

1                   MR. GORDON: I think the information  
2                   that's in the record as to the capacity is,  
3                   frankly, the information, primarily what's in  
4                   there, in their permit application as to how the  
5                   facility will be configured, the fact that  
6                   there's not only fuel storage, but you have to  
7                   take into account when you have fuel storage how  
8                   you're going to feed that fuel on the facility  
9                   grounds into the boiler.

10                   I mean, there's a schematic I  
11                   think, and the diagram reflects not only the  
12                   silos, but also the actual area that you need  
13                   for delivery, the area that you need to then  
14                   store it, the area that you need to take it  
15                   from the storage and feed it into the boiler.  
16                   When you take all of that into account, I  
17                   think the record shows that in fact, the  
18                   capacity is a fuel storage capacity.

19                   JUDGE REICH: Can I ask a different  
20                   question while I still have the floor? Do you  
21                   agree with the position put forth by Sierra Club  
22                   -- and if not, why not -- that if this

1 application had come in describing the boiler  
2 precisely the same way it did, it never  
3 mentioned wood, that as part of the BACT  
4 analysis, you would have had to consider wood as  
5 an option in terms of fuel?

6 MR. GORDON: You know, I think the  
7 question as to other -- given the physical  
8 circumstances and the physical capabilities of  
9 the boiler, whether it can in fact burn other  
10 fuels is something that you would then -- you  
11 have to perform doing a top-down BACT analysis  
12 as to the technological availability. Is it  
13 available? You know, the technological  
14 feasibility -- I mean, CFBs can burn other  
15 fuels. I think that's one of their advantages.

16 Then the question is, I think you  
17 would need to perform your top-down BACT  
18 analysis.

19 JUDGE SHEEHAN: One other question  
20 while I have the scheme up there, the design.  
21 You indicate that there's no room on-site to  
22 take anything but Marquette or Presque coal,

1 which I'll refer to as MPI coal. There seems to  
2 be no differentiation in even the coal storage  
3 area between one kind of coal and another.  
4 Where does the statement in the record come to  
5 the effect that there's no room for any other  
6 kind of coal but those two?

7 MR. GORDON: I don't think the  
8 contention is that there's no room or -- for any  
9 other type of coal. I think what the university  
10 represented in its application was that it was  
11 going to burn coal from two other sources. I  
12 shouldn't say "two other," from two sources:  
13 Either the Wisconsin Electric Presque Isle power  
14 plant or the other utility that's in the area,  
15 the Marquette Board of Light and Power. And so  
16 the analysis then in terms of we're getting into  
17 this issue as to who are the -- was the SO2  
18 emission limit based on the lowest sulfur --

19 JUDGE SHEEHAN: Wait, let's talk about  
20 your statement. You used the word "will," which  
21 does come from the permit application. It does  
22 come from the evaluation form. Both say that

1 the coal burned "will" be Marquette or Presque  
2 Isle coal. What kind of inquiry did you all do  
3 to look into whether other coals outside of  
4 those two plants would be available? Why was it  
5 the focus from the beginning, apparently, only  
6 on those two and no more?

7 MR. GORDON: I think the focus is on  
8 those two because those are the two supplies of  
9 coal that are available in Marquette.

10 JUDGE SHEEHAN: How do you know that  
11 if you haven't done an analysis to see if there  
12 are other coals available? I can't believe that  
13 only those two plants in the upper North  
14 Peninsula there would be the only supplies  
15 available. There are coal sources all over that  
16 region, and they're even referred to in your  
17 evaluation form. You considered other coals  
18 from other places. Why only Marquette or  
19 Presque Isle at the end of the day and no more  
20 beyond those two?

21 MR. GORDON: I think the answer is  
22 because those were the two supplies that were

1 provided -- that were identified by the company.

2 JUDGE SHEEHAN: Well, that doesn't  
3 sound like an analysis. It sounds like a fait  
4 accompli.

5 MR. GORDON: I don't -- first of all,  
6 I don't know if there was ever any -- the other  
7 coal supplies we're talking about, looking at  
8 coal to be shipped in from Wyoming or from other  
9 sources, I mean, the reason why we're looking at  
10 coal that can be provided from those two places  
11 is because they can be trucked in. And given  
12 the storage capacity, again, to be able to just  
13 place stuff in silos, we're looking at what are  
14 the coal supplies that can be provided by truck  
15 delivery during the wintertime?

16 JUDGE SHEEHAN: But are these are the  
17 only two within range for it to be trucked in?  
18 I understand the distinction you're making, but  
19 I don't even hear you saying you looked to see  
20 whether there were other sources within that  
21 range where it could be trucked from, as opposed  
22 to you took it as a given that that's where it

1 would come from because that's what the  
2 application set forth.

3 MR. GORDON: I think those were the  
4 two that were looked at because if you start to  
5 truck and rely on fuel deliveries from sources  
6 that are more than the roughly quarter to a half  
7 a mile distance from this plant to Presque Isle  
8 Power Plant, or more than the roughly one mile  
9 distance from this plant to the Marquette Board  
10 of Light and Power, you're going to start run  
11 afoul of the same problems regarding winter  
12 supply disruptions.

13 If you say, well, you could get  
14 something from a coal supply that's 50, 75,  
15 100 miles away, you're going to have some of  
16 those same problems. The whole point here is  
17 that during the winter weather, where can the  
18 university be assured of being able to get a  
19 backup fuel supply? And it's those wood  
20 supplies --

21 JUDGE SHEEHAN: And where is it  
22 indicated --

1 MR. GORDON: Are disrupted.

2 JUDGE SHEEHAN: Where in the record is  
3 it indicated what the distances are between  
4 Marquette, Presque Isle, and NMU?

5 MR. GORDON: You know what? They're  
6 not.

7 JUDGE SHEEHAN: I saw none.

8 MR. GORDON: I don't think there is  
9 anything in the record. I think it is something  
10 that I'm representing to you here. If you were  
11 to go on the Internet, on to MapQuest, you'll  
12 see that in fact, that is true. It's easily  
13 deducible from, you know, available information.

14 JUDGE SHEEHAN: And it is part of the  
15 representation you're making that it's not on  
16 the record. Does that also include that these  
17 are the two closest sources from which they  
18 could obtain coal?

19 MR. GORDON: I'm not prepared to  
20 represent that there isn't. Those are the only  
21 two that I know of, yes. Yes. I don't want to  
22 say something that is factually inaccurate

1 because --

2 JUDGE SHEEHAN: Well, I appreciate  
3 that.

4 MR. GORDON: Yes.

5 JUDGE SHEEHAN: While we're on the  
6 issue of the stringency of the BACT analysis,  
7 Mr. Kucera, could you put up the printed  
8 evaluation form document? Thank you.

9 About four paragraphs down, the  
10 paragraph beginning, "One of the lowest," we  
11 see that in the first few lines there, you  
12 had other options that were flagged. This  
13 270 megawatt plant with .022 pounds, 30-day,  
14 and .05 pounds, 24-hour -- both lower than the  
15 NMU ultimate limit using .4 sulfur coal or .9  
16 percent sulfur coal, both of which are lower  
17 than what we had here.

18 Then skipping down to the paragraph  
19 with the numerical figures running down the  
20 left margin, the last point examined there,  
21 which most like NMU is a CFB boiler and no  
22 scrubber, as all the other ones in that same



1 column are --

2 MR. GORDON: I'm trying to follow  
3 along. Which --

4 JUDGE SHEEHAN: The.103 at the bottom.

5 MR. GORDON: Yes.

6 JUDGE SHEEHAN: The preamble for that  
7 whole section there aligns these facilities  
8 pretty closely with NMU. And the fact that they  
9 both have -- all have boilers and not have  
10 scrubbers, like NMU. Here again, we have a  
11 permit limit that's better in terms of sulfur; a  
12 lower sulfur fuel, .45. And this permit of all  
13 the others is closest in size -- 44 megawatts to  
14 NMU -- and it's the most recent, 2006.

15 So this seems quite close to the  
16 NMU situation. So there's that  
17 consideration, plus the one I just mentioned  
18 from three paragraphs above. Both of these  
19 other facilities, or both of these other  
20 analyses seem to provide some pretty good  
21 BACT limits for NMU. But for no reason  
22 that's apparent from this form, they weren't

1 accepted by NMU. Why?

2 MR. GORDON: I think the difference is  
3 the percent sulfur. It's that the percent  
4 sulfur that the university will be receiving  
5 from the Presque Isle Power Plant in particular  
6 has -- is by permit authorized to have a sulfur  
7 content of up to 1.5 percent sulfur by weight.

8 JUDGE SHEEHAN: But the whole point I  
9 thought of doing the BACT analysis was to show  
10 you a universe of other possibilities and help  
11 drive NMU to that point, not to say we're only  
12 going to focus on two nearby coals, none other,  
13 and that's the end of it. That doesn't sound  
14 like an analysis. It seems like a conclusion  
15 before an analysis.

16 MR. GORDON: Well, I think we're  
17 circling back to the previous discussion which  
18 is that is .4 or .5 percent sulfur coal an  
19 available control option? To put it in terms of  
20 a BACT discussion, I think the answer that I'm  
21 representing today is it's not an available  
22 option.

1 JUDGE SHEEHAN: Well, even between the  
2 two coals you say you will use, Marquette and  
3 Presque Isle, Presque Isle is 1 percent sulfur  
4 and Marquette is 1.5 percent. So there's a  
5 difference there, reversed.

6 MR. GORDON: Or the other way around.

7 JUDGE SHEEHAN: Okay. We saw them two  
8 different ways in the record. I'm not sure  
9 which is accurate, but one is higher than the  
10 other. But you elected to use only the higher  
11 as the sulfur limit driving the emission limits.  
12 So why was that? Why not go for the lower  
13 sulfur coal as the baseline rather than the  
14 higher sulfur coal?

15 MR. GORDON: Because of the  
16 university's position that it's going to be --  
17 those are the two available supplies, and that,  
18 therefore, you're looking at the maximum. What  
19 is available to you, though? As to whether or  
20 not -- I will defer to the counsel for Northern  
21 Michigan as to whether or not it would be able  
22 to get all of its coal at all times during all

1 winter months from Marquette Board of Light and  
2 Power. My understanding is that that's not the  
3 case, and that at some times, it will need to be  
4 able to receive coal from the Presque Isle Power  
5 Plant.

6 And that therefore --

7 JUDGE WOLGAST: Is there anything on  
8 the record that reflects the availability one  
9 way or the other?

10 MR. GORDON: I think what's in the  
11 record is really what's in the permit  
12 application, and then what's in the response  
13 that really just sort of reinforce or restate  
14 what I've just said.

15 JUDGE REICH: Following up on what  
16 Judge Sheehan is saying, the common thread  
17 sounds to me and in many of your responses is  
18 that you set out to set limits that basically  
19 would allow NMU to do what NMU had already  
20 decided it wanted to do. And what I'm not  
21 hearing is any element of technology forcing or  
22 anything else that is supposed to be the essence

1 of BACT. Why am I incorrect in the way I'm  
2 hearing what you're saying?

3 MR. GORDON: Well, I don't think it's  
4 accurate to say that the department is just  
5 putting a rubber stamp on what the permit  
6 application is. I think they are looking at it,  
7 seeing if it makes sense, doing their own  
8 review, and in this case, as to the percent  
9 sulfur content of the available fuels, there's  
10 agreement that is what is available.

11 JUDGE SHEEHAN: Why is it then that in  
12 the original permit application you -- what  
13 3.5 percent sulfur coal was proposed, and then  
14 in response to perhaps comments from the state,  
15 the sulfur limit went down to 1.5 percent  
16 sulfur. Yet the permit, the ultimate emission  
17 limits stayed the same, even though the coal,  
18 the sulfur content of the coal came down rather  
19 dramatically.

20 MR. GORDON: I think the answer to  
21 that is that the DEQ went back and spoke with  
22 the company and communicated with them as to

1 where are you going to be getting your coal  
2 from? And the answer is --

3 JUDGE SHEEHAN: So the coal is  
4 cleaner, but the ultimate emission limit is no  
5 better than in the original dirtier coal. How  
6 does that work?

7 MR. GORDON: I'm not sure of the  
8 answer to that.

9 JUDGE SHEEHAN: Going to weather  
10 conditions.

11 You talked about snows and bad  
12 weather interrupting fuel supplies. Why is  
13 it that snow only somehow impedes the  
14 delivery of wood, and coal seems to make it  
15 through to the tune of an order of 3-to-1  
16 more coal to wood? If weather is a problem  
17 for any delivery, fuel or coal, why is it  
18 that coal seems to make it through 22 days a  
19 month and wood doesn't?

20 MR. GORDON: Why is it that coal is  
21 able to be delivered?

22 JUDGE SHEEHAN: Yes. Coal somehow

1 seems to surmount the weather difficulties you  
2 spoke of.

3 MR. GORDON: I think it's the  
4 proximity of the coal supplies.

5 JUDGE SHEEHAN: Well, where are the  
6 wood supplies coming from?

7 MR. GORDON: The record shows that the  
8 wood supplies is from independent suppliers that  
9 were going to be bringing the wood in on logging  
10 trucks from the surrounding area.

11 JUDGE SHEEHAN: And to my knowledge,  
12 looking at the record, I see no indication  
13 whatsoever in the record of where those wood  
14 suppliers are. They could be off the front gate  
15 of Ripley for all the record indicates, or they  
16 could be 300 miles away. Where in the record do  
17 you indicate where those suppliers are so that  
18 we can understand why they might be more  
19 adversely affected by the weather than the coal  
20 --

21 MR. GORDON: In the permit application  
22 itself, at page 4, it said, "Wood chips are to

1 be delivered by truck in bulk from independent  
2 suppliers." I think that is in the permit  
3 application itself at page 4.

4 JUDGE SHEEHAN: It doesn't help where  
5 they are, whether they're 2 miles or 200 miles  
6 out.

7 MR. GORDON: And then in the response  
8 to comments, at page 12, it says, "A delivery of  
9 40 tons of wood chips will occur once a day,  
10 except on weekends, on routes used by logging  
11 trucks." I think --

12 JUDGE SHEEHAN: Again --

13 MR. GORDON: "The routes used by  
14 logging trucks," I mean, I think the -- what was  
15 intended to be communicated by that -- by both  
16 of those together is that the wood is not coming  
17 from some stockpile inside Marquette. It's  
18 coming from -- or outside the gate, as you say.  
19 It's coming from independent suppliers that are  
20 outside of the city and out in the Upper  
21 Peninsula. And those are the two references in  
22 the record.



1 I looked for -- I asked that same  
2 question myself and wanted to find out where  
3 they're getting their wood from.

4 JUDGE SHEEHAN: The beating heart of  
5 the BACT analysis here seems to be Operational  
6 Memorandum No. 20. That's --

7 MR. GORDON: I'm sorry, could you  
8 repeat that? I was just noticing my yellow  
9 light went on.

10 JUDGE SHEEHAN: I'm sure we'll go  
11 over, so don't worry about that. The  
12 Operational Memorandum No. 20 seems to be the  
13 guiding light for how the state and how  
14 facilities do the BACT analysis. Is that  
15 correct? It was cited on the --

16 MR. GORDON: I have not reviewed  
17 Operational Memo No. 20, to be honest with you.  
18 What DEQ does is perform its BACT analysis. I'm  
19 vaguely familiar with that.

20 JUDGE SHEEHAN: Well, it's your  
21 document.

22 MR. GORDON: Yes.

1 JUDGE SHEEHAN: It's Michigan  
2 Department of Environmental Quality, Air Quality  
3 Division. It's your product.

4 MR. GORDON: Yes.

5 JUDGE SHEEHAN: On page 33 of the  
6 permit application, it says that that's what  
7 guides the BACT analysis. My question is that  
8 after making that statement at least  
9 rhetorically supportive of your guidance, it  
10 says that the use of this guidance allows the  
11 applicant to "circumvent the rigorous approach"  
12 set forth in the NSR Manual.

13 Is it true that your own document  
14 here appears to be taking a far different  
15 path than the NSR Manual takes with its  
16 five-step process for the top-down BACT  
17 analysis?

18 MR. GORDON: I don't think it's meant  
19 -- if the permit application used the term  
20 "circumvent," I don't think that is what's  
21 intended.

22 I think there -- my recollection

1 from that operational memo, that there are  
2 certain -- if you want to call them  
3 preliminary analyses, screening approaches to  
4 see if a proposed emission limit satisfies  
5 BACT, for example, reviewing what information  
6 might be in the RACT/BACT/LAER clearinghouse  
7 is my recollection, but that was one of the  
8 sort of preliminary analyses that applicants  
9 can use in order to -- first, as an initial  
10 matter, see what other facilities are doing,  
11 and whether their proposed emission limit  
12 meets that threshold.

13 JUDGE SHEEHAN: The final few  
14 paragraphs of your memo, after quoting at length  
15 the NSR five-step process, then goes on to say  
16 with reference to the NSR five-step process that  
17 the AQD should "avoid" the NSR Manual because  
18 the NSR Manual is too complex and it's difficult  
19 to agree upon and it's time- and  
20 resource-intensive, et cetera. It seems like a  
21 repudiation of the NSR Manual.

22 MR. GORDON: Well, you know --

1           JUDGE SHEEHAN: Your own document; not  
2 the permit application, but DEQ's --

3           MR. GORDON: I think that guidance  
4 document was written, as I recall, back in the  
5 -- what is it? At least in the early to  
6 mid-'90s, if not before.

7           JUDGE SHEEHAN: 2005. Effective date  
8 August 9, 2005.

9           MR. GORDON: Effective date -- okay, I  
10 apologize then. That -- for one thing, that  
11 document -- there's not any allegation that that  
12 was what happened in this case. And so --

13           JUDGE SHEEHAN: You've referred to it  
14 throughout the permit application.

15           MR. GORDON: But there was a -- but  
16 the permit application lays out the BACT  
17 analysis that they did, and there's not any  
18 alleged circumventing of any kind of five-step  
19 BACT analysis here. They actually lay forth  
20 that. It may be in their background section of  
21 their discussion, they talk about what that  
22 operational memo says. But actually when you

1 look at what the BACT analysis that was  
2 performed by the university here, it's not that  
3 they are saying, oh, let's just do a quick and  
4 dirty and we'll be done. They're actually doing  
5 a BACT analysis.

6 JUDGE SHEEHAN: I think that's  
7 debatable.

8 JUDGE REICH: Can I ask, this is an  
9 obvious question, which is, if the concern as to  
10 availability of fuel was based on weather  
11 conditions at certain times of the year, did you  
12 not consider or did you consider why did you not  
13 adopt limits and more precisely tailor to the  
14 concern you have? Why does the public and the  
15 facility, the plant, have to live with the  
16 limits in June based on snows in January?

17 MR. GORDON: That argument that was  
18 raised by the Sierra Club in their petition for  
19 review is not an argument that was raised during  
20 the public comment period. Accordingly, the  
21 Department didn't respond, didn't have it  
22 presented to it, didn't have an opportunity to

1 correct it.

2 JUDGE REICH: The Department appeared  
3 to know about it because the Department made the  
4 argument that snow gets in the way and snow is  
5 the reason why we have to have this particular  
6 allocation of coal versus wood. But it doesn't  
7 snow in July, so why does your own reasoning not  
8 support a different result?

9 MR. GORDON: Well, I think there's two  
10 different issues that overlap. One is why isn't  
11 the permit, according to Sierra Club, based on  
12 100 percent wood and 0 coal? And the answer to  
13 that is because of fuel delivery disruptions for  
14 wood during the wintertime. The argument is, if  
15 you agree that some coal will be needed because  
16 of the severe winter weather, then how much wood  
17 and how much coal should the limit reflect? And  
18 the answer to -- and that -- the fact sheet that  
19 was put out to the public at the beginning of  
20 the public comment period laid out very  
21 specifically that the limit is based on 22 days  
22 of -- a mix of coal and wood.

1                   And yet Sierra Club, petitioner  
2 here, did not raise that point in public  
3 comments. Had they done that --

4                   JUDGE REICH: So you're saying that  
5 issue was not properly before us.

6                   MR. GORDON: That's right. It wasn't  
7 preserved for appeal. Had they done that, the  
8 DEQ would have had the opportunity to address  
9 it, but it was not properly before the board.

10                  JUDGE SHEEHAN: Turning briefly to the  
11 redesign argument and the very strong emphasis  
12 in the Clean Air Act itself, Section 169, that  
13 clean fuel needs to be considered, and as the  
14 Sierra Club 7th Circuit case reaffirmed that  
15 clean fuels are not to be read out of the Act  
16 merely because "some adjustment" to technology  
17 is required, what efforts did NMU make here to  
18 push the clean fuels envelope and do some  
19 adjusting to pull in as clean a fuel possible?

20                  MR. GORDON: Well, I think the  
21 argument that the Sierra Club is making, and to  
22 answer your question, is what efforts should

1 have been made to, for example, examine whether  
2 coal from the Powder River Basin -- this is  
3 their specific argument -- should have been  
4 brought here, brought to this plant. And I  
5 think the answer to that is that it would  
6 redefine the source. And we rely in our brief  
7 on the Prairie State decision in saying that for  
8 that to occur, the fuel would have to be  
9 delivered to the facility not by truck, but from  
10 -- but not by truck, from these two local  
11 suppliers -- Presque Isle Power Plant and  
12 Marquette Board of Light and Power -- but from  
13 someplace else. It's not clear if it's by rail  
14 or by some other means.

15           And so for the facility to be able  
16 to, for example, accept Powder River Basin  
17 coal, for example, by rail, they would have  
18 to construct a railroad spur.

19           JUDGE SHEEHAN: Where is that said? I  
20 mean, it sounds fine now, but there's nothing in  
21 the record to say you thought of that and you  
22 said those things and you've actually thought



1 about it and produced a viable analysis to  
2 support what you're saying here in court.

3 MR. GORDON: I think it gets back to  
4 whose burden is it in order to show that there  
5 are in fact alternatives that DEQ failed to  
6 consider.

7 JUDGE SHEEHAN: The Clean Air Act says  
8 it's your burden.

9 JUDGE WOLGAST: Another way to look at  
10 it, though -- I mean, I'm particularly looking  
11 at the Michigan memo, which does raise some  
12 concern about how stringent they were doing a  
13 top-down analysis, is that you identify  
14 obviously, starting with LAER, this isn't LAER,  
15 this is BACT, but -- you know, the cleanest  
16 sources and the best technologies. And why  
17 wouldn't both sources be considered, and then if  
18 -- if -- in the later stages of the analysis you  
19 found it was not economically feasible, for  
20 instance, to transport Powder River Basic coal,  
21 then the analysis would proceed in that fashion.  
22 I don't see why it did say "design change"