NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

May 25, 2012

VIA HAND DELIVERY AND EMAIL

Honorable Lisa P. Jackson
Administrator, U.S. EPA
Ariel Rios Building
1200 Pennsylvania Ave. NW
Washington, D.C. 20004

Dear Administrator Jackson,

Please find enclosed (1) the Natural Resources Defense Council and the Sierra Club's Petition to Object to the Issuance of a State Title V Operating Permit issued by the Michigan Department of Environmental Quality for Lansing Board of Water & Light Eckert & Moores Park Station, Permit No. MI-ROP-B2647-2012, (2) a CD of Exhibits and (3) Proof of Service. Also enclosed is a copy of the Petition and a self addressed envelope that we request you use to send a file-stamped copy of the Petition back to us.

If you have any questions, do not hesitate to contact me at (312) 651-7923 or jrossman@nrdc.org.

Sincerely,

Jessie J. Rossman
Natural Resources Defense Council

cc: Susan Hedman, Regional Administrator, U.S. EPA Region V
Brian Culham, Environmental Quality Analysis, MI Dept of Environmental Quality
Mark Matus, Manger of Environmental Services, Lansing Board of Water & Light

www.nrdc.org
2 N. Riverside Plaza, Suite 2250
Chicago, IL 60606
TEL 312 663-9900
FAX 312 234-9633
NEW YORK * WASHINGTON DC * SAN FRANCISCO * LOS ANGELES * BEIJING

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Lansing Board of Water & Light
Eckert & Moores Park Stations,
Permit No. MI-ROP-B2647-2012

Issued by the Michigan Department of Environmental Quality

PETITION TO OBJECT TO THE ISSUANCE OF A STATE TITLE V OPERATING PERMIT

Petition No.:

PETITION OF THE NATURAL RESOURCES DEFENSE COUNCIL AND SIERRA CLUB TO OBJECT TO ISSUANCE OF A STATE TITLE V OPERATING PERMIT

Pursuant to Section 505(b)(2) of the Clean Air Act, 42 U.S.C. § 7761d(b)(2), 40 C.F.R. §70.8(d) and 40 C.F.R. § 70.7(f) and (g), the Natural Resources Defense Council and Sierra Club (collectively, "Citizen Groups") hereby petition the Administrator of the U.S. Environmental Protection Agency ("Administrator" or "EPA") to object to the Title V Renewable Operating Permit No. MI-ROP-B2647-2012 ("Title V Permit") reissued in May 2012, by the Michigan Department of Environmental Quality ("MDEQ" or "the Agency") for the Eckert & Moores Park Stations (collectively, "Plant") operated by Lansing Board of Water and Light ("LBWL" or "the Company").

The Administrator must object to the issuance of the Title V Permit due to: (1) LBWL's failure to provide, and MDEQ's failure to require, a complete application before issuing the Title V Permit, (2) MDEQ's failure to provide an adequate response to Citizen Group's significant comments, (3) apparent violations of applicable Prevention of Significant Deterioration ("PSD") requirements under the Clean Air Act ("CAA") that require a schedule of compliance to be included in the Title V Permit and (4) MDEQ's failure to include monitoring requirements stringent enough to ensure compliance with the Particulate Matter ("PM") limits included in the permit.

I. INTRODUCTION

The Plant is composed of two coal-fired facilities, located in Lansing, Michigan: (1) the Eckert Station, whose six power generating units commenced operation on or around 1953, 1957, 1960, 1963, 1966 and 1969, respectively,[1] and (2) the Moores Park Station steam facility,

[1] Stone and Webster, "Lansing Board of Water and Light: Power Supply Options for IRP Study," March 1996, at 15 [hereinafter "IRP Study 1996"], attached as Ex. A. Please note that for ease of reference, all citations throughout this Petition refer to the corresponding page in the PDF of any given document.

whose four stoker-fired boilers commenced operation on or around 1956, and produce steam heat for downtown Lansing and for General Motors' Grand River Assembly Plant.[2] Combined, the Plant has the potential to emit 478 tons of Hazardous Air Pollutants ("HAPs"), 3,647 tons of Sulfur Dioxide ("SO_2"), 1,659 tons of Nitrogen Oxides ("NO_X") and 68 tons of Particulate Matter ("PM_{10}") per year. Because the Plant is a fossil fuel-fired steam electric plant of more than 250 million British thermal units per hour, it constitutes a "major stationary source" within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(a) and a "major emitting facility" within the meaning of Section 169(1) of the Act, 42 U.S.C. § 7479(1).

II. PETITIONERS

The Natural Resources Defense Council ("NRDC") is a national, non-profit, environmental organization with more than 357,000 members in the U.S., including over 10,600 members in Michigan. NRDC is dedicated to the protection of the environment and public health, has actively supported effective enforcement of the Clean Air Act and other environmental statues on behalf of its members for over 30 years, and works to promote the development of energy efficiency and clean energy technologies.

The Sierra Club is the nation's oldest and largest grassroots environmental organization. An incorporated, not-for-profit organization, Sierra Club has 619,000 members nationwide, including more than 17,600 members in Michigan. Its mission is to explore, enjoy and protect the wild places of the earth, and to educate and enlist humanity to protect and restore the quality of the natural and human environment. Sierra Club has worked diligently to protect and improve air quality in the United States, curb climate change, and promote clean energy.

III. PROCEDURAL BACKGROUND

On October 13, 2010, Citizen Groups submitted detailed comments regarding MDEQ's proposal to reissue the Title V Permit for the Plant.[3] The objections raised in this petition regarding a failure to assure compliance with applicable PSD requirements under the CAA and to adequately monitor PM were raised with reasonable specificity in the Comment Letter. The grounds for the remaining objections regarding LBWL's failure to provide sufficient information to the Agency and MDEQ's failure to adequately respond to Citizen Groups' comments arose after the comment period was completed. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. §70.8(c)(1).[4]

MDEQ submitted the proposed Title V Permit to EPA on February 10, 2012. EPA's 45-day review period ended on March 26, 2012. This Petition to Object is timely filed within 60 days of the conclusion of EPA's review period and failure to raise objections.

---

[2] IRP Study 1996 at 26.

[3] Citizen Groups' comment letter [hereinafter "Comment Letter"], attached as Ex. B.

[4] Citizen Groups could not know that LBWL would fail to submit, and MDEQ would fail to require, all of the necessary information until after the permitting process was complete. Similarly, Citizen Groups could not know that MDEQ would fail to adequately address their comments until the Response to Comments was issued. Under the applicable statute, these issues must be addressed on the merits because "it was impracticable to raise such objections" during the comment period as "the grounds for such objection[s] arose after such period." 42 U.S.C. § 7661d(b)(2).

IV. LEGAL STANDARDS

A. Title V.

Federal regulations adopted pursuant to Title V of the CAA require that facilities subject to Title V permitting requirements obtain a permit that "assures compliance by the source with all applicable requirements." 40 C.F.R. § 70.1(b); *see also* Mich. Admin. Code R. 336.1213(2) ("Each renewable operating permit shall contain emission limits and standards, including operational requirements and limits that ensure compliance with all applicable requirements at the time of permit issuance."). Applicable requirements include, among others, the requirement to obtain a preconstruction permit that complies with applicable preconstruction review requirements under the CAA, EPA regulations, and state implementation plans ("SIPs"). 40 C.F.R. § 70.2.[5] Title V permit applications must disclose all applicable requirements and any violations at the facility. 42 U.S.C. § 7661b(b); 40 C.F.R. §§ 70.5(c)(4)(i), (5), (8); Mich. Admin. Code R. 336.1212.

If a facility is in violation of an applicable requirement at the time that it receives an operating permit, the permit must include a compliance schedule. 42 U.S.C. §§ 7661b(b)(1), 7661(3). The compliance schedule must contain "an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance." 40 C.F.R. § 70.5(c)(8)(iii)(C); *see also* Mich. Admin. Code R. 336.1119(a). If any statements in the application were incorrect, or if the application omits relevant facts, the applicant has an ongoing duty to supplement and correct the application. 40 C.F.R. § 70.5(b); Mich. Admin. Code R. 336.1210(2).

Where a state or local permitting authority issues a Title V operating permit, EPA will object if the permit is not in compliance with any applicable requirements under C.F.R. Part 70. 40 C.F.R. § 70.8(c). If the EPA does not object, "any person may petition the Administrator within 60 days after the expiration of the Administrator's 45-day review period to make such objection." 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

The Administrator "shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the CAA]." 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(c)(1); *N.Y. Public Interest Group v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2003) [hereinafter "*NYPIRG I*"]. The Administrator must grant or deny a petition to object within 60 days of its filing. 42 U.S.C. § 7661(b)(2). While the burden is on the petitioner to demonstrate to EPA that a Title V Permit is deficient, *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009) [hereinafter "*Sierra Club I*"]; *Sierra Club v. Johnson*, 541 F.3d 1257, 1266-67 (11th Cir. 2008) [hereinafter "*Sierra Club II*"]; *Citizens Against Ruining the Env't. EPA*, 535 F.3d 670, 677-78 (7th Cir. 2008), once such a burden has been met, EPA is required to object to the permit. *NYPIRG I*, 321 F.3d at 332-34.

---

[5] *See also In re E. Ky. Power Coop., Inc., Hugh L. Spurlock Generating Station*, Order in Response to Petition IV-2006-4, at 15 (E.P.A. Aug 30, 2007) [hereinafter "Spurlock Decision"], attached as Ex. C.

B. New Source Review and the Prevention of Significant Deterioration.

PSD is a part of the larger New Source Review ("NSR") program that Congress established in 1977. The NSR program covers both the construction of new industrial facilities and existing facilities that make any modifications that significantly increase pollution and are not exempt from regulation. 42 U.S.C. §§ 7401(a)(1) & (a)(2); *United States v. Ohio Edison Co.*, 276 F.Supp.2d 829, 850 (S.D. Ohio 2003). A modification that substantially increases the amount of emissions from a facility for a pollutant for which the area is in attainment triggers PSD requirements, including the installation of Best Available Control Technology ("BACT"). 40 C.F.R. ¶ 52.21.

The CAA defines "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. §7411(a)(4). The applicable regulation uses similarly sweeping language. 40 C.F.R. § 52.21(b)(2) ("Major modification means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase"). Although the EPA has chosen to exempt a narrow class of activities considered routine maintenance, this exception has been interpreted very narrowly, as federal "courts considering the modification provisions of NSPS and PSD have assumed that 'any physical change' means precisely that." *Wis. Electric Power Co. v. Reilly*, 893 F.2d 901, 908-09 (7th Cir. 1990) [hereinafter "*WEPCO*"].

C. PSD review and the corresponding application of BACT are applicable requirements for which MDEQ must definitively determine the Plant's compliance status.

The CAA mandates that each Title V permit must include such conditions "as are necessary to assure compliance with applicable requirements." 42 U.S.C. § 7661c(a); *see also* 40 C.F.R. 70.7(a)(1)(iv)(Title V permit may issue "only if . . . the conditions of the permit provide for compliance with all applicable requirements."). These applicable requirements include PSD Review and the corresponding BACT analysis.

Michigan's PSD regulations state that "a major modification shall apply best available control technology for each regulated new source review pollutant for which it would be a significant net emissions increase at the source." Mich. Admin. Code R. 336.2810(3). Analyzing a nearly identical provision in the Tennessee Administrative Code, the Sixth Circuit concluded that "[t]his provision, by its own terms, creates an ongoing obligation to apply BACT, regardless of what terms a preconstruction permit may or may not contain." *Nat'l Parks Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 480 F.3d 410, 418 (6th Cir. 2007) [hereinafter "*National Parks*"]. The Sixth Circuit went on to hold that failing to apply BACT is not only actionable, but that this cause of action "manifests itself anew each day a plant operates without BACT limits on emissions." *Id.* at 419.

Several district courts have similarly held that there is an ongoing obligation to apply BACT. *See, e.g., Sierra Club v. Portland Gen. Electric Co.*, 663 F.Supp.2d 983, 993 (D. Or.

2009) [hereinafter "*Portland Gen.*"]; *United States v. American Electric Power Serv. Corp.*, 137 F.Supp.2d 1060, 1066 (S.D. Ohio 2001) [hereinafter "*American Electric*"]; *Sierra Club v. Dairyland Cooperative*, No. 10-cv-303-bbc, 2010 WL 4294622, *15 (W.D. Wis., Oct 22, 2010) [hereinafter "*Dairyland*"]. These courts relied on the persuasive logic that prematurely halting liability for PSD review at the conclusion of construction would perversely reward sources that unlawfully avoided the requirement to obtain a Permit to Install:

> Accepting this argument would reward defendant for its own alleged failure to comply with PSD requirements and would lead to unfair and surely unintended results. For example, under defendant's argument, a owner or operator who actually follows the mandates of the Act, obtains a PSD permit and determines best available control technology for its facility, but then fails to implement or meet emission limitations would be subjected to greater enforcement liability than an owner or operator who ignores the PSD requirements altogether. The citizen suit provisions of the Act cannot be construed reasonably to countenance such an inequitable result. An ongoing requirement to comply with PSD permits, emission limitations and air quality demonstration requirements, with civil penalties for violations, insures a level playing field.

Dairyland, 2010 WL 4294622, *15; *see also id.* (limiting PSD liability to a one-day violation "would effectively read the penalty provision out of the Act and encourage non-compliance with costly PSD requirement"). Such an outcome defeats the entire purpose of PSD review, as

> [i]t is difficult to see how the program could effectively prevent significant deterioration of air quality if PSD requirements ceased upon the completion of construction. It makes little sense for a PSD permit to set emissions limitation and require pollution control technology, but not require a facility to operate pursuant to those restrictions. Courts focusing on language requiring a permit prior to construction do so to the exclusion of language in the statute stating that the PSD permit shall set forth emission limitations for that source following the construction activity.

Portland Gen., 663 F.Supp.2d at 993 (internal quotation marks omitted); *see also American Electric,* 137 F.Supp.2d at 1066 ("[T]he Court finds it illogical to conclude that a defendant may only be held liable for constructing a facility, rather than operating such facility, without complying with the permit requirements.").

This authority is in line with both the language and the intent of the NSR program, and should be controlling here. Consequently, the need to conduct PSD review and to apply a BACT analysis is an applicable requirement for which the Plant's compliance status must be determined.

V. CITIZENS GROUPS IDENTIFED NUMEROUS MAJOR MODIFICATIONS IN THEIR COMMENT LETTER

Citing LBWL's own documents, Citizen Groups' Comment Letter described in detail numerous projects that very likely qualify as major modifications that caused a significant emission increase in SO_2, NO_X and other NSR pollutants.[6]

For example, with respect to Eckert Station, Citizen Groups' identified the following projects which were reasonably likely to cause significant emissions increases of NSR pollutants:

- The condenser in Eckert Station Unit 1 was retubed in 1985/1986.[7] Such re-tubing "is required only when the condenser performance falls to an unsatisfactory level."[8]

- The condenser in Eckert Station Unit 3 had the air cooler sections replaced in 1978.[9] Here too, such retubing "is required only when the condenser performance falls to an unsatisfactory level."[10]

- Both high pressure heaters on Eckert Station Unit 4 were retubed sometime around 1987.[11] Failures in these tubes can lead to loss of performance.[12]

- The superheater in Eckert Station Unit 5 was replaced sometime between 1982 and 1984.[13] Prior to this replacement, the unit was plagued by a series of failures.[14]

- The superheater in Eckert Station Unit 4 was replaced around 1991.[15] Prior to this replacement, the superheater was unreliable and experienced failures, leading LBWL to conclude, "we cannot predict the reliability of this unit at this time. We can only assume that the failure will continue at an accelerated rate."[16]

---

[6] Comment Letter at 7-17.
[7] "Board of Water and Light: Life Extension Study, Eckert Station," March 1987, at 6 [hereinafter "Life Extension Study"], attached as Ex. D.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 16.
[12] *Id.*
[13] *Id.* at 18; *see also* Memo from Ron Larabee to Roy Peffley, Re: Replacement Superheater Elements for Eckert Boiler 4 & Attachments, March 5, 1990, at 1 [hereinafter "Memo: Replacement Superheater Elements"], attached as Ex. E; *see also* Capital Project Justification ("CPJ") 2001 at 17, attached as Ex. F.
[14] Life Extension Study at 18.
[15] Replacement Superheater Elements at 1-6; CPJ 2001 at 17 ("The superheater of Boilers No 4 and No 5 have already been replaced.").
[16] Memo from Ron Larabee to Roy Peffley, Re: Partial Superheater Tube Replacement Boiler 4 Eckert, & Attachments, February 11, 1991, at 1 [hereinafter "Memo: Superheater Tube Replacement"], attached as Ex. G.

- The economizer at Eckert Station Unit 2 was replaced with a revised design between 1984 and 1985.[17] Prior to this revised design, the unit experienced frequent tube failures.[18]

- The economizer at Eckert Station Unit 3 was replaced with a revised design between 1984 and 1985.[19] Prior to this revised design, the unit experienced frequent tube failures.[20]

- The superheater and economizer tubes at Eckert Station Unit 2 were replaced between 1999 and 2000,[21] based on the belief that "[p]roductivity will increase due to higher reliability and availability."[22] The project was eventually expanded to "increase[] [the] number of tubes being replaced."[23]

- The superheater and economizer tubes at Eckert Station Unit 3 were replaced between 1999 and 2000,[24] based on the belief that "[p]roductivity will increase due to higher reliability and availability."[25] The project was eventually expanded to "increase[] [the] number of tubes being replaced."[26]

With respect to Moores Park Station, Citizen Groups identified several "substantial major retrofits" that occurred between 1980 and 1993, including: replacing the induced draft fan turbines and induced draft fans around 1980, replacing coal feeders in 1989, installing new makeup and boiler feed pumps in 1990, replacing stoker grates and chains in 1991 and replacing boiler controls in 1993.[27] In addition, Citizen Groups identified numerous modifications between 2000 and 2009, including:

- Installation of new underthrow coal feeders at Moores Park Station Unit 14 to allow flexibility of usage with alternative coal.[28]

- Significant boiler upgrades at Units 11, 12 and 13 at Moores Park Station because, amongst other things, the "replacement of components will improve combustion" and "increase[] capacity."[29]

- Installation of new underthrow feeders and grate drives at Moores Park Station Unit 13 because "the boiler reliability will increase due to fewer feeder and grate

---

[17] Life Extension Study at 18.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] CPJ 1999 at 12, attached as Ex. H; CPJ 2000 at 20, attached as Ex. I.
[22] CPJ 1999 at 16.
[23] CPJ 2000 at 20.
[24] CPJ 1999 at 12; CPJ 2000 at 20.
[25] CPJ 1999 at 16.
[26] CPJ 2000 at 20.
[27] IRP Study 1996 at 26..
[28] CPJ 2000 at 10-11.
[29] CPJ 2001 at 3.

failures" which "will mean fewer forced outages with the associated loss of load."[30]

- Installation of a new superheater at Unit 14 at Moores Park Station where the old superheater's "life has been expended" and its "leak problems plague future performance of this boiler."[31]

- Replacement of Moores Park Station economizers and superheater sections because "the tubes have reached their reliable useful life" and "are approaching a point where repairs will not be able to keep the units reliably on line."[32]

- Replacement of Moores Park Station Unit 12 economizer tubing with 30 new assemblies in order to "improve boiler reliability by minimizing economizer leaks."[33]

- Replacement of Moores Park Station Unit 11 and 12 superheater tubing "to improve boiler reliability by minimizing superheater leaks."[34]

- Installation of new economizer tubing at Moores Park Unit 14 because the old tubing "has poor reliability with multiple re-occuring tube leaks" that are causing "poor performance."[35]

LBWL's own justifications for these projects, quoted above, makes clear that they were designed to extend the life, increase the availability and reduce forced outages of the Plant. Indeed, as described at length in the Comment Letter, the Company received numerous studies and reports throughout the 1980s and 1990s which indicated that the Plant would require significant life extension work to continue to operate in the 21st century.[36] For example, as the consulting firm Stone and Webster explained in its LWBP Supply Options for IRP Study, "some additional major retrofit and rehabilitation work" at the Plant was necessary "to extend unit life span beyond the normal of approximately 40 years."[37]

Given that these projects were expressly intended to increase the availability and reliability of the Plant, Citizen Groups noted that it was very likely that the projects caused significant emissions increase in SO_2 and NO_X to trigger PSD requirements, including a BACT analysis.[38] Citizen Groups indicated that in many instances, neither LBWL nor MDEQ provided

---

[30] CPJ 2002 at 23, attached as Ex. J.
[31] CPJ 2004 at 3, attached as Ex. K.
[32] CPJ 2006 at 2, attached as Ex. L; CPJ 2007 at 3, attached as Ex. AA.
[33] CPJ 2009 at 2, attached as Ex. M.
[34] CPJ 2009 at 3-4.
[35] CPJ 2009 at 13, 15.
[36] Comment Letter at 7. *See, e.g.*, 1987 Life Extension Study; Black & Veatch, "Electric and Steam Resources Evaluation: Board of Water & Light Lansing, Michigan, Final Report" June 6, 1986, [hereinafter "B & V Electric and Steam Resources Evaluation"], attached as Ex. N.
[37] IRP Study 1996 at 6; *see also id.* at 16 (noting that Eckert could continue to run until 2016, but only "with some necessary major replacements to secure this extended life").
[38] Comment Letter at 8-12.

sufficient data to calculate the exact emissions increase from the given modification.[39] In instances where Citizen Groups *could* conduct the calculations, they revealed increases well above the triggering threshold of 40 tons per year for SO_2 and NO_X.[40]

VI. GROUNDS FOR OBJECTION

A. MDEQ erroneously issued the Permit without providing meaningful responses to significant comments.

EPA must object to MDEQ's issuance of the Title V Permit because the Agency failed to provide legally adequate responses to significant comments articulated by Citizen Groups in their Comment Letter.

(1) A permitting agency must provide meaningful responses to significant comments submitted during the public comment period.

Under 42 U.S.C. § 7661a(b)(6), all Title V permit programs must "offer[] an opportunity for public comment." *See also* 40 C.F.R. § 70.7(h) (same); Mich. Admin. Code R. 336.1214(3) (establishing procedures for public comment in Michigan). "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."[41] In practical terms, "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977). As the Environmental Appeals Board ("EAB" or "the Board") explained within the context of PSD Permits:

> [I]t remains a perennial and important requirement that permit issuers "briefly describe and respond to all significant comments on the draft permit" in their response-to-comment document. 40 C.F.R. § 124.17(a)(2).[42] The Board has construed this provision as meaning that responses to comments must address the issues raised in a meaningful fashion, and though perhaps brief, must nonetheless be clear and thorough enough to adequately encompass the issues raised by commenters.[43]

---

[39] *Id.*

[40] Comment Letter at 12-16.

[41] *In re U.S. Steel Corp – Granite City Works,* Order Granting in Part and Denying in Part Petition for Objection to Permit, Pet. No. V-2009-03, at 7 (E.P.A. Jan. 31, 2011) [hereinafter "*Granite City Works Decision*"], attached as Ex. O; *In re Wisconsin Public Service Corporation's JP Pulliam Power Plant*, Order Granting Petition for Objection to Permit, Pet. No. V-2009-01, at 5 (E.P.A. June 28, 2010) (same) [hereinafter "*JP Pulliam Decision*"], attached as Ex. P.

[42] Although 40 C.F.R. § 124.17(a)(2) formally applies to water permits, it has routinely been applied by the Board and the courts within the context of the Clean Air Act as well. *See, e.g., Sur Contra La Contaminacion v. EPA,* 202 F.3d 443, 449 (1st Cir. 2000); *In re Amerada Hess Corp Port Reading Refinery,* PSD Appeal No. 04-03, 12 E.A.D. 1, 16-20 (EAB 2005) [hereinafter "*Amerada Hess*"], attached as Ex. Q; *In re Vulcan Construction Materials, LP*, PSD Appeal No. 10-11, Slip Op at 27 (March 2, 2011) (EAB) [hereinafter "*Vulcan*"], attached as Ex. R.

[43] *In re N Mich Univ Ripley Heating Plant*, PSD Appeal No. 08-02, Slip Op at 47, (Feb 18, 2009) (EAB) [hereinafter "*NMU*"], attached as Ex. S.

The Administrator has previously granted Title V petitions to object where the permitting agency failed to sufficiently respond to significant comments.[44] For example, in the *Granite City Works Decision*, the Administrator granted a petition to object where, in response to significant comments regarding the insufficiency of the permit's monitoring requirements, the permitting agency had simply stated that the relevant requirements were fulfilled without providing any supporting analysis.[45] MDEQ is aware of this standard. In a recent communication with MDEQ regarding its Draft Title V Permit renewal for the River Rouge facility, EPA Region 5 explicitly warned, "it's important that Michigan provide detail regarding its positions, i.e., including the basis for the positions and not just the positions themselves," because "[a]ny missing responses would be problematic if EPA has concerns with the proposed permit or is petitioned."[46] Region 5 went on to emphasize, "[d]on't assume the reader knows or agrees with the underlying assumptions" and noted that the "EPA may grant [a petition] on the basis of insufficient response to comments."[47]

(2) MDEQ did not provide meaningful responses to Citizen Groups' significant comments prior to issuing the Title V Permit.

The Administrator should grant this Petition to Object because the Agency's sparse response to Citizen Groups' detailed ten-page discussion regarding the projects listed above does not satisfy the requirement to provide meaningful responses to significant comments.

With regard to the numerous projects at Eckert, MDEQ acknowledged that it had "no documentation that LBWL ever submitted an application to obtain a permit to install" for any of these projects before suggesting:

> [t]he reason an application was not submitted was that LBWL believed exemptions were available that relieved the planned activities from the need to obtain a[Permit to Install ("PTI")]. The LBWL evaluated the projects based on applicable use of the exemptions available at that time. The Department did inspect Eckert Station repeatedly through the time periods when these projects occurred. There is no documentation that the Department ever challenged that the projects needed to obtain a permit or that the use of the exemptions was inappropriate.[48]

This attempted justification is both circular and unsupported. That MDEQ erroneously failed to challenge these projects in the past does not excuse its failure to do so here. Moreover, MDEQ did not provide any analysis or evidence to support why (or even whether) LBWL actually "believed" that these major modifications were exempt from PSD requirements. Instead, without citing any documentation from, or communication with, LBWL, the Agency baldly asserted that the Company allegedly determined that unidentified exemptions applied to

---

[44] *See, e.g., JP Pulliam Decision* at 5; *see also Amerada Hess*, Slip Op. at 16 (noting within the context of a PSD Permit Appeal that "a permitting authority's failure to respond to significant comments may itself constitute grounds for remanding a permit").

[45] *Granite City Decision* at 5-33.

[46] Email from Beth Valenziano, EPA Region 5, to Mina Clemorew, MDEQ et al, Re: DTE River Rouge's Pre-Proposed ROP, September 8, 2011, at 2 [hereinafter "EPA Email"], attached as Ex. T.

[47] EPA Email at 4.

[48] MDEQ, Renewable Operating Permit Report and Staff Report Addendum, MI-ROP-B2647-2012, at 11 [hereinafter "Staff Report" or "Response to Comments"], attached as Ex. U.

all of these projects. This is exactly the type of response that Region 5 recently urged MDEQ to avoid.

MDEQ's second justification is similarly unpersuasive. The Agency produced two charts tracking the NO_X and SO_2 annual emissions between 1990 and 2010 for Eckert Station Units 1, 2 and 3 (combined) and Eckert Station Units 4, 5 and 6 (combined).[49] MDEQ noted that "the overall trend of emissions from the boilers at Eckert Station is decreasing" before concluding that it "believe[d] that the use of exemptions by LBWL to determine if a permit was required for th[ese] projects identified [] above was appropriate."[50] MDEQ presumably meant to suggest that the projects did not trigger PSD requirements because they did not lead to significant emissions increases. Notably, there is nothing to indicate that LBWL ever adopted this position.

More important, MDEQ's charts do not support this argument. The CAA provides only two routes for determining whether modifications led to emission increases that would trigger PSD and NSR requirements – the actual-to-projected actual test or the actual-to-potential test. Under the actual-to-projected-actual test, emissions from the unit before each project occurred are compared to the actual emissions projected for the unit after the project occurred. 40 C.F.R. § 52.21(b)(48); 40 C.F.R. § 52.21(b)(41). Electric generating units instigating projects after July 1992 may be subject to the actual-to-potential test. Under this test, emissions from the unit before each project occurred are compared to the potential emissions from the unit after the project. 40 C.F.R. § 52.21(b)(41). An applicant can only use the more favorable actual-to-projected-actual test for projects begun after July 1992 if the facility has satisfied pre- and post-project emissions reporting requirements. 40 C.F.R. § 52.21(b)(21)(v) (providing the actual-to-projected-actual test applies only when reporting requirements are met). If the applicant fails to satisfy these reporting requirements, the actual-to-potential test must be applied. 40 C.F.R. § 52.21(b)(21)(iv) (providing the actual-to-potential test applies to all projects not that are not covered by the conditional test in (b)(21)(v)); 61 Fed. Reg. 38,250, 38,254-38,255 (July 23, 1996); *see also United States v. Duke Energy Corp.*, 278 F.Supp.2d 619, 647 n.25 (M.D.N.C. 2003) *rev'd on other grnds by Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007). MDEQ's alleged "analysis" does not satisfy either of these tests. Indeed, MDEQ's crude regression lines, which only attempt to capture the *trends* of the *combined annual emissions* of three units at a time, are incapable of indicating whether the various projects caused emission increases that triggered PSD requirements.[51]

MDEQ's response to Citizen Groups' comments regarding projects at Moores Park Station is even weaker. The Agency stated that it "was aware of *some* of the[m]", and that a consent order "was entered requiring *some* of these repairs."[52] It then simply concluded that the "Consent Order did not require LBWL to obtain a permit to install to complete the identified repairs; hence PSD was not considered to be applicable at that time."[53] Assuming for the sake of the argument that the Consent Order could lawfully exempt LBWL from PSD requirements, MDEQ did not specify which projects were covered by this order. More pertinently, MDEQ

---

[49] Staff Report at 12-13.
[50] *Id.*
[51] This is particularly true given that the majority of projects cited by Citizen Groups was initiated *before* 1990, and therefore occurred several years prior to the information captured in MDEQ's charts.
[52] Staff Report at 13 (emphasis added).
[53] *Id.*

never identified the projects which were not covered by the consent order, let alone address whether they triggered PSD requirements.

Region 5 has already expressed concerns similar to those articulated above. With respect to the Eckert Station projects, Region 5 informed MDEQ, "[t]he RTC that AQD has provided is inadequate in addressing the comment that was made, please ensure that AQD has fully responded to the comment made."[54] With respect to the Moores Park Station projects, it notified MDEQ "AQD's RTC addressed, non-specifically, some of the modifications that were made at the facility, however AQD was silent on the modifications identified by [Citizen Groups] which were not addressed by Consent Orders. AQD should fully respond to the comment made."[55]

MDEQ did not perfect these errors. The Agency's "full" response to these comments consisted of a mere three sentences:

> Based on the information currently available and the regulations that were in effect at the time, the Department concluded that the projects at Eckert Station did not trigger PSD. The MDEQ finds no evidence that the projects circumvented any permitting or review procedures in place when the projects occurred or that those projects constituted major modifications.
>
> **********
>
> Based on the information currently available and the regulations that were in effect at the time, the MDEQ concluded that there were no major modifications at Moores Park Station; therefore PSD is not applicable.[56]

The Agency did not, as Region 5 had previously instructed it to do, provide "the basis for the position, and not just the positions themselves."[57] Instead, much like the permitting agency in the *Granite Works Decision*, MDEQ simply recited the mantra that LBWL had satisfied the statutory requirements without providing any analysis to support its conclusion.[58] The Administrator should therefore adopt the outcome of the *Granite Works Decision* and grant this Petition to Object so that MDEQ can meaningfully respond to these significant comments.[59]

B. MDEQ erroneously issued the permit without requiring a complete application.

EPA must object to MDEQ's issuance of the Title V Permit because the MDEQ's Response to Comments suggests that the Agency lacked the information it needed to determine the Plant's compliance status.

---

[54] Letter from Genevieve Damico, Region 5 Air Permit Section, to Tom Hess, MDEQ Enforcement Unit, March 23, 2012, at 1 [hereinafter "EPA Letter"], attached as Ex. V.
[55] EPA Letter at 2.
[56] Staff Report at 18-19.
[57] EPA Email at 2.
[58] *Granite City Decision* at 5-33.
[59] *See also NMU*, Slip Op. at 62 (remanding within the context of a PSD permit appeal when "Sierra Club submitted detailed, significant comments on this topic during the public review period, but the Department abruptly dismissed them in its response-to-comments document with the vague three-sentence answer quoted above. This state of affairs does not comport with 40 C.F.R. §124.17(a)(2) and concomitant well-settled Board case law, which place upon permit issuers an obligation to provide meaningful responses to significant comments that articulate with reasonable clarity the facts and circumstances supporting the permit issuers' decisions").

1. *An applicant must provide, and a permitting agency must receive, all information sufficient to evaluate the application and to determine all applicable requirements prior to issuing a Title V permit.*

Federal and state regulations are very clear regarding an applicant's duty to provide information to the state permitting agency during the permitting process. *See* 40 C.F.R. § 70.5; Mich. Admin. Code R. 336.1210; Mich. Admin. Code R. 1212. The information "must be sufficient to evaluate the subject source and its application and to determine all applicable requirements." 40 C.F.R. § 70.5(a)(2); *see also* Mich. Admin. Code R. 336.1212(1) (noting that the application must "contain all information that is necessary to implement and enforce all applicable requirements that include a process specific emissions limitation or standard or to determine the applicability of those requirements").

"An application may not omit information needed to determine the applicability of, or to impose, any applicable requirement," 40 C.F.R. § 70.5(c), and if an applicant "fails to submit any relevant facts" or submits "incorrect information," it must promptly submit the additional or corrected information, 40 C.F.R. § 70.5(b); Mich. Admin. Code R. 336.1210(2)(b). Moreover, the regulations mandate that an applicant must provide additional information that the permitting agency determines "is necessary to evaluate or take final action on that application," or "that may be necessary to implement and enforce other applicable requirements of the Act or of this part or to determine the applicability of such requirements." 40 C.F.R. §§ 70.5(a)(2) & (c)(5); *see also* Mich. Admin. Code R. 336.1210(3) ("[T]he department may require additional information, including . . . . information necessary to evaluate or take final action on the application, information needed to determine the applicability of any lawful requirement, [or] information needed to enforce any lawful requirement[.]").

The Agency, in turn, has both the authority to request the information necessary to fully evaluate the application as well as the responsibility to do so before it issues the permit. It is only "*[a]fter* the department has received an administratively complete application and all additional information requested by the department," that it "shall prepare a draft permit." Mich. Admin. Code R. 336.1214(1) (emphasis added). In light of this responsibility, the Administrator has previously granted petitions to object where it is unable to "ensure that the record contains sufficient information to evaluate the source and determine all applicable requirements."[60]

2. *MDEQ's Response to Comments suggests that the Agency did not receive all information sufficient to evaluate the application and determine all applicable requirements prior to issuing the Title V Permit.*

MDEQ's Response to Comments was lacking in actual evidence. For instance, responding to Citizen Groups' comment that Eckert Station Units 5 and 6 and Moores Park Station Unit 14 were all constructed after August 15, 1967, and thus should have required a PTI, MDEQ merely "speculate[d] as what may have happened in the past,"[61] suggesting that "[t]hese units were *likely* under construction when the rule was promulgated and *may* have been treated

[60] *In re Murphy Oil USA, Inc., Meraux Refinery, St. Bernard Parish, La.*, Order Granting in Part and Denying in Part Petition for Objection to Permit, Pet. No. VI-2011-02, at 6 (E.P.A. Sept. 21, 2011) [hereinafter "*Murphy Oil Decision*"], attached as Ex. W.

[61] EPA Letter at 1.

as 'grandfathered' at that time."[62] In reaction to Region 5's request for additional information, MDEQ merely concluded that "based on available information, the MDEQ concluded that construction of Boiler Units 5, 6, and 14 began prior to the promulgation of NSR permitting regulations."[63] The Agency did not state what, if anything, constituted this "available information." Indeed, there was no indication that this conclusion was supported by any documentation from, or communication with, LBWL.

MDEQ's responses to Citizen Groups' comments about modifications at Eckert Station and Moores Park Station indicate a similar lack of information. Regarding the latter, MDEQ simply stated that a Consent Order covered "some" of the cited projects without clarifying which projects were covered, which projects were not, and for those that were not, whether PSD was triggered. Regarding the former, the Agency stated that there was no documentation that LBWL ever submitted an application to obtain a PTI for any of the Eckert Station projects and there was no documentation that the Department ever challenged these projects' lack of a permit.[64] It simultaneously provided no documentation or communication to support its vague assertion "that LBWL believed exemptions were available that relieved the planned activities from the need to obtain a [PTI],"[65] while also suggesting that it was difficult to evaluate the emissions data.[66] Region 5 again chastised MDEQ for its lack of detail.[67] And once again, MDEQ opaquely responded that it based its conclusion that PSD was not triggered "on the information currently available and the regulations that were in effect at the time," [68] without providing any indication what, if anything, constituted this available information.

As described above, if MDEQ had additional information, but refused to provide it notwithstanding Citizen Groups' Comment Letter, then it violated the requirement to provide meaningful responses to significant comments. *See supra,* VI(A).[69] However, providing such a sparse response in the face of several clear requests from Region 5 to provide more detail suggests that the Agency actually lacked the information it needed to determine the compliance status of the Plant. In a White Paper authored by the EPA, the Office of Air Planning and Standards indicated that information for applicability purposes must "be detailed enough to resolve any open questions about which requirements apply."[70] Here, MDEQ's vague and seemingly unsupported responses imply that many open questions continue to abound regarding the applicability of PSD and NSR requirements. Because LBWL apparently did not provide, and MDEQ apparently did not require, this information, EPA should object to the issuance of the Title V Permit and urge MDEQ to seek the necessary information.

---

[62] Staff Report at 10 (emphasis added).
[63] Staff Report at 18.
[64] Staff Report at 11.
[65] Staff Report at 11.
[66] Staff Report at 12.
[67] EPA Letter at 1-2.
[68] Staff Report at 18-19.
[69] *See NMU*, Slip Op. at 47 (noting that in order to be sufficiently meaningful, responses "though perhaps brief, must nonetheless be clear and thorough enough to adequately encompass the issues raised by commenters").
[70] U.S. EPA Office of Air Quality Planning and Standards, "White Paper for Streamlined Development of Part 70 Permit Applications," July 10, 1995, at 3, attached as Ex. X.

C. MDEQ failed to impose the required compliance schedule even though there is strong evidence that LBWL is violating PSD, NSR and Title V requirements at the Plant.

In the present proceeding, LBWL has certified compliance with all of the requirements that apply to its facility. MDEQ accepted this certification, and consequently did not incorporate any schedule of compliance or other remedial measures into the Title V Permit.[71] The information that is available, however, strongly suggests that LBWL undertook major modifications at the Plant that led to significant emissions increases and significant net emissions increases. 40 C.F.R. § 52.21(b)(2)(i); 40 C.F.R. Part 51, Appendix S. Such modifications trigger PSD requirements, including the establishment of emission limits reflecting BACT, which the Plant has not satisfied. *Id.* As a result, EPA should object to the Title V Permit and direct the Agency to include an enforceable schedule of compliance for PSD permitting to occur.

1. *LBWL made significant changes to the Plant that were undertaken to extend the life, increase the availability and reduce forced outages of the Plant.*

As described at length above, LBWL undertook a variety of projects at Eckert and Moores Park Stations that constitute significant physical changes that should qualify as major modifications. *See supra*, Section V.[72] These projects ranged in cost from several hundred thousand to several million dollars,[73] and were designed to extend the life and increase the availability of the Plant. LBWL's own justifications, quoted above, made clear that these projects were specifically targeted to reduce outages, increase reliability and alleviate the complications stemming from the Plant's aging equipment. *See supra,* Section V. Such actions were in keeping with the numerous studies and reports received by LBWL during this period which indicated that life extension projects would be needed in order to keep the Plant in operation into the 21st century.[74]

2. *LBWL's significant changes to the Plant were not Routine Maintenance, Repair or Replacement.*

The projects described above do not constitute Routine Maintenance, Repair or Replacement ("RMRR"), and thus are not excused from PSD requirements under this exemption.

EPA's long-standing interpretation of the definition of PSD-triggering "physical changes," and the RMRR exemption, "is to construe "physical change" very broadly, to cover

---

[71] Staff Report at 7.

[72] In addition to those modifications already listed, LBWL's own documents indicate additional significant projects , including: (1) upgrading the feedwater heater at Eckert to "increase reliability", CPJ 1999 at 4-5; CPJ 2003 at 2-7, attached as Ex. Y; CPJ 2004 at 16-20, (2) upgrading the superheater at Eckert Unit 6 because the old material is susceptible to failure, CPJ 2001 at 16-22, attached as Ex. Z; CPJ 2002 at 40-45; CPJ 2006 at 4; CPJ 2007 at 7; CPJ 2008 at 4, attached as Ex. BB; CPJ 2009 at 9, (3) overhauling numerous turbines because "not completing necessary component necessary component repairs /replacements will gradually reduce the unit full load capacity" and "[d]ue to the age of the unit a substantial failure of tubes is possible and could force the unit down." CPJ 2006 at 7-15; CPJ 2007 at 16-21; CPJ 2008 at 5-10; CPJ 2009 at 12, 19-22.

[73] See, e.g, Life Extension Study at 57 (noting that labor and material to replace a superheater cost approximately $338,000 in 1982 dollars); CPJ 2000 (estimating a total cost of $6.6 million for tube replacements in Eckert Units 2 and 3).

[74] *See generally,* Life Extension Study 1987; B & V Electric and Steam Resources Evaluation; IRP Study 1996.

virtually any significant alteration to an existing plant and to interpret the exclusion related to routine maintenance, repair and replacement narrowly."[75] This interpretation is fully consistent with the intent of the NSR provisions, which is to ensure that existing air pollution sources that were grandfathered under the Clean Air Act are not granted an endless exemption from the Act's requirements. *Cf. WEPCO*, 893 F.2d at 909 (warning that RMRR cannot be interpreted to "open vistas of indefinite immunity from the provisions of ... PSD"); *Ohio Edison*, 276 F. Supp. 2d at 855; *Sierra Club v. Morgan*, 2007 WL 3287850, Case No. 07-C-251-S, at *11 (W.D. Wis. Nov. 7, 2007); *In re Tenn. Valley Auth.*, 9 E.A.D. 359, 410-11(Sept. 15, 2000) (rejecting an interpretation of RMRR that would "constitute 'perpetual immunity' for existing plants, a result flatly rejected by Congress and the circuit courts in *Alabama Power* and *WEPCO*").

As the D.C. Circuit has held, the RMRR exemption is only lawful (if at all[76]), based on a *de minimis* theory of administrative necessity. *Alabama Power Co. v. Costle*, 636 F.2d 323, 360-61, 400 (D.C.Cir. 1979); *see also New York v. EPA*, 443 F.3d 880, 883-84, 888 (D.C. Cir. 2006) (holding that the only possible basis for a RMRR is a *de minimis* theory); *In re Tenn. Valley Auth.*, 9 E.A.D. at 392-93 (citing *O'Neil v. Barrow County Bd. of Comm'rs*, 980 F.2d 674 (11th Cir. 1993); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982)); *United States v. S. Indiana Gas & Elec. Co.*, 245 F. Supp. 2d 994, 1019 (S.D. Ind. 2003) [hereinafter "*SIGECO*] (quoting a U.S. EPA determination for Wisconsin Electric's Port Washington plant that the exemptions from the definition of "modification"—including routine maintenance—are "very narrow.").

In short, routine maintenance "occurs regularly, involves no permanent improvements, is typically limited in expense, is usually performed in large plants by in-house employees, and is treated for accounting purposes as an expense." *Ohio Edison*, 276 F. Supp. 2d at 834 (citing *WEPCO*, 893 F.2d 901). Non-routine, and therefore non-exempt, projects include "capital improvements which generally involve more expense, are large in scope, often involve outside contractors, involve an increase of value to the unit, are usually not undertaken with regular frequency, and are treated for accounting purposes as capital expenditures on the balance sheet." *Id.*

Mindful of the narrowness of this exception, both the Administrator and the courts carefully evaluate whether a modification qualifies as RMRR by analyzing (1) the nature and extent of the work, (2) the purpose of the work, (3) the frequency of the work, and (4) the cost. *WEPCO*, 893 F.2d at 909-11; *see also* 67 Fed. Reg. 80, 290, 80, 292-93 (Dec. 31, 2002) (describing the routine maintenance exemption as "a case-by-case determination by weighing the nature, extent, purpose, frequency, and cost of the work as well as other factors to arrive at a common sense finding."); *see also United States v. Cinergy Corp.*, 495 F. Supp. 2d 909, 933-948 (S.D. Ind. 2007); *SIGECO,* 245 F. Supp. 2d at 1008 (S.D. Ind. 2003); *United States v. S. Indiana*

---

[75] Letter from Doug Cole, EPA, to Alan Newman, Washington Dept. of Ecology (Nov. 5, 2001) [hereinafter "*Boise Cascade Decision*"], attached as Ex. CC.

[76] The D.C. Circuit has implied in *dicta* that the RMRR exclusion may be an unlawful "application of the *de minimis* exception, given the limits on the scope of the *de minimis* doctrine." *New York*, 443 F.3d at 888 (citing *Shays v. FEC*, 414 F.3d 76, 113-14 (D.C. Cir. 2005)). In *Shays*, the D.C. Circuit held that "there are limits" to agencies' ability to create *de minimis* exceptions to statutory schemes, including: (1) that the "*de minimis* exemption power does not extend to 'extraordinarily rigid' statutes"; and (2) that it "does not extend to 'a situation where the regulatory function does provide benefits, in the sense of furthering regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs.'" 414 F.3d at 114.

Gas & Elec. Co., 2003 WL 446280, *2 (S.D. Ind. Feb. 18, 2003); *United States v. S. Indiana Gas & Elec. Co.*, 258 F. Supp. 2d 884, 886 (S.D. Ind. 2003); *see also Ohio Edison*, 276 F. Supp. 2d at 834.

Applying these concepts to the publicly available information in this case reveals that the projects at the Plant are similar in extent, purpose, frequency and cost to the modifications that have been found to trigger NSR requirements at other coal-fired power plants. *See Cinergy,* 495 F. Supp. 2d at 933-935; *Ohio Edison*, 276 F. Supp. 2d at 834, 840-849, 858-862. Each of these projects was an expensive endeavor that replaced integral components of the Plant and would be expected to occur only once or a few times over the expected life of the Plant. The projects were designed to address the fact that the components had reached the end of their useful lives and were reducing the availability of the units. As such, LBWL cannot validly demonstrate that such projects constituted mere RMRR.

3. *The available evidence suggests that it is likely that these modifications led to emissions increases that triggered the PSD and NSR requirements of the CAA.*

Based on the publicly available information, it appears that neither LBWL nor MDEQ conducted the statutorily approved methods to determine whether these modifications led to emission increases that would trigger PSD and NSR requirements.[77] Moreover, as indicated in the Comment Letter, in many instances Citizen Groups did not have access to the information necessary to conduct their own calculations.[78] Nevertheless, the available evidence suggests that it is likely that these modifications led to qualifying emission increases at the Plant.

Due to a lack of information, Citizen Groups were unable to conduct the applicable actual-to-projected-actual test for the following projects: the condenser retubing at Eckert Station Units 1 & 3, the high pressure feedwater heater retubing at Eckert Station Unit 4, the superheater upgrades at Eckert Station Units 4 & 5, the economizer replacement at Eckert StationUnits 2 & 3 and all of the projects at Moores Park Station. However, these projects were undertaken in order to increase the reliability and availability of the affected units. LBWL's own materials indicated that prior to these modifications, the relevant units suffered from numerous failures that the projects were designed to eliminate.[79] Given this history and these goals, it is reasonably likely that these modifications should have been projected to cause an increase above the significance level for NSR regulated pollutants. At the very least, the Administrator should object to the Permit along the lines described in Section VI, and require MDEQ to obtain the information necessary to conduct the proper calculations for emissions increases.

Citizen Groups were able to conduct rudimentary calculations for the tube replacements at Eckert Units 2 & 3.[80] While the calculations would be more exact with better data, even Citizen Groups' conservative estimates suggest that it is very likely that these modifications increased the SO2 and NOX emissions from both units above the 40 tons per year significant

---

[77] *Compare* 40 C.F.R. § 52.21(b) *with* Staff Report at 12-13.

[78] Comment Letter at 8-12.

[79] *See, e.g.,* Life Extension Study at 16 (noting that Eckert Unit 5 experienced a series of failures prior to the replacement of the superheater); *id.* (noting that "economizer tube failures in Units 2 and 3 have been the most frequent" at Eckert prior to their replacement); Memo: Superheater Tube Replacement at 2 (noting that Eckert Unit 4 experienced a failure of its superheater before it was replaced and that the company assumed failures would increase if it was not replaced).

[80] Comment Letter 13-15.

threshold.[81] In brief, applying the actual-to-potential test,[82] Citizen Groups divided the number of hours in a year by the number of hours the respective units ran in 2000, and then multiplied that result by the tons per year the respective unit emitted in 2000 to determine the unit's potential to emit.[83] Finally, Citizen Groups subtracted from this figure the tons per year that the respective unit emitted in 2000 in order to determine the increase.[84] These calculations yielded an increase of 103 and 271 tons per year of SO2 at Units 2 and 3 respectively, and 57 and 168 tons per year of NOX at Units 2 and 3 respectively.[85] Each of these increases are well above the 40 tons per year significance threshold such that any reasonable changes in methodology, such as using actual emission from the 24 month period immediately following the modifications or any other 24 month period within 5 years of the modifications should not change the outcome that the emission increases are high enough to trigger PSD requirements. The Administrator should therefore object to the issuance of the Title V Permit.

D. MDEQ failed to require sufficient monitoring requirements to ensure compliance with the PM limits in the Title V Permit.

The Title V Permit's provisions are inadequate to ensure compliance with its PM limits. When Congress amended the Clean Air Act in 1990 and added the Title V permitting program, Congress mandated that "[e]ach permit issued under [Title V] shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." 42 U.S.C. § 7661c(c); *cf.* 40 C.F.R. § 70.6(c)(1) (providing that all Title V permits "shall contain" "compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit"). The D.C. Circuit has explained that, under § 70.6(c)(1), "a permitting authority may supplement an inadequate monitoring requirement so that the requirement will 'assure compliance with the permit terms and conditions.'" *Sierra Club v. U.S. EPA*, 536 F.3d 673, 680 (D.C. Cir. 2008). Similarly, Michigan's Title V program provides that an operating permit "shall include . . . .conditions necessary to assure compliance with the applicable requirements." M.C.L. 324.5506(6). Michigan's regulations further provide that:

> The renewable operating permit shall contain terms and conditions necessary to ensure that sufficient testing, monitoring, recordkeeping, reporting, and compliance evaluation activities will be conducted to determine the status of compliance of the stationary source with the emission limitations and standards contained in the renewable operating permit.

Mich. Admin. Code R. 336.1213(3).

---

[81] *Id.*

[82] The "WEPCO Rule" applies to these projects because Units 2 and 3 are electric generating units and because the project occurred after July 1992. LBWL elected not to submit post-project emission data pursuant to 40 C.F.R. § 52.21(b)(21)(v)(1998). *See* Letter from Rhonda Jones, LBWL, to David Bender, Garvey, McNeil &McGillivray, Re: FOIA Response (January 28, 2009) at 2, attached as Ex. DD. Thus, the applicable emission test is actual-to-potential.

[83] Comment Letter at 13-15; *see also* Clean Air Market Database, Eckert Station Emissions, 1999-2000, attached as Ex. EE.

[84] Comment Letter at 13-15.

[85] Comment Letter at 14-15.

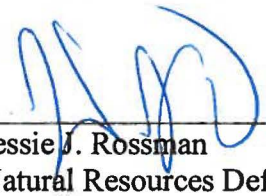
The Title V Permit requires LBWL to test PM emissions once every three calendar years.[86] While this is an improvement over the Draft Permit, which required only one test during the life of the permit, it still does not assure compliance with applicable requirements. MDEQ's Response to Comments did not explain why the Agency chose 36 months for stack test frequency rather than every year, and why it had chosen stack testing over CEMs, even though Citizen Groups' Comment Letter explicitly advocated both of these alternatives.[87]

With respect to another Plant's Title V Permit, EPA has explicitly warned MDEQ "[i]n a petition situation, if it's not clear why the state chose a certain monitoring method (including frequency), EPA may grant on the basis of insufficient response to comments."[88] The Agency did not satisfy this standard here. The Administrator should therefore grant this Petition to Object and instruct MDEQ to require LBWL to install PM CEMs at the Plant to ensure continuous compliance with the PM limit or, at a minimum, require stack tests to occur at least once per year.

VI. CONCLUSION

For the foregoing reasons, EPA must object to the LBWL Title V Operating Permit, along with instructions that (1) MDEQ must meaningfully respond to Citizen Groups' significant comments, (2) LBWL must provide all necessary information to MDEQ, (3) MDEQ must include a schedule for LBWL to come into compliance as part of any Title V Permit for the Plant and (4) MDEQ must require LBWL to install PM CEMs at the Plant to ensure continuous compliance with the PM limit or, at a minimum, require stack tests to occur at least once per year.

Respectfully submitted,



Jessie J. Rossman
Natural Resources Defense Council
2 N. Riverside Plaza, Suite 2250
Chicago, IL 60606
(312) 651-7923
jrossman@nrdc.org

Attorney for Natural Resources Defense Council and Sierra Club

DATED: May 25, 2012

[86] Staff Report at 14.
[87] Comment Letter at 19.
[88] EPA Email.

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Lansing Board of Water & Light
Eckert & Moores Park Stations,
Permit No. MI-ROP-B2647-2012

Issued by the Michigan Department of Environmental Quality

PETITION TO OBJECT TO THE ISSUANCE OF A STATE TITLE V OPERATING PERMIT

Petition No.:

PETITION OF THE NATURAL RESOURCES DEFENSE COUNCIL AND SIERRA CLUB TO OBJECT TO ISSUANCE OF A STATE TITLE V OPERATING PERMIT

PROOF OF SERVICE

On May 25, 2012, I filed the above referenced Petition, along with the corresponding CD of Exhibits, with Administrator Lisa Jackson via hand delivery and electronic mail, and sent by Federal Express overnight and electronic mail a copy of the above referenced Petition, along with the corresponding CD of Exhibits to:

Mark Matus, Manager of Environmental Services
Lansing Board of Water & Light
830 E. Hazel Street
Lansing, MI 48909
mwm@lbwl.com

Susan Hedman, Regional Administrator
U.S. EPA Region V
77 W. Jackson Blvd.
Chicago, IL 60604
hedman@susan@epa.gov

Brian Culham, Environmental Quality Specialist
Michigan Department of Environmental Quality
Lansing District Office
525 W. Allegan
4 North Tower
Constitution Hall
Lansing, MI 48909
culhamb@michigan.gov

I declare that the above statement is true to the best of my information, knowledge and belief.

DATED: May 25, 2012

Jessie J. Rossman