

1 versus -- or that it would never have been
2 considered initially -- not whether you would
3 get to the same place in the end or not, but how
4 stringent is the analysis itself.

5 MR. GORDON: The argument that was
6 presented and the Sierra Club's comments is that
7 we should -- the DEQ -- and this permit should
8 be subjected to an analysis for Powder River
9 Basin coal -- coal to somehow be delivered from
10 the Powder River Basin to this plant, stockpiled
11 at this plant, and then fed into the boilers.

12 The analysis that DEQ went through
13 was to say -- you know, as a threshold
14 matter, before we get into technological
15 feasibility and the whole five-step process,
16 there's a threshold matter -- that whole
17 analysis would entail redefining the source.
18 And that was -- and so it's not necessary to
19 say is it technologically feasible? It's
20 technologically feasible for coal to -- you
21 know, can you deliver it by rail all the way
22 to this facility?

1 JUDGE WOLGAST: Why is that?

2 MR. GORDON: Because when you look
3 back at that diagram, there's no railroads for
4 here. So you'd have to redesign that. There's
5 no space, frankly, at this facility to have a
6 coal stockpile.

7 JUDGE SHEEHAN: But you just indicated
8 earlier that that design might not contain
9 all -- the whole picture of the facility, so our
10 not knowing there's a railroad spur is
11 impossible because you just said that design may
12 not be accurate or --

13 MR. GORDON: I'm talking about what's
14 on the actual Ripley Heating Plant. It is
15 representative of what's actually at the plant
16 itself. There's not a railroad spur on that
17 diagram. And whether or not there's a railroad
18 someplace down off of that, I'm not attempting
19 to make a representation as to that.

20 But it was the DEQ's analysis, and
21 I think it's the correct analysis here, that
22 to put in a spur, to somehow make room of

1 which there isn't room for a coal stockpile,
2 for coal from the Powder River Basin to be
3 delivered, to then reconfigure your plant so
4 that you can --

5 JUDGE SHEEHAN: You said it's the
6 DEQ's analysis the spur can't be put in. Where
7 is that in the record? I never saw the word
8 "spur" --

9 MR. GORDON: I don't -- you're not
10 going to find --

11 JUDGE SHEEHAN: Or any other railroad
12 issues you're talking about.

13 MR. GORDON: You won't find that in
14 the record. I think you're right. The DEQ's
15 presentation of this issue is that in order for
16 Powder River Basin coal to be an available
17 option, for it to be BACT would entail
18 redesigning the source. That is in the record.
19 That's in the response to comments.

20 JUDGE WOLGAST: And then you rely on
21 the Prairie State decision for that position.
22 But it strikes me that that's a much broader

1 reading of this application were it so would be
2 a much larger reading of redesign. And what we
3 found were the 7th Circuit considered in Prairie
4 State. I mean, they are -- the power plant
5 would never have been built but for the fact it
6 was used in the contiguous and co-online
7 facility. And here you're talking about
8 reconfigurations, but I think, as Counsel
9 pointed out, the 7th Circuit didn't seem to
10 embrace any reconfiguration as equating
11 redesign.

12 MR. GORDON: I think that my review of
13 that decision was that it was -- you're right,
14 in a very, very broad macro level, I mean, the
15 plant wouldn't have been going -- a sort of
16 raison d'etre for that plant was that it was a
17 mine-mouth plant.

18 But in addition, I think an
19 important part of that analysis was that even
20 if the facility could have -- was achievable
21 in some general fashion, accepting coal from
22 some other place, it emphasized that to do so

1 would involve a physically substantial
2 reconfiguration of that entire facility. So
3 that rather than having a conveyor taking
4 coal straight from the mine and feeding it
5 right into the boiler, you'd have to have
6 some other kind of configuration for not only
7 receiving, storing it, and feeding it into
8 the boilers. I think that aspect of the 7th
9 Circuit analysis is applicable here, too.
10 The same kind of reconfiguration would be
11 applied.

12 Would it be -- is it the same sort
13 of raison d'etre argument? Is that analogous
14 here? No. But the substantial
15 reconfiguration and physical redesign of the
16 plant is what would be required, and that's
17 why it's off the table for purposes of the
18 BACT analysis here.

19 JUDGE SHEEHAN: Can we move to the
20 increment issue?

21 MR. GORDON: Yes.

22 JUDGE SHEEHAN: The regs, .21(b)(13)

1 and.21(c) seem to call for the increment
2 calculation to be based on a 24-month
3 calculation pre-mod. In this case, it would be
4 the WEPCO-PIPP facility. Twenty-four months
5 pre-mod and 24 months post-mod. And then you
6 compare those and the difference. If it's -- an
7 increase is the portion that consumes increment.
8 Why did you just simply take 1973 and 2006 and
9 compare those emissions, which seems arbitrary
10 and it's certainly not the 24-month period.

11 MR. GORDON: Well, the 1973 emissions,
12 reported emissions that are prior to the major
13 source baseline date of January 6, 1975 -- then
14 the comment that was submitted by Petitioner was
15 that there were modifications made to the
16 Presque Isle Power Plant from Wisconsin Electric
17 that were not included in the analysis as -- and
18 they should have been included in the analysis.
19 Those alleged modifications took place in 1999,
20 and that's in their comments.

21 And so the most reported emissions
22 are from 2006. Michigan has its annual

1 emission reporting forms, and that those were
2 -- the emissions that were reflective and
3 representative of the emissions
4 post-modification. And so that's the
5 comparison is baseline versus what is
6 increment-consuming post-baseline.

7 JUDGE SHEEHAN: But the regs seem to
8 say -- and I'm reading from the regs here
9 at.21(b)(21) -- that the average rate times per
10 year consecutive 24-month period preceding a
11 particular date, which is representative. So
12 the 24-month block, period. It seems to me what
13 the regs call for -- and you seem to have just
14 taken one year versus another year and left it
15 at that.

16 MR. GORDON: Yes. And I conferred
17 with my colleagues over at the DEQ on that
18 issue. And I said, well, why did you look at
19 just the 2006 emissions as opposed to the
20 consecutive 24-month period, which is I think
21 the point that you're getting at. And they did
22 not. I'm not going to say that they did because

1 the record's clear that they looked at just the
2 2006.

3 But, frankly, that's not the
4 argument the Petitioner is making here. So,
5 I mean, the issue that's presented on appeal
6 in this petition for review is that all of
7 the emissions from the Presque Isle Power
8 Plant after the major source baseline date
9 should be excluded from the baseline and
10 should be considered increment-consuming.

11 The issue that there was some error
12 because he didn't take the 24-month
13 representative -- most recent 24-month
14 consecutive period as opposed to the 2006
15 emissions, frankly, was never presented to
16 DEQ. It's not raised in this petition for
17 review, and that's not the issue that I think
18 is before the Board.

19 JUDGE WOLGAST: Isn't it generally in
20 the regs that the requirements of Section 52.21
21 aren't followed here, which would include the
22 contemporaneous data issue?

1 MR. GORDON: No, I don't think that
2 that general -- the specific issue, if you look
3 at their comments was as to this argument
4 regarding what emissions should be excluded from
5 our increment-consuming and not was the 2006
6 data wrong? In fact, actually if you look at
7 their own brief, I think they give a range of
8 what emissions should be excluded, and they
9 relied on that same 2006 Maer's, M-a-e-r,
10 report. So I don't think -- that issue was not
11 presented in there, in their comments or in the
12 petition for review. And so then it's not
13 preserved for appeal.

14 But this -- you know, the argument
15 anyhow, and I don't mean to beat this, but
16 the -- they're essentially wanting to have
17 the Board ignore that portion of the rule
18 that says emissions from any major source on
19 which construction commenced after the major
20 source baseline bid -- they'd have them
21 rewrite that provision to just say -- what is
22 increment-consuming? It's just actually

1 emissions from any major stationary source.
2 It doesn't say that. It has that important
3 second phrase: from any major source on which
4 construction has commenced after the major
5 source baseline date. They're essentially
6 asking you to ignore that second phrase and
7 rewrite it, and that's not the way it's
8 supposed to be interpreted. And the workshop
9 manual doesn't interpret it that way either.

10 JUDGE SHEEHAN: Okay. Can we go to
11 modeling? We discussed earlier, of course, what
12 the Sierra Club is driving at in terms of
13 getting down to hourly limits or very close to
14 hourly limits to meet the NAAQS and increment
15 compliance standard average periods. Although
16 your response to comments really didn't provide
17 much information at all, you just said that
18 hourly emissions are limited by the size of the
19 equipment. Sounds rather nonresponsive
20 actually. Your brief went into more detail and
21 pointed to places in the record where you say
22 you had done the calculation to the tune of 87

1 or 88 pounds per hour, to take the SO2 example.

2 How is it -- I'm looking at page 24
3 of your application where that calculation
4 was done. You say -- even accepting as true
5 that it is 87 or 88 pounds per hour, you say
6 in the footnote to that chart on page 24 that
7 it's based on a 92 percent reduction. I
8 presume that's the limestone reduction
9 referred to elsewhere.

10 MR. GORDON: You're referring to the
11 permit application?

12 JUDGE SHEEHAN: Permit application,
13 page 24.

14 MR. GORDON: Twenty-four, thank you.

15 JUDGE SHEEHAN: The chart, Table
16 4.4-1. Okay, have that?

17 MR. GORDON: Thank you, yes.

18 JUDGE SHEEHAN: Footnote 1 premises
19 the calculation on 92 percent reduction. Where
20 is it enforceable in the permit that there will
21 be this 92 percent reduction so that that figure
22 has meaning or reality?

1 MR. GORDON: The 92 percent reduction
2 is from the -- that is the required control
3 efficiency or reduction, if you will, that is
4 set forth in the New Source Performance Standard
5 that's applicable to this facility. And I'm
6 going to -- I'm having trouble putting a finger
7 on a general condition, but it's -- you know,
8 the -- the permittee is required to -- it says
9 actually, "general condition no. 8." It says,
10 no, they're not exempt from complying with any
11 of the applicable requirements under the federal
12 Clean Air Act.

13 And so they -- to the extent that
14 there are other requirements, like fuel
15 source performance standards that the company
16 -- permit applicant has to satisfy, those are
17 -- there's a general condition that requires
18 them to do that, too. And so the 92 percent
19 reduction is something that's required. They
20 have to meet it under NSPS.

21 The Sierra Club's argument that we
22 should be looking at increment consumption is

1 that it should be based on uncontrolled
2 emissions. They point that it's not 87
3 pounds per hour, but instead it's
4 500-and-some-odd pounds per hour. And that's
5 based on an uncontrolled rate. The reality
6 is that the permit requires them to operate
7 the baghouse fabric filter at all times in
8 proper operating conditions.

9 JUDGE SHEEHAN: Well, looking more
10 deeply at footnote 1 there, the second sentence
11 of it, page 24, "The limits above are also based
12 on a 30-day rolling average." Now, Sierra
13 Club's concern was that a long-term average like
14 that can help blunt or smooth out or steer
15 spikes, one-hour, two-hour, three-hour spikes
16 that are at the core of the NAAQS increment
17 compliance standards. So how does your
18 statement that this is based on a 30-day average
19 align with the chart's seeming conclusion that
20 this is a one-hour rate?

21 MR. GORDON: I am not sure why that
22 last sentence in there says the limits -- when

1 it says they are also based on a 30-day rolling
2 average, well, that is true. There is a
3 separate emission limit base, so that is a
4 30-day rolling average. What I do know is that
5 the modeling was based on maximum hour
6 emissions. And I think -- and based on the
7 design and capacity of the plant, using a
8 baghouse fabric filter operating in the 92
9 percent control efficiency. I don't think that
10 last sentence is attempting to say that the,
11 what is it, 87.8 pounds per hour limit the --
12 not limit, emission rate that was used for
13 modeling purposes is derived from a 30-day
14 rolling average. And in fact, when you look at
15 the permit application, I don't think that that
16 is, in fact -- that's not what happened.
17 They're relying instead on what I've just said,
18 that it's an hourly rate.

19 JUDGE SHEEHAN: Now going into the
20 monitoring issue. Here, as alluded to earlier
21 when the Sierra Club was speaking, you have the
22 receptor grid layout, the 5-kilometer radius

1 grid from Appendix C of the permit application,
2 which looks very tight and close to the actual
3 NMU site. But what you offered up in your
4 pleadings was the background concentration
5 sheet, the so-called August 21, 2006 e-mail that
6 I presume MDEQ sent to NMU to satisfy the
7 ambient air monitoring requirement.

8 So are you relying on the -- is
9 your analysis based on a 5-kilometer study or
10 on the background concentration study, which
11 seems far vaster in terms of distance from
12 NMU?

13 MR. GORDON: Relying on the
14 information that DEQ sent them in that August
15 2006. I don't believe that this receptor grid
16 layout diagram is really to what is the
17 background concentration for determining
18 increment consumption here and in Marquette. I
19 think it's for a different purpose altogether.

20 JUDGE SHEEHAN: Okay. Well, then
21 turning to the back of the concentration sheet,
22 it shows us distances of NMU's as close in as or

1 far out, depending on how you look at it, as
2 65 kilometers up to about 316 for lead in
3 Milwaukee. How is it that distances of this
4 scope, so far out or close in depending on your
5 point of view, satisfy the NSR Manual standards
6 for monitor location, data quality, and so on?

7 MR. GORDON: The request came in in
8 the summer of 2006. The data that was provided
9 by DEQ is for the most recent three years.
10 Information you'll see on that same sheet, that
11 is 2003, 2004, and 2005. So I don't think
12 there's any real dispute as to whether or not
13 the data that DEQ provided to them is current or
14 not.

15 JUDGE SHEEHAN: But the manual lays
16 out very strict requirements about how you
17 satisfy currency and location and quality.
18 Detailed requirements. And all we've got -- we
19 have from you is a one-page document that
20 doesn't seem to address any of them at all. It
21 just throws out these numbers without any
22 analytical foundation for them.

1 MR. GORDON: Right. Is there anything
2 written in the record where there's something
3 from DEQ saying that it actually looked at --
4 presented a written analysis that says this --
5 these -- is current? No. I mean, it just
6 presented it to them because it's current.
7 Similarly, is there any -- something, a written
8 document laying out that it looked at location
9 and accuracy?

10 And the answer -- and I think what
11 it is, is it's basically, it is implicit and
12 demonstrated from what actually happened
13 here. The company -- excuse me, the
14 university -- submitted their request for
15 data. They knew what the requirements were
16 that needed to be representative of what the
17 air quality is in Marquette County and
18 Marquette at this plant.

19 DEQ reviewed the available
20 information, was aware of all those
21 requirements, and provided information that
22 it thought was representative of the air

1 quality.

2 JUDGE SHEEHAN: But how do we credit
3 that? It looks very random and there's no
4 particular framework undergirding it that would
5 give us any confidence that it does reflect a
6 careful consideration of the location factors
7 and the currency factors and the quality
8 factors. It just looks like something thrown
9 out because somebody happened to have it, and he
10 needed to have something to check this box. Why
11 should we give it any deference? There's no
12 analysis to support that.

13 MR. GORDON: Because I think one -- I
14 think the reasonable inference is that when a
15 permit applicant asks DEQ for representative
16 data that he can use for modeling, DEQ then
17 reviews its available information, selects what
18 it thinks is representative. It doesn't just
19 select stuff and give it to the company when
20 it's random, you know. And so they selected
21 information from -- for example, Escanaba, Two
22 Rivers, Green Bay, Milwaukee because that

1 information is representative, or even more --
2 actually, it's more conservative than the air
3 quality from Marquette because it's coming from
4 urban areas that are much, much larger and have
5 higher pollutant concentrations than what's
6 present in Marquette. But the prevailing wind
7 directions are actually not sending pollutants
8 up towards Marquette, but actually sending it in
9 areas that -- it's going to be lower in
10 Marquette than it would be here. So if anything
11 --

12 JUDGE SHEEHAN: But we wouldn't know
13 that if there's nothing in the record to tell us
14 what you're saying.

15 MR. GORDON: It is because it's
16 implicit. And I think actually --

17 JUDGE REICH: In regard to that, were
18 the issues about the representativeness of the
19 data -- relative to say, for example, location
20 of the surrogate -- were those issues raised
21 during the comment period? And if so, you know,
22 response to comments, did you not have to

1 actually address those issues at that point,
2 even if they -- and I'm looking kind of implicit
3 up until that point? Did they not require you
4 to articulate why in fact they were
5 representative? And isn't that what we should
6 be looking to to see if the position you're
7 taking is sustainable or not?

8 MR. GORDON: I think -- excuse me, I'm
9 trying to keep track of all the different facts
10 and everything that's happening in this case. I
11 think there was -- it was raised. There was a
12 response to comments. It's at page 15, and
13 talks about how the DEQ's experience with
14 monitoring in the area -- and says the DEQ
15 didn't require pre-construction monitoring.
16 There was no written waiver requested by the
17 permit application -- by the permit applicant,
18 so he didn't lay out in detail -- go through
19 each of those three criteria that are in the
20 manual. But it was raised, it was addressed in
21 the response to comments.

22 Was it addressed in a somewhat

1 cursory fashion? I'm not going to deny that
2 it wasn't addressed in a somewhat cursory
3 fashion.

4 JUDGE REICH: I was a little confused
5 because on the one hand -- I mean, you do say
6 there was no waiver, but on the other hand, it
7 seems like there was a waiver.

8 MR. GORDON: No, no written waiver is
9 what the response is. They didn't actually
10 submit something in writing, which would then
11 prompt the DEQ.

12 JUDGE REICH: So you think there was
13 an oral waiver at the time?

14 MR. GORDON: Well, not -- I mean, I
15 think --

16 JUDGE REICH: Or you just sort of
17 treated it as if waived?

18 MR. GORDON: When the company is
19 requesting information as to what model -- what
20 background concentrations it should use for its
21 modeling, both as to PSD increment consumption
22 and NAAQS, and the DEQ provides this

1 information, it's saying, you know -- and then
2 you look to see if the modeling shows that it's
3 not exceeding the significant impact levels and
4 then a full-blown increment analysis isn't
5 needed because instead, you've satisfied some
6 threshold level on the preliminary analysis.

7 I just want to raise one more point
8 here. I think -- I think that the exchange
9 of information, the request and then the
10 providing of the data here, I don't think
11 that rises to the level of clear error, you
12 know. I mean, what could happen is if you
13 were to remand on this issue, what would
14 happen is that the DEQ would then write a
15 letter, as it has done with other applicants
16 where they have actually requested something
17 in writing, saying, yep, it needs
18 currentness, it needs accuracy, and it needs
19 monitoring location.

20 Remand is not appropriate when the
21 permitting of an agency is simply going to
22 restate the explanations that are offered on

1 appeal. And where there's explanations --

2 JUDGE REICH: Just out of curiosity,
3 when you write letters like that, is that all we
4 say or do we say it needs it because? Is there
5 any explanation in those letters as to how
6 you've determined any such criteria, or is it
7 just recycled --

8 MR. GORDON: I think it lays out the
9 same things that I've just laid out here. They
10 are -- it is current because it's 2003, 2004,
11 2005. It's representative because those monitor
12 locations are from areas where the air -- the
13 pollutant concentrations are at least as high --
14 are higher, in fact, than what they would be at
15 Marquette; and that the prevailing wind
16 directions are such that it was -- it's going to
17 be less than it is in Marquette; that those
18 monitors are actually accurate regarding the
19 number of the monitors that were used, the
20 accuracy of the monitors that were used, that
21 the quality of that data is sufficient.

22 The DEQ lays out in writing exactly

1 what I'm stating here today.

2 JUDGE SHEEHAN: Is it true that the
3 monitoring was not done for CO and PM and NOX
4 because the SIL or the SMC line wasn't
5 triggered? Is that accurate?

6 MR. GORDON: Yes.

7 JUDGE SHEEHAN: Then where is it in
8 the record that shows how you decided that that
9 line was not crossed and no analysis needed to
10 be done?

11 MR. GORDON: It's in their permit
12 application. I don't have it in front of me. I
13 think in the modeling file, there is some little
14 -- DEQ taking the information that was provided
15 to the agency by Northern Michigan University
16 and determining whether or not in fact those
17 significant impact levels were exceeded. And if
18 they're not -- the preliminary analysis is
19 sufficient.

20 JUDGE SHEEHAN: Thank you. Mr. Finto?

21 MR. FINTO: Good morning. I thought I
22 might pick up first with the fuel issues since

1 there was some discussion about that. The BACT
2 analysis that needs to be performed on a
3 case-by-case basis, on the project that was
4 proposed by the applicant. And in this case, I
5 think the case-by-case is more important than it
6 is in a usual case. If you look at the map
7 behind me, you can see this is on the southern
8 shore of Lake Superior. It's far from the
9 north, and there's been some questions raised
10 about the weather. I think what's happening in
11 many instances is people who live up there day
12 to day have some understanding of what goes on
13 and perhaps don't think about the fact that they
14 need a document and all the various details.

15 With respect to the case-by-case
16 analysis, the specific factors are that this
17 is a rural location. This is a dedicated
18 plant. It's not going to be tied into the
19 grid. It has a very harsh climate in the
20 wintertime. There's a small slip space to
21 store fuel. You saw the map and you asked
22 questions. There's a parking lot there.