

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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In the Matter of an Operating Permit  
For the Appleton Coated, LLC Plant  
Outagamie County, Wisconsin

Source ID: 445031290  
Permit No. 445031290-P10  
Petition No. V-2013-\_\_\_\_\_

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**PETITION OF APPLETON COATED, LLC AND  
THE WISCONSIN PAPER COUNCIL, INC. REQUESTING  
THE ADMINISTRATOR OBJECT TO ISSUANCE OF THE PROPOSED  
TITLE V OPERATING PERMIT FOR THE APPLETON COATED, LLC PLANT**

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Pursuant to §502(b)(2) of the Clean Air Act (“CAA” or the “Act”) and 40 C.F.R. §70.8(d), Appleton Coated, LLC (“Appleton”) and the Wisconsin Paper Council, Inc. (“WPC”) hereby petition the Environmental Protection Agency (“EPA”) Administrator (“Administrator”) to object to Appleton’s proposed Title V Operating Permit No. 445031290-P10 (the “Permit”). A copy of the Permit is enclosed as Exhibit A.

Appleton is the permittee. WPC, headquartered in Appleton, Wisconsin, is a non-profit membership organization representing the interests of pulp and paper manufacturers and allied industries in Wisconsin.

The Permit was proposed to EPA by the Wisconsin Department of Natural Resources (“WDNR”) on August 6, 2013. Pursuant to CAA §502(b)(1), EPA had 45 days to review and comment on the Permit and object, but did not. Pursuant to CAA §502(b)(2), this petition is timely filed within sixty days following the end of EPA’s 45 day review period. If the Administrator determines that the Permit does not comply with the requirements of the Act or the Wisconsin State Implementation Plan (“SIP”), she must object to its issuance. CAA §505(b); 40 C.F.R. §70.8(c)(1).

This petition seeks an objection by the Administrator because the Permit fails to conclude within the permit shield section of the Permit that Prevention of Significant Deterioration (“PSD”) requirements are not “applicable requirements” for purposes of a routine maintenance project commenced by Appleton in 2005 on Boiler B23 (the “Project”). See CAA §504(f), Wis. Stat. §285.62(10)(b), 40 C.F.R. §70.6(f), Wis. Admin. Code § NR 407.09(5) (“An operation permit shall include a provision pursuant to and consistent with [the permit shield] §285.62(10)(b)”) (emphasis added). The Project was commenced more than seven years ago in accordance with a final WDNR determination dated August 13, 2004 that held the Project was

not subject to PSD permitting requirements. The permit shield section of the Permit must explicitly reflect this WDNR determination and identify PSD requirements as not applicable to the Project.

The importance of WDNR compliance with the permit shield requirement assumes heightened importance in the wake of the Seventh Circuit Court of Appeals decision in *United States v. Midwest Generation LLC*, 7th Cir., Nos. 12-1026 and 12-1051, 7/8/13; 44 ER 2049, 7/12/13 (“Midwest Generation”). The central holding of *Midwest Generation* is that there is a five year statute of limitations on actions alleging a failure to obtain a PSD construction permit. *Midwest Generation* at 5-6. Because the Project was commenced more than five years ago, in reliance on WDNR’s final determination it did not trigger PSD, the statute of limitations has long run out on the Project. As such, Appleton and WDNR are “entitled to proceed as if it possessed all required permits” for the Project and the permit shield should recognize that PSD requirements do not apply to the Project. *Id.* at 7. A copy of the *Midwest Generation* decision is enclosed as Exhibit B. A permit shield for the Project is proper for this reason as well.

The grounds for Appleton’s objection did not arise until well after the public comment period on the Permit closed on May 14, 2012. It was not until June 25, 2012 that EPA first suggested disagreement with the WDNR’s August 13, 2004 Decision (despite EPA having been asked for its opinion on that determination approximately eight years earlier).<sup>1</sup> Further, the Seventh Circuit Court of Appeals issued its *Midwest Generation* decision on July 8, 2013, nearly fourteen months after the close of the public comment period. Appleton could not have reasonably anticipated that the EPA would so belatedly question the preclusive effect of WDNR’s Decision - 8 years after the fact. Nor could Appleton have predicted during the public

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<sup>1</sup> WDNR itself noted that EPA’s June 25, 2102 letter was submitted outside the public comment period for the Permit. See, August 10, 2102 letter from WDNR Secretary Cathy Stepp to EPA Region 5 Administrator Susan Hedman.

comment period on the Permit that the Seventh Circuit would later issue its preclusive decision in *Midwest Generation*.

Finally, WDNR is the delegated state permitting authority that has effectively regulated Appleton for more than 30 years. The final determination of WDNR, issued in 2004, must be afforded appropriate deference to allow the agency to administer its EPA-approved air permitting program and to provide regulatory certainty for the hundreds of permitted facilities throughout Wisconsin.

### **FACTUAL BACKGROUND**

On July 27, 2004, Appleton requested that WDNR issue a determination that its proposed replacement of superheater tubes within Appleton's Boiler 23 (also known as "Boiler 10") was exempt from PSD construction permitting obligations. Appleton's July 27, 2004 request is enclosed as Exhibit C. On August 13, 2004, WDNR submitted a letter to EPA with WDNR's analysis and conclusion that the Project was considered routine maintenance, repair or replacement ("RMRR") that was exempt from PSD permitting requirements, and requested EPA's concurrence or assistance with the determination. WDNR's August 13, 2004 letter is enclosed as Exhibit D.

Following WDNR's submittal to EPA, several correspondences were exchanged between the two agencies. In 2005, Appleton commenced construction on the Project in reliance on the WDNR's Determination.

Between 2007 and 2010, EPA issued Appleton two separate requests for information pursuant to CAA §114, seeking documents and information concerning, among other things, Appleton's facilities and operations, emissions, boilers and all projects costing greater than \$100,000 and which were approved and completed between January 1, 1990 and August 2010.

In response to these requests, Appleton produced thousands of documents to EPA. To date, EPA has not pursued any enforcement or other action in response to the significant documentation produced by Appleton.

The Permit was issued for public notice and comment on February 19, 2010 and again on April 13, 2012. The final public comment period ended May 14, 2012.

On June 25, 2012 – seven years after construction commenced on the Project and more than a month after the final public comment period ended – EPA sent a letter to WDNR suggesting that the Project may not have been RMRR and requesting that WDNR conduct additional analysis on the historic Project. EPA's June 25, 2012 letter is enclosed as Exhibit E.

On August 10, 2012, WDNR responded to EPA with a letter stating that "DNR concluded that [the Project] did not trigger PSD requirements in its 2004 letter." As such, Appleton was entitled to rely on WDNR's determination in completing the project. Moreover, WDNR identified significant policy reasons why, as the delegated air permitting authority, its final determination must be afforded deference. WDNR's August 10, 2012 letter is enclosed as Exhibit F. On February 15, 2013, Appleton submitted to WDNR a letter providing additional legal and factual information further documenting the reasonableness of WDNR's 2004 RMRR determination. Appleton's February 15, 2013 letter and its referenced attachments are enclosed as Exhibit G.

The Seventh Circuit issued the Midwest Generation opinion on July 8, 2013, long after the close of the public comment period, but before the Permit was issued. On September 20, 2013, WDNR issued the Permit. The Permit does not contain a permit shield concerning PSD applicability of the Project.

## LEGAL ANALYSIS

Pursuant to CAA §504(f), Wis. Stat. §285.62(10)(b), 40 C.F.R. §70.6(f) and Wis. Admin. Code § NR 407.09(5), compliance with all emission limits included in an operation permit is considered to be compliance with all applicable emissions limits in the Act. The predicate requirement is that the operation permit contain all applicable emission limits or that WDNR, in acting on the application for an operation permit, has determined in writing that emission limits not included in the permit do not apply to the source. In this case, WDNR determined in writing in 2004 that the Project did not trigger PSD construction permitting requirements, and reaffirmed that determination during the reissuance process for the Permit. As such, a permit shield is appropriate pursuant to CAA §504(f) and Wis. Stat. §285.62(10)(b). Moreover, pursuant to the EPA-approved SIP, “An operation permit shall include a provision pursuant to and consistent with [the permit shield] §285.62(10)(b)” (emphasis added). See Wis. Admin. Code § NR 407.09(5), 60 FR 3543 (Jan. 18, 1995).

The Seventh Circuit Court of Appeals decision in *Midwest Generation* settled law in this jurisdiction on two significant, relevant points. First, the statute of limitations begins to run when a CAA claim accrues, not when it is discovered, because the discovery rule does not apply to governmental agencies. *Midwest Generation* at 4, citing *Gabelli v. SEC*, 133 S. Ct. 1216 (2013). Second, the failure to obtain a PSD construction permit is a one-time violation. *Id.* at 5-6. Out of these principles arise the ultimate holding of *Midwest Generation* that “[o]nce the statute of limitations expired, [defendant] was entitled to proceed as if it possessed all required construction permits.” *Id.* at 7. See also *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. 2010); *National Parks and Conservation Association Inc. v. Tennessee Valley Authority*,

502 F.3d 1316 (11th Cir. 2007), *United States v. EME Homer City Generation LP*, 3rd Cir., No. 11-4406, 8/21/13.

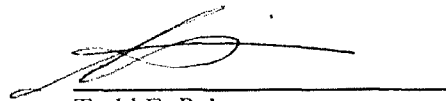
The Project was commenced seven years ago, in reliance on WDNR's determination that the project did not trigger PSD requirements. The statute of limitations has long run on any PSD permitting claim that could arise from the Project. The Seventh Circuit's decision in *Midwest Generation* unequivocally secures for Appleton the right to operate as though no construction permit was required for the Project, and Appleton is entitled to have that right reflected in the Permit.

#### CONCLUSION

The Project was commenced more than five years ago, with the written concurrence of WDNR, the delegated air permitting authority, that Project did not trigger PSD construction permitting requirements. Because the Permit fails to conclude within the permit shield section that PSD requirements are not "applicable requirements" for the Project, it does not comply with the requirements of the Act or the SIP. For these and all the reasons stated above, the Administrator should object to the Permit.

Respectfully submitted this 19<sup>th</sup> day of November, 2013,

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