICATE OF SERVICE

I, Theresa A. Graziano, hereby certify that I am an employee of the law firm of Foley & Lardner LLP and that on the 29th day of July, 2011, I caused a true and correct copy of **Wisconsin Public Service Corporation's Petition Requesting that the Administrator Object to Issuance of the Proposed Title V Operating Permit for the Wisconsin Public Service Corp-De Pere Energy, LLP Plant**, in the above-captioned matter, to be served by electronic mail and Federal Express on the parties appearing in this action as follows:

Via Federal Express and Electronic Mail
Lisa P. Jackson
Administrator
United States Environmental Protection Agency
U.S. EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460
Email: Jackson.lisap@epa.gov

Via Federal Express
Lisa P. Jackson
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United States Environmental Protection Agency
401 M Street, S.W.
Washington, DC 20460

Via Federal Express
Cathy Stepp
Secretary
Wisconsin Department of Natural Resources
101 South Webster Street – AD/8
Madison, WI 53703

Via Federal Express
Susan Hedman
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United States Environmental Protection Agency
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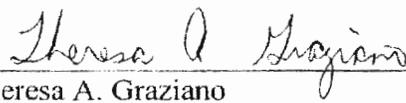

Theresa A. Graziano

EXHIBIT D

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

An Operating Permit for Wisconsin Public
Service Corporation – Weston Plant, Marathon
County, Wisconsin

Source I.D. 737009020

Permit No. 737009020-P10

Proposed by the Wisconsin Department of
Natural Resources on July 3, 2013

Petition No. _____

**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE
OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE WISCONSIN
PUBLIC SERVICE CORPORATION – WESTON PLANT**

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Date: October 16, 2013

Pursuant to the Clean Air Act (“CAA”), Wisconsin Public Service Corporation (“WPSC”) petitions the Administrator of the United States Environmental Protection Agency (“U.S. EPA”) to object to the proposed Title V Operating Permit for WPSC’s Weston plant (“Weston Plant”), Permit No. 737009020-P10 (the “Permit”). 42 U.S.C. § 7661d(b); 40 C.F.R. § 70.8(d). The Wisconsin Department of Natural Resources (“WDNR”) proposed the Permit to U.S. EPA on July 3, 2013. A copy of the proposed Permit is attached as Exhibit A.

WPSC provided comments to WDNR on the draft permit on March 6, 2013. A copy of WPSC’s comments is attached as Exhibit B. A copy of WDNR’s response to comments is attached as Exhibit C.

This petition is filed within 60 days of the end of U.S. EPA’s 45-day review period, as required by CAA § 505(b)(2). Pursuant to this statute, the U.S. EPA 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, she must object to issuance of the permit. 42 U.S.C. § 7661d(b); 40 C.F.R. § 70.8(c).

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

- (1) The Permit impermissibly imposes new or modifies preexisting requirements as part of the Title V permitting process;
- (2) Various emission limits and monitoring provisions in the Permit are vague and unenforceable because they do not identify the appropriate averaging time periods;
- (3) WDNR failed to incorporate proper and adequate averaging periods into the compliance assurance monitoring (“CAM”) provisions contained in the Permit;
- (4) WDNR failed to incorporate into the Permit the provisions, including the affirmative defense provisions, of the federal Mercury and Air Toxics Standard for Power Plants,

which was promulgated by U.S. EPA on February 16, 2012 and codified at 43 C.F.R. Part 63, Subpart UUUUU; and

(5) WDNR did not adequately respond to WPSC's public comments on the Permit.

I. THE PERMIT IMPERMISSIBLY IMPOSES NEW REQUIREMENTS AS PART OF THE TITLE V PERMITTING PROCESS

The operating permit program established pursuant to Title V of the CAA, 42 U.S.C. §§ 7651, *et seq.*, is meant to serve as a tool of administrative efficiency, and as a means by which state agencies and permittees can compile all preexisting conditions and requirements for ease of reference. As U.S. EPA has recognized, Title V permits only consolidate preexisting applicable requirements (*e.g.*, including those from past construction permits) and do not fundamentally change underlying determinations that established those requirements, such as Prevention of Significant Deterioration ("PSD") determinations:

[O]perating permits required by title V are meant to accomplish the largely procedural task of identifying and recording existing substantive requirements applicable to regulated sources and to assure compliance with these existing requirements. Accordingly, operating permits and their accompanying applications should be vehicles for defining existing compliance obligations rather than for imposing new requirements or accomplishing other objectives.

U.S. EPA, Office of Air Quality Planning and Standards, White Paper for Streamlined Development of Part 70 Permit Applications 1 (1995). U.S. EPA has also proclaimed in guidance that "Title V permits *cannot* . . . change a requirement of an NSR permit." U.S. EPA, Questions and Answers On the Requirements of Operating Permits Program Regulations 12-2 (1993) (emphasis added).

Both the United States Court of Appeals for the Seventh Circuit and the federal district court for the Western District of Wisconsin have agreed with U.S. EPA on this point. *See*

Citizens Against Ruining the Env't v. EPA, 535 F.3d 670, 672 (7th Cir. 2008) (“Title V does not impose additional requirements on sources but rather consolidates all applicable requirements in a single document to facilitate compliance.”); *Sierra Club v. Dairyland Power Coop.*, No. 10-cv-303, 2010 U.S. Dist. LEXIS 112817, at *13 (W.D. Wis. Oct. 22, 2010) (“[T]he Title V operating permit program does not impose new obligations but instead consolidates preexisting requirements such as those from the PSD program into a single document to facilitate compliance.”). Other courts have reached the same conclusion. *See, e.g., Ohio Pub. Interest Research Group v. Whitman*, 386 F.3d 792, 794 (6th Cir. 2004) (citations omitted) (“Title V does not impose new obligations; rather, it consolidates pre-existing requirements into a single, comprehensive document for each source, which requires monitoring, record-keeping, and reporting of the source’s compliance with the [Clean Air] Act.”); *United States v. Kerr-McGee Corp.*, No. 07-CV-01034, 2008 U.S. Dist. LEXIS 24494 (D. Colo. Mar. 26, 2008) (citations omitted) (“Operating permits set out in one single permit all of the requirements that apply to the source, including emission limitations and other requirements set forth in PSD construction permits, monitoring, recordkeeping and reporting requirements, and a schedule for compliance designed to address outstanding violations of CAA requirements.”). Contrary to law and U.S. EPA guidance, WDNR has included new requirements in the Permit that impermissibly change the preexisting requirements applicable to the Weston Plant.

A. WDNR Cannot Change the Averaging Period for the NO_x Emission Limit Already Established in a Construction Permit for the Weston Plant Auxiliary Boiler

WDNR established the nitrogen oxides (“NO_x”) emission limit for the Auxiliary Boiler at the Weston Plant (“Aux Boiler”) in 2004 when it issued construction permit number 03-CV-248 for the electric generating unit at the Weston Plant known as “Weston 4” (the “Weston 4 Construction Permit,” a copy of which is attached as Exhibit D), into which it directly

incorporated the New Source Performance Standards (“NSPS”) requirements for NO_x. In doing so, WDNR imposed a 30-day averaging period for demonstrating compliance with this NO_x limit. The Weston 4 Construction Permit requires WPSC to “comply with the NSPS compliance requirements per s. NR 440.205(7)(c), Wis. Adm. Code.” Weston 4 Construction Permit § I.B.4.b.(5). This regulation states that “[c]ompliance with the nitrogen oxides emission standards . . . shall be determined through performance testing under par. (e) or (f), or under pars. (g) and (h), as applicable.” The applicable paragraph—Wis. Admin. Code § NR 440.205(7)(c)3—specifically requires a 30-day averaging period for demonstrating compliance, stating that “the owner or operator of an affected facility . . . shall determine compliance with the nitrogen oxides standards . . . on a continuous basis through the use of a 30-day rolling average emission rate.”

The Permit does not include in the NO_x limit for the Aux Boiler the reference to Wis. Admin. Code § NR 440.205(7)(c) (and the 30-day averaging period included therein) that was included in the Weston 4 Construction Permit. *See* Permit § I.H.4.a.(1). The averaging period is critical in order to calculate emissions and ensure compliance. Without the reference to the 30-day averaging period included in the Weston 4 Construction Permit, the new provision in the Permit may be ambiguous or may be interpreted to include a 1-hour averaging period, which would be a significant change in the applicable emissions limitation. This modification of the compliance demonstration method impermissibly imposes a new requirement on the Weston Plant, requiring that compliance be demonstrated on a one-hour basis, rather than a 30-day basis.¹

¹ In addition, the Weston 4 Construction Permit included both an NSPS limit (0.20 pounds per million Btu) and a more stringent best available control technology (“BACT”) limit (0.10 pounds per million Btu) for NO_x for the Aux Boiler. The compliance demonstration methods for these limits in the Weston 4 Construction Permit are, respectively, the NSPS compliance demonstration requirements under Wis. Admin. Code § 440.205(7)(c), and calculation based on fuel consumption record and vendors or AP-

Exacerbating WDNR's failure to comply with established law regarding the Title V process is the fact that WDNR failed to provide any rational basis for failing to incorporate the 30-day averaging period included in the Weston 4 Construction Permit into the Permit. In its response to comments on the Permit, WDNR stated that because the Aux Boiler uses a CFMS to monitor NOx emissions, a one-hour averaging period is necessary to assure compliance with the NOx limit. *See* Exh. C at 168-69. However, the agency provides no justification as to why a 30-day averaging period—which WDNR had previously determined to be sufficient by incorporating it into the Weston 4 Construction Permit—would not assure compliance with the NOx limit. In fact, the 30-day rolling average (and all of the other monitoring options included in the NSPS regulations) were specifically incorporated into the Weston 4 Construction Permit because WPSO had not yet decided, at the time that permit was issued, whether it planned to install a CEMS on the Aux Boiler, and so needed to have alternate compliance demonstration methods available. Furthermore, WPSO has been reporting its compliance with the Aux Boiler NOx limit to WDNR based on a 30-day averaging period since the Aux Boiler became operational, including after the NOx CEMS was installed. WDNR has never asserted that this reporting violated the Weston 4 Construction Permit or was otherwise incorrect, confirming that prior to the issuance of the Permit, the agency was interpreting the Aux Boiler NOx limit to include a 30-day averaging period.

42 emission factors. Exh. D at 22. In the Permit, WDNR has created a new, hybrid requirement. The Permit removed both the BACT limit calculation compliance demonstration method and the multiple compliance demonstration options under the NSPS (including the use of a continuous emissions monitoring system ["CEMS"] with a 30-day averaging period), and replaced them with a more restrictive requirement to utilize a CEMS with a one-hour averaging period for purposes of demonstrating compliance with both the BACT limit and the NSPS limit. Accordingly, the Permit impermissibly combines two limits established in the Weston 4 Construction Permit into a single limit that is more restrictive than either limit would have been individually.

Accordingly, WDNR should not be allowed to modify this averaging period as part of the Title V permitting process, and the Administrator should object to the Permit on that basis and require that WDNR incorporate into the Permit the 30-day averaging period for the Aux Boiler NOx limit that was established in the Weston 4 Construction Permit.

B. WDNR Cannot Change the Monitoring Requirements for the Aux Boiler NOx Emission Limit Established in the Weston 4 Construction Permit

The Weston 4 Construction Permit requires that WPSC “comply with the NSPS emission monitoring requirements per s. NR 440.205(9), Wis. Admin. Code” for the Aux Boiler NOx limit. This section of the Wisconsin Administrative Code provides a number of monitoring options for compliance with the NSPS, one of which is the installation of a CEMS. In the Permit, however, WDNR has changed this requirement and now requires WPSC to use a CEMS, removing the other options under the NSPS that are expressly allowed by the Weston 4 Construction Permit. WDNR has impermissibly used the Title V permitting process to revise a substantive construction permit term, in violation of both state and federal law. *See also* Exh. B, at 11, Exh. B, Attachment B at 29. The Administrator should object to the Permit on this basis and require that WDNR revise the Permit to allow WPSC to use any and all monitoring options allowed under the Weston 4 Construction Permit and the applicable regulations for the Aux Boiler NOx limit.

II. VARIOUS EMISSION LIMITS IN THE PERMIT FAIL TO INCLUDE PROPER AVERAGING PERIODS AND ARE THEREFORE VAGUE AND UNENFORCEABLE

The courts and U.S. EPA have routinely recognized that an agency cannot issue permit terms that are vague and therefore unenforceable. *See, e.g., Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1233, 1250-51 (9th Cir. 2001) (finding that it was arbitrary and capricious for the Fish and Wildlife Service to issue terms and conditions so vague

as to preclude compliance therewith); *ConocoPhillips Co.*, 13 E.A.D. 768, 2008 WL 2324133, *15-18 (Env'tl. Appeals Bd. 2008) (remanding PSD air permit for state agency to consider and explain why certain provisions were not vague and unenforceable). The lack of averaging periods in the Permit makes the emission limits vague and unenforceable and U.S. EPA should therefore object to the Permit.

A. U.S. EPA Has Clearly Directed the States to Include Averaging Periods in Title V Permits

The CAA expressly provides that each Title V permit “issued . . . shall include *enforceable* emission limitations and standards . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter” 42 U.S.C. § 7661c(a).

U.S. EPA has interpreted this provision and clearly stated that to be enforceable, Title V permits must include averaging periods:

Title V Conditions must assure compliance with all applicable requirements. To assure that emission limits will be complied with, the limits must be written in a practically enforceable way. The title V permit must clearly include each limit and associated information from the underlying applicable requirement that defines the limit, *such as averaging time* and the associated reference method. . . . *When reviewing an emission limit, [the state agency must] make sure that . . . [t]he averaging time is included*

Title V Permit Review Guidelines: Practical Enforceability at III-57 (September 9, 1999)

(emphasis added) (Exhibit E-1).² U.S. EPA has also noted that for a permit to be enforceable, “*it must contain emissions limits with a reasonable averaging period* (usually not exceeding three hours), a method for determining compliance on a regular basis (annual stack tests are the

² Copies of the relevant excerpts from select EPA guidance documents referenced in this petition are included in Exhibit E. Copies of EPA guidance documents not included in Exhibit E are available upon request.

minimum here) and adequate record keeping.” Letter from Thomas W. Rarick, Chief, Air Operations Branch, Air Mgmt. Div., U.S. Env’tl. Prot. Agency, Region IX to James D. Boyd, Air Pollution Control Officer, Cal. Air Res. Bd. (Dec. 17, 1985) (emphasis added) (Exhibit E-2).

An averaging period is the time period component of a particular emission limit, and if the underlying regulatory provision requiring the limit expressly includes an averaging period, then that period should be used in the Permit. However, if the underlying provision does not specifically include an averaging period, then U.S. EPA has directed states to use an averaging period that coincides with the sampling time periods used for stack testing purposes. *See* Credible Evidence Rule Revisions: Response to Comments at 58 (Exhibit E-3) (“Note, however, that in the absence of a clearly specified averaging time, the time for conducting the reference test is generally the averaging time for compliance.”); *see also* Letter from Winston A. Smith, Dir., Air, Pesticides & Toxics Mgmt. Div., U.S. Env’tl. Prot. Agency, Region IV to Howard L. Rhodes, Dir., Air Mgmt. Div., Fla. Dep’t of Env’tl. Prot at Enclosure 1, pg. 3 (Dec. 11, 1997) (Exhibit E-4) (“In instances where the SIP regulations do not indicate an averaging time for the standard, the permit must include one to determine compliance with the applicable requirement.”). As a result, even for the emission limits in the Permit that do not have an underlying averaging period specified in the regulations, WDNR, as the expert agency charged with implementing the CAA in Wisconsin, must establish an averaging period in the Permit for such limits.³

³ In its public comments on the Permit, WPSC identified at least 65 emission limits that lack proper averaging periods. *See, e.g.*, Exh. B, Attachment A at 1 and Attachment B. When issuing the Permit, WDNR should have examined each of the sampling periods for each of these limits, determined the appropriate averaging period, and included that averaging period in the Permit for each limit.

WPSC has previously raised the issue of WDNR's failure to include proper averaging periods in Title V permits with both U.S. EPA and WDNR. On July 29, 2011, WPSC filed a petition for objection with U.S. EPA regarding the Title V permit issued by WDNR to WPSC's De Pere Energy, LLC plant, based on WDNR's failure to include proper averaging periods in the permit. WPSC has not yet received a response from U.S. EPA. Also in 2011, WPSC participated in a contested case proceeding with WDNR related to the lack of averaging periods in the Title V permit issued for WPSC's J.P. Pulliam Plant ("Pulliam Plant").⁴ WPSC has also filed a petition for a contested case hearing with WDNR challenging the agency's failure to include proper averaging periods in this Permit. Despite WPSC's repeated assertions that WDNR must include proper averaging periods in Title V permits in accordance with established law and U.S. EPA guidance, the agency has now issued Title V permits to three WPSC facilities in the last four years that are deficient because they lack proper averaging periods.

U.S. EPA's silence on this issue has contributed to WDNR's continued failure to include proper averaging periods in Title V permits. In WDNR's response to comments on the Permit, WDNR stated that "[l]acking any direction to the contrary, the department will not be adding averaging periods to emission limitations where the underlying regulation does not include an averaging period." Exh. C at 172 (emphasis added). This statement is a direct contradiction of U.S. EPA guidance, which states that "[i]n instances where the [state

⁴ In that proceeding, the Sierra Club asserted that the emission limits expressed without averaging periods are instantaneous limits. The Administrative Law Judge did not find that such limits were instantaneous, but determined that WDNR had routinely enforced such limits as applying "at all times." In re Petition for Review of Construction Permit No. 02-RV-032-R2 and Operation Permit No. 405031990-P20 issued to Wisconsin Public Service Corporation for the Pulliam Facility, Case No. IH-09-05, Findings of Fact, Conclusions of Law and Order at 3 (Wis. Div. Hrg. App. Dec. 7, 2011).

implementation plan] regulations do not include an averaging time for the standard, the permit must include one to determine compliance with the applicable requirement.” Exh. E-4 at 3. It is therefore imperative that U.S. EPA object to the issuance of the Permit and direct WDNR to revise the Permit to include appropriate averaging periods.

B. U.S. EPA Has Objected To Title V Permits In The Past That Do Not Contain Averaging Periods

U.S. EPA has consistently stated that permit terms must specify the applicable averaging periods to be enforceable, and it should do so again in this case. For example, provided below are excerpts from two other U.S. EPA objections to Title V permits (from Florida and Mississippi), which clearly mandate the inclusion of averaging periods:

Appropriate Averaging Times: In order for the emissions standard for particulate matter (conditions A.4, B.4, D.5, D.6, D.12 and E.4), sulfur dioxide (conditions A.5 and D.7), carbon monoxide (condition A.8), TRS (condition C.4), VOC’s (condition A.7) and nitrogen oxides (condition A.6) contained in the permit to be practicably enforceable, the appropriate averaging time must be specified in the permit. An approach that can be used to address this deficiency is to include general language in the permit to indicate that the averaging times for all specified emission standards are tied to or based on the run time of the test method(s) used for determining compliance.

Letter from Region 4, United States Env’tl Prot. Agency to Howard L. Rhodes, Director, Div. of Air Resources Mgmt., Fla. Dept. of Env’tl Prot. at 4 (June 5, 2000) (Exhibit E-5).

Appropriate Averaging Times: In order for the emissions standards to be practicably enforceable, the appropriate averaging time must be specified in the permit. One approach that can be used to address this deficiency is to include general language in the permit to indicate that the averaging times for all specified emission standards are tied to or based on the run time of the test method(s) used for determining compliance. . . .

Letter from Winston A. Smith, Director, Air, Pesticides, & Toxics Mgmt. Div., United States Env't'l Prot. Agency to Dwight K. Wylie, Chief, Air Div., Miss. Dept. of Env't'l Quality at 5-6 (Dec. 23, 1999) (Exhibit E-6).

During the public comment period and in the Permit application, WPSC asked WDNR to include averaging period language for all the emission limits in the Permit and to clarify that the time period component was a three-hour average (or longer). *See* Exh. B, Attachment A at 1, Attachment B. For example, WPSC requested the following underlined language for particulate matter emissions: "Emissions from boiler B01 may not exceed 0.10 pounds/mmBtu heat input averaged over any three consecutive hours . . ." Exh. B, Attachment B at 1. WDNR failed to include the requested language in the Permit. The suggested language clarifies that the time period component of the emission limitation is a three-hour average, and is consistent with the language included in permits issued by other states, including Indiana, Illinois, Minnesota, Michigan and Ohio, all states within U.S. EPA Region 5.⁵

C. WDNR's Regulations and the Permit Record Also Require That The Emission Limits Be Expressed With Averaging Periods

WDNR regulations and the administrative record for the Permit specifically recognize that the emission limits set forth in the Permit must be expressed with averaging periods. Part I.A.1.a of the Permit contains the 0.10 pound per million Btu particulate matter

⁵ Such permits include: (1) Indiana Department of Environmental Management Part 70 Operating Permit Renewal for Duke Energy, Inc. Cayuga Generating Station, T165-27260-00001; (2) Illinois EPA Division of Air Pollution Control Clean Air Act Permit Program (CAAPP) Renewal for Ameren Energy Generating Company, Elgin Energy Center, ID No 031438ABC; (3) Minnesota Pollution Control Agency Air Emission Permit issued to Otter Tail Power Company, Hoot Lake Plant, Permit No. 11100002-004; (4) Michigan Department of Environmental Quality Renewable Operating Permit issued to Alpena Power Generation, Inc, Calcite Road Site, Permit No 200000022; and (5) Ohio Environmental Protection Agency Title V Permit issued to E.I. Du Pont, Fort Hill Plant, Permit No P0099754. Copies of relevant portions of all these permits are included in Exhibit F.

emission limit and identifies Wis. Admin. Code § NR 415.06(2)(c) as the authority for the limit. This permit language, and the underlying Wisconsin Administrative Code provision, require certain facilities, like the Weston Plant, to meet an emission limitation “of 0.10 pounds of *particulate matter* per million Btu heat input” (emphasis added). “Particulate matter” is further defined as “all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air *as measured by an applicable reference method or an equivalent or alternative method specified by the department.*” Wis. Admin. Code § NR 400.02(119) (emphasis added). Read together, Wis. Admin. Code § NR 415.06(2)(c) and Wis. Admin. Code § NR 400.02(119) state that the permittee shall meet an emission limitation of “0.10 pounds of all finely divided solid or liquid material . . . emitted to the ambient air as measured by an applicable reference method per million BTU heat input.” The applicable reference method for particulate matter (as set forth in Wis. Admin. Code § NR 439.07(8)(a)) requires at minimum an average of three one-hour tests and, as such, WDNR’s own regulations require that the particulate matter emission limit be measured the same way, over at least a three-hour average.

In addition, for at least four of the emissions limits in the Permit, WDNR failed to include in the Permit the averaging periods that it had previously recognized were appropriate by including them in the Analysis and Preliminary Determination for the Weston 4 Construction Permit (a copy of which is attached as Exhibit G). *See* Exh. G at 43-44; *see also* Exh. B, Attachment B at 10, 16, 17. These include the emissions limits in the Permit for lead, fluorides, beryllium, and ammonia, none of which contain an averaging period. *See* Permit §§ I.C.6.a.(1), I.C.8.a.(1), I.C.10.a.(1), and I.C.12.a.(1). Despite including the appropriate averaging periods in the Analysis and Preliminary Determination for the Weston 4 Construction Permit, WDNR

failed to incorporate them into either the Weston 4 Construction Permit or the Permit, as required.

D. WDNR's Failure To Include Averaging Periods Makes The Permit Vague And Unenforceable

Despite WPSC's comments, WDNR issued the Permit without including averaging times for all of the emissions limitations contained therein. As a result, WPSC as the permittee, WDNR as the agency charged with enforcement of the Permit, and members of the public who may have rights to enforce certain provisions of the Permit,⁶ are left with no clear language in the Permit as to what averaging periods apply (*i.e.*, a three-hour average, a one-hour average, or a different time period).⁷ Moreover, WPSC is obligated under state and federal law and the Permit terms to certify on an annual basis that the Weston Plant is in compliance with the terms of the Permit. *See* 42 U.S.C. § 7661b(b)(s); Wis. Admin. Code § 407.09(4)(a)3; Permit § I.XXX.1.a.(2). By not addressing the averaging period issue directly, WDNR has placed WPSC in an untenable situation because the company will be asked to certify compliance with vague and ambiguous terms that other parties may interpret differently.

As a result, U.S. EPA should object to the issuance of the Permit with ambiguous and vague language and terms that are not practically enforceable and require that WDNR revise the Permit to include proper averaging periods for all of the emissions limitations included therein, particularly in light of U.S. EPA's express direction to address the averaging period issue in Title V permits in order to ensure their enforceability.

⁶ Under the CAA, citizens may initiate actions for alleged violations of the terms of a permit if they meet certain conditions. 42 U.S.C. § 7604.

⁷ *See* In re Petition for Review of Construction Permit No. 02-RV-032-R2 and Operation Permit No. 405031990-P20 issued to Wisconsin Public Service Corporation for the Pulliam Facility, Case No. IH-09-05, Findings of Fact, Conclusions of Law and Order at 3 (Wis. Div. Hrg. App. Dec. 7, 2011).

III. THE AVERAGING PERIODS INCLUDED IN THE CAM PROVISIONS OF THE PERMIT ARE CONTRARY TO FEDERAL REGULATIONS AND U.S. EPA GUIDANCE

Federal regulations require that CAM provisions in Title V permits include proper averaging periods for determining whether an “excursion” from or an “exceedance” of an emissions limitation has occurred.⁸ *See* 40 C.F.R. § 64.6(c)(2) (“The permit shall specify the level at which an excursion or exceedance will be deemed to occur, including the appropriate averaging period associated with such exceedance or excursion.”). These averaging periods must be “commensurate with the time period over which a change in control device performance that would require actions by [the] owner or operator to return operations within normal ranges or designated conditions is likely to be observed.” 40 C.F.R. § 64.3(b)(4)(i).

In submitting its CAM plan to WDNR for inclusion in the Permit, WPSC specifically included three-hour averaging periods for all relevant CAM provisions. These three-hour averaging periods were established because the correlations between monitoring parameters and excursions or exceedances included in the CAM plan were created based on stack test results that were obtained by calculating the arithmetic mean of three, one-hour test runs. Accordingly, three-hour averaging periods are appropriate because they are of adequate length to ensure that WPSC will respond in a timely fashion to actual excursions or exceedances, but not so short as to flag normal variability in operating conditions as excursions or exceedances. *See, e.g.*, Exh. B, Attachment A at 1-2; *see also* Parker, Barrett, U.S. EPA OAQPS. “Guidance on Establishing

⁸ An “excursion” is defined as “a departure from an indicator range established for monitoring . . . , consistent with any averaging period specified for averaging the results of the monitoring.” 40 C.F.R. § 64.1. An “exceedance” is defined as “a condition that is detected by monitoring that provides data in terms of an emission limitation or standard and that indicates that emissions (or opacity) are greater than the applicable emission limitation or standard (or less than the applicable standard in the case of a percent reduction requirement) consistent with any averaging period specified for averaging the results of the monitoring.” *Id.*

Monitoring to Comply with CAM and Other Title V Requirements, A Summary of Technical and Policy Materials” at 7.9 (stating that averaging periods within a CAM plan should not be “so short as to flag minor perturbations as excursions”).

When WDNR issued the Permit, it improperly revised the averaging periods for multiple CAM provisions from three-hour averages to one-hour averages. *See generally* Permit Part IV; *see also* Exh. B, Attachment B at 52-54 (identifying CAM provisions that WDNR revised from three-hour to one-hour averaging periods). These one-hour averages are inappropriate under the federal regulations and U.S. EPA guidance because the correlations used to identify excursions or exceedances were developed based on three hours of collected data. More specifically, using a one-hour averaging period has the potential to nullify the correlation between monitoring parameters and excursions or exceedances originally established by WPSC, as this shorter period fails to take into account the normal operational variability that can occur over a one-hour period. This variability is precisely the reason that stack test results (including U.S. EPA Method 201 stack test results) are obtained by performing three, one-hour test runs and then averaging the results of each individual run. Because the stack test results are an average, this means there are normally test runs with results higher than the average and runs with results lower than the average. WDNR’s imposition of one-hour averaging periods for these CAM provisions thus violates the federal regulations requiring that averaging periods be “commensurate” with the time period actual control device failures are likely to be observed, and violates U.S. EPA guidance requiring that averaging periods be sufficiently long so as to avoid flagging “minor perturbations” as excursions or exceedances. Accordingly, U.S. EPA should object to the Permit and require that WDNR revise the averaging periods in these provisions to be at least three hours in length.

IV. THE PERMIT FAILS TO INCORPORATE ALL APPLICABLE PROVISIONS OF THE FEDERAL MERCURY AND AIR TOXICS STANDARD

U.S. EPA promulgated the Mercury and Air Toxics Standard (the “MATS Rule”) on February 16, 2012, which includes emissions standards for various hazardous air pollutants. The MATS Rule also provides for an affirmative defense against civil penalties for violations of these emissions standards if the violations were caused by a “malfunction” and the source could satisfy all the required elements of the affirmative defense. *See* 40 C.F.R. § 63.10001. WPSC requested in its public comments that WDNR incorporate these affirmative defense provisions into the Permit. *See* Exh. B, Attachment A at 6-8. WDNR denied this request, stating that these affirmative defense provisions are “not required as permit content.” Exh. C at 182, 62.

Title V permits are required to include “all applicable requirements applicable to emissions units that cause the source to be subject to the part 70 [Title V operating permit] program.” 40 C.F.R. § 70.3(c). “Applicable requirements” are defined to include, among other things, “[a]ny standard or other requirement under section 111 of the [Clean Air] Act” and “[a]ny standard or other requirement under section 112 of the [Clean Air] Act.” 40 C.F.R. § 70.2. Because the MATS Rule is a “standard or requirement” promulgated pursuant to section 111 and 112 of the CAA, it qualifies as an “applicable requirement” and WDNR should be required to incorporate all of its relevant provisions, including the affirmative defense provisions, into the Permit.⁹

⁹ At least one other state permitting agency has accomplished this task by including a general reference to 40 C.F.R. Part 63, Subpart UUUUU as applicable to a permitted facility. *See, e.g.*, Title V Operating Permit for PSEG Power Connecticut, LLC, issued October 31, 2012 at 6-7 (a copy of which is attached as Exhibit H). WPSC believes this would be an acceptable approach for WDNR to use in revising the Permit.

U.S. EPA has also recognized that the affirmative defense provisions in the MATS Rule are a necessary and integral element of these standards. In the preamble to the final MATS Rule, U.S. EPA stated that “[t]he affirmative defense provisions give the EPA the flexibility to ensure both that its emissions limitations are ‘continuous’ as required by 42 U.S.C. § 7602(k), and account for unplanned upsets and thus support the reasonableness of the standard as a whole.” 77 Fed. Reg. 9304, 9383 (Feb. 16, 2012). If a permittee does not receive the benefit of the MATS Rule affirmative defense provisions, the emissions standards contained in the rule and incorporated into a Title V permit are incomplete, and therefore unreasonable. As a result, these affirmative defense provisions qualify as “standards or requirements” and, therefore, are “applicable requirements” under Part 70. The Administrator should object to the Permit based on WDNR’s failure to incorporate the affirmative defense provisions into the Permit.

V. WDNR’S RESPONSE TO COMMENTS WAS DEFICIENT

WDNR failed to respond adequately to significant comments on the draft Permit. CAA § 502(b)(6) requires that all Title V permit programs include adequate procedures for public notice regarding the issuance of Title V permits, “including offering an opportunity for public comment.” 42 U.S.C. § 7661a(b)(6); *see also* 40 C.F.R. § 70.7(h). It is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments. *See, e.g., Home Box Office v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977). In fact, U.S. EPA has objected to numerous WDNR-issued Title V permits recently due to WDNR’s failure to adequately respond to comments.¹⁰ Here, WPSC provided extensive comments to WDNR

¹⁰ *See, e.g.,* Order Granting Petition for Objection to Permit Issued to Wisconsin Public Service Corporation’s J.P. Pulliam Power Plant at 5 (Exhibit I); Order Granting in Part and Denying in Part Petition for Objection to Permit Issued to Alliant Energy – WPL Edgewater Generating Station at 8

during the public comment period related to each of the deficiencies in the Permit described in this petition, and WDNR's response to the comments was insufficient.

A. WDNR Provided No Legal Justification for the Lack of Averaging Periods in the Permit

WPSC's public comments on the Permit requested that averaging periods be included for each of the emissions limitations in the Permit, and cited numerous U.S. EPA guidance documents in support. *See* Exh. B, Attachment A at 1. In denying this request, WDNR relied exclusively on the decision issued by the Administrative Law Judge ("ALJ") in the contested case proceeding on the Title V Permit for the Pulliam Plant. *See* Exh. C at 172. However, because both the ALJ decision and WDNR's reliance on it violate applicable U.S. EPA guidance, WDNR's response to WPSC's public comments lacks legal justification and is therefore inadequate. WDNR will likely continue to refuse to include proper averaging periods in Title V permits unless and until U.S. EPA directs the agency to do so. As a result, the Administrator should object to the Permit and direct WDNR to properly respond to WPSC's request for the inclusion of proper averaging periods for each emission limitation in the Permit.

B. WDNR Failed to Adequately Respond to WPSC's Comments Regarding Certain Compliance Demonstration Requirements

WDNR mischaracterized and failed to adequately respond to WPSC's public comments regarding the compliance demonstration methods for the visible emissions limits included in the Permit for Combustion Turbines B11, B12, and B13 at the Weston Plant (the "Combustion Turbines"). The Permit requires that WPSC perform a U.S. EPA Method 9 test once every 12 months in order to demonstrate compliance with the visible emissions limits for

(Exhibit J); Order Granting in Part and Denying in Part Petition for Objection to Permit Proposed to be Issued to WE Energies Oak Creek Power Plant at 10 (Exhibit K).

these units. Permit §§ I.D.2.b.(2), I.E.2.b.(2). In its public comments on the Permit, WPSC requested that the Permit be revised to require only annual visual observations (*e.g.*, via U.S. EPA Method 22) for the Combustion Turbines and, if visible emissions were detected, then require the U.S. EPA Method 9 test within 90 days. *See* Exh. B, Attachment B at 20, 23.

In its response to WPSC's comments, WDNR rejected the requested monitoring approach, stating that the reasons for WPSC's requested monitoring were "not clear" and "lack[ed] specificity." Exh. C at 39-40. WDNR also incorrectly stated that WPSC requested U.S. EPA Method 9 compliance testing for the Combustion Turbines in its renewal application for the Permit. In fact, WPSC merely requested in its application that "[t]esting for visible emissions" be required, and did not specify a method. Exh. C. at 40. In its public comments, WPSC clarified that it was not requesting a U.S. EPA Method 9 compliance test, but rather was requesting that only a "visual observation" (*e.g.*, via U.S. EPA Method 22) be required, with a U.S. EPA Method 9 test to be required only if visible emissions were observed as a result of the visual observation. Accordingly, WPSC's comments clearly and specifically described the requested monitoring approach and WDNR effectively ignored those comments when it issued the Permit, meaning the Administrator should object to the Permit based on WDNR's failure to adequately respond to WPSC's comments.

CONCLUSION

For the foregoing reasons, the Permit fails to comply with the requirements of the CAA and, therefore, U.S. EPA should object to the Permit pursuant to 40 C.F.R. § 70.8(c)(1) and 42 U.S.C. § 7661d(b)(2).

Dated this 16th day of October, 2013.

FOLEY & LARDNER LLP



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Attorneys for Wisconsin Public Service Corporation

CERTIFICATE OF SERVICE

I, Louis J. Thorson, hereby certify that I am an attorney with the law firm of Foley & Lardner LLP and that on the 16th day of October, 2013, I caused a true and correct copy of Wisconsin Public Service Corporation's **Petition Requesting that the Administrator Object to Issuance of the Proposed Title V Operating Permit for the Wisconsin Public Service Corporation – Weston Plant**, in the above-captioned matter, to be served by electronic mail, U.S. Mail, and/or Federal Express on the parties appearing in this action as follows:

Via U.S. Mail and Electronic Mail

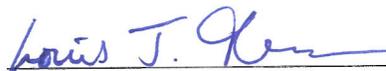
Gina McCarthy
Administrator
United States Environmental Protection Agency
U.S. EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460
Email: McCarthy.gina@epa.gov

Via Federal Express

Cathy Stepp
Secretary
Wisconsin Department of Natural Resources
101 South Webster Street – AD/8
Madison, WI 53703

Via U.S. Mail

Susan Hedman
Regional Administrator
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Mail Code: R-19J
Chicago, IL 60604-3507



Louis J. Thorson

EXHIBIT E

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

Revision Of An Operating Permit for
Wisconsin Public Service Corporation –
Weston Plant, Marathon County, Wisconsin

Source I.D. 737009020

Permit Revision Nos. 737009020-P13
737009020-P16

Proposed by the Wisconsin Department of
Natural Resources on August 1, 2014

Petition No. _____

**PETITION RENEWING REQUEST THAT THE ADMINISTRATOR OBJECT TO
ISSUANCE OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE
WISCONSIN PUBLIC SERVICE CORPORATION – WESTON PLANT**

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Date: November 14, 2014

Pursuant to the Clean Air Act (“CAA”), Wisconsin Public Service Corporation (“WPSC”) petitions the Administrator of the United States Environmental Protection Agency (“U.S. EPA”) to object to the proposed Title V Operating Permit Revision for WPSC’s Weston plant, Permit Revision Nos. 737009020-P13 and 737009020-P16 (the “Permit Revision”), which Permit Revision includes provisions carried forward from the Title V Operating Permit No. 737009020-P10 issued on August 27, 2013 (the “2013 Title V Permit”). 42 U.S.C. § 7661d(b); 40 C.F.R. § 70.8(d). The Wisconsin Department of Natural Resources (“WDNR”) proposed the Permit Revision to U.S. EPA on August 1, 2014. A copy of the proposed Permit Revision is attached as Exhibit A.

On October 16, 2013, WPSC petitioned the U.S. EPA Administrator to object on various grounds to the 2013 Title V Permit (the “2013 Petition”). A copy of the 2013 Petition, without attachments, is attached as Exhibit B.¹ On November 4, 2013, U.S. EPA issued a letter to WPSC acknowledging receipt of the 2013 Petition and stating that U.S. EPA would review and respond to the issues raised therein. A copy of this acknowledgment letter is included as Exhibit C. To date, WPSC has not received any additional response from U.S. EPA to the 2013 Petition.

WDNR issued the Permit Revision in 2014 only to revise several of the terms from the 2013 Title V Permit that are the subject of an ongoing state administrative challenge by WPSC. As a result, the Permit Revision resolved only one of the issues raised by WPSC in the

¹ Due to the large size of the attachments to the 2013 Petition and the fact that they were previously provided to U.S. EPA, they are not reattached here. WPSC will provide copies of these attachments upon request.

2013 Petition.² The remaining issues from the 2013 Petition are: (1) the 2013 Title V Permit impermissibly imposes new or modifies preexisting requirements as part of the Title V permitting process; (2) various emission limits and monitoring provisions in the 2013 Title V Permit are vague and unenforceable because they do not identify the appropriate averaging time periods; (3) WDNR failed to incorporate proper and adequate averaging periods into the compliance assurance monitoring provisions contained in the 2013 Title V Permit; and (4) WDNR did not adequately respond to WPSC's public comments on the 2013 Title V Permit. WPC's challenge to these remaining issues is still pending. However, out of an abundance of caution, WPC hereby incorporates by reference the 2013 Petition (including all attachments thereto) and reasserts each of the issues raised in the 2013 Petition. WPC previously provided comments to WDNR on each of these issues on March 6, 2013, and a copy of these comments was attached to the 2013 Petition as Exhibit B.

This petition is filed within 60 days of the end of U.S. EPA's 45-day review period, as required by CAA § 505(b)(2). Pursuant to this statute, the U.S. EPA Administrator must grant or deny this petition within sixty days after it is filed. If the Administrator determines that the Permit Revision does not comply with the requirements of the CAA, she must object to issuance of the permit. 42 U.S.C. § 7661d(b); 40 C.F.R. § 70.8(c).

CONCLUSION

For the foregoing reasons and the reasons stated in the 2013 Petition, the 2013 Title V Permit and the subsequent Permit Revision fail to comply with the requirements of the

² The issue raised in Section IV of the 2013 Petition, relating to WDNR's failure to incorporate all applicable provisions of the Federal Mercury and Air Toxics Standard into the Title V permit for the Weston Plant, was resolved with the issuance of the Permit Revision.

CAA and, therefore, U.S. EPA should object to the 2013 Title V Permit and the Permit Revision pursuant to 40 C.F.R. § 70.8(c)(1) and 42 U.S.C. § 7661d(b)(2).

Dated this 14th day of November, 2014.

FOLEY & LARDNER LLP

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Attorneys for Wisconsin Public Service Corporation

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____)	
<i>Plaintiff</i>)	
)	
v.)	Civil Action No.
)	
_____)	
<i>Defendant</i>)	

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify):* _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	
		LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	
		IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee (Prisoner Petition) <input type="checkbox"/> 465 Other Immigration Actions	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ _____ CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE _____

SIGNATURE OF ATTORNEY OF RECORD _____

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, (except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.**

Example: U.S. Civil Statute: 47 USC 553
Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.