

BEFORE THE ENVIRONMENTAL PROTECTION APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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In re: :
 :
NORTHERN MICHIGAN UNIVERSITY, : PSD Appeal No. 08-02
RIPLEY POWER PLANT, :
 :
PSD PERMIT 60-07 :
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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

2	<p>1 APPEARANCES:</p> <p>2 On behalf of Northern Michigan University:</p> <p>3 KEVIN J. FINTO, ESQUIRE Hunton & Williams, LLP 4 951 East Byrd Street Richmond, Virginia 23219-4074 5 (804) 788-8568</p> <p>6 CATHERINE DEHLIN, ESQUIRE General Counsel 7 Northern Michigan University</p> <p>8 On behalf of Michigan Department of Environmental Quality:</p> <p>9</p> <p>10 NEIL D. GORDON, ESQUIRE Assistant Attorney General State of Michigan 11 Department of Attorney General Environment, Natural Resources and 12 Agriculture Division G. Mannen Williams Building - Sixth Floor 13 525 West Ottawa Street Post Office Box 30755 14 Lansing, Michigan 48909 (517) 373-7540</p> <p>15 16 17 18 19 20 21 22</p>	4
3	<p>1 APPEARANCES (CONT'D):</p> <p>2 On behalf of Petitioner:</p> <p>3 DAVID C. BENDER, ESQUIRE Garvey McNeil & McGillivray, S.C. 4 634 West Main Street, Suite 101 Madison, Wisconsin 53703 5 (608) 256-1003</p> <p>6 BRUCE NILLES Director Sierra Club National Coal Campaign 7 122 West Washington Avenue, Suite 830 Madison, Wisconsin 53703 8 (608) 257-4994</p> <p>9 ALSO PRESENT: 10 Eurika Durr Gary Millstein</p> <p>11</p> <p>12 * * * * *</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	5
2	<p>1 PROCEEDINGS</p> <p>2 MS. DURR: The Environmental Appeals 3 Board of the United States Environmental 4 Protection Agency is now in session for oral 5 argument in re: Northern Michigan University, 6 Ripley Heating Plant, Permit No. 60-07, PSD 7 Appeal Number 08-02, the Honorable Judges Anna 8 Wolgast, Charles Sheehan, and Ed Reich 9 presiding.</p> <p>10 Please turn off all cell phones, 11 and please be seated.</p> <p>12 JUDGE SHEEHAN: Good morning. We are 13 here for argument in the matter of Northern 14 Michigan University, Ripley Heating Plant, 15 pursuant to the Board's order of October 2, 16 2008. The parties are Sierra Club, petitioner, 17 opposing the permit; Michigan Department of 18 Environmental Quality, permit issuer; and NMU, 19 the permittee, defending the permit decision.</p> <p>20 As our order indicated, the Sierra 21 Club has a total of 40 minutes to present its 22 argument and will proceed first. At the</p>	4
3	<p>1 outset, it will inform us if it wishes to 2 reserve up to 10 minutes of time for 3 rebuttal. MDEQ will go second with 30 4 minutes, 5 of which it may reserve for 5 rebuttal. Finally, NMU will proceed third, 6 and that's 10 minutes, 5 of which it may 7 reserve for rebuttal.</p> <p>8 As we said in our order, the BACT 9 arguments on greenhouse gases will not be 10 entertained here, and you may assume that the 11 Board is generally familiar with all the 12 briefs.</p> <p>13 Let's begin by asking counsel to 14 state their names for the record and whom 15 they represent, beginning with the Sierra 16 Club, followed by MDEQ, and then NMU.</p> <p>17 MR. BENDER: Good morning, Your Honor. 18 David Bender on behalf of the Sierra Club in 19 this case, and with me is Bruce Nilles of the 20 Sierra Club.</p> <p>21 MR. GORDON: Good morning, Your Honor 22 Neil Gordon on behalf of the Michigan Department</p>	5

6	<p>1 of Environmental Quality.</p> <p>2 MR. FINTO: Good morning. Kevin</p> <p>3 Finto, on behalf of Northern Michigan</p> <p>4 University. At counsel table with me is</p> <p>5 Catherine Dehlin, general counsel for the</p> <p>6 university.</p> <p>7 JUDGE SHEEHAN: Thank you, Counsel.</p> <p>8 Mr. Bender, you may proceed and</p> <p>9 advise us up front of your reserving time for</p> <p>10 rebuttal or not.</p> <p>11 MR. BENDER: Thank you. Good morning,</p> <p>12 Your Honors. Sierra Club would like to reserve</p> <p>13 10 minutes for rebuttal.</p> <p>14 Your Honors, there were originally</p> <p>15 seven issues in the petition in this case.</p> <p>16 After briefing, Sierra Club withdrew one of</p> <p>17 the issues and at the Board's order, asked</p> <p>18 the parties not to address the BACT limits</p> <p>19 for greenhouse gas emissions. Of the</p> <p>20 remaining issues, I intend to principally</p> <p>21 focus on three issues here today: BACT for</p> <p>22 clean fuels, pre-construction monitoring, and</p>	8	<p>1 That's 22 days of every month for</p> <p>2 snowfall, including 22 days in June, 22 days</p> <p>3 in July, 22 days in August. A total of 267</p> <p>4 days a year that the BACT limit assumes coal</p> <p>5 will be burned. And the only justification</p> <p>6 for burning any coal is as a backup.</p> <p>7 JUDGE SHEEHAN: Would you have any</p> <p>8 problem with a permit that bifurcated the year</p> <p>9 in some respect? So maybe that coal-burning</p> <p>10 during the winter months when snow makes</p> <p>11 delivery difficult, according to the state, and</p> <p>12 wood in the summer, so it wasn't a year-round 22</p> <p>13 days per month coal limit, but something broken</p> <p>14 up, depending on weather conditions.</p> <p>15 MR. BENDER: I think if there was a</p> <p>16 top-down analysis to determine -- and there was</p> <p>17 evidence in the record that snowfall really was</p> <p>18 too deep for a clean fuel delivery, then that</p> <p>19 would be a possibility.</p> <p>20 I also note that in the</p> <p>21 response -- in Sierra Club's comments, Sierra</p> <p>22 Club raised the issue of considering natural</p>
7	<p>1 Class 1 increment impacts. I'm happy to</p> <p>2 address any of the questions the Board has on</p> <p>3 other issues in the petition as well.</p> <p>4 The issue of clean fuels, there's</p> <p>5 no dispute that Northern Michigan University</p> <p>6 intends to build what's termed primarily a</p> <p>7 wood-fire boiler. The boiler is capable of</p> <p>8 running some back-up fuels, but the BACT</p> <p>9 emission limit for principally sulfur dioxide</p> <p>10 is established based on an assumption that</p> <p>11 the boiler will burn primarily coal, a</p> <p>12 dirtier fuel.</p> <p>13 There are two significant problems</p> <p>14 with that determination. First, the only</p> <p>15 justification that Michigan DEQ gave for</p> <p>16 establishing a BACT limit principally on coal</p> <p>17 was presence of snowfall, which could make</p> <p>18 wood deliveries difficult. However, this</p> <p>19 basis does not justify the BACT limit</p> <p>20 established. The BACT limit established</p> <p>21 assumes that the plant would burn 100 percent</p> <p>22 coal during 22 out of every 30 days.</p>	9	<p>1 gas as a backup emergency fuel as well. In</p> <p>2 response, Michigan DEQ said that the boiler</p> <p>3 would be a solid fuel boiler and would burn</p> <p>4 coal or wood.</p> <p>5 JUDGE WOLGAST: If the permit had been</p> <p>6 submitted as coal only and had never mentioned</p> <p>7 wood, would that have been deficient from a PSD</p> <p>8 and BACT standpoint --</p> <p>9 MR. BENDER: It would because we know</p> <p>10 they can burn wood fuel, Your Honor. It'd be a</p> <p>11 different question if it was incapable of</p> <p>12 burning wood fuel.</p> <p>13 JUDGE SHEEHAN: But it can only burn,</p> <p>14 what percent can only burn wood -- excuse me,</p> <p>15 only burn coal?</p> <p>16 MR. BENDER: If it was set up to only</p> <p>17 burn coal, then I think it would depend on an</p> <p>18 analysis similar to what the 7th Circuit</p> <p>19 discussed in its review of the Board's Prairie</p> <p>20 State decision, which is, is the plant</p> <p>21 physically incapable of burning clean fuel, or</p> <p>22 is it merely a preference by the applicant to</p>

10	<p>1 burn coal? What the 7th Circuit specifically</p> <p>2 said was it made a distinction between a plant,</p> <p>3 like Prairie State, that was set up only to burn</p> <p>4 one fuel stream and could not receive any other</p> <p>5 fuel stream, with a plant that was intended to</p> <p>6 burn, by contract -- I think the 7th Circuit</p> <p>7 discussed by contract one fuel stream. The</p> <p>8 dirty versus clean discussion that the 7th</p> <p>9 Circuit had was on coal.</p> <p>10 JUDGE SHEEHAN: What about the fact</p> <p>11 that the original permit application had</p> <p>12 3.5 percent sulfur coal, and then the final</p> <p>13 permit after the addendum went down to</p> <p>14 1.5 percent sulfur coal? That seems like it's</p> <p>15 going in the direction for which you're arguing.</p> <p>16 How do you respond to that?</p> <p>17 MR. BENDER: Well, I agree that it's</p> <p>18 going in the direction of cleaner fuel, and I</p> <p>19 think it indicates that DEQ agrees that there is</p> <p>20 some ability to consider clean fuels other than</p> <p>21 the fuel proposed by the applicant. At least</p> <p>22 early in the process that's what DEQ's position</p>	12	<p>1 that the fact -- there's no discussion in the</p> <p>2 record on whether or not there's space available</p> <p>3 elsewhere on the campus for storage of clean</p> <p>4 fuel, biomass fuel.</p> <p>5 JUDGE SHEEHAN: Do you regard that</p> <p>6 design as a fundamental or inherent aspect of</p> <p>7 the project?</p> <p>8 MR. BENDER: I don't believe that it's</p> <p>9 fundamental to the design in the same way that</p> <p>10 Prairie State was, because any fuel, any solid</p> <p>11 fuel that's delivered to the plant gets</p> <p>12 delivered by truck. Coal is delivered by truck</p> <p>13 and wood is delivered by truck, and nothing</p> <p>14 would change in that delivery system, depending</p> <p>15 on if they pull it right out of the forest and</p> <p>16 into the plant from a local wood processor or a</p> <p>17 local storage facility and bring it into the</p> <p>18 plant. Nothing changes in the design of the</p> <p>19 fuel handling, which was the issue in Prairie</p> <p>20 State.</p> <p>21 Again, Northern Michigan University</p> <p>22 and DEQ cite the Board's Prairie State</p>
11	<p>1 was. I think it's that DEQ's position now</p> <p>2 before the Board, and especially Northern</p> <p>3 Michigan University's position concerning in</p> <p>4 that it says that anything other than the</p> <p>5 applicant's business decision -- or I think</p> <p>6 Northern Michigan University uses the term</p> <p>7 "business plan," and says anything that would</p> <p>8 change the business plan is off limit for best</p> <p>9 available control technology and now it's --</p> <p>10 JUDGE SHEEHAN: Well, the university</p> <p>11 argues that they are employing a so-called</p> <p>12 just-in-time system whereby apparently you've</p> <p>13 just got to race the coal in there, I guess to</p> <p>14 beat the snows, don't store it for long, it goes</p> <p>15 right into the boiler and is almost immediately</p> <p>16 consumed. So a series of quick-hit deliveries.</p> <p>17 That's the design they say they had used here.</p> <p>18 What's the problem, if any, with that in your</p> <p>19 view?</p> <p>20 MR. BENDER: I think that's the design</p> <p>21 for all fuels. I think that there's three days</p> <p>22 of fuel storage for wood or biomass. I think</p>	13	<p>1 decision for a theory in this case that any</p> <p>2 change other than what the applicant itself</p> <p>3 designates as its preferred plan is immune</p> <p>4 from review in a top-down BACT analysis. And</p> <p>5 this is important because it's something that</p> <p>6 we're seeing in other states where applicants</p> <p>7 are coming in in recent years and several</p> <p>8 very recently, using the term "fuel</p> <p>9 flexibility," and saying that fuel</p> <p>10 flexibility is inherent to their plant.</p> <p>11 And by fuel flexibility they mean</p> <p>12 they want the ability to be able to burn any</p> <p>13 kind of fuel, from very clean to very dirty,</p> <p>14 and telling state permitting agencies that</p> <p>15 they have to because their permitting agency</p> <p>16 has to grant BACT limits based on the</p> <p>17 dirtiest possible fuel because of the</p> <p>18 flexibility -- the desire to be able to burn</p> <p>19 a range of fuels is inherent to the design of</p> <p>20 the plant.</p> <p>21 JUDGE SHEEHAN: But what's wrong with</p> <p>22 flexibility if conditions make flexibility</p>

14	<p>1 necessary? No system, presumably, is perfect, 2 and there must be some flexibility allowed to 3 deal with the realities of daily life.</p> <p>4 MR. BENDER: And I think that there's 5 flexibility in, for example, how permit limits 6 are established for having some headroom above a 7 permit limit to allow the natural fluctuations 8 in fuel quality. I think it's different to say 9 that the plant wants to burn -- or had the 10 flexibility to burn anything from wood to 11 petroleum coke.</p> <p>12 JUDGE SHEEHAN: What authority would 13 you offer as far as your flexibility theory?</p> <p>14 MR. BENDER: I think the 7th Circuit's 15 decision in Prairie State -- I think the 7th 16 Circuit was clear in making a distinction, 17 again, between the physical incapability at 18 Prairie State that was inherent to the design 19 and the applicant's desire or contract to burn 20 different fuels.</p> <p>21 In fact, the Court said in the 22 Prairie State decision -- the 7th Circuit</p>	16	<p>1 Act requires an applicant to obtain 2 monitoring data representative of what 3 ambient air quality is in the area that'll be 4 affected by the new facility. It's 5 essentially a look before you leap provision. 6 We want some idea of what the air quality is 7 in the area before significant capital 8 investments, before new sources are 9 permitted.</p> <p>10 JUDGE SHEEHAN: But what about the NSR 11 manual's allowance of exemptions from perhaps 12 the strict requirement that you cite to use 13 existing ambient data that might not be as 14 source-specific as the regs might be saying?</p> <p>15 MR. BENDER: The Clean Air Act appears 16 to be specific in that the data should be from 17 the area that will be affected by the source. 18 The New Source Review Manual does say "in 19 certain situations," and it puts boundaries 20 around the situations where up data from other 21 monitors can be used.</p> <p>22 JUDGE SHEEHAN: So what's wrong with</p>
15	<p>1 said that a BACT determination has to provide 2 for or take into account cleaner -- the 3 ability to burn cleaner fuels even when 4 there'd be some change to the applicant's 5 plans, or even the applicant's plant design, 6 as long as that change was no more than would 7 be necessary whenever a plant switches from a 8 dirtier fuel to a clean fuel.</p> <p>9 In this case, we're far removed 10 from a Prairie State situation. There's no 11 question that the plant can burn a clean 12 fuel. In fact, it's designed to burn 13 primarily a wood fuel. It's just that the 14 BACT limit was established and switched it 15 around from having coal as a backup to 16 presuming coal is burned 73 percent of the 17 time, 22 out of every 30 days. That's not 18 consistent with any reasonable interpretation 19 of BACT, that we preserve the clean fuels 20 analysis.</p> <p>21 Brings us to the second issue, 22 pre-construction monitoring. The Clean Air</p>	17	<p>1 what the state did here for representative data, 2 they claim anyhow, that might not have been 3 right out the gate of the facility, but still in 4 the nearby area?</p> <p>5 MR. BENDER: Two things, Your Honor. 6 There's no evidence and no analysis that the 7 data that DEQ used is in fact representative, so 8 you don't know what the air quality is in 9 Marquette, Michigan. DEQ used data from 10 existing monitors located in Escanaba, Michigan, 11 82 kilometers away; Two Rivers, Wisconsin, 255 12 kilometers away; Green Bay, Wisconsin, 227 13 kilometers away; and Milwaukee, Wisconsin, 387 14 kilometers away. That's approximately the 15 distance from here to New York. It'd be like 16 using a monitor outside New York to try to 17 assess what air quality is in Washington.</p> <p>18 JUDGE SHEEHAN: Well, Escanaba, I'm 19 looking at their background concentration 20 offering that they mentioned in their brief. 21 Sixty-five kilometers out, that doesn't seem 22 like it's the distance from here to New York.</p>

18	<p>1 That's for SO2.</p> <p>2 MR. BENDER: That's for Escanaba, but</p> <p>3 some of the other pollutants are, like I said,</p> <p>4 Milwaukee is 387 kilometers away. The --</p> <p>5 JUDGE SHEEHAN: What principle would</p> <p>6 you give us for deciding where that line is?</p> <p>7 MR. BENDER: One principle and the one</p> <p>8 that's referenced in the New Source Review</p> <p>9 Manual is the PSD monitoring guideline, where</p> <p>10 EPA -- and that's what's referenced, '87</p> <p>11 guidelines. EPA sets some categories of</p> <p>12 different types of locations and what EPA</p> <p>13 considered to be representative data. For a</p> <p>14 facility located in flat terrain, there's no</p> <p>15 unusual atmospheric conditions. Where there's</p> <p>16 multiple sources, the representative data has to</p> <p>17 be from a monitor that's located no less than 10</p> <p>18 kilometers from the source, or at a location</p> <p>19 that's within 1 kilometer of maximum</p> <p>20 concentrations.</p> <p>21 That's the test that's most</p> <p>22 favorable to DEQ. And again, the monitors</p>	20
19	<p>1 here, even the closest monitor that you</p> <p>2 referenced is 82 kilometers away.</p> <p>3 JUDGE SHEEHAN: What about the</p> <p>4 document, the Appendix C to the permit</p> <p>5 application showing a 5 kilometer radius area</p> <p>6 out from the facility? What relevance or weight</p> <p>7 does that have?</p> <p>8 MR. BENDER: If I understand the</p> <p>9 document you're referencing, it's a document</p> <p>10 that shows the Cartesian modeling grid.</p> <p>11 JUDGE SHEEHAN: Right.</p> <p>12 MR. BENDER: And so the facility and</p> <p>13 MDEQ modeled the impact from the plant and</p> <p>14 determined the maximum impacts from this boiler</p> <p>15 would be within that 5 kilometer radius. And so</p> <p>16 under the PSD monitoring guideline, the two</p> <p>17 options -- again, assuming that this was a flat</p> <p>18 terrain area with no atmospheric conditions, the</p> <p>19 furthest out that the monitor could be was 10</p> <p>20 kilometers.</p> <p>21 I note that Marquette, Michigan is</p> <p>22 on Lake Superior, which is on a water body</p>	21

22	<p>1 years.</p> <p>2 MR. BENDER: Your Honor, our position</p> <p>3 is that the rule does not apply. There's no</p> <p>4 legislative rulemaking that allows the surrogate</p> <p>5 policy to be used because the plant comes before</p> <p>6 the effective date. Instead, to the extent that</p> <p>7 the surrogate policy would apply, it has to rely</p> <p>8 on the two guidance memos and the weight of that</p> <p>9 authority and the -- how convincing that</p> <p>10 argument is made --</p> <p>11 JUDGE SHEEHAN: So if the May</p> <p>12 rulemaking didn't exist at all, it never</p> <p>13 occurred, would your view be that the surrogate</p> <p>14 policy existed or did not exist?</p> <p>15 MR. BENDER: Sierra Club's position</p> <p>16 would be that the memo certainly existed and a</p> <p>17 surrogate policy existed, it'd be our position</p> <p>18 that that policy is unlawful as applied to BACT</p> <p>19 determinations. And the memos provide as their</p> <p>20 basis difficulties -- technical difficulties in</p> <p>21 modeling and monitoring primarily. And --</p> <p>22 JUDGE SHEEHAN: That doesn't seem to</p>	24	<p>1 2.5, PM 10 equivalent, then we'd have to rely</p> <p>2 on those memos.</p> <p>3 Then we also said that those memos</p> <p>4 are no longer convincing maybe, because what</p> <p>5 they relied on as the basis, the policy, it's</p> <p>6 the actual basis for using that surrogacy</p> <p>7 approach no longer exists in May of 2008,</p> <p>8 when this permit was --</p> <p>9 JUDGE REICH: If we were to conclude</p> <p>10 that this surrogacy was appropriate, have you in</p> <p>11 this proceeding or below challenged the PM 10</p> <p>12 BACT analysis in and of itself, or have you</p> <p>13 accepted that to the extent that there was an</p> <p>14 analysis relative to PM 10, that that was an</p> <p>15 acceptable BACT analysis for PM 10 -- there</p> <p>16 should have been one for 2.5?</p> <p>17 MR. BENDER: We have not challenged</p> <p>18 the PM top-down BACT analysis. We think that</p> <p>19 they're not equivalent. And actually in</p> <p>20 Northern Michigan University's brief I think is</p> <p>21 one of the best examples of why they shouldn't</p> <p>22 be treated as equivalents here.</p>
23	<p>1 me what you argued in your brief. You seem to</p> <p>2 say in your brief that because the effective</p> <p>3 date of the rule is July, and the rule requires</p> <p>4 the use of a surrogate policy until that point,</p> <p>5 that the surrogate policy wasn't even applicable</p> <p>6 until July.</p> <p>7 MR. BENDER: I'm sorry if that's what</p> <p>8 we conveyed. And the guidance memos clearly</p> <p>9 existed to the extent that that constitutes --</p> <p>10 JUDGE WOLGAST: You're not saying that</p> <p>11 this permit is not within the timing ambit of</p> <p>12 the surrogate policy memo and the Seitz memo.</p> <p>13 You're just arguing that the underlying</p> <p>14 principle of conflating PM 10 and the 2.5 is</p> <p>15 unlawful. Is that correct?</p> <p>16 MR. BENDER: Right. I think that's</p> <p>17 correct, and let me try to clarify.</p> <p>18 We are saying that the permit here</p> <p>19 does not fall within the May 16, 2008</p> <p>20 regulation. So we're looking only at the</p> <p>21 guidance memo. And if the guidance memos are</p> <p>22 lawful and if they are justified using a PM</p>	25	<p>1 JUDGE SHEEHAN: If the only issue</p> <p>2 before us was whether the PM 10 BACT analysis</p> <p>3 was acceptably done, you would not challenge</p> <p>4 that the PM 10 analysis was acceptably done,</p> <p>5 only its use as a surrogate for 2.5.</p> <p>6 MR. BENDER: Sierra Club does not</p> <p>7 challenge in this case the PM 10 top-down BACT</p> <p>8 analysis for PM 10. But again, the Northern</p> <p>9 Michigan University's brief identifies the test</p> <p>10 method which Northern Michigan University thinks</p> <p>11 that the permit requires. And again, we say it,</p> <p>12 albeit if it's not clear, that this is the case.</p> <p>13 But if it is that the test method is that NSPS</p> <p>14 test method, a filterable only particulate test</p> <p>15 method, it highlights why PM 10 BACT limit in</p> <p>16 this case is not representative of PM 2.5 BACT.</p> <p>17 Because PM 2.5 is a majority of -- PM 2.5 from</p> <p>18 production sources is condensable fraction. And</p> <p>19 so the BACT limit, the PM 10 BACT limit, would</p> <p>20 limit a fraction, 20 percent, a little bit more</p> <p>21 than 20 percent of the total PM 2.5. Because PM</p> <p>22 2.5 is -- consists mostly of a condensable</p>