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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

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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

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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 --

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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

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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

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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

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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

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.

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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

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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

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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

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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

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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

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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.

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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.

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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

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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 --

70	<p>1 JUDGE SHEEHAN: Your own document; not</p> <p>2 the permit application, but DEQ's --</p> <p>3 MR. GORDON: I think that guidance</p> <p>4 document was written, as I recall, back in the</p> <p>5 -- what is it? At least in the early to</p> <p>6 mid-'90s, if not before.</p> <p>7 JUDGE SHEEHAN: 2005. Effective date</p> <p>8 August 9, 2005.</p> <p>9 MR. GORDON: Effective date -- okay, I</p> <p>10 apologize then. That -- for one thing, that</p> <p>11 document -- there's not any allegation that that</p> <p>12 was what happened in this case. And so --</p> <p>13 JUDGE SHEEHAN: You've referred to it</p> <p>14 throughout the permit application.</p> <p>15 MR. GORDON: But there was a -- but</p> <p>16 the permit application lays out the BACT</p> <p>17 analysis that they did, and there's not any</p> <p>18 alleged circumventing of any kind of five-step</p> <p>19 BACT analysis here. They actually lay forth</p> <p>20 that. It may be in their background section of</p> <p>21 their discussion, they talk about what that</p> <p>22 operational memo says. But actually when you</p>	72	<p>1 correct it.</p> <p>2 JUDGE REICH: The Department appeared</p> <p>3 to know about it because the Department made the</p> <p>4 argument that snow gets in the way and snow is</p> <p>5 the reason why we have to have this particular</p> <p>6 allocation of coal versus wood. But it doesn't</p> <p>7 snow in July, so why does your own reasoning not</p> <p>8 support a different result?</p> <p>9 MR. GORDON: Well, I think there's two</p> <p>10 different issues that overlap. One is why isn't</p> <p>11 the permit, according to Sierra Club, based on</p> <p>12 100 percent wood and 0 coal? And the answer to</p> <p>13 that is because of fuel delivery disruptions for</p> <p>14 wood during the wintertime. The argument is, if</p> <p>15 you agree that some coal will be needed because</p> <p>16 of the severe winter weather, then how much wood</p> <p>17 and how much coal should the limit reflect? And</p> <p>18 the answer to -- and that -- the fact sheet that</p> <p>19 was put out to the public at the beginning of</p> <p>20 the public comment period laid out very</p> <p>21 specifically that the limit is based on 22 days</p> <p>22 of -- a mix of coal and wood.</p>
71	<p>1 look at what the BACT analysis that was</p> <p>2 performed by the university here, it's not that</p> <p>3 they are saying, oh, let's just do a quick and</p> <p>4 dirty and we'll be done. They're actually doing</p> <p>5 a BACT analysis.</p> <p>6 JUDGE SHEEHAN: I think that's</p> <p>7 debatable.</p> <p>8 JUDGE REICH: Can I ask, this is an</p> <p>9 obvious question, which is, if the concern as to</p> <p>10 availability of fuel was based on weather</p> <p>11 conditions at certain times of the year, did you</p> <p>12 not consider or did you consider why did you not</p> <p>13 adopt limits and more precisely tailor to the</p> <p>14 concern you have? Why does the public and the</p> <p>15 facility, the plant, have to live with the</p> <p>16 limits in June based on snows in January?</p> <p>17 MR. GORDON: That argument that was</p> <p>18 raised by the Sierra Club in their petition for</p> <p>19 review is not an argument that was raised during</p> <p>20 the public comment period. Accordingly, the</p> <p>21 Department didn't respond, didn't have it</p> <p>22 presented to it, didn't have an opportunity to</p>	73	<p>1 And yet Sierra Club, petitioner</p> <p>2 here, did not raise that point in public</p> <p>3 comments. Had they done that --</p> <p>4 JUDGE REICH: So you're saying that</p> <p>5 issue was not properly before us.</p> <p>6 MR. GORDON: That's right. It wasn't</p> <p>7 preserved for appeal. Had they done that, the</p> <p>8 DEQ would have had the opportunity to address</p> <p>9 it, but it was not properly before the board.</p> <p>10 JUDGE SHEEHAN: Turning briefly to the</p> <p>11 redesign argument and the very strong emphasis</p> <p>12 in the Clean Air Act itself, Section 169, that</p> <p>13 clean fuel needs to be considered, and as the</p> <p>14 Sierra Club 7th Circuit case reaffirmed that</p> <p>15 clean fuels are not to be read out of the Act</p> <p>16 merely because "some adjustment" to technology</p> <p>17 is required, what efforts did NMU make here to</p> <p>18 push the clean fuels envelope and do some</p> <p>19 adjusting to pull in as clean a fuel possible?</p> <p>20 MR. GORDON: Well, I think the</p> <p>21 argument that the Sierra Club is making, and to</p> <p>22 answer your question, is what efforts should</p>

<p style="text-align: right;">74</p> <p>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.</p> <p>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.</p> <p>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</p>	<p style="text-align: right;">76</p> <p>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.</p> <p>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.</p> <p>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?</p>
<p style="text-align: right;">75</p> <p>1 about it and produced a viable analysis to 2 support what you're saying here in court.</p> <p>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.</p> <p>7 JUDGE SHEEHAN: The Clean Air Act says 8 it's your burden.</p> <p>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"</p>	<p style="text-align: right;">77</p> <p>1 JUDGE WOLGAST: Why is that?</p> <p>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.</p> <p>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 --</p> <p>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.</p> <p>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</p>