BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

Source I.D. 405170920

Permit No. 405170920-P10

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

Petition No. _____

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

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

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

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

This petition is filed within sixty days of the end of EPA's 45-day review period, as required by Clean Air Act ("CAA") § 505(b)(2). The Administrator must grant or deny this petition within sixty days after it is filed. If the Administrator determines that the Permit does not comply with the requirements of the CAA, she must object to issuance of the permit. 42 U.S.C. § 7661d(b); 40 C.F.R. § 70.8(c)(1).

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

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

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

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

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

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

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

Title V Permit Review Guidelines: Practical Enforceability at III-57 (September 9, 1999) (emphasis added) (Exhibit D-1).[1] U.S. EPA has also noted that for a permit to be enforceable, "*it must contain emissions limits with a reasonable averaging period* (usually not exceeding three hours), a method for determining compliance on a regular basis (annual stack tests are the minimum here) and adequate record keeping." Letter from Thomas W. Rarick, Chief, Air Operations Branch, Air Mgmt. Div., U.S. Envtl. Prot. Agency, Region IX to James D. Boyd, Air Pollution Control Officer, Cal. Air Res. Bd. (Dec. 17, 1985) (emphasis added) (Exhibit D-2).

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

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

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

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

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

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

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

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

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

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

consistent with the language included in permits issued by other states, including Indiana, Illinois, Minnesota, Michigan and Ohio, all states within U.S. EPA Region 5.[3]

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

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

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

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

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

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

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

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

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

II. WDNR'S RESPONSE TO COMMENTS WAS DEFICIENT

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

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

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

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

Ex. C at 1.

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

CONCLUSION

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

Dated this 29th day of July, 2011.

FOLEY & LARDNER LLP

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

Attorneys for Wisconsin Public Service Corporation

CERTIFICATE OF SERVICE

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

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

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

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

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

Theresa A Graziano
Theresa A. Graziano