BEFORE THE ENVIRONMENTAL PROTECTION APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

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In re: :

: PSD Appeal No. 08-02

NORTHERN MICHIGAN UNIVERSITY, :

RIPLEY POWER PLANT, :

: PSD PERMIT 60-07

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ENVIRONMENTAL APPEALS BOARD

Washington, D.C.

Wednesday, October 22, 2008

The above-entitled matter came on for ORAL ARGUMENT at approximately 10:00 a.m. at the Environmental Protection Agency, 1201 Constitution Avenue, NW, Washington, D.C.

BEFORE:

ANNA WOLGAST

EDWARD E. REICH

CHARLES SHEEHAN

APPEARANCES:

On behalf of Northern Michigan University:

KEVIN J. FINTO, ESQUIRE
Hunton & Williams, LLP
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8568

CATHERINE DEHLIN, ESQUIRE
General Counsel
Northern Michigan University

On behalf of Michigan Department of Environmental Quality:

NEIL D. GORDON, ESQUIRE
Assistant Attorney General
State of Michigan
Department of Attorney General
Environment, Natural Resources and Agriculture Division
G. Mannen Williams Building - Sixth Floor
525 West Ottawa Street
Post Office Box 30755
Lansing, Michigan 48909
(517) 373-7540

APPEARANCES (CONT'D):

On behalf of Petitioner:

DAVID C. BENDER, ESQUIRE
Garvey McNeil & McGillivray, S.C.
634 West Main Street, Suite 101
Madison, Wisconsin 53703
(608) 256-1003

BRUCE NILLES
Director Sierra Club National Coal Campaign
122 West Washington Avenue, Suite 830
Madison, Wisconsin 53703
(608) 257-4994

ALSO PRESENT:

Eurika Durr
Gary Millstein

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P R O C E E D I N G S

MS. DURR: The Environmental Appeals Board of the United States Environmental Protection Agency is now in session for oral argument in re: Northern Michigan University, Ripley Heating Plant, Permit No. 60-07, PSD Appeal Number 08-02, the Honorable Judges Anna Wolgast, Charles Sheehan, and Ed Reich presiding.

Please turn off all cell phones, and please be seated.

JUDGE SHEEHAN: Good morning. We are here for argument in the matter of Northern Michigan University, Ripley Heating Plant, pursuant to the Board's order of October 2, 2008. The parties are Sierra Club, petitioner, opposing the permit; Michigan Department of Environmental Quality, permit issuer; and NMU, the permitee, defending the permit decision.

As our order indicated, the Sierra Club has a total of 40 minutes to present its argument and will proceed first. At the

outset, it will inform us if it wishes to reserve up to 10 minutes of time for rebuttal. MDEQ will go second with 30 minutes, 5 of which it may reserve for rebuttal. Finally, NMU will proceed third, and that's 10 minutes, 5 of which it may reserve for rebuttal.

As we said in our order, the BACT arguments on greenhouse gases will not be entertained here, and you may assume that the Board is generally familiar with all the briefs.

Let's begin by asking counsel to state their names for the record and whom they represent, beginning with the Sierra Club, followed by MDEQ, and then NMU.

MR. BENDER: Good morning, Your Honor. David Bender on behalf of the Sierra Club in this case, and with me is Bruce Nilles of the Sierra Club.

MR. GORDON: Good morning, Your Honor. Neil Gordon on behalf of the Michigan Department

of Environmental Quality.

MR. FINTO: Good morning. Kevin Finto, on behalf of Northern Michigan University. At counsel table with me is Catherine Dehlin, general counsel for the university.

JUDGE SHEEHAN: Thank you, Counsel.

Mr. Bender, you may proceed and advise us up front of your reserving time for rebuttal or not.

MR. BENDER: Thank you. Good morning, Your Honors. Sierra Club would like to reserve 10 minutes for rebuttal.

Your Honors, there were originally seven issues in the petition in this case. After briefing, Sierra Club withdrew one of the issues and at the Board's order, asked the parties not to address the BACT limits for greenhouse gas emissions. Of the remaining issues, I intend to principally focus on three issues here today: BACT for clean fuels, pre-construction monitoring, and

Class 1 increment impacts. I'm happy to address any of the questions the Board has on other issues in the petition as well.

The issue of clean fuels, there's no dispute that Northern Michigan University intends to build what's termed primarily a wood-fire boiler. The boiler is capable of running some back-up fuels, but the BACT emission limit for principally sulfur dioxide is established based on an assumption that the boiler will burn primarily coal, a dirtier fuel.

There are two significant problems with that determination. First, the only justification that Michigan DEQ gave for establishing a BACT limit principally on coal was presence of snowfall, which could make wood deliveries difficult. However, this basis does not justify the BACT limit established. The BACT limit established assumes that the plant would burn 100 percent coal during 22 out of every 30 days.

That's 22 days of every month for snowfall, including 22 days in June, 22 days in July, 22 days in August. A total of 267 days a year that the BACT limit assumes coal will be burned. And the only justification for burning any coal is as a backup.

JUDGE SHEEHAN: Would you have any problem with a permit that bifurcated the year in some respect? So maybe that coal-burning during the winter months when snow makes delivery difficult, according to the state, and wood in the summer, so it wasn't a year-round 22 days per month coal limit, but something broken up, depending on weather conditions.

MR. BENDER: I think if there was a top-down analysis to determine -- and there was evidence in the record that snowfall really was too deep for a clean fuel delivery, then that would be a possibility.

I also note that in the response -- in Sierra Club's comments, Sierra Club raised the issue of considering natural

gas as a backup emergency fuel as well. In response, Michigan DEQ said that the boiler would be a solid fuel boiler and would burn coal or wood.

JUDGE WOLGAST: If the permit had been submitted as coal only and had never mentioned wood, would that have been deficient from a PSD and BACT standpoint --

MR. BENDER: It would because we know they can burn wood fuel, Your Honor. It'd be a different question if it was incapable of burning wood fuel.

JUDGE SHEEHAN: But it can only burn, what percent can only burn wood -- excuse me, only burn coal?

MR. BENDER: If it was set up to only burn coal, then I think it would depend on an analysis similar to what the 7th Circuit discussed in its review of the Board's Prairie State decision, which is, is the plant physically incapable of burning clean fuel, or is it merely a preference by the applicant to

burn coal? What the 7th Circuit specifically said was it made a distinction between a plant, like Prairie State, that was set up only to burn one fuel stream and could not receive any other fuel stream, with a plant that was intended to burn, by contract -- I think the 7th Circuit discussed by contract one fuel stream. The dirty versus clean discussion that the 7th Circuit had was on coal.

JUDGE SHEEHAN: What about the fact that the original permit application had 3.5 percent sulfur coal, and then the final permit after the addendum went down to 1.5 percent sulfur coal? That seems like it's going in the direction for which you're arguing.

How do you respond to that?

MR. BENDER: Well, I agree that it's going in the direction of cleaner fuel, and I think it indicates that DEQ agrees that there is some ability to consider clean fuels other than the fuel proposed by the applicant. At least early in the process that's what DEQ's position

was. I think it's that DEQ's position now before the Board, and especially Northern Michigan University's position concerning in that it says that anything other than the applicant's business decision -- or I think Northern Michigan University uses the term "business plan," and says anything that would change the business plan is off limit for best available control technology and now it's --

JUDGE SHEEHAN: Well, the university argues that they are employing a so-called just-in-time system whereby apparently you've just got to race the coal in there, I guess to beat the snows, don't store it for long, it goes right into the boiler and is almost immediately consumed. So a series of quick-hit deliveries. That's the design they say they had used here. What's the problem, if any, with that in your view?

MR. BENDER: I think that's the design for all fuels. I think that there's three days of fuel storage for wood or biomass. I think

that the fact -- there's no discussion in the record on whether or not there's space available elsewhere on the campus for storage of clean fuel, biomass fuel.

JUDGE SHEEHAN: Do you regard that design as a fundamental or inherent aspect of the project?

MR. BENDER: I don't believe that it's fundamental to the design in the same way that Prairie State was, because any fuel, any solid fuel that's delivered to the plant gets delivered by truck. Coal is delivered by truck and wood is delivered by truck, and nothing would change in that delivery system, depending on if they pull it right out of the forest and into the plant from a local wood processor or a local storage facility and bring it into the plant. Nothing changes in the design of the fuel handling, which was the issue in Prairie State.

Again, Northern Michigan University and DEQ cite the Board's Prairie State

decision for a theory in this case that any change other than what the applicant itself designates as its preferred plan is immune from review in a top-down BACT analysis. And this is important because it's something that we're seeing in other states where applicants are coming in in recent years and several very recently, using the term "fuel flexibility," and saying that fuel flexibility is inherent to their plant.

And by fuel flexibility they mean they want the ability to be able to burn any kind of fuel, from very clean to very dirty, and telling state permitting agencies that they have to because their permitting agency has to grant BACT limits based on the dirtiest possible fuel because of the flexibility -- the desire to be able to burn a range of fuels is inherent to the design of the plant.

JUDGE SHEEHAN: But what's wrong with flexibility if conditions make flexibility

necessary? No system, presumably, is perfect, and there must be some flexibility allowed to deal with the realities of daily life.

MR. BENDER: And I think that there's flexibility in, for example, how permit limits are established for having some headroom above a permit limit to allow the natural fluctuations in fuel quality. I think it's different to say that the plant wants to burn -- or had the flexibility to burn anything from wood to petroleum coke.

JUDGE SHEEHAN: What authority would you offer as far as your flexibility theory?

MR. BENDER: I think the 7th Circuit's decision in Prairie State -- I think the 7th Circuit was clear in making a distinction, again, between the physical incapability at Prairie State that was inherent to the design and the applicant's desire or contract to burn different fuels.

In fact, the Court said in the Prairie State decision -- the 7th Circuit

said that a BACT determination has to provide for or take into account cleaner -- the ability to burn cleaner fuels even when there'd be some change to the applicant's plans, or even the applicant's plant design, as long as that change was no more than would be necessary whenever a plant switches from a dirtier fuel to a clean fuel.

In this case, we're far removed from a Prairie State situation. There's no question that the plant can burn a clean fuel. In fact, it's designed to burn primarily a wood fuel. It's just that the BACT limit was established and switched it around from having coal as a backup to presuming coal is burned 73 percent of the time, 22 out of every 30 days. That's not consistent with any reasonable interpretation of BACT, that we preserve the clean fuels analysis.

Brings us to the second issue, pre-construction monitoring. The Clean Air

Act requires an applicant to obtain monitoring data representative of what ambient air quality is in the area that'll be affected by the new facility. It's essentially a look before you leap provision. We want some idea of what the air quality is in the area before significant capital investments, before new sources are permitted.

JUDGE SHEEHAN: But what about the NSR manual's allowance of exemptions from perhaps the strict requirement that you cite to use existing ambient data that might not be as source-specific as the regs might be saying?

MR. BENDER: The Clean Air Act appears to be specific in that the data should be from the area that will be affected by the source. The New Source Review Manual does say "in certain situations," and it puts boundaries around the situations where up data from other monitors can be used.

JUDGE SHEEHAN: So what's wrong with

what the state did here for representative data, they claim anyhow, that might not have been right out the gate of the facility, but still in the nearby area?

MR. BENDER: Two things, Your Honor. There's no evidence and no analysis that the data that DEQ used is in fact representative, so you don't know what the air quality is in Marquette, Michigan. DEQ used data from existing monitors located in Escanaba, Michigan, 82 kilometers away; Two Rivers, Wisconsin, 255 kilometers away; Green Bay, Wisconsin, 227 kilometers away; and Milwaukee, Wisconsin, 387 kilometers away. That's approximately the distance from here to New York. It'd be like using a monitor outside New York to try to assess what air quality is in Washington.

JUDGE SHEEHAN: Well, Escanaba, I'm looking at their background concentration offering that they mentioned in their brief. Sixty-five kilometers out, that doesn't seem like it's the distance from here to New York.

That's for SO2.

MR. BENDER: That's for Escanaba, but some of the other pollutants are, like I said, Milwaukee is 387 kilometers away. The --

JUDGE SHEEHAN: What principle would you give us for deciding where that line is?

MR. BENDER: One principle and the one that's referenced in the New Source Review Manual is the PSD monitoring guideline, where EPA -- and that's what's referenced, '87 guidelines. EPA sets some categories of different types of locations and what EPA considered to be representative data. For a facility located in flat terrain, there's no unusual atmospheric conditions. Where there's multiple sources, the representative data has to be from a monitor that's located no less than 10 kilometers from the source, or at a location that's within 1 kilometer of maximum concentrations.

That's the test that's most favorable to DEQ. And again, the monitors

here, even the closest monitor that you referenced is 82 kilometers away.

JUDGE SHEEHAN: What about the document, the Appendix C to the permit application showing a 5 kilometer radius area out from the facility? What relevance or weight does that have?

MR. BENDER: If I understand the document you're referencing, it's a document that shows the Cartesian modeling grid.

JUDGE SHEEHAN: Right.

MR. BENDER: And so the facility and MDEQ modeled the impact from the plant and determined the maximum impacts from this boiler would be within that 5 kilometer radius. And so under the PSD monitoring guideline, the two options -- again, assuming that this was a flat terrain area with no atmospheric conditions, the furthest out that the monitor could be was 10 kilometers.

I note that Marquette, Michigan is on Lake Superior, which is on a water body

which the PSD monitoring guidelines suggest the distances to a representative model are even less than 10 kilometers. But giving DEQ and NMU the benefit of the doubt that it's 10 kilometers, all the monitors are again well outside that 10 kilometer radius.

JUDGE SHEEHAN: But is it the area of maximum impact that's the threshold here? Five kilometers may be maximum, but that doesn't mean that anything outside of 5 kilometers isn't still measurable and represents the ambient representative air quality data necessary.

MR. BENDER: Under the PSD guidelines, it's an either/or. And it's actually three, three options. Ten kilometers within 1 kilometer of the source's maximum impact, or within 1 kilometer of the source, plus other contributing sources in the area's maximum impact. And we don't have that point. We have the point of maximum impact in this plant, and that's within 5 kilometers.

It's likely that the maximum

combined impact area is in that range as well. And so again, that's the first option under that section of the PSD monitoring guidelines is the most beneficial for NMU, NDEQ, and again, we're five times that distance at the closest monitor.

JUDGE SHEEHAN: Can we turn to your BACT 2.5 argument?

MR. BENDER: Yes.

JUDGE SHEEHAN: Let me begin with a question, if I may. The Seitz surrogate policy, PM 10 from PM 2.5, has been in existence since 1997, was re-affirmed by rule in 2005. Your argument seems to be that the May rule-making this year that grandfathered in the policy, because that rule-making wasn't effective until July of this year and the permit issues occurred here before July, because the rule wasn't effective until July, the surrogate policy somehow doesn't exist until the rule -- this rule says it does, even though it's been vitally used as far as we can tell for the last 11

years.

MR. BENDER: Your Honor, our position is that the rule does not apply. There's no legislative rulemaking that allows the surrogate policy to be used because the plant comes before the effective date. Instead, to the extent that the surrogate policy would apply, it has to rely on the two guidance memos and the weight of that authority and the -- how convincing that argument is made --

JUDGE SHEEHAN: So if the May rulemaking didn't exist at all, it never occurred, would your view be that the surrogate policy existed or did not exist?

MR. BENDER: Sierra Club's position would be that the memo certainly existed and a surrogate policy existed, it'd be our position that that policy is unlawful as applied to BACT determinations. And the memos provide as their basis difficulties -- technical difficulties in modeling and monitoring primarily. And --

JUDGE SHEEHAN: That doesn't seem to

me what you argued in your brief. You seem to say in your brief that because the effective date of the rule is July, and the rule requires the use of a surrogate policy until that point, that the surrogate policy wasn't even applicable until July.

MR. BENDER: I'm sorry if that's what we conveyed. And the guidance memos clearly existed to the extent that that constitutes --

JUDGE WOLGAST: You're not saying that this permit is not within the timing ambit of the surrogate policy memo and the Seitz memo. You're just arguing that the underlying principle of conflating PM 10 and the 2.5 is unlawful. Is that correct?

MR. BENDER: Right. I think that's correct, and let me try to clarify.

We are saying that the permit here does not fall within the May 16, 2008 regulation. So we're looking only at the guidance memo. And if the guidance memos are lawful and if they are justified using a PM

2.5, PM 10 equivalent, then we'd have to rely on those memos.

Then we also said that those memos are no longer convincing maybe, because what they relied on as the basis, the policy, it's the actual basis for using that surrogacy approach no longer exists in May of 2008, when this permit was --

JUDGE REICH: If we were to conclude that this surrogacy was appropriate, have you in this proceeding or below challenged the PM 10 BACT analysis in and of itself, or have you accepted that to the extent that there was an analysis relative to PM 10, that that was an acceptable BACT analysis for PM 10 -- there should have been one for 2.5?

MR. BENDER: We have not challenged the PM top-down BACT analysis. We think that they're not equivalent. And actually in Northern Michigan University's brief I think is one of the best examples of why they shouldn't be treated as equivalents here.

JUDGE SHEEHAN: If the only issue before us was whether the PM 10 BACT analysis was acceptably done, you would not challenge that the PM 10 analysis was acceptably done, only its use as a surrogate for 2.5.

MR. BENDER: Sierra Club does not challenge in this case the PM 10 top-down BACT analysis for PM 10. But again, the Northern Michigan University's brief identifies the test method which Northern Michigan University thinks that the permit requires. And again, we say it, albeit if it's not clear, that this is the case. But if it is that the test method is that NSPS test method, a filterable only particulate test method, it highlights why PM 10 BACT limit in this case is not representative of PM 2.5 BACT. Because PM 2.5 is a majority of -- PM 2.5 from production sources is condensable fraction. And so the BACT limit, the PM 10 BACT limit, would limit a fraction, 20 percent, a little bit more than 20 percent of the total PM 2.5. Because PM 2.5 is -- consists mostly of a condensable