NATURAL RESOURCES DEFENSE COUNCIL

May 7, 2012

VIA FEDERAL EXPRESS 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 Great Lakes Environmental Law Center's Petition to Object to the Issuance of a State Title V Operating Permit issued by the Michigan Department of Environmental Quality for Detroit Edison's River Rouge Power Plant, Permit No. MI-ROP-B2810-2012, (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
Jeff Korniski, Michigan Department of Environmental Quality
Vinay Bhakkad, River Rouge Plant Manager, DTE Energy

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BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Detroit Edison Company's River Rouge Power Plant,
Permit No. MI-ROP-B2810-2012

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 GREAT LAKES ENVIRONMENTAL LAW CENTER 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 ("NRDC") and the Great Lakes Environmental Law Center ("GLELC") (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-B2810-2012 ("Title V Permit") reissued on April 1, 2012, by the Michigan Department of Environmental Quality ("MDEQ" or "the Agency") for the River Rouge Coal Plant ("Plant") operated by Detroit Edison ("DTE" or "the Company").

The Administrator must object to the issuance of the Title V Permit due to: (1) DTE's failure to provide, and MDEQ's failure to require, a complete application before issuing the Title V Permit, (2) apparent violations of applicable Prevention of Significant Deterioration ("PSD") and Non-attainment New Source Review ("NNSR") requirements under the Clean Air Act ("CAA") that require a schedule of compliance to be included in the Title V Permit and (3) 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 a fossil fuel-fired electric utility steam-generating station located in River Rouge, Michigan, that has the potential to emit more than 100 tons per year each of Sulfur Dioxide ("SO_2"), Nitrogen Oxides ("NO_x") and Particulate Matter 2.5 ("$PM_{2.5}$"). The Plant consists of three units. Unit 1 is a natural gas unit with a heat input capacity of 2,400 mmBtu/hr;

it was taken out of service in the early 1980s and repowered on natural gas in or around 2000.[1] Units 2 and 3 are coal-fired units with a heat input capacity of 2,280 mmBtu/hr and 2,670 mmBtu/hr, respectively.[2] Unit 2 commenced operation in or around 1957, and Unit 3 commenced operation in or around 1958.[3] Because the Plant is a fossil fuel-fired steam electric plant of more than 250 million British 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).[4]

II. PETITIONERS

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.

GLELC is an independent, not-for-profit, public interest environmental law organization established in 2008 to protect the world's greatest freshwater resource and the communities that depend upon it. The GLELC is located in Detroit, Michigan and has a board and staff of dedicated and innovative attorneys to address the most pressing environmental challenges.

III. PROCEDURAL BACKGROUND

On August 18, 2010, Citizen Groups, along with several other organizations, submitted detailed comments regarding MDEQ's proposal to reissue the Title V Permit for the Plant.[5] The objections raised in this petition regarding a failure to assure compliance with applicable PSD and NNSR 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 DTE's failure to provide sufficient information to the Agency arose after the comment period was completed. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. §70.8(c)(1).[6]

MDEQ submitted the proposed Title V Permit to EPA on January 25, 2012. EPA's 45-day review period ended on March 9, 2012. EPA apparently did not object to the Permit, as MDEQ issued it in final form on March 9, 2012. This Petition to Object is timely filed within 60 days of the conclusion of EPA's review period and failure to raise objections.

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[1] *In re DTE Energy*, Notice and Finding of Violation, EPA-5-09-MI-10 at 6, ¶ 38 [hereinafter "NOV"] attached as Ex. A; MI-ROP-2810-2012 [hereinafter "Title V Permit"], at 14, attached as Ex. B.

[2] NOV at 6, ¶ 38; Title V Permit at 14.

[3] NOV at 6, ¶ 38; Title V Permit at 14.

[4] NOV at 7, ¶ 41.

[5] The Citizen Groups' comment letter [hereinafter "Comment Letter"], attached as Ex. C. Citizen Groups also submitted supplemental comments on January 7, 2011. Attached as Ex. D.

[6] Citizen Groups could not know that DTE would fail to submit, and MDEQ would fail to require, all of the necessary information until after the permitting process was complete. Under the applicable statute, these issues must be addressed on the merits because "it was impracticable to raise such objections" during the comments 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 must 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.[7] 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.

[7] *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. E.

B. New Source Review, Non-attainment New Source Review and the Prevention of Significant Deterioration.

PSD and NNSR are both 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. A modification that substantially increases the amount of emissions from a facility for a pollutant for which the area is in non-attainment triggers NNSR requirements, including the installation of the Lowest Achievable Emission Rate ("LAER"). 40 C.F.R. § 51 Appx S.[8]

The CAA defines "modification" as "any physical change in, or change in the method of operation of, a stationary source which increase 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. §111(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 and NNSR review and the corresponding application of BACT/LAER are applicable requirements for which MDEQ must definitively determine the Plant's compliance status.

The CAA mandates that each Title V permit much 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

[8] River Rouge is located within Wayne County, which at the time of the permit application process was in attainment for SO_2 and NO_X, and in non-attainment for $PM_{2.5}$. Therefore, both PSD and NNSR regulations potentially are applicable to the Plant.

"*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 and NNSR review and to apply a BACT/LAER analysis is an applicable requirement for which the Plant's compliance status must be determined.

V. GROUNDS FOR OBJECTION

A. MDEQ erroneously issued the permit without requiring a complete application after DTE failed to provide all of the necessary information.

EPA must object to MDEQ's issuance of the Title V Permit renewal because the Agency lacked information needed to determine the Plant's compliance status.

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 generally* 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 taken final action or 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."[9]

[9] *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. F.

2. *DTE did not provide, and MDEQ did not receive, all information sufficient to evaluate the application and determine all applicable requirements, prior to issuing the Title V Permit.*

The Administrator should similarly grant this petition to object to the Title V Permit because the permit record does not contain "all sufficient information to evaluate the source and determine all applicable requirements."[10] Indeed, EPA already recognized this violation in a Notice of Violation ("NOV") that it issued to DTE on July 24, 2009, determining that

> Since August 15, 1996, DTE has failed and/or continues to fail to submit timely and complete Title V permit applications for the . . . River Rouge . . . power plant[] with information pertaining to the modifications identified in Appendices A through E and with information concerning all applicable requirements, including, but not limited to, the requirement to apply, install and operate BACT or LAER for NO_x, SO_2, CO, PM, PM_{10} and/or $PM_{2.5}$ at the plants and also failed to supplement or correct the Title V permit applications for these plants in violation of Sections 502, 503 and 504 of the Act, 42 U.S.C. §§ 7661a, 7661b and 7661c; the regulations at 40 C.F.R. Part 70, including, but not limited to, 40 C.F.R. §§ 70.1(b), 70.5(a), (b) and (c), 70.6 and 70.7(b), and Michigan's Renewable Operating Permit Program, R 336.[11]

The justifications which MDEQ offered in defense of its decision to ignore EPA's holding are not compelling.

First, MDEQ concluded "the ROP renewal application submitted by Detroit Edison River Rouge is deficient only if NSR violations exist, and as stated above, the [Agency] has not found sufficient evidence in either the comments, Detroit Edison's submittals, or in EPA's NOV/FOV to arrive at such a determination."[12] This argument amounts to the suggestion that DTE does not need to submit information pertaining to modifications unless MDEQ already has information about these modifications. Such circular logic is nonsensical, particularly given that DTE is the entity in control and possession of the necessary information. Moreover, even assuming that MDEQ's reasoning is correct, its standard for triggering the requirement to provide additional information was satisfied here. As described in greater detail below, both EPA and Citizen Groups provided MDEQ with extensive evidence of NSR violations. *See infra*, p 8-17.

MDEQ's second justification is similarly unpersuasive. In order to argue that requiring DTE to submit additional information would create an undue administrative burden, the Agency constructed a straw man argument, stating that "[r]ead literally, AQD surmises the commenter asserts an ROP application is only complete when an NSR analysis is presented within for each physical change and change in the method of operation at all Detroit Edison's facilities."[13] This statement stretches Citizen Group's argument beyond recognition. Citizen Groups are not suggesting that DTE must submit an NSR analysis every time it changes a light bulb at the Plant.

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[10] *Id.*

[11] NOV, at 12 ¶ 61.

[12] MDEQ, Renewable Operating Permit Staff Report and Staff Report Addendum, MI-ROP-B2810-2012, at 38 [hereinafter "Staff Report"], attached as Ex. G.

[13] Staff Report at 38.

Multi-million dollar projects that take the Plant offline for several months, however, are not light bulbs. The regulations require that "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). In a White Paper relied upon by MDEQ, the EPA explained, "[i]nformation for applicability purposes need only be detailed enough to resolve any open questions about which requirements apply."[14] Where, as here, there is evidence of several expensive, extensive projects, significant open questions regarding the applicability of PSD and NSR requirements require the submission of additional information. Because DTE did not provide, and MDEQ did not require, this information EPA should object to the issuance of the Title V Permit and urge MDEQ to seek the necessary information.

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

In the present permit proceeding, DTE 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 in the Title V Permit. EPA should therefore object to the issuance of the Title V Permit because there is strong evidence, including findings by both EPA *and* MDEQ, that the River Rouge Plant improperly avoided NSR requirements when the Plant was modified. Such modification triggers PSD or NNSR requirements, including the establishment of emission limits reflecting BACT and/or LAER, which the River Rouge Plant has not satisfied. As a result, EPA should object to the Title V Permit and direct the Agency to include an enforceable schedule of compliance for PSD and/or NNSR permitting to occur as well as emission and operational standards equivalent to a new facility in this source category.

1. EPA and MDEQ both have already found that DTE is violating PSD, NSR and Title V requirements at the Plant.

EPA's July 24, 2009 NOV concluded that DTE had undertaken projects constituting major modifications at River Rouge Units 2 and 3.[15] The un-redacted copy of the NOV sent to MDEQ revealed that the specific projects of concern included the September 2005-November 2005 outage at Unit 3.[16] EPA further found that such projects led to significant net emissions increases of SO_2, NO_X and/or PM.[17] Based on these determinations, the NOV concluded that the River Rouge Plant is "in violation of" PSD and NNSR requirements of the Clean Air Act.[18]

At least one court has, correctly, found that the EPA's issuance of a NOV to a facility is alone sufficient evidence to demonstrate that the Agency should object to the Title V Permit for the facility. *N.Y. Pub. Interest Research Group v. Johnson*, 427 F.3d 172, 180 (2nd Cir. 2005) [hereinafter "*NYPIRG II*"]. Such an outcome is particularly appropriate here, where MDEQ

[14] 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. H.
[15] NOV at 7, 11, ¶¶ 44, 53.
[16] Staff Report at 36.
[17] NOV at 11, ¶52.
[18] NOV at 11, ¶¶ 55-56.

twice relied on EPA's NOV to conclude that, "[b]ased on EPA's review, AQD considers Detroit Edison River Rouge Unit 3 not in compliance with major NSR regulations."[19] Other courts have held that an NOV is one "relevant factor" in determining whether a Title V Permit is not in compliance. *See, e.g., Sierra Club I,* 557 F.3d at 406-07; *Sierra Club II,* 541 F.3d at 1267. Other relevant factors include:

> (1) The kind and quality of information underlying the agency's original finding that a prior violation occurred, (2) the information the petitioner puts forward in addition to the agency's enforcement actions, (3) the types of factual and legal issues that remain in dispute, (4) the amount of time that has lapsed between the original decision and the current one, and (5) the likelihood that a pending enforcement case could resolve some of these issues.

Sierra Club I, 557 F.3d at 406-07. Consequently, the NOV issued here is either sufficient on its own to demonstrate that the Title V Permit is out of compliance with the CAA, *NYPIRG II,* 427 F.3d at 180, or, at a minimum, is relevant evidence that it is out of compliance with the CAA. *Sierra Club I,* 557 F.3d at 406-07; *Sierra Club II,* 541 F.3d at 1267.

MDEQ's attempt to dismiss the import of the NOV is unpersuasive. Facing the explicit statement from both EPA and MDEQ that the 2005 major modification of Unit 3 violated PSD and NNSR requirements, the Agency is now limited to the argument that "the NOV/FOV does not delineate which of the three pollutants EPA concludes have seen net emissions increases at River Rouge Unit 2 and River Rouge Unit 3, and EPA has chosen to withhold from the NOV/FOV the emissions information, methods of analysis, and calculations to support these determinations."[20] There is no evidence on the record that MDEQ ever contacted EPA to request this additional information. More important, as will be described in detail below, even without EPA's analysis, MDEQ had access to information that revealed projected and/or actual emission increases of SO_2 and NO_X at Units 2 and 3 that would trigger PSD and NNSR requirements. Coupling the NOV with this additional information demonstrates that the River Rouge Plant is out of compliance with the CAA and that any Title V permit must include a schedule for bringing it into compliance.

2. The available evidence demonstrates that DTE has undertaken major modifications at the Plant.

Beyond the NOV, MDEQ had access to a wealth of additional evidence that DTE made significant physical changes to its River Rouge Power Plant that led to projected and/or actual emission increases of SO_2 and NO_X to trigger PSD and NNSR requirements. 40 C.F.R. § 52.21(b)(i); 40 C.F.R. Part 51, Appendix S. In particular, DTE described numerous projects in which the company replaced and/or upgraded integral components of the River Rouge Power Plant in a series of filings with the Michigan Public Service Commission ("PSC") and MDEQ. None of these projects ever obtained an NSR permit or underwent a BACT or LAER analysis. There is strong evidence that DTE thus modified this aging coal-fired power plant in order to

[19] Memo from Jeff Korniski, Air Quality Division of MDEQ, Review of 2009 NSR Emission Reports for Units 2 and 3 (Mar. 11, 2010) at 2, attached as Ex. I, ; Memo from Jeff Korniski, Air Quality Division of MDEQ, Review of 2008 NSR Emission Reports for Units 2 and 3 (Sept. 25, 2009) at 2, attached as Ex. J.
[20] Staff Report at 36.

extend its life and increase its availability without installing the modern pollution controls that are required if the plant is to continue legally operating.

(i) DTE made significant physical changes to Units 2 and 3 of its River Rouge Plant.

In a September 9, 2005 letter ("Unit 3 Outage Letter"), DTE informed MDEQ that it was undertaking an eleven-week long outage at Unit 3 of the Plant between September and November 2005 in order to, among other things, replace furnace bullnose tubes, reheater tube bundles, twelve coal mill feeders and two turbine blades on the lower pressure turbine.[21] MDEQ received the Unit 3 Outage Letter, which erroneously asserted that these modifications did not trigger PSD or NNSR requirements, only three days before the project began. According to an article from the newsletter of the Building Trades Union that carried out much of the work on Unit 3, the project was a "$28 million outage to replace some aging components" that involved 280 construction workers and 78,000 person-hours of work.[22] In a June 2006 filing with the PSC, DTE stated that it was had spent $3.9 million to replace the reheater tube bundle and $3.7 million to replace the boiler bullnose for Unit 3 in 2005.[23]

In a March 15, 2006 letter ("Unit 2 Outage Letter"), DTE announced that it was commencing a ten-week long outage at Unit 2 of the Plant between March and May 2006 in order to, among other things, replace condenser tubes in the boiler, the damaged High Pressure turbine rotor and two turbine blades on the Low Pressure turbine.[24] MDEQ received the Unit 2 Outage Letter, which erroneously asserted that the modifications did not trigger PSD or NNSR requirements, the day the project began. DTE's filings with the PSC reported that the replacement of the high pressure turbine rotor had cost $5 million and had increased the net demonstrated operating capability of Unit 2 by 13MW.[25] In addition, a company named Olin Brass reported having sold 593,000 feet of Alloy 194 condenser tubes to DTE for the River Rouge Power Plant in April 2006.[26]

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[21] Letter from Wayne A. Rugenstein, Detroit Edison, to Lynn Fiedler, MDEQ, Re: 2005 Planned Outage Notification – River Rouge Power Plant (B2810), Unit 3 (Sept 9, 2005) at 1 and Attachment A [hereinafter "Unit 3 Outage Letter"], attached as Ex. K.

[22] Mary Mulcahy, 'A' For effort on DTE-Rouge Powerhouse Outage, The Building Tradesman (Dec. 9 2005), attached as Ex. L.

[23] *In re Commission's Own Motion Order the Detroit Edison Company to Show Cause Why Its Retail Rates For the Sale and Distribution of Electric Energy Should Not Be Decreased*, Mich. PSC Case No. U-14838, Testimony of Guy N. Harris (June 2005) [hereinafter "U-14838, Harris"], at 28, attached as Ex. M.

[24] Letter from Wayne A. Rugenstein, Detroit Edison, to Lynne Fiedler, MDEQ, Re: 2006 Planned Outage Notification – River Rouge Power Plant (B2810), Unit 2 (Mar. 15 2006) at 1 and Attachment A, [hereinafter "Unit 2 Outage Letter"], attached as Ex. N.

[25] *In re Application of Detroit Edison Company to Increase Rates,* Mich. PSC Case No. U-15244, Testimony of David B. Harwood, Detroit Edison's Director of Fossil Generation (June 2008) [hereinafter "U-15244, Harwood"] at 24, attached as Ex. O; *In re Application of Detroit Edison Company for Reconciliation of its Power Supply Cost Recovery Plan for the 12-month Period Ending December 31, 2006,* Mich. PSC Case No. U-14702-R, Testimony of James H. Byron, Detroit Edison's Manager of Generation Optimization-Power Supply Planning (Mar. 31, 2007) [hereinafter "U-14702-R, Byron"], at 9-10, attached as Ex. P.

[26] Olin Brass Co., *Technical Letter – Alloy 194 – Superior Performance and Lower Cost Versus Admiralty Brass (Alloy 443)* (Jan. 23, 2008), at 5, attached as Ex. Q.

Finally, in a 2009 PSC filing, DTE reported that it was planning to spend $2.7 million for radiant superheater tubes on Unit 3, and that it was also retubing the main condenser at Unit 3.[27] The ensuing outage lasted over three months between November 2010 and February 2011, which was the most substantial outage by duration since September 2005.[28] While Citizen Groups do not have access to all of the information surrounding this project, we believe that this was a significant capital investment that likely triggered the need for PSD and/or NNSR permitting at the Plant.

(ii) DTE's capital expenditures at the River Rouge Power Plant were undertaken to extend the life, increase the availability and reduce forced outages of the Plant, and in fact did so.

The projects described above were designed to extend the life and increase the availability of the Plant. These projects were carried out or planned pursuant to one of DTE's two primary programs for making capital expenditures on its coal-fired power plants. First is the Company's "Plant Improvement Project" capital budget, which is "designed to prioritize projects in order to achieve the best combination of reliability and generation economics."[29] Second is the "Boiler Tube Failure Reduction" team, which was created in 2003 in order to "identify the most critical needs for investments in our boilers."[30] These capital expenditures are quite similar to the projects that a leading industry engineering firm, Babcock & Wilcox, has described as being necessary to extend the life of an existing coal plant well beyond the expected useful life.[31] DTE itself has recognized that it "has experienced, and continues to experience, end of design life for many major components that require ongoing O&M and capital investments"[32] and that its Boiler Tube Failure Reduction program is part of "recognizing that most of our equipment is reaching end of design life."[33]

DTE's PSC filings provide strong evidence that the capital expenditures identified above achieved their goal to increase the availability and reduce the forced outages at the River Rouge Coal Plant. For example, DTE reported a 13MW capacity increase in the net demonstrated operating capability of Unit 2 due to a $5 million project in 2006 to replace the high pressure turbine rotor at that unit.[34] Similarly, the Company reported that its Boiler Tube Failure Reduction team's efforts have led to boiler waterwall and steam tubing replacements that "have and will continue to result in reduced forced outage frequencies across the fleet. The combination of reduced outage duration and frequency are expected to save $9 million in 2007

[27] *In re Application of Detroit Edison Company to Increase Rates*, Mich. PSC Case No. U-15768, Testimony of Paul Fessler, Detroit Edison's Vice Presidents of Fossil Generation [hereinafter "U-15768, Fessler] at 26-27, attached as Ex. R.
[28] Staff Report at 34.
[29] *In re Application of Detroit Edison Company to Increase Rates*, Mich. PSC Case No. U-13808, Testimony of Nazoor A. Baig, Detroit Edison's Director of Fossil Generation (June 2003) [hereinafter "U-13808, Baig"], at 20, attached as Ex. S.
[30] U-14838, Harris at 14- 15.
[31] Babcock & Wilcox, Steam (40th Ed.), at Ch. 46, attached as Ex. T.
[32] U-15244, Harwood at 11.
[33] U-14838, Harris at 14-14
[34] U-15244, Harwood at 24; U-14702-R, Byron at 9-10.

and as much as $26 million annually in the 2008-2012 time period,"[35] presumably due to an increase in the company's ability to run the modified plants.

In fact, overall availability of the River Rouge Plant increased significantly during the time when these capital expenditures were being made. For example, in 2004 the River Rouge Plant had an availability of 78.21% and was projected to increase to an average of 82.33% in 2005 through 2008.[36] In 2006, the availability for River Rouge was 82.1%, and was projected to be 90.2% in 2009, 87.3% in 2011, and 87.2% in 2012.[37]

Similarly, DTE projected and experienced reductions in the Random Outage Rate ("ROR"), which is the percentage of generation lost through derated operation and non-periodic outages at its coal-fired facilities due to its capital expenditures. The ROR for DTE's coal-fired fleet was projected to decline from an average of 11.85% in 2000 through 2002 and 12.48% in 2003 to an average of 10.29% from 2004 through 2008 and 9.45% in 2008.[38] This predicted improvement in ROR was "a direct result of the capital improvements, planned maintenance activities, and increased predictive and preventive maintenance programs" at Detroit Edison's coal-fired power plants.[39] By 2007, the random outage factor was 7.75%,[40] and between July 2007 and June 2008, the figure was 8.1%.[41]

(iii) DTE's significant modifications at Units 2 & 3 of the River Rouge Plant were not Routine Maintenance, Repair or Replacement.

MDEQ's Staff Report assumed without deciding that the aforementioned projects are not Routine Maintenance, Repair or Replacement ("RMRR"). [42] As set forth in detail in the Comment Letter, these projects definitively do not constitute RMRR.[43]

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 virtually any significant alteration to an existing plant and to interpret the exclusion related to routine maintenance, repair and replacement narrowly."[44] 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.

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[35] U-15244, Harwood at 52.
[36] U-13808 Baig Testimony Exhibits, at Exhibit A-16, Schedule F6-1, attached as Ex. U.
[37] U-15244 Exhibits, Harwood Exhibits, at Exhibit A-16, Schedule F6-1, attached as Ex. V.
[38] U-13808, Baig at 50.
[39] U-13808, Baig at 50.
[40] *In re Application of Detroit Edison Company for Reconciliation of its Power Supply Cost Recovery Plan for the 12-Month Period Ending December 31, 2007*, Mich. PSC Case No. U-15002-R, Testimony of Angela P. Wojtowicz (Jan. 2007), at 8, attached as Ex. W.
[41] U-15768, Fessler at 12.
[42] Staff Report at 19.
[43] Comment Letter at 7-12.
[44] Letter from Doug Cole, EPA, to Alan Newman, Washington Dept. of Ecology (Nov. 5, 2001) (Boise Cascade Decision), attached as Ex. X.

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[45]), 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 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 Units 2 and 3 of the River Rouge Power 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,* 61 F. Supp. 2d at 933-935; *Ohio Edison*, 276 F. Supp. 2d at 834, 840-849, 858-862. Each of these projects was a multi-million dollar endeavor

[45] 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.

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, DTE cannot validly demonstrate that such projects constituted mere RMRR.

(iv) DTE's projected-actual emissions for Unit 3 should have triggered PSD requirements.

The CAA provides two alternative 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-potential test, emissions from the Plant before each project occurred are compared to the potential emissions from the plant after the project. An applicant can only use the more favorable actual-to-projected-actual test if the facility has satisfied pre- and post-project emissions reporting requirements. 40 C.F.R. § 52.21(b)(21)(v). Under the actual-to-projected-actual, emissions from the Plant before each project occurred are compared to the actual emissions projected for after the project occurred. 40 C.F.R. 52.21(b)(41)(i). In determining the projected actual emissions, the facility may "exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions under paragraph (b)(48) of this section and that are also unrelated to the particular project, including any increased utilization due to product demand growth." 40 C.F.R. § 52.21(b)(41)(ii)(c).

DTE's selected baseline for the Unit 3 2005 project was January 2001-December 2002.[46] During this baseline, River Rouge annually emitted 7,598 tons of SO_2, 3,076 tons of NO_X and 144 tons of $PM_{2.5}$. DTE's projected-actual emissions predicted that, post-modification, Unit 3 would emit 251 tons per year more SO_2 and 102 tons per year more NO_X than this baseline.[47] These emission increases are well in excess of the emissions increase thresholds for triggering PSD and NNSR requirements. 40 C.F.R. §§ 52.21(b)(3)(i) and (b)(23)(i). DTE only avoided these requirements because it excluded all of these increases by explaining "we then excluded from the PROMOD projections '*any portion of the emissions increase that could have been accommodated . . . and is unrelated to the change*," including increases due to demand and market conditions or fuel quality per 40 C.F.R. 51.21(b)(41)(ii)(c)."[48]

DTE provided no support for its claim that that these significant projected emissions increases are due to factors unrelated to the modifications. Indeed, DTE did not even identify which factors (demand growth or otherwise) allegedly should apply here. Instead, DTE merely parroted back the regulatory language. This baseless claim cannot be used to evade PSD and NSR requirements.

In response to the Comment Letter, MDEQ alleged that the holding in *United States v. DTE Energy Co., et al*, 2-10-cv-13101-BAF-RSW (E.D. Mich. Aug 23, 2011) dictates that the initial notification submitted in this case met the minimal requirements of the NSR regulations.[49]

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[46] Unit 3 Outage Letter at Table 1.
[47] Unit 3 Outage Letter at Table 1.
[48] Unit 3 Outage Letter at 2 (emphasis in original).
[49] Staff Report at 23-25.

This erroneous conclusion was based on both a misinterpretation of *U.S. v. DTE* and a misunderstanding of the differences between the two cases.

First, although *U.S. v. DTE* referenced the content of the notification letter at issue in that case, its holding turned on an issue of waiver. *U.S. v DTE*, at 12. Prior to commencing its lawsuit in the Eastern District of Michigan, the Plaintiff United States sent DTE a Notice of Violation. *Id.* The District Court concluded "Plaintiff did not allege any insufficiency of the Notice Letter in its Notice of Violation" and "[a]s the Court ruled in its Order Granting Defendants' Motion for Protective Order, Plaintiff is barred from pursuing claims not specified in its Notice of Violation." *Id.* In contrast, Citizen Groups raised the lack of sufficiency of the notification letter in their Comment Letter.[50]

Second, even if *U.S. v. DTE*'s discussion regarding the content of the notification letter is not *dicta*, the fact pattern is dispositively different. MDEQ stated that it could find "no substantive distinction between the timing and content of the initial notification letter at issue in the *U.S. v. DTE* case and the initial notification letter submitted for the September 2005 outage at Detroit Edison River Rouge Unit 3."[51] There is, however, a critical distinction in the amount of evidence that contradicts DTE's hollow assertions.

Here, MDEQ had access to the NOV, which explicitly cited the 2005 Project at Unit 3 as violating the CAA. The Agency also had access to the wealth of information provided by Citizen Groups which strongly suggested that the increases could not be due to demand growth. For example, in the exact same month that Detroit Edison submitted the Unit 3 Planned Outage Notification, the company made a filing with the Michigan PSC in which it projected that its annual electric sales, system output, and coincident peak demand would be lower in 2006 than the average for 2001 and 2002. In particular, Detroit Edison's electric sales in 2001 and 2002 averaged 50,421.5 million kWh per year and were projected to be only 48,401 million kWh in 2006.[52] The company's system output averaged 54,094 million kWh per year in 2001 and 2002, and was projected to be only 52,062 million kWh per year in 2006.[53] And peak demand for Detroit Edison averaged 11,550.5 million kWh per year in 2001 and 2002, and was projected to be 11,400 million kWh in 2006.[54]

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[50] Comment Letter at 26.

[51] Staff Report at 25.

[52] *In re Application of Detroit Edison Company for Authority to Implement a Power Supply Cost Recovery Plan in its Rate Schedules for 2006 Metered Jurisdictional Sales of Electricity*, Mich. PSC Case. No. U-14702, Testimony of Aldo F. Colandrea (Sept. 30, 2005) at Ex. A-14 [hereinafter "U-14702, Colandrea"], attached as Ex. Y.

[53] *Id.*

[54] *Id.* In the staff comment, MDEQ appeared to reject this evidence entirely, explaining "the commenter neglects to explain the lockstep connection between Detroit Edison's system-wide output and the output at Unit 3 which allows the comment to draw a conclusion that a decrease in the system-wide demand inevitably results in the same for River Rouge Unit 3. In failing to find any factual basis for the claim within the comment, the AQD is left to speculate the commenter either accepts, as an article of faith, that every individual unit within the fleet must mimic the overall system or regards, for some reason, River Rouge Unit 3 to be the bellwether for the entire fleet." Staff Report at 26. This argument is tenuous at best, particularly given the evidence Citizen Groups presented indicating that the modification at Unit 3 would increases availability and reduce outages at the Unit. *See supra* at 11-12. This suggests that the modification, and not demand growth, caused the emissions increase. At the very least, this evidence should have prompted MDEQ to ask DTE for additional evidence regarding unit-specific demand. Instead, MDEQ chose to accept DTE's unsupported assertions "as an article of faith." In the face of such strong evidence to the contrary, this decision was unlawful.

MDEQ's adoption of DTE's unsupported assertions despite the weight of contradicting evidence creates a nearly impossible standard. As the Agency described in its Staff Report, because MDEQ "lack[ed] evidence to dispute the claim" in the Unit 3 Outage Letter that the projected emissions increases were unrelated to the modification, it "accepted Detroit Edison's position" on its face.[55] Even assuming that this would be a lawful approach in a situation where a company's claims are unsupported *and* unchallenged, it is untenable where, as here, Citizen Groups have provided strong evidence to contradict DTE's claims. To support their respective positions, DTE provided a single sentence that quoted the regulatory language without providing any specific information, whereas Citizen Groups provided pages of data and analysis, including explicit statements from DTE and findings from EPA. MDEQ's decision to adopt the former notwithstanding the latter turns any reasonable understanding of burden of proof on its head and undermines the goals of PSD and NNSR review. The EPA should therefore object to the issuance of the Title V Permit.

(v) DTE's post-modification actual emissions for Unit 2 should have triggered PSD and NNSR requirements.

Several years after the 2006 Project at Unit 2 was completed, DTE changed the baseline in its post-project SO_2 emission reports to March 2002-February 2004 for SO_2.[56] Assuming, arguendo, that this post-construction revision was appropriate,[57] Unit 2's post-construction reports are still flawed because the new baseline was not "representative of normal source operations" in comparison to the post-modification years. 40 C.F.R. 52.21(b)(48)(i). Specifically, the sulfur content of the coal used during the March 2002-February 2004 baseline was higher than it was in the post-modification years,[58] which resulted in post-modification SO_2 emissions appearing to be lower than pre-modification SO_2 emissions.[59]

Unless the modification itself led to a reduction in sulfur content, the use of different data for the baseline years and the post-modification years is improper for two reasons. First, it means that the baseline years are no longer "representative of normal source operation" in comparison to the post-modification years. 40 C.F.R. § 52.21(b)(48)(i). Second, allowing the

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[55] Staff Report at 26.

[56] Staff Report at 21.

[57] EPA has already suggested that such an amendment may be unlawful, explaining in an email to MDEQ "please note that it is inappropriate to revised the past actual baseline after the commencement of construction, because applicability is to be determined prior to commencing construction. 40 C.F.R. 52.21(a)(2)(iv)(b) requires the process for calculating an increase to occur 'before beginning actual construction.' While River Rouge could have used the higher emitting years initially, for whatever reason, they chose not to prior to commencing construction. Whether or not River Rouge can change the baseline – as a post construction matter – would be specific to the enforcement case, which we must defer to." Email from Beth Valenziano, EPA Region 5, to Mina Clemorew, MDEQ et al, Re: DTE River Rouge's Pre-Proposed ROP, September 8, 2011, [hereinafter "EPA Email"], attached as Ex. Z.

[58] *Compare* 2009 NSR Emissions Report for River Rouge Power Plant [hereinafter "2009 NSR Emissions Report"], at pg 5, attached as Ex AA *with* 2008 NSR Emissions Report for River Rouge Plant [hereinafter "2008 NSR Emissions Report"], at pg 5, attached as Ex BB *and* 2007 NSR Emissions Report for River Rouge Plant [hereinafter "2007 NSR Emissions Report"], at pg 4, attached as Ex CC. Because SO_2 is uncontrolled at the River Rouge Plant, the lb/mmBtu of SO_2 is essentially an indicator of the sulfur content of the coal. The SO_2 lb/mmBtu in the baseline year was 1. In contrast, the SO_2 lb/mmBtu in 2007, 2008 and 2009 was .8, .84 and .85, respectively.

[59] *Compare* 2009 NSR Emissions Report at 5 *with* 2008 NSR Emissions Report at 5 *and* 2007 NSR Emissions Report. Unit 2 emitted 8,431 tons of SO2 in its baseline year, 7,481 tons of SO_2 in 2009, 7,854 tons of SO_2 in 2008 and 7,181 tons of SO2 in 2007.

use of different sulfur contents for the baseline versus the post-modification years would create a loophole for utilities like DTE, as they could avoid an NSR triggering emissions increase by an unenforceable decision to use lower sulfur coal for five years rather than undertaking the level of BACT controls required by the CAA. EPA should therefore object to the Permit and instruct MDEQ that it must ensure consistency in the data it uses when conducting its calculations.[60]

C. 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).

The Title V Permit requires DTE to test PM emissions once every three calendar years.[61] 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. EPA has already asked MDEQ to explain why it had chosen 36 months for stack test frequency rather than another time period, and why it had chosen stack testing over other common monitoring approaches.[62] In response to the former question, MDEQ only stated "the most recent PM tests conducted by the facility have measured emissions at less than one-fifth the emission limit, and

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[60] MDEQ discussion of this issue in its Staff Report is inapposite, as the Agency misconstrued Citizen Groups' analyses and then argued against this misunderstanding. Staff Report at 31-32. MDEQ described Citizen Groups' position as arguing that the baseline emissions should be adjusted downward to exclude any non-compliant emissions that occurred during the baseline period pursuant to 40 C.F.R. § 52.21(b)(48)(i)(b), and then went on to argue that Unit 2 was in compliance with any legally enforceable emission limitations throughout this baseline period. *Id.* Irrespective of whether Unit 2 was, indeed, *compliant* throughout the baseline period, this does not address Citizen Groups' argument that this baseline was improper under 40 C.F.R. § 52.21(b)(48)(i) because it was not *representative* of normal source operations post-modification due to the disparity in sulfur content.

[61] Title V Permit at pg 25, Condition V(1).

[62] EPA Email.

typically around one-tenth the limit," and therefore the Agency "does not agree [that] annual emissions tests will substantially improve stack testing as a responsive compliance measure for the PM emission limit."[63] Regarding the latter question, MDEQ baldly stated that it "concludes the installation of PM CEMS is redundant and therefore unnecessary."[64] These explanations are neither supported nor sufficient.

With respect to this 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."[65] The Agency's Staff Report did not rectify this error. The Administrator should therefore grant this Petition to Object and instruct MDEQ to require DTE to install PM CEMs at the River Rouge Power Plant to ensure continuous compliance with the PM limit or, at a minimum, require stacks test to occur at least once per year.

VI. CONCLUSION

For the foregoing reasons, EPA must object to the River Rouge Title V Operating Permit, along with instructions that (1) DTE must provide all necessary information to MDEQ, (2) MDEQ must include a schedule for DTE to come into compliance as part of any Title V Permit for the Plant and (3) MDEQ must require DTE to install PM CEMs at the River Rouge 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,

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DATED: May 7, 2012

Attorneys for Natural Resources Defense Council

[63] Staff Report at 40.
[64] Staff Report at 41.
[65] EPA Email.

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Detroit Edison Company's River Rouge Power Plant,
Permit No. MI-ROP-B2810-2012

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 GREAT LAKES ENVIRONMENTAL LAW CENTER TO OBJECT TO ISSUANCE OF A STATE TITLE V OPERATING PERMIT

PROOF OF SERVICE

On May 7, 2012, I filed the above referenced Petition, along with the corresponding CD of Exhibits, with Administrator Lisa Jackson, and sent by Federal Express overnight a copy of the above referenced Petition, along with the corresponding CD of Exhibits, to:

Vinay Bhakkad, River Rouge Plant Manager
DTE Energy
1 Belanger Park Drive
River Rouge, MI 48218

Susan Hedman, Regional Administrator
U.S. EPA Region V
77 W. Jackson Blvd.
Chicago, IL 60604

Jeff Korniski, Air Quality Specialist
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Detroit Field Office
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Detroit, MI 48202

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

DATED: May 7, 2012

Jessie J. Rossman