

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

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In the Matter of an Air Pollution Control  
Operating Permit for Wisconsin Public Service  
Corporation's Weston Generation Station in  
Marathon County, Wisconsin.

Source I.D. 737009020

Permit 737009020-P02

Proposed by the Wisconsin Department of  
Natural Resources on September 28, 2006.

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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE  
OF THE PROPOSED REVISED TITLE V OPERATING PERMIT FOR THE WESTON  
GENERATING STATION IN ROTHCHILD, WISCONSIN**

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Pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d), the Sierra Club hereby petitions the Administrator (“the Administrator”) of the United States Environmental Protection Agency (“U.S. EPA”) to object to proposed revised Title V Operating Permit for the Weston Generating Station in Rothschild, Wisconsin, Permit 737009020-P02 (“Permit”). The Permit was proposed to U.S. EPA by the Wisconsin Department of Natural Resources (“DNR”) more than 45 days ago. A copy of the Permit is attached as Exhibit A. Sierra Club provided comments to the DNR on the draft permit. A true and accurate copy of Sierra Club’s comments is attached at Exhibit B. DNR responded to Sierra Club’s comments through a memorandum, a copy of which is attached as Exhibit C.

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

Notably, “applicable requirements” include any requirement to obtain a preconstruction permit and comply with New Source Review regulations. *In re Monroe Electric Generating Plant*, Petition No. 6-99-2 at p. 2 (EPA Adm’r 1999).

**1. The Permit Illegally Limits Evidence That Can Be Used By Citizens To Demonstrate Noncompliance.**

In response to comments by the Sierra Club, DNR revised the preamble to the permit to state: “Notwithstanding the compliance determination methods which the owner or operator of a source is authorized to use under ch. NR 439, Wis. Admin. Code, the department may use any relevant information or appropriate method to determine a source’s compliance with applicable emission limitations.” Ex. A p. 4; Ex. C pp. 2-3 (emphasis added). This is an improvement on the draft permit. However, it fails to comply with the credible evidence rule because it purports to reserve the right to use any credible evidence to only the “department,” meaning the DNR. By omission of U.S. EPA and citizens, this provision could be interpreted as prohibiting the use of credible evidence by EPA or citizens. The permit cannot expressly prevent the use of credible evidence and should not do so implicitly either.

The U.S. EPA and citizen suit litigants have the authority to bring enforcement actions “on the basis of *any information available* to the Administrator.” 42 U.S.C. § 7413 (emphasis added); *see also* 42 U.S.C. § 7604; *Sierra Club v. Pub. Serv. Co. of Colorado, Inc.*, 894 F.Supp. 1455 (D.Colo. 1995) (The Clean Air Act does not limit the evidence that citizen suit plaintiffs can use to demonstrate noncompliance); *Credible Evidence Revisions*, 62 Fed. Reg. 8314 (Feb. 24, 1997); U.S. EPA Region 9 *Title V Permit Review Guidelines*,

Sept. 9 1999, p. III-46. By reserving the right to use any relevant information to only enforcement actions brought by the DNR, the Permit tacitly precludes this right for U.S. EPA and citizens. The credible evidence rule does not allow the DNR to limit EPA or citizens' ability to use any credible evidence. Therefore, the Administrator must object to the permit and require the DNR to amend the preamble to allow the use of any credible evidence by U.S. EPA and citizen suit plaintiffs, in addition to DNR.

## **2. The Permit Illegally Omits Operating Limitations Applicable to Unit 3**

The Permit describes Unit 3 as "a tangentially fired boiler installed in December 1981." Ex. A p. 20. The Permit also notes that the maximum heat input for Unit 3 is 3906 MMBtu/hr. This maximum heat input fails to account for the fact that Unit 3 is subject to a lower limit on heat input. Additionally, the Permit lacks enforceable operating limits applicable to Unit 3.

As noted above, every Title V permit must include all "applicable requirements," which includes requirements from preconstruction permits. 40 C.F.R. § 70.2. U.S. EPA issued a preconstruction permit for Unit 3 in 1977. Ex. D. That permit authorized Wisconsin Public Service Corporation ("WPSC") "to construct one 321 MW electrical generating unit..." Ex. D p. 4 (WP2-7-00313). Moreover, the permit required WPSC to construct and operate Unit 3 "consistent with the materials and data included in the application filed by the Corporation." The Wisconsin DNR also issued a preconstruction permit for Unit 3, pursuant to the Wisconsin State Implementation Plan (SIP), that requires "[t]hat the system be installed in accordance with submitted plans

and specifications..." and that "[a]ny construction or operation of this facility which proceeds at variance with the submitted specifications or approval conditions will be regarded as a violation of the approval..." Ex. F, pp. 1, 3. In short, both preconstruction permits require compliance with the specifications provided in the application materials. Such specifications include: (1) a maximum 3,423.48 MMBtu/hour heat input; (2) a maximum 2,350,000 pounds of steam per hour; (3) a maximum 321 megawatts per hour of generation; and (4) a maximum 191 tons of bituminous coal burned per hour. *See* Application to Construct Weston Unit 3, p. WP2-7-00243-44, WP2-7-00246 (attached hereto as Exhibit E, pp. 10-11, 13) (stating that the unit size is 3423.48 10<sup>6</sup>BTU/hour, will provide 321.9 MW,<sup>1</sup> and will use a maximum 191 tons of bituminous coal per hour); Notice of Intent to Construct Unit 3, p. WP2-7-00267, 00269 (attached hereto as Ex. G, p. 5) (stating that the unit size will be 321,800 kW and produce 2,350,000 lb/hour of steam). Even if the permit were silent on the issue, these specifications from the permit application constitute applicable operating limits for Unit 3. 40 C.F.R. § 70.2. The Clean Air Act requires that a PSD applicant construct and operate the source consistent with and according to the specifications provided in its permit application. 40 C.F.R. § 52.21(r); Notice of Violation Issued to East Kentucky Power Cooperative at ¶ 6 (January 24, 2003) (attached as Exhibit H); *see also* Letter from Beverly H. Banister, Directors Air, Pesticides and Toxics Management Division, U.S. EPA Region IV, to John S. Lyons, Kentucky Department for Environmental Protection (February 18, 2006)

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<sup>1</sup> The application states 321,900 Megawatts, which clearly refers to 321,900 kW, or 321.9 MW. *See* Ex. G p. 2 (unit 3 will produce 321,800 kW).

(objecting to a Title V permit for the Tennessee Valley Authority's Plant Paradise because the permit did not include applicable maximum heat input limits) (attached hereto as Exhibit K). However, the permits are not silent. To the contrary, they expressly provide that departure from the application specifications for Unit 3 constitute violations of the permits. Ex. D pp. 1, 4; Ex. F pp. 1, 3. Therefore, the unit specifications in the application are applicable requirements that must be included in the Title V permit. 40 C.F.R. § 70.2 (applicable requirements include "[a]ny standard or other requirement provided for in [the SIP] or promulgated by EPA... [and] [a]ny term or condition of any preconstruction permits issued pursuant to [the PSD program]..."); 40 C.F.R. § 52.21(r) (requiring a new or modified major source to construct and operate consistent with the specifications in its permit application); Wis. Stat. § 285.64(1); Wis. Admin. Code § NR 400.02(26).

[A PSD permit issued by EPA], in effect, limits increases beyond certain parameters (e.g., heat input, steam production, megawatt production) proposed by [the applicant] in its PSD permit application. The permit clearly states that the permit is issued for the project "as proposed" by the company. It also states that operation of the source not in accordance with what was proposed by the company and what was reviewed/approved by EPA would be subject to enforcement action. (NOTE: This mentioned text is probably contained in each PSD permit issued by EPA/Region VII). As such, the permit prohibits increases of production rates that were proposed and reviewed/approved.

Memorandum Re: PSD-Sunflower Electric, Holcomb, KS (from files of U.S. EPA Region VII Air Permitting and Compliance Branch) (attached hereto as Exhibit L).

The operating limits applicable to Unit 3 are not mere formalities. Limits on heat rate and production rate are important because an increase in the heat input results in an increase in allowable emissions. Unit 3 was permitted assuming a maximum hourly emission rate, which was determined by multiplying the maximum heat rate (3423.8 MMBtu/hour) by permit limits expressed as pounds per MMBtu heat input. If Unit 3 operates at a higher heat rate than the maximum specified in WPSC's application (3423.8 MMBtu/hour), the preconstruction analysis is undermined.

A boiler's maximum heat input rate is thus a measure of its size or capacity. Clearly, then, a coal-fired boiler's heat input rate is directly related to the amount of pollution it can emit. Congress' understanding of this fact in the context of the Clean Air Act is evidenced by the fact that heat input is used to determine which sources are potentially subject to the statutory PSD program. See 42 U.S.C. § 7479(1) (defining "fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input" as a type of stationary source). As an example of the direct relationship between heat input capacity and the amount of pollution, [a boiler] permitted to burn coal containing a specific amount of sulfur dioxide (SO<sub>2</sub>), as measured in pounds of SO<sub>2</sub> per mmBtu. For any given coal SO<sub>2</sub> content (i.e., pounds of SO<sub>2</sub> per mmBtu), there is a direct and linear relationship between heat input and SO<sub>2</sub> emissions. By increasing its heat input capacity, [the boiler] increases its capacity to generate steam and SO<sub>2</sub>...

The rated heat input capacity of a boiler is not a meaningless number. Rather, it is directly related to the capacity of the boiler to emit pollution. In the absence of a boiler heat input capacity in the description, [the boiler] could be a unit of any size, which would translate into widely ranging impacts on the environment. Common sense thus dictates that a permit concerned with emissions must limit the heat input of the boiler. Otherwise, the regulated unit is not really limited in its capacity to pollute... The greater the capacity of the boiler, the more tons of SO<sub>2</sub> that will be emitted into the

atmosphere. Thus, heat input capacity plays a very real role in effectively limiting a source's capacity to emit pollution.

United State's Memorandum in Support of its Sixth Motion for Summary Judgment, *United States v. East Kentucky Power Cooperative, Inc.*, Case No. 04-34 KSF (E.D. Ky), pp. 16-17, 20-21 (attached as Exhibit I, hereto).

In the *East Kentucky Power Cooperative* enforcement case brought by EPA, the company had applied for a PSD permit from EPA. Ex. J, p. 34. The company's permit application indicated that the boiler had a heat rate capacity of 4,850 MMBtu/hour. *Id.* The air quality modeling and compliance determinations performed by EPA and the state permitting authority were based on the heat rate input included in the permit application. *Id.* at 36. EPA concluded that the heat rate from the application constitutes an operational limit.

By increasing the heat input over the levels identified in its applications, [the company] has fundamentally changed the assumptions upon which approval to construct the unit was based. If air quality modeling were to be done using a higher heat input capacity and the same coal sulfur content that was identified in [the company's] permit application... the unit would have been modeled at a higher emissions rate because increasing the heat input rate is directly proportional to the amount of emissions from a unit.

*Id.* at 36-37. The same is true for Weston Unit 3. Weston Unit 3 sought and obtained a PSD permit from U.S. EPA based on WPSC's representations that it was building a unit capable of (1) a maximum 3,423.48 MMBtu/hour heat input; (2) a maximum 2,350,000 pounds of steam per hour; (3) a maximum 321 megawatts per hour of generation; and (4) a maximum of 191 tons of bituminous coal burned per hour. Ex. E, pp. 10-11, 13

(stating that the unit size is 3423.48 10<sup>6</sup>BTU/hour, will provide 321.9 MW,<sup>2</sup> and will use a maximum 191 tons of bituminous coal per hour); Ex. G, p. 5 (stating that the unit size will be 321,800 kW and produce 2,350,000 lb/hour of steam). These characteristics were then used to model and determine compliance determinations when issuing the PSD permit for Unit 3.

Despite the fact that WPSC's PSD permit and DNR preconstruction permit applications for Unit 3 included unit characteristics of (1) a maximum 3,423.48 MMBtu/hour heat input; (2) a maximum 2,350,000 pounds of steam per hour; (3) a maximum 321 megawatts per hour of generation; and (4) a maximum of 191 tons of bituminous coal per hour, the Title V permit proposed by DNR fails to incorporate these specifications as enforceable operating limits. Instead, the Permit actually identifies Unit 3 as capable of 3,906 MMBtu/hour – which is higher than the 3,423.48 MMBtu/hour specification provided for in Unit 3's PSD permit application. While Sierra Club raised this comment, the DNR did not respond. EPA must object to the permit based on its failure to include applicable production limits from the PSD permit. Failure to do so results in a deficient permit that allows illegal quantities of air pollution.

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<sup>2</sup> The application states 321,900 Megawatts, which clearly refers to 321,900 kW, or 321.9 MW. See Ex. G p. 2 (unit 3 will produce 321,800 kW).

**3. The Permit Fails To Include A Compliance Schedule For The Plant's Continuing Violations of the Heat and Energy Limits In the PSD Permit For Unit 3.**

Every Title V permit must “assure[] compliance by the source with all applicable requirements.” CAA § 504(a); 40 C.F.R. § 70.1; Wis. Stat. § 285.64(1); Wis. Admin. Code § NR 407.09(4)(b). “Applicable requirements” include requirements contained in preconstruction permits. 40 C.F.R. § 70.2; Wis. Stat. § 285.64(1); Wis. Admin. Code § NR 400.02(26). If a source is not in compliance with any applicable requirement, it must disclose that fact in its Title V permit application. 42 U.S.C. § 7661b(b); 40 C.F.R. §§ 70.5(c)(4)(i), (5), (8); Wis. Admin. Code § NR 407.05(4)(h). Additionally, the source must provide a narrative description of how the source intends to come into compliance with any requirements for which it will not be in compliance when the permit is issued. 42 U.S.C. § 7661b(b); 40 C.F.R. § 70.5(c)(8)-(9); Wis. Admin. Code § NR 407.05(4)(h)2.c.

When DNR issues a permit, it must include a compliance schedule for any applicable requirements for which the source is not in compliance. 40 C.F.R. § 70.5(c)(8)(iii); Wis. Admin. Code § NR 407.05(4)(h)3.c.

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

*In the Matter of Onyx Environmental Services, Order Responding to Petitioners' Request That the Administrator Object to Issuance of a State Operating Permit*, pp. 6-7 (Adm'r Feb. 1, 2006) (hereinafter "Onyx").

Unit 3 at the Weston Generating Station has been in continuous noncompliance with its PSD permit. As set forth above, the SIP-based preconstruction permit and the EPA-issued PSD permit for Unit 3 require compliance with the following specifications from the permit application for Unit 3: maximum 3,423.48 MMBtu/hour heat input; maximum 2,350,000 pounds of steam per hour; maximum 321 MW/hour; and combustion of a maximum of 191 tons of coal per hour. *See* sec. 2, *supra*. However, capacity tests run on Unit 3 in 1985 and 2000 indicate maximum steam production of 2,418,000 and 2,429,500 pounds per hour, respectively and well over 321 MW during nearly all periods of operation. *See* WPSC Units Steam Flow Rates at WP2-4-00081 (attached as Exhibit M); Unit 3 Capacity Rates, WP2-4-00143 (attached as Exhibit N). In fact, in WPSC's 1985 Life Extension Program document, WPSC notes that "Weston Unit #3 has recently been rated 21 MW higher than previously rated." *See* WPSC Life Extension Program at WP2-6-00987 (attached hereto as Exhibit O). This continual operation above the operational limits applicable to Unit 3 constitute violations that must be addressed in the Title V permit. 42 U.S.C. § 7661b(b); 40 C.F.R. §§ 70.5(c)(4)(i), (5), (8)-(9); Wis. Admin. Code § NR 407.05(4)(h). EPA addressed similar situation regarding the East Kentucky Coop. Spurlock facility in Kentucky:

[T]he PSD regulations specifically provide that operating a source... in a manner that is inconsistent with a prior permit

application is considered by definition to be a 'change in the method of operation.'

... By definition, then, the regulations define a 'change in the method of operation' as including an increase in the hours of operation or in the production rates that would be prohibited by 40 C.F.R. § 52.21 or 401 Ky. Admin. Reg. 50:035. The applicable regulations set forth at 40 C.F.R. § 52.21, in turn, prohibit the owner or operator of a source that originally obtained PSD approval under EPA's regulations from operating that source 'not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct.' 40 C.F.R. § 52.21(r)(1)...

Thus, under the plain language of the applicable production rate/hours of operation exclusion set forth at 401 Ky. Admin. Reg. 51.017 Section 1(2)(b)<sup>3</sup>, operation not in accordance with a PSD application or authority to construct (as required by 40 C.F.R. § 52.21(r)(1)) or operation not in accordance with a state operating permit application or permit... constitutes, by definition, a change in the method of operation of a source. In other words, the plain language of the exclusion clearly defines operation not in accordance with a previously submitted PSD application or PSD permit, or state operating permit application or permit, as a regulatory 'change in the method of operation.'

Plaintiff United States' Memorandum in Support of Its Fourth Motion for Summary Judgment, U.S. v. East Kentucky Power Cooperative, Inc., Case No. 04-34 KSF, pp. 32-33 (E.D. Ky., filed January 17, 2006) (attached hereto as Exhibit J). Sierra Club's comments to DNR addressed the fact that Unit 3 was operating in excess of its PSD permit specifications, without such violations being addressed in the Title V permit. Ex. B pp. 23-24. However, the DNR did not include a compliance schedule to bring Unit 3 into compliance. The Administrator must object. A failure to object will result in continuing

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<sup>3</sup> Compare to Wis. Admin. Code § NR 405.02(21)(b).

operation of Unit 3 in violation of operation limits and, consequently, illegal amounts of air pollution affecting Sierra Club's members.

**4. The Permit Contains Insufficient Monitoring for Particulate Matter Emissions From Units 1, 2, and 3.**

Sierra Club's comments to the DNR requested sufficient monitoring for Units 1, 2 and 3. Ex. B pp. 2-3. Specifically, Sierra Club stated that:

The PM limits for Boilers 1 and 2 must include sufficient monitoring to assure continuous compliance. The Draft Permit requires monitoring of electrostatic precipitator ("ESP") parameters and requires WPS to "define normal performance ranges for the parameters... in its Malfunction, Prevention and Abatement Plan." This is insufficient for two reasons:

- a. The ESP parameters must be made enforceable, and not merely "determined" by WPSC. *See* 40 C.F.R. §§ 70.6(a)(3)(i)(B); Wis. Admin. Code §§ NR 407.09(1)(c)(1)b. (monitoring must assure compliance based on sufficient data for the relevant time period); Wis. Admin. Code § NR 407.09(1)(c)1.b. U.S. EPA requires that the permit either: (1) establish an enforceable parameter range correlated to compliance with the PM limits; or (2) specify a method for establishing a range and provide that such range is an enforceable permit requirement. *In the Matter of Midwest Generation, LLC, Waukegan Generation Station*, Order Responding to Petitioner's Request That the Administrator Object to Issuance of a State Operating Permit at pp. 20-21 (September 22, 2005); *see also In Re Port Hudson Operation Georgia Pacific*, Petition No. 6-03-01, at pages 37-40 (May 9, 2003) ("Georgia Pacific"); *In Re Doe Run Company Buick Mill and Mine*, Petition No. VII-1999-001, at pages 24-25 (July 31, 2002) ("Doe Run"); *In the Matter of Dunkirk Power LLC*, Order Objecting to Proposed Operating Permit No. II-2002-02 at 20 (Adm'r July 31, 2003) ("Once the operating ranges have been established for the ESP operating parameters [based on emission stack tests],

operating the ESP outside of any of these ranges would constitute a violation of the title V permit.”); *In the Matter of Oxy Vinyls, LP, Louisville, Kentucky*, Objection to Proposed Part 70 Operating Permit No. 212-99-TV (Feb. 1, 2001) (“The permit must specify the parametric range or procedure used to establish that range, as well as the frequency for re-evaluating the range.”).

- b. DNR is relying on the Malfunction Prevention and Abatement Plan (“MPAP”) as the basis for determining adequate ESP parameter ranges, which in turn are used to demonstrate adequate ESP operation, and therefore compliance with the PM limit. In other words, determining continuous compliance with the PM limit will depend on the MPAP. Therefore, the MPAP must be provided in the application. 40 C.F.R. § 70.5(a)(2) (a complete application must contain sufficient information to determine all applicable requirements), 70.5(c). More importantly, DNR must approve the ESP parameter range as assuring compliance, but cannot do so until it reviews the MPAP. 40 C.F.R. §§ 70.6(a)(1), 70.7(a)(iv); *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 855-56 (9th Cir.2003) (“[P]rograms that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program [complies with the relevant statutory standard].”); *In re RockGen Energy Center*, 8 E.A.D. 536, 553-54 (EAB 1999) (remanding DNR permit requirement for a startup/shutdown plan that was not reviewed by DNR before permit issuance). DNR cannot assume sufficient monitoring based on a parameter range that is not yet determined, and is left to the permittee to determine at some point in the future. Moreover, the public must be given the opportunity to review the MPAP before permit issuance to be able to provide meaningful comments on the sufficiency of the ESP parameter monitoring as the method for assuring continuous compliance. 40 C.F.R. § 70.7(h); *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 503-04 (2<sup>nd</sup> Cir. 2005) (invalidating EPA

regulation that allowed nutrient management plans to be submitted after public comment and after a NPDES permit was issued); *RockGen*, 8 E.A.D. at 553-54 (remanding permit requirement for a startup/shutdown plan that was not subject to public notice and review).

The permit must establish an enforceable pressure drop range for Boiler 3. The Draft Permit requires the source to monitoring pressure drop, but does not require an enforceable range that correlates to continuous compliance with the PM limit. *Waukegan* at pp. 20-21; see also *In the Matter of Dunkirk Power LLC*, at 20; *In the Matter of Oxy Vinyls*, supra. The permit must establish an enforceable pressure drop range or provide a specific process for determining the range and make such range enforceable as part of the permit.

Ex. B pp. 2-3.

In summary, Sierra Club's comments requested sufficient parametric monitoring to satisfy the requirement in 40 C.F.R. §§ 70.6(a)(3)(i)(B) and in the SIP at Wis. Admin. Code §§ NR 407.09(1)(c)1.b. The Permit relies on electrostatic precipitator (ESP) and baghouse parameters to monitor compliance with the PM limits for Units 1, 2, and 3. Sierra Club asked that parametric ranges for the ESP and baghouse be established and made enforceable in the permit to ensure that the source is continuously complying with its permit limits. *In the Matter of Midwest Generation, LLC, Waukegan Generation Station*, at pp. 20-21; *In Re Port Hudson Operation Georgia Pacific*, pp. 37-40; *In Re Doe Run Company Buick Mill and Mine*, pp. 24-25; *In the Matter of Dunkirk Power LLC*, p. 20; *In the Matter of Oxy Vinyls, LP, Louisville, Kentucky*,. Additionally, Sierra Club requested that the parametric monitoring ranges be reviewed and approved by DNR and subject to

public notice and comment. The applicable law and prior Administrator decisions support both requests by Sierra Club.

DNR did not respond to the substance of Sierra Club's comments. Instead, DNR stated that

The emission limitation for particulate matter has not been changed in this permit and neither has the compliance monitoring requirements cited by the commenter. Since this compliance monitoring is unchanged in this permit revision from the original Title V permit, the Department is not accepting comments on this permit provision at this time.

Ex. C p. 1 ¶¶ 4 and 5.

DNR's response violates Part 70 and the Wisconsin SIP. The DNR is required to provide for "public comments and a hearing on the draft permit." 40 C.F.R. § 70.8(h).

This is not limited to the provisions that are revised, but to the entire permit.

Additionally, Wis. Admin. Code § NR 407.13, which is included in the Wisconsin SIP, requires that before issuing a Title V permit, the DNR must ensure that the source—not just the revised permit provisions-- meets all requirements in Wis. Stat. § 285.62.

Section 285.62, Stats., in turn, requires that the permit contain monitoring "sufficient to yield reliable data from the relevant time period that are representative of the stationary source's compliance with the permit." Wis. Stat. § 285.62(7)(a), 285.63(1)(a); Wis.

Admin. Code § NR 407.09(1)(c)b. In short, DNR is required to determine that the permit contains sufficient monitoring to ensure continuance compliance. DNR refused to do so, arguing that it is not required to ensure compliance with monitoring requirements during permit revisions.

EPA must object to the permit because it fails to include sufficient parametric monitoring for particulate matter emissions from units 1, 2 and 3. Rather than including enforceable parametric ranges that are demonstrated to ensure compliance (i.e., through stack testing correlation), the permit only requires that the permittee operate within “normal performance ranges. ” Ex. A pp. 6, 14, 20. Such “ranges” are to be determined solely by the permittee and included in a Malfunction, Prevention and Abatement Plan sometime after the final permit is issued. *Id.* This scheme fails to comply with the requirements of Title V because it: (1) does not make the “normal performance ranges” enforceable; (2) does not subject the “performance ranges” to DNR review for adequacy and accuracy; and (3) does not allow the public to review and determine adequacy of the ranges through public notice and comment. 40 C.F.R. § 70.5(a)(2) (a complete application must contain sufficient information to determine all applicable requirements), 70.5(c) (application cannot “omit information needed to determine the applicability of, or impose, any applicable requirement...”); 40 C.F.R. §§ 70.6(a)(1), 70.7(a)(iv) (DNR must determine that the permit requirements-- including the “normal performance ranges” for parametric monitoring-- assure compliance with all applicable requirements); *Environmental Defense Center, Inc. v. EPA* 344 F.3d 832, 855-56 (9th Cir.2003) (holding that permit conditions intended to ensure compliance with regulatory standards must be reviewed by the permitting agency to determine that the conditions do, in fact, ensure compliance); *In re RockGen Energy Center*, 8 E.A.D. 536, 553-54 (EAB 1999) (remanding a permit requirement because it was not reviewed by DNR before permit issuance and was not subject to public notice and review); *In re Fisk*

*Generating Station* at p. 14 (requirements must be contained within the permit for the permit to be practically enforceable). The Administrator must object to the Permit and require an enforceable parametric monitoring range, subject to DNR review and approval, and subject to public review and comment.

**5. The Permit Fails to Require Sufficient Monitoring to Ensure Compliance With Visible Emission Limits on Sources B11, B12, and B13.**

Sierra Club commented to DNR that the monitoring for B11, B12 and B13 ensures compliance with visible emission limits is insufficient. Ex. B pp. 5-6. Indeed, the monitoring is nonexistent. DNR assumes compliance with the particulate matter and visible emission limits for these units, based on fuel (#2 distillate and gas). Ex. A pp. 26, 29-30, 33-34. However, DNR concedes that a restriction on fuel type is not enough to ensure compliance. DNR's response to comments states that "the combustion of #2 oil could possibly lead to opacity exceedances..." Ex. C p. 1 ¶ 6. DNR nevertheless declined to include monitoring of visible emissions based on its assumption that "the general incentive for the permittee to run these operations efficiently to lower the cost of producing power, are adequate to demonstrate compliance..." *Id.* This is insufficient monitoring to satisfy the requirement that the permit require monitoring sufficient to ensure continuous compliance. 40 C.F.R. § 70.6(a)(3); Wis. Admin. Code § 407.09(1)(c). The Administrator must object.

Moreover, the Wisconsin SIP requires one of two methods for monitoring compliance with opacity limits:

1. Method 9 in 40 CFR part 60, Appendix A, incorporated by reference in s. NR 484.04 (13); or

2. Install, calibrate, maintain and operate a continuous emission monitor that meets the applicable performance specifications in 40 CFR part 60, Appendix B or 40 CFR part 75, Appendices A to I, incorporated by reference in s. NR 484.04 (21) and (27), and follow a quality control and quality assurance plan for the monitor which has been approved by the department.

Wis. Admin. Code § NR 439.06(9)(a); 40 C.F.R. § 52.2570(c)(98)(i). One of these two monitoring options must be used. The Permit fails to require one of these two monitoring options for processes B11, B12 and B13. For this reason, too, the Administrator must object. 42 U.S.C. § 7661d(b)(2) (“The Administrator shall issue an objection with such period if the petition demonstrated to the Administrator that the permit is not in compliance with [the Clean Air Act], including the requirements of the applicable implementation plan.”); 40 C.F.R. § 70.2 (a SIP requirement is an “applicable requirement” under CAA Title V).

#### **6. The Permit Revision Constitutes A Change In the Method of Operation Without Going Through PSD Permitting.**

The Administrator must object to the Permit because it fails to comply with all applicable requirements, including PSD permitting requirements. 42 U.S.C. § 7661d(b); 40 C.F.R. § 70.8(d); *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 333 n.11 (2<sup>nd</sup> Cir. 2002); *In re Monroe Electric Generating Plant, Entergy Louisiana, Inc.*, Proposed Operating Permit, Petition No. 6-99-2, Order Responding to Petitioner’s Request that the Administrator Object to Issuance of a State Operating Permit at 2 (EPA Adm’r; available at [http://www.epa.gov/Region7/programs/artd/air/title5/t5memos/ccaw\\_ord.pdf](http://www.epa.gov/Region7/programs/artd/air/title5/t5memos/ccaw_ord.pdf)). The

Administrator must object to permits that fail to require a source to obtain necessary preconstruction permits and comply with new source review requirements. The Administrator must object to the permit for the Weston plant because it modifies emission limits for the boilers and combustion turbines in a manner that constitutes “a change in the method of operation,” but does not require that the plant obtain the necessary preconstruction permits and comply with new source review requirements.

*Id.*

A. Increases In The Carbon Monoxide Limits For Units 1 and 2

The prior Title V permit for the Weston Station limited hourly carbon monoxide (“CO”) emissions to 30.80 pounds per hour for Boiler 1 and 35.90 pounds per hour for Boiler 2. *See* Permit 737009020-P01 §§ I.A.5(a)1, I.B.5.(a)1 (attached hereto as Exhibit P). The modified permit increases the hourly emissions to 36.5 and 84 pounds per hour, respectively. Ex. A §§ I.A.5(a), I.B.5(a). This is a 53.8 pound-per-hour increase in allowable emissions; a 235.64 ton increase annually. This is a significant increase pursuant to Wis. Admin. Code § NR 405.02(27)(a)1.

DNR does not disagree that the Title V permit modification substantially increases CO emission rates. Instead, DNR contends that the changes in emission limits do not result in any “change in the method of operation” of the boilers. Ex. C p. 2 ¶ 10. DNR misinterprets the definition of “change in the method of operation.” The boilers were previously limited in the fuel they used and their production rate due to the prior permit’s CO limits. The boilers could meet their CO limits by burning clean fuel or by

restricting their production rate. By increasing the CO limits, DNR effectively allows the units to burn dirtier fuel and increase the production rate.

Boilers 1 and 2 are wall-fired boilers capable of burning coal, natural gas, distillate and other fuels. By burning natural gas, these units can limit their CO emissions to 84 lb/10<sup>6</sup> scf. See U.S. EPA AP-42 Emission Factor 1.4-5, Table 1.4-1. This translates to 0.082 lb CO/MMBtu. *Id.* This means that by burning natural gas and limiting heat input to 375.6 MMBtu/hour, Unit 1 could have complied with its prior permit limit. (0.082 lb/MMBtu\* 375.6 MMBtu/hour = 30.80 lb/hour). Another option was to burn coal and limiting the amount of coal burned. The emission when burning coal are 0.5 lbs of CO per ton of coal combusted. See U.S. EPA AP-42 Emission Factors Table 1.1-1. Unit 1 could have complied with its prior permit limit by combusting fewer than 73 tons of coal per hour. (73 tons of coal/hour\* 0.5 lb CO/ton of coal = 30.80 lb CO/hour). Alternatively, Unit 1 could have achieved compliance by burning less than 6,160 gallons of fuel oil per hour. See AP-42 Emission Factor 1.3, Table 1.3-1(5 lb CO/10<sup>3</sup> gallons of fuel oil \* 6,160 gallons/hour = 30.80 lb CO/hour). Similarly, Unit 2 could have achieved its previous permit limit (35.90 lb CO/hour) by limiting its heat input to 437.8 MMBtu per hour when burning gas. See AP-42 1.4 (0.082 lb CO/MMBtu \* 437.8 MMBtu/hour = 35.90 lb CO/hour). Alternatively, Unit 2 could achieve its prior 35.90 lb/hour CO limit when burning by burning less than 71.8 tons of coal or less than 7,180

gallons of fuel oil per hour.<sup>4</sup> AP-42 1.1 (0.5 lb CO/ton coal \* 71.8 tons/hour = 35.90 lb CO/hour); AP-1.3 (5 lb/ 10<sup>3</sup> gallons \* 7,180 gallons/hour = 35.90 lb CO/hour).

Therefore, the previous permit's CO hourly emission limit for units 1 and 2 acted as an enforceable limit on the type of fuel and production rate (heat rate) of the boilers. The proposed Permit (737009020-P02) significantly increases the CO limit for units 1 and 2, which increases the production rate and allows a change in fuel. Such changes constitute a "change in the method of operation" of units 1 and 2. Wis. Admin. Code § NR 405.02(21). While the term "change in the method of operation" is not expressly defined, it clearly covers the changes in fuel and increases in production rate at issue here-- that would otherwise have been prohibited by a federally enforceable permit limit. EPA's PSD regulations, and Wisconsin's SIP, exclude changes in fuel and increases in production rate from the definition of "major modification" only when such changes would not be prohibited by a federally enforceable limit. 40 C.F.R. § 51.166(b)(2)(iii); 45 Fed. Reg. 52676, 52730 (Aug. 7, 1980). Since increases in production rate or fuel change at units 1 and 2 would have been prohibited by the hourly CO limit in the prior permit, those changes were prohibited by a federally enforceable limit and are not exempt from the term "change in the method of operation." Therefore, the change in hourly CO emission limits constitutes a "modification" triggering PSD review and lower particulate matter and visible emission limits for Units 1 and 2. Wis. Admin. Code ch. NR 405, §§ NR 415.06(2) and NR 431.05.

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<sup>4</sup> Note that at 16 MMBtu/ton, the Unit should be burning less than this amount of coal per hour as a 1000 MMBtu/hour boiler.

Moreover, the CO emission limits from the prior Title V permit were used in the PSD permitting analysis for Weston Unit 4—a new coal-fired power plant on the same site. WPSC’s PSD permit application contained emission rates for each emission source. WPSC stated the CO emission rates for Unit 1 and Unit 2 as 30.80 and 35.90 pounds per hour, respectively. PSD Permit Application for Weston Unit 4, Appendix C: Emission Calculations (attached hereto as Ex. Q, p. 2). The DNR’s Analysis and Preliminary Determination for the Weston 4 PSD permit incorporated the same maximum emission rates for the two boilers as a part of DNR’s basis for granting the PSD permit for Unit 4. Wisconsin Department of Natural Resources, Analysis and Preliminary Determination for the PSD Permit for Weston Unit 4, p. 91 (attached in relevant part hereto as Exhibit R); Memorandum from John Roth to Raj Vakharia, *Re: Revised Air Dispersion Analysis for a PSD Permit for the Wisconsin Public Service Corporation Weston Generating Station-Rothschild (Marathon County)- North Site*, p. 267 (attached hereto in relevant part as Exhibit S). Because the prior hourly CO limits for units 1 and 2 were included as specifications for review of the PSD permit for Weston Unit 4, the specifications became federally enforceable limits. 40 C.F.R. § 52.21(r)(1) (requiring the modified source to operate according to its PSD permit application). In *Hawaiian Elec. Co., Inc. v. EPA*, the Ninth Circuit held that an increase in a permitted emission rate, which was relied upon when issuing other PSD permits, must go through PSD review because it changes the air impact assumptions for such other permits. 723 F.2d 1440, 1448-49 (9<sup>th</sup> Cir. 1984). Similarly, in EPA’s 1980 PSD rules, EPA explained that “any change in... rate of operation that would disturb a prior assessment of a source’s environmental impact

should have to undergo [PSD] scrutiny.” 45 Fed. Reg. 42,676, 52,704 (1980). Because the increase in CO emissions allows an increase in production rate and/or a change in fuel, and the prior CO limits were relied upon when issuing a PSD permit for Weston Unit 4, the emission increases are unlawful unless authorized by preconstruction permits. The Administrator must object.

B. Increases In Allowable Emissions Of Particulate Matter, Carbon Monoxide and Nitrogen Oxides From the Combustion Turbines.

The Permit includes an increase in the PM/PM10, CO, and Nitrogen Oxide (NOx) emissions from three combustion turbines (B11, B12 and B13). These increases are not exempt from requirements for preconstruction permitting, but DNR did not require a preconstruction permit for the emission increases. Therefore, the Administrator must object to the increased emission limits for the combustion turbines.

a. *Increase in PM/PM10 Limits.*

The prior Title V permit limited operation of B11 to 4.74 pounds of PM/PM10 per hour. Ex. P § I.E.1.(a). The revised Permit increases the allowable emissions from B11 to 25 pounds per hour. *See* Ex. A p. 26. The revised Permit also increases the PM/PM10 limit for B12 and B13 from 5.21 pounds per hour, each, to 26.91 pounds per hour, each. *Compare* Permit 737009020-P02 §§ I.E.1.a. and I.F.1.a. *with* Ex. A pp. 29, 33. Sierra Club’s comments noted that such changes constitute a change in the method of

operation subject to PSD permitting<sup>5</sup> because “it allows the unit to operate more, operate at a higher rate, increase fuel consumption, and/or increase use of oil vs. gas.” Ex. B p. 10. Moreover, Sierra Club noted that the change is not exempt from PSD permitting because “the changes would be prohibited by a federally enforceable permit condition limiting PM and PM10 emissions.” *Id.*

DNR responded to Sierra Club’s comments by disagreeing that the change constitutes a “change in the method of operation.” Ex. C p. 2 ¶ 13. Instead, DNR asserts that “[t]he proposed changes are based on recent test data for the turbines.” *Id.* DNR’s response does not address the issue: whether the increase in hourly emissions results in an increase in production rate or a change in fuel. Previously, the 4.74 lb/hour and 5.21 lb/hour limits on PM/PM10 from B11, B12, and B13 acted to limit the fuel that could be burned and the operating rate of the combustion turbines. For example, DNR assumes emission of 0.023 lb/MMBtu when firing natural gas and 0.063 lb/MMBtu for distillate oil in B12 and B13. Ex. A, pp. 26, 33. The turbines, therefore, could have limited production to 226.6 MMBtu/hour when burning gas and complied with the 5.21 lb/hour limit.<sup>6</sup>

Moreover, the prior PM/PM10 limits for B11, B12 and B13 were included in WPSC’s application for Weston Unit 4 and were relied upon by DNR when issuing a PSD permit for Weston Unit 4. Ex. Q, p. 4 (application for Weston 4 using prior permit

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<sup>5</sup> The PM/PM10 increase from 4.74 lb/hour in the prior Title V permit to 25 lb/hour in the proposed Permit results in a 55.3 TPY increase (even assuming the 455 hour/month limit in the Permit). This is a major increase pursuant to Wis. Admin. Code § NR 405.02(27)(a)4. and 5.

<sup>6</sup> 0.023 lb/MMBtu \* 226.6 MMBtu/hour = 5.21 lb/hour.

limits for PM/PM10); Ex. S, p. 267 (PM emission rates for S11, S12 and S13 assumed to be 4.74 lb/hour, 5.21 and 5.21 lb/hour, respectively). These limits cannot be changed without PSD review. *Hawaiian Elec. Co.*, 723 F.2d at 1448-49; 45 Fed. Reg. at 52,704. Therefore, the increased hourly emission rate is effectively an increase in production rate, or a change in fuel from gas to oil – either of which constitutes a “change in the method of operation” subject to PSD permitting, as stated above for the increase in CO emission from units 1 and 2.

*b. Increase in Carbon Monoxide Emissions.*

Additionally, the Permit increases the CO limits for B11, B12 and B13. The prior permit limited CO emissions from B11 to 1.30 lb/hour (32.39 lb/hour when firing natural gas) and from B12 and B13 to 35.59 lb/hour. Ex. P §§ I.D.5.a., I.E.5.a, and I.F.5.a. However, the proposed Title V permit increases the hourly CO emissions to 216.25 lb/hour for B11 and 176.6 lb/hour, each, for B12 and B13. Ex. A pp. 28, 32, 36. This change also constitutes a change in the method of operation of the combustion turbines because CO emissions are directly related to production rate and fuel. U.S. EPA, AP-42 Emission Factors, Fifth Edition, Section 3.1, Table 3.1-2a; Ex. A pp. 28, 32, 36 (emission factors for CO emissions when burning oil and gas). The units could comply with the prior permit limit by liming operation. The increased hourly CO emissions effectively increases the allowable production rate and allows a more-polluting fuel to be burned. For example, B11 could comply with its prior CO limit by operating at 15.9

MMBtu/hour when burning gas<sup>7</sup>, or 394 MMBtu/hour when burning oil.<sup>8</sup> Similarly, B12 and B13 could comply with the prior 35.59 lb/hour CO limit by limiting operation to 90.9 MMBtu/hour when burning gas<sup>9</sup> or by burning only distillate oil.<sup>10</sup> Notably, here too, WPSC's application for a PSD permit for Weston 4 and DNR's review of that application relied on the prior CO emission limits for B11, B12 and B13. Ex. Q, p. 4; Ex. S, p. 267. Therefore, the increase in the hourly emission rate allows greater production rates, which results in a significant increase in emissions. Even assuming the 455 hour/month operating limit in the Permit, the modification allowed by the proposed Permit results in an annual CO emission increase greater than 500 TPY.

*c. Increase in Nitrogen Oxide Emissions.*

The Permit increases the allowable emissions for NO<sub>x</sub> from B12 and B13. The prior Title V permit limited NO<sub>x</sub> emissions from each unit to 138.88 lb/hour when firing natural gas and 381.9 lb/hour when firing fuel oil. Permit 737009020-P02 §§ I.E.4.a. and I.F.4.a. However, the proposed Permit increases the NO<sub>x</sub> limits for these units to 212.7 pounds per hour when firing gas and 411 lb/hour when firing oil. Ex. A pp. 31, 35. Again, hourly emissions are directly proportional to fuel use and production rate. AP-24 Emission Factors, Fifth Edition, Section 3.1, Table 3.1-2a; Ex. A, pp. 31, 35 (establishing emission factors of 0.476 lb/MMBtu for gas and 0.947 lb/MMBtu for oil).

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<sup>7</sup> Based on DNR's emission factor of 0.082 lb/MMBtu. See Ex. A p. 28.

<sup>8</sup> Based on DNR's emission factor of 0.0033 lb/MMBtu for distillate oil. See Ex. A p. 28.

<sup>9</sup> Based on DNR's emission factor of 0.392 lb/MMBtu. Ex. A p. 32.

To comply with the prior permit limits, the combustion turbines were required to either burn gas or limit their operation to 157.8 MMBtu/hour when burning distillate oil. Therefore, hourly emission limits in the prior Title V permit limited production rates and fuel and the Permit's increase in hourly emission limits results in an increase in production rate and/or a switch in fuel use.

Because Wis. Admin. Code § NR 405.02(21)(b) only exempts increases in production rate and fuel changes that are not limited by a prior permit limit – the production rate increases and/or fuel changes allowed by the modifications in the proposed Permit are changes in the method of operation that are subject to PSD permitting. Furthermore, each of the prior permit limits was specifically relied upon by DNR when it conducted the PSD review for Weston Unit 4. Ex. Q; Ex. S, p. 267 (modeling inputs based on prior permit limits on NO<sub>x</sub> for S11, S12, and S13). Even though the proposed Permit also limits hours of operation for B12 and B13 to 73 hours per month, the change results in an increase greater than the “significance” threshold in Wis. Admin. Code § NR 405.02(21), the modification results in a major modification subject to PSD. Therefore, EPA must object to the modified (increased) NO<sub>x</sub> permit limits unless and until the increase is permitted pursuant to PSD. 40 C.F.R. § 52.21(r)(1); 45 Fed. Reg. at 52,704 (a permitted production rate and fuel relied upon in a prior PSD review should only be increased through PSD permitting); *Hawaiian Elec. Co.*, 723 F.2d at 1448-49 (same).

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<sup>10</sup> Using DNR's emission factor of 0.043 lb/MMBtu and the unit's maximum hourly capacity of 434 MMBtu/hour. Ex. A p. 32.

## 7. The Administrator Must Object Because Units 1 and 2 Underwent Major Modifications Without PSD Permit Review.

Sierra Club's comments on the Permit noted that the Permit "fails to assure compliance by the source with all applicable requirements, and fails to include a compliance schedule for requirements for which the facility will not be in compliance when the final permit is issued." Ex. B p. 15 (citing 42 U.S.C. §§ 7661b(b), 7661c(a); 40 C.F.R. §§ 70.1, 70.5(c)(8)(iii); Wis. Admin. Code §§ NR 407.09(4)(b), (h)3.c.). Specifically, Sierra Club noted that Units 1 and 2 underwent physical changes – replacement of economizers and superheater – without a PSD permit. Ex. B pp. 16-23. These physical changes result in significant emission increases under either the actual-to-potential<sup>11</sup> or actual-to-future-actual tests. *Id.* pp. 18-22.

DNR did not directly address Sierra Club's comment. Instead, DNR's response to comments states:

The Department has not made a finding that the Weston facility has violated PSD or NSPS requirements nor has the facility reported to the Department that such violations have occurred. If such a finding is made in the future, then the Department will take appropriate actions to revise the operation permit as needed. Without a finding of violation, the Department will not be including a compliance plan or other requirements pertaining to PSD or NSPS.

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<sup>11</sup> Since WPSC did not submit the annual reporting necessary for it to take advantage of the "WEPCo Rule" (actual-to-projected-actual test), the actual-to-potential test applies. This is the test that U.S. EPA applies when the facility fails to conduct the monitoring and reporting necessary to take advantage of the WEPCo Rule. *See United States v. Duke Energy Corp.*, Slip Op. p. 47 n. 17 (M.D.N.C. August 26, 2003) (noting that EPA's briefing argues that the actual to potential test applies). Additionally, at least one of the modifications occurred prior to July 21, 1992, the date the "WEPCO Rule" became effective, so the WEPCo Rule does not apply to that modification. 57 Fed. Reg. 32314 (July 21, 1992).

Ex. C. p. 3. In other words, DNR neither concurred, nor disagreed that PSD violation have occurred at the Weston Generating Station. Rather, DNR noted that it has not made a decision either way. This is an insufficient response. See *In re Midwest Generation, LLC, Fisk Generating Station, Objection* pp. 5-6 (Adm'r March 25, 2005) (objecting to permit issued by Illinois EPA for failing to address Sierra Club's significant comments regarding likely New Source Review/PSD violations).

A "major modification" is: "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 of any air contaminant subject to regulation under the [Clean Air Act]." Wis. Admin. Code § NR 405.02(21); *In re Tennessee Valley Authority*, 9 E.A.D. 357, 388 (EAB 2000) (citing *WEPCo. v. Reilly*, 893 F.2d 901, 907-09 (7th Cir. 1990)). The term "physical change" is very broad, applying to almost any activity done at the facility. *Ohio Edison*, 276 F.Supp.2d at 854; *New York v. EPA*, 443 F.3d 880, 884-85, 887 (D.C. Cir. 2006).<sup>12</sup>

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<sup>12</sup> A routine maintenance, repair, or replacement, by itself, is not a modification. However, very few physical changes are routine, and must meet a four-factor test including the nature, extent, purpose, frequency and cost of the work. *WEPCo.*, 893 F.2d at 910 (quoting Sept. 9, 1988 Memorandum from Don R. Clay, USEPA, to David A. Kee, "Applicability of Prevention of Significant Deterioration (PSD) and New Source Performance Standards (NSPS) Requirements to the WEPCO Power Company Port Washington Life Extension Project."). Moreover, [r]outine maintenance, repair, and replacement occurs regularly, involves no permanent improvements, is typically limited in expense, is usually performed in large plants by in-house employees, and is treated for accounting purposes as an expense. In contrast to routine maintenance stand capital improvements which generally involve more expense, are large in scope, often involve outside contractors, involve an increase of value to the unit, are usually not undertaken with regular frequency, and are treated for accounting purposes as capital expenditures on the balance sheet." *Ohio Edison*, 276 F.Supp. 2d at 834 (citations omitted). Routine maintenance must be interpreted as very narrow. *U.S. v. So. Ind. Gas & Elec. Co.*, 245 F.Supp.2d 994, 1009 (S.D. Ind. 2003) ("Giving the routine maintenance exemption a broad reading could postpone the application of NSR to many facilities, and would flout the Congressional intent evinced by the broad definition of medication."). None of the modifications addressed in these comments are routine. Moreover, it is WPSC's burden to prove the application of the routine maintenance exemption and WPSC has never asked for a DNR determination, nor proven the application of the routine maintenance exception. *Ohio Edison*, 276 F.Supp.2d at 855; *In Re Tennessee Valley Authority, Order Regarding Scope of the Record, the Standard of Review, and Allocation of the Burden of Proof* at 25 (E.A.B. July 3, 2000).

According to WPSC's statements, under oath, to the U.S. EPA, WPSC made the following modifications:

UNIT	CHANGE	DATE
Pulliam 7	Replace Secondary Superheater and Outlet Header	October 1986
Pulliam 8	Air Heater Rotating Element	February 1986
Pulliam 7	Replace Reheater	September 1999
Pulliam 8	Replace Outlet Section of Reheat Tubes	December 1988
Pulliam 8	Superheater Replacement	January 1994
Pulliam 8	Secondary Superheater & Waterwall Replacement	January 1994
Pulliam 5	Secondary Superheater Bank	February 1995
Pulliam 7	Replace Economizer	April 1982
Weston 1	Replace Economizer	February 1990/March 1991
Weston 2	Replace Economizer & Secondary Superheater	November 1993

See WPSC Resp. to U.S. EPA § 114 Request, June 28, 2002 (attached as Exhibit W, page 10). Additionally, WPSC disclosed in documents produced to U.S. EPA that it replaced a lower pressure cylinder seal on Weston Unit 1 in 1987, which WPSC identified as necessary to keep the unit in service. See WPSC 1987 Life Extension Plan at pp. WP2-6-01235 to 1236 (attached as exhibit). There is no question that the replacement of the economizer on unit 1, replacement of the economizer and secondary superheater on unit 2, and replacement of the lower pressure cylinder seal on unit 1 constitute "physical changes" under the broad meaning of that term. *New York*, 443 F.3d at 887. Therefore, whether these changes are subject to PSD permitting depends on whether they lead to a significant net increase in emissions. *Id.* at 887 ("only physical changes that do not result in emission increases are excused from NSR.").

Under either the actual-to-potential test or the actual-to-future-actual test, the modifications noted above result in significant net increases that trigger PSD. Units 1 and 2 operate significantly below their potential annual emission levels. Therefore, any physical change would cause a significant emission increase under the actual-to-potential test. Moreover, under the actual-to-future-actual test, Units 1 and 2 would need to increase hours of operation by less than 250 hours per year to result in a significant emission increase. Ex. B pp. 20-21. The evidence submitted by Sierra Club with its permit comments demonstrated that such an increase in operating hours occurred. The replaced parts (economizers on both units and the Unit 2 superheater) were causing recurring forced outages during the period preceding the modification. Specifically, Unit 1 experienced 1727.8 hours of forced outages due to boiler problems during the 24 months preceding the replacement of the economizer on that unit. Ex. B pp. 20-21. In fact, WPSC's internal planning documents admit that the company expected the replacement of Unit 1's economizer to reduce forced outage by approximately 1691 hours annually. See Ex. B p. 21; WPSC Pulliam and Weston 1 Life Assessment Study, July 1987 at p. WP2-6-00050, WP2-6-00069, WP2-6-00161 (attached hereto as Exhibit T). This expected increased annual operation causes a significant increase of NO<sub>x</sub> and SO<sub>2</sub>. Similarly, Unit 2 experienced 3794.5 hours of forced outage due to boiler problems in the 24 months preceding the November, 1993 replacement of the economizer and superheater. See Ex. B p. 21; Weston Unit 2 Data Sheets (attached hereto as Exhibit U). Regaining even a small fraction of this time would result in a significant increase in annual emissions.

Sierra Club's comments also pointed out that WPSC has undertaken a number of modifications at the Weston Generating Station that were necessary to allow it to burn lower-sulfur western coal, including upgrades to the pulverizers, flue gas conditioning, and precipitator upgrades. Ex. B p. 21. WPSC's own documents state that the company changed these parts to allow it to burn low sulfur coal to comply with acid rain requirements. *See* Fossil Plants- Enhanced Maintenance Program, March 8, 1991 at p. WP2-6-01344 (attached as Exhibit V). Because low sulfur western coal contains higher ash content, switching to western coal results in increases in particulate matter emissions. WPSC never obtained a construction permit for the modifications made to allow burning western coal and, consequently, increased particulate matter emissions.

For each of these reasons, WPSC triggered PSD and NSPS permitting requirements at Weston. The final permit must include a compliance schedule by which WPSC will comply with PSD, including but not limited to, submitting a complete PSD permit application. Moreover, because each of the modifications also triggers the lower PM and visible emission limits in NR 415.06 and 431.05, those limits constitute the maximum emission limit that can be included in the final permit for Weston. If DNR had required the necessary PSD permit for the modifications identified above, lower emission limits for all criteria pollutants would apply. DNR never responded to Sierra Club's comments on these issues. The Administrator must object because of DNR's failure to respond and because the Permit fails to include applicable PSD requirements.

**8. The Administrator Must Object Because Weston Generating Station Has Unaddressed Opacity (Visible Emission) Violations.**

The Administrator must also object because the Permit does not assure compliance by the source with visible emission limits and fails to include a compliance schedule to bring the source into compliance with visible emission standards. 42 U.S.C. §§ 7661b(b), 7661c(a); 40 C.F.R. §§ 70.1, 70.5(c)(8)(iii); Wis. Admin. Code §§ NR 407.09(4)(b), (h)3.c.

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

*In re Midwest Generation, LLC, Waukegan Generating Station, Order Responding to Request that the Administrator Object to Issuance of a State Operating Permit p. 4 (Adm’r, September 22, 2005) (“Waukegan”).*

Sierra Club’s comments demonstrated that the facility had ongoing visible emission violations and violations of monitoring requirements. Ex. B pp. 25-26. Sierra Club also included excess emission reports wherein the company certified, under oath, that it had violated the visible emission standards. *Id.* However, DNR did not address the comment and did not include a compliance schedule to bring the facility into compliance. Instead, DNR responded: “The Department has not issued a Notice of

Violation (NOV) to WPSC for emissions in excess of established opacity limitations nor for excessive downtime for the continuous opacity monitor identified in these comments. Without a finding of violation, the Department will not be including a compliance plan or other requirements pertaining to the continuous opacity monitor.” Ex. C p. 3. This in an insufficient response and the Administrator must object because the Permit does not satisfy the requirements of 42 U.S.C. §§ 7661b(b), 7661c(a), 40 C.F.R. §§ 70.1, 70.5(c)(8)(iii) and Wis. Admin. Code §§ NR 407.09(4)(b), (h)3.c. Waukegan, supra, p. 4 (objecting to a permit where state permitting agency failed to respond to public comments regarding the necessity for a compliance schedule for opacity violations). As a result of DNR’s failure to include a compliance schedule, the source will continue to emit excess visible emissions into the ambient air affecting Sierra Club’s members.

## 9. CONCLUSION

For the foregoing reasons, the permit fails to meet federal requirements in numerous ways. These deficiencies require that the Administrator object to issuance of the permit pursuant to 40 C.F.R. § 70.8(c)(1). Each of the issues raised by Sierra Club in this petition result in a deficient permit. Most of the deficiencies result in unlawful emissions of air pollutants that negatively affect the health and welfare of Sierra Club members. Others result in illegal monitoring and reporting that make it difficult for Sierra Club to monitor and enforce air pollution limits applicable to the Weston Generating Station.

Dated this 20th day of November, 2006.

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Dated : November 20, 2006

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Laura Boyd

Signed and sworn to before me  
This 20th day of November, 2006.

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Notary Public, State of Wisconsin  
My commission is permanent.