

1 There is a staging area, which is basically
2 trucks turn around in that area when they're
3 delivering things. So there is limited space
4 there.

5 These utilities are less than a
6 mile away. In terms of thinking about the
7 fuel supply in this case, we have an amount
8 of wood up there. It can be gotten from a
9 lot of locations. It's going to have to come
10 in to the plant from a lot of locations to
11 supply a 10 megawatt plant.

12 The coal, on the other hand, needs
13 to come from nearby sources in the wintertime
14 because of the weather. One of the things
15 that's not in the record, but the fact of the
16 matter is that the utilities get their fuel
17 by barge. That barge will stop running in
18 November, so they've got to stop and
19 stockpile for the wintertime.

20 The university has been greatly
21 accommodated by these utilities. In fact, if
22 they didn't have this accommodation -- and

1 someone mentioned the Prairie State case --
2 this plant would not be built without that
3 accommodation from those two utilities in
4 this case. Because you simply can't run the
5 risk of not having fuel in a location like
6 that.

7 JUDGE SHEEHAN: It was said certain of
8 the facts you just provided us are not in the
9 record. If it's not in the record, what are we
10 supposed to do with that? It should be in the
11 record. If it's not, how can we consider it?

12 MR. FINTO: I think it is in the
13 record to a certain extent, and that is they
14 talk about the harsh weather and they explain
15 the fact that deliveries are difficult in the
16 wintertime, that it will be very difficult for
17 the wood to come in. That's why we have the
18 backup coal --

19 JUDGE SHEEHAN: But why isn't it
20 difficult for the coal to come in?

21 MR. FINTO: I think it's -- one of the
22 points I just mentioned is the fact that the

1 utilities are nearby. They're in Marquette.

2 JUDGE SHEEHAN: They weren't told
3 that. The record shows nothing to that effect.

4 MR. FINTO: I understand. I
5 understand. But I'm just saying if that is part
6 of what the understanding is, if this is an
7 accommodation by these local utilities, they're
8 in the city itself --

9 JUDGE SHEEHAN: You make a number of
10 points in your brief on the redesign issue, that
11 there were would be transport difficulties,
12 stockpile difficulties, boiler feed
13 difficulties, none of which I saw were in the
14 record. But is there not some adjustment, as
15 Judge Posner put in the Sierra Club case, some
16 adjustment that could be made to deal with the
17 realities you say are out there on the ground to
18 get cleaner fuel?

19 MR. FINTO: I think the answer with
20 respect to bringing the wood waste, it is on the
21 record there were complaints about odor. They
22 didn't want stockpiles of wood everywhere. They

1 wanted it in silos in certain locations. So
2 that was an accommodation that was made. So
3 we've got certain limitations on just
4 stockpiling wood.

5 JUDGE SHEEHAN: Let me ask it this
6 way. What is your argument for what NMU did to
7 accommodate the Clean Air Act's mandate that
8 clean fuels be considered?

9 MR. FINTO: I think basically if you
10 look at what they have proposed here, it is a
11 very clean plant. They're talking about burning
12 a renewable fuel with wood, which everybody I
13 think has to agree is cleaner than coal. They
14 said this is our primary fuel. If you look at
15 the source obligation rules, they've got to
16 construct that plant and operate it in
17 accordance with their current application.

18 JUDGE SHEEHAN: But it's not the
19 primary fuel if you look at the permit, which
20 says 22 days in a month are allowed for coal.
21 So rhetorically, yes, it sounds great for wood,
22 but the facts don't seem to back that up when

1 push comes to shove.

2 MR. FINTO: I think what -- excuse me.
3 I, you know, think what happened, Your Honor, is
4 that if you're looking at the worst-case
5 scenario, what do we have to permit here? And
6 that's what they looked at. They said, look, if
7 we're going to burn wood, that's not going to be
8 the issue. When we burn coal, that's our worst
9 case, that's what we have to look at the
10 reasonably foreseeable workspace scenario, and
11 that's what we're permitting here. And that's
12 why it's based on burning coal.

13 Now, the preference of the
14 university, without a doubt, is to burn wood
15 whenever they can.

16 JUDGE SHEEHAN: Well, do you drive
17 down to the worst-case scenario, which could be
18 very dirty fuel, or do you drive up to BACT, the
19 best available? Which is it? It sounds like
20 there's a tension there.

21 MR. FINTO: I think that there is a
22 certain amount of tension when you're looking at

1 fuel flexibility in these cases. I think that
2 what we're looking at here is a situation where
3 this plant has complied with the PSD
4 regulations. It could burn -- the BACT analysis
5 indicates that this is -- the numbers from the
6 initial indication for BACT. The dispersion
7 model is done. It shows that the plant will not
8 cause or contribute to a violation of NAAQS. So
9 it does satisfy the requirements of the
10 lawmakers, too.

11 With respect to the fuels, another
12 comment was made about Prairie State. In
13 this case, they're sort of getting this
14 lifeline into this plant for the coal as a
15 backup from the usual utility. And it's
16 similar in Prairie State in the sense that
17 there was, in that case, a conveyor belt that
18 came from a mining plant offline into the
19 plant. And here what we have are two
20 locations in which the can get coal; they're
21 sort of at the mercy of these utilities and
22 having to supply what they have a lifeline

1 there -- that there are really no other
2 options.

3 Given the distance, this is within
4 a mile, and those are the only options that
5 they have.

6 JUDGE SHEEHAN: I think time has
7 expired, but you had rebuttal time, is that
8 right?

9 MR. FINTO: Correct.

10 JUDGE SHEEHAN: Mr. Bender?

11 MR. BENDER: Thank you, Your Honor.

12 In response to a number of new facts that were
13 raised here during argument today, Sierra Club
14 did not have the benefit of those facts or any
15 of these analysis that apparently was implicit
16 according to DEQ. If we had, we could have been
17 more specific even in our comments. We could
18 have addressed those issues more specifically.
19 But still, I think even with the facts, if all
20 those representations made today are true, I
21 still think that the permit analysis was
22 sufficient.

1 A number of things were identified
2 as not being possible. The two power plants
3 in town the only source of coal, you can't
4 truck it in from anywhere else, there's no
5 rail line, or a coal transfer point where it
6 can be taken off some other contractor. A
7 number of things, other possibilities, that
8 all should have been identified in step 1 of
9 the top-down BACT analysis. And if there was
10 a not possible or it's too expensive to truck
11 fuel a certain distance, all those things are
12 dealt with in a proper top-down BACT
13 analysis, either in technological feasibility
14 or a cost effectiveness or in one of the
15 later steps.

16 On the issue of increment analysis
17 and Presque Isle, DEQ suggested that Sierra
18 Club asked the Board to rewrite the
19 regulator. That's not the case. Asking that
20 the regulation be applied as it's currently
21 written. As it's currently written, it
22 states the following are not included in the

1 baseline concentration and effective
2 applicable maximum allowable increase.
3 Actual emissions as defined in B-21 of this
4 section from any major stationary source on
5 which construction commenced. It does not
6 say emissions from the construction of. It
7 doesn't say emissions from the modification
8 increases. It says actual emissions from the
9 source. Source is defined as the unit or the
10 boiler, the entire facility in 52(21)(b),
11 definition of --

12 JUDGE SHEEHAN: So what does that do
13 to the statement in the manual on page C-10, the
14 NSR manual, that emission increases that consume
15 increment are those occurring after the
16 baseline.

17 MR. BENDER: It's true for resource
18 baseline data. The increases that occur
19 afterwards at sources that don't fall within the
20 prior section, a major source baseline
21 provision. So for example, under
22 52.21(b)(13)(2)(b), in that section, increases

1 is discussed specifically. I don't know from
2 the NSR Manual if that was what was intended to
3 be referenced or not. I do know that the plain
4 language of the regulation makes the distinction
5 between major sources -- commence construction
6 after major source baseline data, where the
7 actual emissions consuming increment, and after
8 the minor source baseline date increases and
9 decreases effectively.

10 Regarding lower sulfur coal, simple
11 questions of whether coal at the lower sulfur
12 content, .45 and other coals, were available
13 as referenced in part of the review documents
14 that DEQ did. The answer is we don't know.
15 We don't know if those are available or not
16 available, because DEQ did not identify that
17 in step 1 and deal with it in a top-down BACT
18 analysis.

19 There are a number of potential
20 sources for other cleaner coals in the Upper
21 Peninsula. But instead of identifying them
22 and discussing whether or not those could be

1 used at Northern Michigan, DEQ just ignored
2 that and just assumed that one of two coals
3 was going to be burned.

4 JUDGE SHEEHAN: Did you point to any
5 of those other sources in your comments?

6 MR. BENDER: We didn't because we
7 don't have the information the DEQ has. It's
8 under the New Source review manual, it's DEQ --
9 it's actually the permit applicant's obligation
10 first, and then DEQ's obligation to do an
11 exhaustive search of potentially applicable
12 pollution-control options, which includes
13 cleaner fuel. That was not done.

14 JUDGE SHEEHAN: But I thought I heard
15 you to say you knew of other sources than the
16 two selected by NMU.

17 MR. BENDER: We know that there are
18 coal-burning facilities generally in Northern
19 Wisconsin, and we know that there are coal
20 terminals where, of course, taken off barges and
21 stockpiles. We don't know what the coal sulfur
22 content is or is not at any of those. And the

1 point is that it's the permit applicant and then
2 the permit authority's job to identify those.

3 I think DEQ has conceded here today
4 that it didn't do that. It just assumed. It
5 just assumed that coal for one of these two
6 power plants would be burned. And it assumed
7 that the coal would have the highest sulfur
8 content that either or those two plants is
9 authorized to burn.

10 There's also discussion on why
11 snowfall in Northern Michigan makes it
12 difficult to deliver wood, biomass fuel, but
13 it does not make it difficult or impossible
14 to deliver coal fuel. The record doesn't
15 indicate it. And in response to comments,
16 there was no indication -- in response to
17 comments was when DEQ identified the snowfall
18 as the problem, and actually identified
19 snowfall at two different months: April of
20 '07, April of '08 as months with a lot of
21 snowfall.

22 It did not identify where they were

1 getting biomass fuel from. They didn't
2 identify how far away it was, and it didn't
3 identify other storage possibilities in town,
4 parking lot, vacant lot, another industrial
5 facility that could handle or store that
6 biomass material. Again, it's something
7 that's not in the record. So step 1 top-down
8 BACT analysis was not completed as intended
9 in the NSR Manual.

10 There's also a discussion from DEQ
11 on how it is assured -- DEQ is assured that
12 SO2 control will be achieved at a constant
13 rate of emission, assuming 92 percent control
14 of SO2. This is the first time Sierra Club
15 had heard that it was assured because of the
16 NSPS standard. As I sit here today, that
17 doesn't sound like a correct interpretation
18 of NSPS for the permit to meet, but I don't
19 have that NSPS section memorized. So if the
20 Board decides to consider that argument,
21 Sierra Club respectfully requests to be able
22 to brief that small issue.

1 There's also -- DEQ made I think
2 the concerning remark that if it was asked
3 to, or a remand occurred to justify the
4 pre-construction monitoring that was done,
5 that DEQ would just write a letter to the
6 applicant saying the monitoring is fine. It
7 meets their criteria.

8 You know, from the distance of the
9 monitors compared to the PSD monitoring
10 guidelines that it can't meet the criteria.
11 The guidelines are clear on what's -- what
12 meets the location criteria to take the first
13 criteria. For example, we know, as we
14 discussed earlier today, as we addressed in
15 our brief, 10 kilometers giving DEQ and NMU
16 the benefit of the doubt and all the
17 assumptions in that, in the three
18 possibilities in the PSD monitoring -- giving
19 them the benefit of the doubt, 10 kilometers
20 is the distance.

21 There's no argument. There's no
22 justification made that the monitors can meet

1 that criteria.

2 And there was also a discussion on
3 how DEQ just knows -- knows what air quality
4 is like and knows that the monitors are
5 representative. There's no information to
6 support that. There's no monitoring data
7 that we could find for Marquette County,
8 Michigan at all.

9 There are other regional monitors
10 in Michigan which were not used. We don't
11 think those would meet the location criteria
12 either. But we don't know why monitors that
13 were used were used, and why the monitors
14 that were not used were not used. And so
15 even if the 10 kilometer did not apply, we
16 still don't know -- the public is left in the
17 dark as to why the monitoring data that was
18 used is representative of monitoring the
19 ambient air quality in the area that'll be
20 affected by the source.

21 And just in conclusion, there are a
22 number of procedural problems with this

1 permit. There are also some significant
2 issues, especially about clean fuel, that if
3 the applicant and DEQ's interpretations are
4 taken and accepted -- have significant
5 implications nationally for other permitting
6 agencies considering clean fuels. Thank you.

7 JUDGE REICH: I have one question. If
8 I understood Mr. Gordon correctly, he indicated
9 that the question of whether MDEQ should have at
10 least considered establishing different limits
11 for the parts of the year where there was no
12 issue about availability of wood due to snows,
13 that issue was not one raised in comments on the
14 draft permit. Is that correct?

15 MR. BENDER: I don't --

16 JUDGE REICH: Or let me ask more
17 specifically. Did Sierra Club raise that issue?

18 MR. BENDER: Sierra Club raised the
19 issue of using clean fuels and maximizing clean
20 fuels in establishing the BACT limit. DEQ's
21 response was -- in April of '07 and April of
22 '08, there were heavy snowfalls which may

1 prevent wood from being delivered. And it's our
2 position that that analysis wasn't done
3 according to a top-down process and shouldn't be
4 given any credence. But for argument's sake,
5 even if there are periods of the year where
6 snowfall prevents wood trucks but not coal
7 trucks from reaching the plant, that the proper
8 way to deal with it is similar to how start-ups
9 and shut-downs are dealt with. If emission
10 rates, BACT limits can't be met during those
11 times, there's a special carve-out for them with
12 boundaries places around them.

13 JUDGE REICH: But are you saying, and
14 maybe Mr. Gordon can react to this as well, that
15 in terms of the draft permit, there was no
16 articulation of this problem of getting wood in
17 the winter that was used to explain why the
18 permit limits were proposed as they were.

19 MR. BENDER: Not very clearly. And
20 there may be some -- I don't recall everything
21 in the application or record. But not very
22 clearly, and frankly, the response to comments

1 isn't very clear either for how this weather
2 emergency really happens, how often it actually
3 happens. And in fact, DEQ had to point to
4 weather data on the Internet outside the record
5 in its response in support of this position.
6 And so there's -- if there's anything, it wasn't
7 much, and even with this response to comments,
8 it's not much. Thank you.

9 MR. GORDON: Very briefly, just to
10 really address that last question. The draft
11 permit and the fact sheet that went out with the
12 draft permit at the beginning of the public
13 comment period identified the number of days
14 that the boiler would burn wood, the number of
15 days that the boiler would burn coal. And look
16 at the Petitioners' comments; they didn't
17 address that point at all.

18 They addressed the point that we
19 shouldn't require a particular -- this
20 1.5 percent sulfur content is something that
21 was not correct, and that we should require
22 the -- DEQ should be requiring all wood and

1 no coal, but this particular mix of wood and
2 coal and that it should be in the summer
3 months, it should be more -- it should be all
4 wood because the fuel delivery disruptions is
5 not at issue in the summer months. That
6 point was not raised at all.

7 And the issue was teed up prior to
8 the start of the public comment period. It's
9 our position that the issue was not preserved
10 for appeal.

11 JUDGE REICH: In a sense, it was clear
12 that the way you were proceeding was driven in
13 part by unavailability of wood in winter months.

14 MR. GORDON: Correct. And
15 specifically, the 8 days of wood and 22 days of
16 coal has actually been the fact sheet itself.
17 That breakdown of how much wood and how much
18 coal.

19 JUDGE REICH: Right, but also the
20 rationale for it.

21 MR. GORDON: Yes. I believe, yes, it
22 is. It's my recollection that it is, yes. And

1 then, again -- you know, as to this issue as to
2 whether actual emissions should be -- from the
3 entire plant should be excluded from the
4 analysis of whether -- that all actual emissions
5 from the facility are increment-consuming if the
6 facility makes a modification after the major
7 source baseline date. Again, I think the
8 Petitioner's argument is reading out of the
9 definition of actual emissions that portion that
10 talks about -- mentions that -- or associated
11 with construction that occurred after the major
12 source baseline date. I don't think there's any
13 basis for that argument. It requires ignoring
14 the particular provision on which they're
15 relying.

16 Unless there are other questions, I
17 don't have any other points to raise. I
18 think I addressed all their points that they
19 raised in rebuttal, frankly, in the thorough
20 discussion that we had previously.

21 Thank you.

22 JUDGE REICH: Thank you. Mr. Finto?

1 MR. FINTO: I just wanted to make a
2 couple points. There were some questions about
3 the increment and some discussion about the
4 language in 52.21(b)(13)(i). The baseline does
5 include the air quality. We put the air quality
6 on the baseline date. There's been some
7 discussion about 52.21(b)(13)(i)(a) which says
8 you include the actual emissions from
9 construction after the baseline date is not
10 included.

11 And then 52.21(b)(13)(i)(b), which
12 I think is the important one here, says that
13 actual increases or decreases that occur
14 after the minor source baseline date are not
15 included in the baseline. And that's the
16 provision that allows for the expansion of
17 increment. And that is why this netting
18 process is used. And that is the basis for
19 what Michigan did. Michigan's process is
20 completely consistent with what EPA said to
21 do in the proposed clarification to the
22 increment modeling.

1 With respect to fuels, there was
2 some economic analysis done in the permit
3 application. There was also a follow-up
4 letter that showed economic analysis. So
5 consumption of coal is not purely a function
6 of the weather. It was also a function of
7 economics. And subsequent to the permit
8 application, there was an additional
9 submittal.

10 Finally, there were some questions
11 about what to do with the record. Well, the
12 question we go back to is clear error, and
13 that is the question about whether the
14 information here reflects whether there would
15 have been a different permit decision
16 reached. And as Mr. Gordon put out, it's
17 just a matter of documentation. It seems to
18 us that that's not clear error. Thank you.

19 JUDGE REICH: I just wanted to make
20 sure I heard correctly. Did you say that the
21 decision on the mix of coal versus wood was in
22 part a question of economics?

1 MR. FINTO: There was some economics.

2 My understanding is that the MDEQ did ask for
3 some additional information that was submitted.

4 It was alluded to in the cover letter with the
5 original permit application on February 5, 2007.

6 And if you'd like, I can make sure that I can
7 get to you subsequent to this the letter that
8 had the other information in it.

9 JUDGE SHEEHAN: Are you referring to
10 the -- I presume to the permit addendum from
11 September of '07?

12 MR. FINTO: I believe that's correct.

13 JUDGE SHEEHAN: Yes, I think it's the
14 last few paragraphs you're talking about there
15 in which you say, "Cost effectiveness
16 spreadsheet has been included, and it shows
17 numbers," I won't repeat them here, "much higher
18 than recent BACT cost effectiveness
19 determinations." And then it concludes that
20 because of cost, no change will be made.

21 It seems a rather conclusory
22 statement, but we'll look at it. We know to

1 what you refer.

2 JUDGE REICH: With Judge Sheehan's
3 indulgence, can I ask Mr. Gordon to answer a
4 question -- in the determination that MDEQ made
5 on this issue, were you relying on the economics
6 as well as the potential unavailability of fuel?

7 MR. GORDON: I'm not aware of DEQ
8 relying on the economic issue as its basis.

9 JUDGE REICH: Okay.

10 JUDGE SHEEHAN: This concludes our
11 argument. Thank you all very much for your
12 participation.

13 (Whereupon, at approximately
14 12:04 p.m., the ORAL ARGUMENT was
15 adjourned.)

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