

**BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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Revision Of An Operating Permit for  
Wisconsin Public Service Corporation –  
Weston Plant, Marathon County, Wisconsin

Source I.D. 737009020

Permit Revision Nos. 737009020-P13  
737009020-P16

Proposed by the Wisconsin Department of  
Natural Resources on August 1, 2014

Petition No. \_\_\_\_\_

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**PETITION RENEWING REQUEST THAT THE ADMINISTRATOR OBJECT TO  
ISSUANCE OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE  
WISCONSIN PUBLIC SERVICE CORPORATION – WESTON PLANT**

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Date: November 14, 2014

Pursuant to the Clean Air Act (“CAA”), Wisconsin Public Service Corporation (“WPSC”) petitions the Administrator of the United States Environmental Protection Agency (“U.S. EPA”) to object to the proposed Title V Operating Permit Revision for WPSC’s Weston plant, Permit Revision Nos. 737009020-P13 and 737009020-P16 (the “Permit Revision”), which Permit Revision includes provisions carried forward from the Title V Operating Permit No. 737009020-P10 issued on August 27, 2013 (the “2013 Title V Permit”). 42 U.S.C. § 7661d(b); 40 C.F.R. § 70.8(d). The Wisconsin Department of Natural Resources (“WDNR”) proposed the Permit Revision to U.S. EPA on August 1, 2014. A copy of the proposed Permit Revision is attached as Exhibit A.

On October 16, 2013, WPSC petitioned the U.S. EPA Administrator to object on various grounds to the 2013 Title V Permit (the “2013 Petition”). A copy of the 2013 Petition, without attachments, is attached as Exhibit B.<sup>1</sup> On November 4, 2013, U.S. EPA issued a letter to WPSC acknowledging receipt of the 2013 Petition and stating that U.S. EPA would review and respond to the issues raised therein. A copy of this acknowledgment letter is included as Exhibit C. To date, WPSC has not received any additional response from U.S. EPA to the 2013 Petition.

WDNR issued the Permit Revision in 2014 only to revise several of the terms from the 2013 Title V Permit that are the subject of an ongoing state administrative challenge by WPSC. As a result, the Permit Revision resolved only one of the issues raised by WPSC in the

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<sup>1</sup> Due to the large size of the attachments to the 2013 Petition and the fact that they were previously provided to U.S. EPA, they are not reattached here. WPSC will provide copies of these attachments upon request.

2013 Petition.<sup>2</sup> The remaining issues from the 2013 Petition are: (1) the 2013 Title V Permit impermissibly imposes new or modifies preexisting requirements as part of the Title V permitting process; (2) various emission limits and monitoring provisions in the 2013 Title V Permit are vague and unenforceable because they do not identify the appropriate averaging time periods; (3) WDNR failed to incorporate proper and adequate averaging periods into the compliance assurance monitoring provisions contained in the 2013 Title V Permit; and (4) WDNR did not adequately respond to WPSC's public comments on the 2013 Title V Permit. WPSC's challenge to these remaining issues is still pending. However, out of an abundance of caution, WPSC hereby incorporates by reference the 2013 Petition (including all attachments thereto) and reasserts each of the issues raised in the 2013 Petition. WPSC previously provided comments to WDNR on each of these issues on March 6, 2013, and a copy of these comments was attached to the 2013 Petition as Exhibit B.

This petition is filed within 60 days of the end of U.S. EPA's 45-day review period, as required by CAA § 505(b)(2). Pursuant to this statute, the U.S. EPA Administrator must grant or deny this petition within sixty days after it is filed. If the Administrator determines that the Permit Revision does not comply with the requirements of the CAA, she must object to issuance of the permit. 42 U.S.C. § 7661d(b); 40 C.F.R. § 70.8(c).

### **CONCLUSION**

For the foregoing reasons and the reasons stated in the 2013 **Petition**, the 2013 Title V Permit and the subsequent Permit Revision fail to comply with the requirements of the

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<sup>2</sup> The issue raised in Section IV of the 2013 Petition, relating to WDNR's failure to incorporate all applicable provisions of the Federal Mercury and Air Toxics Standard into the Title V permit for the Weston Plant, was resolved with the issuance of the Permit Revision.

CAA and, therefore, U.S. EPA should object to the 2013 Title V Permit and the Permit Revision pursuant to 40 C.F.R. § 70.8(c)(1) and 42 U.S.C. § 7661d(b)(2).

Dated this 14<sup>th</sup> day of November, 2014.

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**BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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An Operating Permit for Wisconsin Public  
Service Corporation – Weston Plant, Marathon  
County, Wisconsin

Source I.D. 737009020

Permit No. 737009020-P10

Proposed by the Wisconsin Department of  
Natural Resources on July 3, 2013

Petition No. \_\_\_\_\_

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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE  
OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE WISCONSIN  
PUBLIC SERVICE CORPORATION – WESTON PLANT**

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Date: October 16, 2013

Pursuant to the Clean Air Act (“CAA”), Wisconsin Public Service Corporation (“WPSC”) petitions the Administrator of the United States Environmental Protection Agency (“U.S. EPA”) to object to the proposed Title V Operating Permit for WPSC’s Weston plant (“Weston Plant”), Permit No. 737009020-P10 (the “Permit”). 42 U.S.C. § 7661d(b); 40 C.F.R. § 70.8(d). The Wisconsin Department of Natural Resources (“WDNR”) proposed the Permit to U.S. EPA on July 3, 2013. A copy of the proposed Permit is attached as Exhibit A.

WPSC provided comments to WDNR on the draft permit on March 6, 2013. A copy of WPSC’s comments is attached as Exhibit B. A copy of WDNR’s response to comments is attached as Exhibit C.

This petition is filed within 60 days of the end of U.S. EPA’s 45-day review period, as required by CAA § 505(b)(2). Pursuant to this statute, the U.S. EPA Administrator must grant or deny this petition within sixty days after it is filed. If the Administrator determines that the Permit does not comply with the requirements of the CAA, she must object to issuance of the permit. 42 U.S.C. § 7661d(b); 40 C.F.R. § 70.8(c).

This petition seeks an objection by the Administrator for the following reasons:

- (1) The Permit impermissibly imposes new or modifies preexisting requirements as part of the Title V permitting process;
- (2) Various emission limits and monitoring provisions in the Permit are vague and unenforceable because they do not identify the appropriate averaging time periods;
- (3) WDNR failed to incorporate proper and adequate averaging periods into the compliance assurance monitoring (“CAM”) provisions contained in the Permit;
- (4) WDNR failed to incorporate into the Permit the provisions, including the affirmative defense provisions, of the federal Mercury and Air Toxics Standard for Power Plants,

which was promulgated by U.S. EPA on February 16, 2012 and codified at 43 C.F.R. Part 63, Subpart UUUUU; and

(5) WDNR did not adequately respond to WPSC’s public comments on the Permit.

**I. THE PERMIT IMPERMISSIBLY IMPOSES NEW REQUIREMENTS AS PART OF THE TITLE V PERMITTING PROCESS**

The operating permit program established pursuant to Title V of the CAA, 42 U.S.C. §§ 7651, *et seq.*, is meant to serve as a tool of administrative efficiency, and as a means by which state agencies and permittees can compile all preexisting conditions and requirements for ease of reference. As U.S. EPA has recognized, Title V permits only consolidate preexisting applicable requirements (*e.g.*, including those from past construction permits) and do not fundamentally change underlying determinations that established those requirements, such as Prevention of Significant Deterioration (“PSD”) determinations:

[O]perating permits required by title V are meant to accomplish the largely procedural task of identifying and recording existing substantive requirements applicable to regulated sources and to assure compliance with these existing requirements. Accordingly, operating permits and their accompanying applications should be vehicles for defining existing compliance obligations rather than for imposing new requirements or accomplishing other objectives.

U.S. EPA, Office of Air Quality Planning and Standards, White Paper for Streamlined Development of Part 70 Permit Applications 1 (1995). U.S. EPA has also proclaimed in guidance that “Title V permits *cannot* . . . change a requirement of an NSR permit.” U.S. EPA, Questions and Answers On the Requirements of Operating Permits Program Regulations 12-2 (1993) (emphasis added).

Both the United States Court of Appeals for the Seventh Circuit and the federal district court for the Western District of Wisconsin have agreed with U.S. EPA on this point. *See*

*Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 672 (7th Cir. 2008) (“Title V does not impose additional requirements on sources but rather consolidates all applicable requirements in a single document to facilitate compliance.”); *Sierra Club v. Dairyland Power Coop.*, No. 10-cv-303, 2010 U.S. Dist. LEXIS 112817, at \*13 (W.D. Wis. Oct. 22, 2010) (“[T]he Title V operating permit program does not impose new obligations but instead consolidates preexisting requirements such as those from the PSD program into a single document to facilitate compliance.”). Other courts have reached the same conclusion. *See, e.g., Ohio Pub. Interest Research Group v. Whitman*, 386 F.3d 792, 794 (6th Cir. 2004) (citations omitted) (“Title V does not impose new obligations; rather, it consolidates pre-existing requirements into a single, comprehensive document for each source, which requires monitoring, record-keeping, and reporting of the source’s compliance with the [Clean Air] Act.”); *United States v. Kerr-McGee Corp.*, No. 07-CV-01034, 2008 U.S. Dist. LEXIS 24494 (D. Colo. Mar. 26, 2008) (citations omitted) (“Operating permits set out in one single permit all of the requirements that apply to the source, including emission limitations and other requirements set forth in PSD construction permits, monitoring, recordkeeping and reporting requirements, and a schedule for compliance designed to address outstanding violations of CAA requirements.”). Contrary to law and U.S. EPA guidance, WDNR has included new requirements in the Permit that impermissibly change the preexisting requirements applicable to the Weston Plant.

A. WDNR Cannot Change the Averaging Period for the NO<sub>x</sub> Emission Limit Already Established in a Construction Permit for the Weston Plant Auxiliary Boiler

WDNR established the nitrogen oxides (“NO<sub>x</sub>”) emission limit for the Auxiliary Boiler at the Weston Plant (“Aux Boiler”) in 2004 when it issued construction permit number 03-CV-248 for the electric generating unit at the Weston Plant known as “Weston 4” (the “Weston 4 Construction Permit,” a copy of which is attached as Exhibit D), into which it directly



incorporated the New Source Performance Standards (“NSPS”) requirements for NO<sub>x</sub>. In doing so, WDNR imposed a 30-day averaging period for demonstrating compliance with this NO<sub>x</sub> limit. The Weston 4 Construction Permit requires WPSC to “comply with the NSPS compliance requirements per s. NR 440.205(7)(c), Wis. Adm. Code.” Weston 4 Construction Permit § I.B.4.b.(5). This regulation states that “[c]ompliance with the nitrogen oxides emission standards . . . shall be determined through performance testing under par. (e) or (f), or under pars. (g) and (h), as applicable.” The applicable paragraph—Wis. Admin. Code § NR 440.205(7)(c)3—specifically requires a 30-day averaging period for demonstrating compliance, stating that “the owner or operator of an affected facility . . . shall determine compliance with the nitrogen oxides standards . . . on a continuous basis through the use of a 30-day rolling average emission rate.”

The Permit does not include in the NO<sub>x</sub> limit for the Aux Boiler the reference to Wis. Admin. Code § NR 440.205(7)(c) (and the 30-day averaging period included therein) that was included in the Weston 4 Construction Permit. *See* Permit § I.H.4.a.(1). The averaging period is critical in order to calculate emissions and ensure compliance. Without the reference to the 30-day averaging period included in the Weston 4 Construction Permit, the new provision in the Permit may be ambiguous or may be interpreted to include a 1-hour averaging period, which would be a significant change in the applicable emissions limitation. This modification of the compliance demonstration method impermissibly imposes a new requirement on the Weston Plant, requiring that compliance be demonstrated on a one-hour basis, rather than a 30-day basis.<sup>1</sup>

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<sup>1</sup> In addition, the Weston 4 Construction Permit included both an NSPS limit (0.20 pounds per million Btu) and a more stringent best available control technology (“BACT”) limit (0.10 pounds per million Btu) for NO<sub>x</sub> for the Aux Boiler. The compliance demonstration methods for these limits in the Weston 4 Construction Permit are, respectively, the NSPS compliance demonstration requirements under Wis. Admin. Code § 440.205(7)(c), and calculation based on fuel consumption record and vendors or AP-

Exacerbating WDNR's failure to comply with established law regarding the Title V process is the fact that WDNR failed to provide any rational basis for failing to incorporate the 30-day averaging period included in the Weston 4 Construction Permit into the Permit. In its response to comments on the Permit, WDNR stated that because the Aux Boiler uses a CFMS to monitor NOx emissions, a one-hour averaging period is necessary to assure compliance with the NOx limit. *See* Exh. C at 168-69. However, the agency provides no justification as to why a 30-day averaging period—which WDNR had previously determined to be sufficient by incorporating it into the Weston 4 Construction Permit—would not assure compliance with the NOx limit. In fact, the 30-day rolling average (and all of the other monitoring options included in the NSPS regulations) were specifically incorporated into the Weston 4 Construction Permit because WPSO had not yet decided, at the time that permit was issued, whether it planned to install a CEMS on the Aux Boiler, and so needed to have alternate compliance demonstration methods available. Furthermore, WPSO has been reporting its compliance with the Aux Boiler NOx limit to WDNR based on a 30-day averaging period since the Aux Boiler became operational, including after the NOx CEMS was installed. WDNR has never asserted that this reporting violated the Weston 4 Construction Permit or was otherwise incorrect, confirming that prior to the issuance of the Permit, the agency was interpreting the Aux Boiler NOx limit to include a 30-day averaging period.

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42 emission factors. Exh. D at 22. In the Permit, WDNR has created a new, hybrid requirement. The Permit removed both the BACT limit calculation compliance demonstration method and the multiple compliance demonstration options under the NSPS (including the use of a continuous emissions monitoring system ["CEMS"] with a 30-day averaging period), and replaced them with a more restrictive requirement to utilize a CEMS with a one-hour averaging period for purposes of demonstrating compliance with both the BACT limit and the NSPS limit. Accordingly, the Permit impermissibly combines two limits established in the Weston 4 Construction Permit into a single limit that is more restrictive than either limit would have been individually.

Accordingly, WDNR should not be allowed to modify this averaging period as part of the Title V permitting process, and the Administrator should object to the Permit on that basis and require that WDNR incorporate into the Permit the 30-day averaging period for the Aux Boiler NOx limit that was established in the Weston 4 Construction Permit.

B. WDNR Cannot Change the Monitoring Requirements for the Aux Boiler NOx Emission Limit Established in the Weston 4 Construction Permit

The Weston 4 Construction Permit requires that WPSC “comply with the NSPS emission monitoring requirements per s. NR 440.205(9), Wis. Admin. Code” for the Aux Boiler NOx limit. This section of the Wisconsin Administrative Code provides a number of monitoring options for compliance with the NSPS, one of which is the installation of a CEMS. In the Permit, however, WDNR has changed this requirement and now requires WPSC to use a CEMS, removing the other options under the NSPS that are expressly allowed by the Weston 4 Construction Permit. WDNR has impermissibly used the Title V permitting process to revise a substantive construction permit term, in violation of both state and federal law. *See also* Exh. B, at 11, Exh. B, Attachment B at 29. The Administrator should object to the Permit on this basis and require that WDNR revise the Permit to allow WPSC to use any and all monitoring options allowed under the Weston 4 Construction Permit and the applicable regulations for the Aux Boiler NOx limit.

**II. VARIOUS EMISSION LIMITS IN THE PERMIT FAIL TO INCLUDE PROPER AVERAGING PERIODS AND ARE THEREFORE VAGUE AND UNENFORCEABLE**

The courts and U.S. EPA have routinely recognized that an agency cannot issue permit terms that are vague and therefore unenforceable. *See, e.g., Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1233, 1250-51 (9th Cir. 2001) (finding that it was arbitrary and capricious for the Fish and Wildlife Service to issue terms and conditions so vague

as to preclude compliance therewith); *ConocoPhillips Co.*, 13 E.A.D. 768, 2008 WL 2324133, \*15-18 (Env'tl. Appeals Bd. 2008) (remanding PSD air permit for state agency to consider and explain why certain provisions were not vague and unenforceable). The lack of averaging periods in the Permit makes the emission limits vague and unenforceable and U.S. EPA should therefore object to the Permit.

A. U.S. EPA Has Clearly Directed the States to Include Averaging Periods in Title V Permits

The CAA expressly provides that each Title V permit “issued . . . shall include *enforceable* emission limitations and standards . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter . . . .” 42 U.S.C. § 7661c(a).

U.S. EPA has interpreted this provision and clearly stated that to be enforceable, Title V permits must include averaging periods:

Title V Conditions must assure compliance with all applicable requirements. To assure that emission limits will be complied with, the limits must be written in a practically enforceable way. The title V permit must clearly include each limit and associated information from the underlying applicable requirement that defines the limit, *such as averaging time* and the associated reference method. . . . *When reviewing an emission limit, [the state agency must] make sure that . . . [t]he averaging time is included . . . .*

Title V Permit Review Guidelines: Practical Enforceability at III-57 (September 9, 1999)

(emphasis added) (Exhibit E-1).<sup>2</sup> U.S. EPA has also noted that for a permit to be enforceable, “*it must contain emissions limits with a reasonable averaging period* (usually not exceeding three hours), a method for determining compliance on a regular basis (annual stack tests are the

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<sup>2</sup> Copies of the relevant excerpts from select EPA guidance documents referenced in this petition are included in Exhibit E. Copies of EPA guidance documents not included in Exhibit E are available upon request.

minimum here) and adequate record keeping.” Letter from Thomas W. Rarick, Chief, Air Operations Branch, Air Mgmt. Div., U.S. Env’tl. Prot. Agency, Region IX to James D. Boyd, Air Pollution Control Officer, Cal. Air Res. Bd. (Dec. 17, 1985) (emphasis added) (Exhibit E-2).

An averaging period is the time period component of a particular emission limit, and if the underlying regulatory provision requiring the limit expressly includes an averaging period, then that period should be used in the Permit. However, if the underlying provision does not specifically include an averaging period, then U.S. EPA has directed states to use an averaging period that coincides with the sampling time periods used for stack testing purposes. *See* Credible Evidence Rule Revisions: Response to Comments at 58 (Exhibit E-3) (“Note, however, that in the absence of a clearly specified averaging time, the time for conducting the reference test is generally the averaging time for compliance.”); *see also* Letter from Winston A. Smith, Dir., Air, Pesticides & Toxics Mgmt. Div., U.S. Env’tl. Prot. Agency, Region IV to Howard L. Rhodes, Dir., Air Mgmt. Div., Fla. Dep’t of Env’tl. Prot at Enclosure 1, pg. 3 (Dec. 11, 1997) (Exhibit E-4) (“In instances where the SIP regulations do not indicate an averaging time for the standard, the permit must include one to determine compliance with the applicable requirement.”). As a result, even for the emission limits in the Permit that do not have an underlying averaging period specified in the regulations, WDNR, as the expert agency charged with implementing the CAA in Wisconsin, must establish an averaging period in the Permit for such limits.<sup>3</sup>

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<sup>3</sup> In its public comments on the Permit, WPSC identified at least 65 emission limits that lack proper averaging periods. *See, e.g.*, Exh. B, Attachment A at 1 and Attachment B. When issuing the Permit, WDNR should have examined each of the sampling periods for each of these limits, determined the appropriate averaging period, and included that averaging period in the Permit for each limit.

WPSC has previously raised the issue of WDNR's failure to include proper averaging periods in Title V permits with both U.S. EPA and WDNR. On July 29, 2011, WPSC filed a petition for objection with U.S. EPA regarding the Title V permit issued by WDNR to WPSC's De Pere Energy, LLC plant, based on WDNR's failure to include proper averaging periods in the permit. WPSC has not yet received a response from U.S. EPA. Also in 2011, WPSC participated in a contested case proceeding with WDNR related to the lack of averaging periods in the Title V permit issued for WPSC's J.P. Pulliam Plant ("Pulliam Plant").<sup>4</sup> WPSC has also filed a petition for a contested case hearing with WDNR challenging the agency's failure to include proper averaging periods in this Permit. Despite WPSC's repeated assertions that WDNR must include proper averaging periods in Title V permits in accordance with established law and U.S. EPA guidance, the agency has now issued Title V permits to three WPSC facilities in the last four years that are deficient because they lack proper averaging periods.

U.S. EPA's silence on this issue has contributed to WDNR's continued failure to include proper averaging periods in Title V permits. In WDNR's response to comments on the Permit, WDNR stated that "*[l]acking any direction to the contrary*, the department will not be adding averaging periods to emission limitations where the underlying regulation does not include an averaging period." Exh. C at 172 (emphasis added). This statement is a direct contradiction of U.S. EPA guidance, which states that "[i]n instances where the [state

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<sup>4</sup> In that proceeding, the Sierra Club asserted that the emission limits expressed without averaging periods are instantaneous limits. The Administrative Law Judge did not find that such limits were instantaneous, but determined that WDNR had routinely enforced such limits as applying "at all times." In re Petition for Review of Construction Permit No. 02-RV-032-R2 and Operation Permit No. 405031990-P20 issued to Wisconsin Public Service Corporation for the Pulliam Facility, Case No. IH-09-05, Findings of Fact, Conclusions of Law and Order at 3 (Wis. Div. Hrg. App. Dec. 7, 2011).

implementation plan] regulations do not include an averaging time for the standard, the permit must include one to determine compliance with the applicable requirement.” Exh. E-4 at 3. It is therefore imperative that U.S. EPA object to the issuance of the Permit and direct WDNR to revise the Permit to include appropriate averaging periods.

B. U.S. EPA Has Objected To Title V Permits In The Past That Do Not Contain Averaging Periods

U.S. EPA has consistently stated that permit terms must specify the applicable averaging periods to be enforceable, and it should do so again in this case. For example, provided below are excerpts from two other U.S. EPA objections to Title V permits (from Florida and Mississippi), which clearly mandate the inclusion of averaging periods:

Appropriate Averaging Times: In order for the emissions standard for particulate matter (conditions A.4, B.4, D.5, D.6, D.12 and E.4), sulfur dioxide (conditions A.5 and D.7), carbon monoxide (condition A.8), TRS (condition C.4), VOC’s (condition A.7) and nitrogen oxides (condition A.6) contained in the permit to be practicably enforceable, the appropriate averaging time must be specified in the permit. An approach that can be used to address this deficiency is to include general language in the permit to indicate that the averaging times for all specified emission standards are tied to or based on the run time of the test method(s) used for determining compliance.

Letter from Region 4, United States Env’tl Prot. Agency to Howard L. Rhodes, Director, Div. of Air Resources Mgmt., Fla. Dept. of Env’tl Prot. at 4 (June 5, 2000) (Exhibit E-5).

Appropriate Averaging Times: In order for the emissions standards to be practicably enforceable, the appropriate averaging time must be specified in the permit. One approach that can be used to address this deficiency is to include general language in the permit to indicate that the averaging times for all specified emission standards are tied to or based on the run time of the test method(s) used for determining compliance. . . .

Letter from Winston A. Smith, Director, Air, Pesticides, & Toxics Mgmt. Div., United States Env't'l Prot. Agency to Dwight K. Wylie, Chief, Air Div., Miss. Dept. of Env't'l Quality at 5-6 (Dec. 23, 1999) (Exhibit E-6).

During the public comment period and in the Permit application, WPSC asked WDNR to include averaging period language for all the emission limits in the Permit and to clarify that the time period component was a three-hour average (or longer). *See* Exh. B, Attachment A at 1, Attachment B. For example, WPSC requested the following underlined language for particulate matter emissions: "Emissions from boiler B01 may not exceed 0.10 pounds/mmBtu heat input averaged over any three consecutive hours . . ." Exh. B, Attachment B at 1. WDNR failed to include the requested language in the Permit. The suggested language clarifies that the time period component of the emission limitation is a three-hour average, and is consistent with the language included in permits issued by other states, including Indiana, Illinois, Minnesota, Michigan and Ohio, all states within U.S. EPA Region 5.<sup>5</sup>

C. WDNR's Regulations and the Permit Record Also Require That The Emission Limits Be Expressed With Averaging Periods

WDNR regulations and the administrative record for the Permit specifically recognize that the emission limits set forth in the Permit must be expressed with averaging periods. Part I.A.1.a of the Permit contains the 0.10 pound per million Btu particulate matter

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<sup>5</sup> Such permits include: (1) Indiana Department of Environmental Management Part 70 Operating Permit Renewal for Duke Energy, Inc. Cayuga Generating Station, T165-27260-00001; (2) Illinois EPA Division of Air Pollution Control Clean Air Act Permit Program (CAAPP) Renewal for Ameren Energy Generating Company, Elgin Energy Center, ID No 031438ABC; (3) Minnesota Pollution Control Agency Air Emission Permit issued to Otter Tail Power Company, Hoot Lake Plant, Permit No. 11100002-004; (4) Michigan Department of Environmental Quality Renewable Operating Permit issued to Alpena Power Generation, Inc, Calcite Road Site, Permit No 200000022; and (5) Ohio Environmental Protection Agency Title V Permit issued to E.I. Du Pont, Fort Hill Plant, Permit No P0099754. Copies of relevant portions of all these permits are included in Exhibit F.



emission limit and identifies Wis. Admin. Code § NR 415.06(2)(c) as the authority for the limit. This permit language, and the underlying Wisconsin Administrative Code provision, require certain facilities, like the Weston Plant, to meet an emission limitation “of 0.10 pounds of *particulate matter* per million Btu heat input” (emphasis added). “Particulate matter” is further defined as “all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air *as measured by an applicable reference method or an equivalent or alternative method specified by the department.*” Wis. Admin. Code § NR 400.02(119) (emphasis added). Read together, Wis. Admin. Code § NR 415.06(2)(c) and Wis. Admin. Code § NR 400.02(119) state that the permittee shall meet an emission limitation of “0.10 pounds of all finely divided solid or liquid material . . . emitted to the ambient air as measured by an applicable reference method per million BTU heat input.” The applicable reference method for particulate matter (as set forth in Wis. Admin. Code § NR 439.07(8)(a)) requires at minimum an average of three one-hour tests and, as such, WDNR’s own regulations require that the particulate matter emission limit be measured the same way, over at least a three-hour average.

In addition, for at least four of the emissions limits in the Permit, WDNR failed to include in the Permit the averaging periods that it had previously recognized were appropriate by including them in the Analysis and Preliminary Determination for the Weston 4 Construction Permit (a copy of which is attached as Exhibit G). *See* Exh. G at 43-44; *see also* Exh. B, Attachment B at 10, 16, 17. These include the emissions limits in the Permit for lead, fluorides, beryllium, and ammonia, none of which contain an averaging period. *See* Permit §§ I.C.6.a.(1), I.C.8.a.(1), I.C.10.a.(1), and I.C.12.a.(1). Despite including the appropriate averaging periods in the Analysis and Preliminary Determination for the Weston 4 Construction Permit, WDNR

failed to incorporate them into either the Weston 4 Construction Permit or the Permit, as required.

D. WDNR's Failure To Include Averaging Periods Makes The Permit Vague And Unenforceable

Despite WPSC's comments, WDNR issued the Permit without including averaging times for all of the emissions limitations contained therein. As a result, WPSC as the permittee, WDNR as the agency charged with enforcement of the Permit, and members of the public who may have rights to enforce certain provisions of the Permit,<sup>6</sup> are left with no clear language in the Permit as to what averaging periods apply (*i.e.*, a three-hour average, a one-hour average, or a different time period).<sup>7</sup> Moreover, WPSC is obligated under state and federal law and the Permit terms to certify on an annual basis that the Weston Plant is in compliance with the terms of the Permit. *See* 42 U.S.C. § 7661b(b)(s); Wis. Admin. Code § 407.09(4)(a)3; Permit § I.XXX.1.a.(2). By not addressing the averaging period issue directly, WDNR has placed WPSC in an untenable situation because the company will be asked to certify compliance with vague and ambiguous terms that other parties may interpret differently.

As a result, U.S. EPA should object to the issuance of the Permit with ambiguous and vague language and terms that are not practically enforceable and require that WDNR revise the Permit to include proper averaging periods for all of the emissions limitations included therein, particularly in light of U.S. EPA's express direction to address the averaging period issue in Title V permits in order to ensure their enforceability.

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<sup>6</sup> Under the CAA, citizens may initiate actions for alleged violations of the terms of a permit if they meet certain conditions. 42 U.S.C. § 7604.

<sup>7</sup> *See* In re Petition for Review of Construction Permit No. 02-RV-032-R2 and Operation Permit No. 405031990-P20 issued to Wisconsin Public Service Corporation for the Pulliam Facility, Case No. IH-09-05, Findings of Fact, Conclusions of Law and Order at 3 (Wis. Div. Hrg. App. Dec. 7, 2011).

### III. THE AVERAGING PERIODS INCLUDED IN THE CAM PROVISIONS OF THE PERMIT ARE CONTRARY TO FEDERAL REGULATIONS AND U.S. EPA GUIDANCE

Federal regulations require that CAM provisions in Title V permits include proper averaging periods for determining whether an “excursion” from or an “exceedance” of an emissions limitation has occurred.<sup>8</sup> *See* 40 C.F.R. § 64.6(c)(2) (“The permit shall specify the level at which an excursion or exceedance will be deemed to occur, including the appropriate averaging period associated with such exceedance or excursion.”). These averaging periods must be “commensurate with the time period over which a change in control device performance that would require actions by [the] owner or operator to return operations within normal ranges or designated conditions is likely to be observed.” 40 C.F.R. § 64.3(b)(4)(i).

In submitting its CAM plan to WDNR for inclusion in the Permit, WPSC specifically included three-hour averaging periods for all relevant CAM provisions. These three-hour averaging periods were established because the correlations between monitoring parameters and excursions or exceedances included in the CAM plan were created based on stack test results that were obtained by calculating the arithmetic mean of three, one-hour test runs. Accordingly, three-hour averaging periods are appropriate because they are of adequate length to ensure that WPSC will respond in a timely fashion to actual excursions or exceedances, but not so short as to flag normal variability in operating conditions as excursions or exceedances. *See, e.g.*, Exh. B, Attachment A at 1-2; *see also* Parker, Barrett, U.S. EPA OAQPS. “Guidance on Establishing

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<sup>8</sup> An “excursion” is defined as “a departure from an indicator range established for monitoring . . . , consistent with any averaging period specified for averaging the results of the monitoring.” 40 C.F.R. § 64.1. An “exceedance” is defined as “a condition that is detected by monitoring that provides data in terms of an emission limitation or standard and that indicates that emissions (or opacity) are greater than the applicable emission limitation or standard (or less than the applicable standard in the case of a percent reduction requirement) consistent with any averaging period specified for averaging the results of the monitoring.” *Id.*

Monitoring to Comply with CAM and Other Title V Requirements, A Summary of Technical and Policy Materials” at 7.9 (stating that averaging periods within a CAM plan should not be “so short as to flag minor perturbations as excursions”).

When WDNR issued the Permit, it improperly revised the averaging periods for multiple CAM provisions from three-hour averages to one-hour averages. *See generally* Permit Part IV; *see also* Exh. B, Attachment B at 52-54 (identifying CAM provisions that WDNR revised from three-hour to one-hour averaging periods). These one-hour averages are inappropriate under the federal regulations and U.S. EPA guidance because the correlations used to identify excursions or exceedances were developed based on three hours of collected data. More specifically, using a one-hour averaging period has the potential to nullify the correlation between monitoring parameters and excursions or exceedances originally established by WPSC, as this shorter period fails to take into account the normal operational variability that can occur over a one-hour period. This variability is precisely the reason that stack test results (including U.S. EPA Method 201 stack test results) are obtained by performing three, one-hour test runs and then averaging the results of each individual run. Because the stack test results are an average, this means there are normally test runs with results higher than the average and runs with results lower than the average. WDNR’s imposition of one-hour averaging periods for these CAM provisions thus violates the federal regulations requiring that averaging periods be “commensurate” with the time period actual control device failures are likely to be observed, and violates U.S. EPA guidance requiring that averaging periods be sufficiently long so as to avoid flagging “minor perturbations” as excursions or exceedances. Accordingly, U.S. EPA should object to the Permit and require that WDNR revise the averaging periods in these provisions to be at least three hours in length.

#### **IV. THE PERMIT FAILS TO INCORPORATE ALL APPLICABLE PROVISIONS OF THE FEDERAL MERCURY AND AIR TOXICS STANDARD**

U.S. EPA promulgated the Mercury and Air Toxics Standard (the “MATS Rule”) on February 16, 2012, which includes emissions standards for various hazardous air pollutants. The MATS Rule also provides for an affirmative defense against civil penalties for violations of these emissions standards if the violations were caused by a “malfunction” and the source could satisfy all the required elements of the affirmative defense. *See* 40 C.F.R. § 63.10001. WPSC requested in its public comments that WDNR incorporate these affirmative defense provisions into the Permit. *See* Exh. B, Attachment A at 6-8. WDNR denied this request, stating that these affirmative defense provisions are “not required as permit content.” Exh. C at 182, 62.

Title V permits are required to include “all applicable requirements applicable to emissions units that cause the source to be subject to the part 70 [Title V operating permit] program.” 40 C.F.R. § 70.3(c). “Applicable requirements” are defined to include, among other things, “[a]ny standard or other requirement under section 111 of the [Clean Air] Act” and “[a]ny standard or other requirement under section 112 of the [Clean Air] Act.” 40 C.F.R. § 70.2. Because the MATS Rule is a “standard or requirement” promulgated pursuant to section 111 and 112 of the CAA, it qualifies as an “applicable requirement” and WDNR should be required to incorporate all of its relevant provisions, including the affirmative defense provisions, into the Permit.<sup>9</sup>

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<sup>9</sup> At least one other state permitting agency has accomplished this task by including a general reference to 40 C.F.R. Part 63, Subpart UUUUU as applicable to a permitted facility. *See, e.g.*, Title V Operating Permit for PSEG Power Connecticut, LLC, issued October 31, 2012 at 6-7 (a copy of which is attached as Exhibit H). WPSC believes this would be an acceptable approach for WDNR to use in revising the Permit.

U.S. EPA has also recognized that the affirmative defense provisions in the MATS Rule are a necessary and integral element of these standards. In the preamble to the final MATS Rule, U.S. EPA stated that “[t]he affirmative defense provisions give the EPA the flexibility to ensure both that its emissions limitations are ‘continuous’ as required by 42 U.S.C. § 7602(k), and account for unplanned upsets and thus support the reasonableness of the standard as a whole.” 77 Fed. Reg. 9304, 9383 (Feb. 16, 2012). If a permittee does not receive the benefit of the MATS Rule affirmative defense provisions, the emissions standards contained in the rule and incorporated into a Title V permit are incomplete, and therefore unreasonable. As a result, these affirmative defense provisions qualify as “standards or requirements” and, therefore, are “applicable requirements” under Part 70. The Administrator should object to the Permit based on WDNR’s failure to incorporate the affirmative defense provisions into the Permit.

#### **V. WDNR’S RESPONSE TO COMMENTS WAS DEFICIENT**

WDNR failed to respond adequately to significant comments on the draft Permit. CAA § 502(b)(6) requires that all Title V permit programs include adequate procedures for public notice regarding the issuance of Title V permits, “including offering an opportunity for public comment.” 42 U.S.C. § 7661a(b)(6); *see also* 40 C.F.R. § 70.7(h). It is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments. *See, e.g., Home Box Office v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977). In fact, U.S. EPA has objected to numerous WDNR-issued Title V permits recently due to WDNR’s failure to adequately respond to comments.<sup>10</sup> Here, WPSC provided extensive comments to WDNR

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<sup>10</sup> *See, e.g.,* Order Granting Petition for Objection to Permit Issued to Wisconsin Public Service Corporation’s J.P. Pulliam Power Plant at 5 (Exhibit I); Order Granting in Part and Denying in Part Petition for Objection to Permit Issued to Alliant Energy – WPL Edgewater Generating Station at 8

during the public comment period related to each of the deficiencies in the Permit described in this petition, and WDNR's response to the comments was insufficient.

A. WDNR Provided No Legal Justification for the Lack of Averaging Periods in the Permit

WPSC's public comments on the Permit requested that averaging periods be included for each of the emissions limitations in the Permit, and cited numerous U.S. EPA guidance documents in support. *See* Exh. B, Attachment A at 1. In denying this request, WDNR relied exclusively on the decision issued by the Administrative Law Judge ("ALJ") in the contested case proceeding on the Title V Permit for the Pulliam Plant. *See* Exh. C at 172. However, because both the ALJ decision and WDNR's reliance on it violate applicable U.S. EPA guidance, WDNR's response to WPSC's public comments lacks legal justification and is therefore inadequate. WDNR will likely continue to refuse to include proper averaging periods in Title V permits unless and until U.S. EPA directs the agency to do so. As a result, the Administrator should object to the Permit and direct WDNR to properly respond to WPSC's request for the inclusion of proper averaging periods for each emission limitation in the Permit.

B. WDNR Failed to Adequately Respond to WPSC's Comments Regarding Certain Compliance Demonstration Requirements

WDNR mischaracterized and failed to adequately respond to WPSC's public comments regarding the compliance demonstration methods for the visible emissions limits included in the Permit for Combustion Turbines B11, B12, and B13 at the Weston Plant (the "Combustion Turbines"). The Permit requires that WPSC perform a U.S. EPA Method 9 test once every 12 months in order to demonstrate compliance with the visible emissions limits for

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(Exhibit J); Order Granting in Part and Denying in Part Petition for Objection to Permit Proposed to be Issued to WE Energies Oak Creek Power Plant at 10 (Exhibit K).

these units. Permit §§ I.D.2.b.(2), I.E.2.b.(2). In its public comments on the Permit, WPSC requested that the Permit be revised to require only annual visual observations (*e.g.*, via U.S. EPA Method 22) for the Combustion Turbines and, if visible emissions were detected, then require the U.S. EPA Method 9 test within 90 days. *See* Exh. B, Attachment B at 20, 23.

In its response to WPSC's comments, WDNR rejected the requested monitoring approach, stating that the reasons for WPSC's requested monitoring were "not clear" and "lack[ed] specificity." Exh. C at 39-40. WDNR also incorrectly stated that WPSC requested U.S. EPA Method 9 compliance testing for the Combustion Turbines in its renewal application for the Permit. In fact, WPSC merely requested in its application that "[t]esting for visible emissions" be required, and did not specify a method. Exh. C. at 40. In its public comments, WPSC clarified that it was not requesting a U.S. EPA Method 9 compliance test, but rather was requesting that only a "visual observation" (*e.g.*, via U.S. EPA Method 22) be required, with a U.S. EPA Method 9 test to be required only if visible emissions were observed as a result of the visual observation. Accordingly, WPSC's comments clearly and specifically described the requested monitoring approach and WDNR effectively ignored those comments when it issued the Permit, meaning the Administrator should object to the Permit based on WDNR's failure to adequately respond to WPSC's comments.

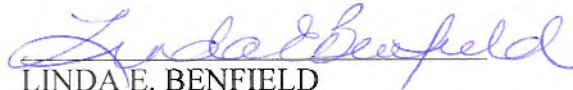


**CONCLUSION**

For the foregoing reasons, the Permit fails to comply with the requirements of the CAA and, therefore, U.S. EPA should object to the Permit pursuant to 40 C.F.R. § 70.8(c)(1) and 42 U.S.C. § 7661d(b)(2).

Dated this 16th day of October, 2013.

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**CERTIFICATE OF SERVICE**

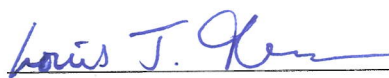
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I, Louis J. Thorson, hereby certify that I am an attorney with the law firm of Foley & Lardner LLP and that on the 16th day of October, 2013, I caused a true and correct copy of Wisconsin Public Service Corporation's **Petition Requesting that the Administrator Object to Issuance of the Proposed Title V Operating Permit for the Wisconsin Public Service Corporation – Weston Plant**, in the above-captioned matter, to be served by electronic mail, U.S. Mail, and/or Federal Express on the parties appearing in this action as follows:

Via U.S. Mail and Electronic Mail  
Gina McCarthy  
Administrator  
United States Environmental Protection Agency  
U.S. EPA Headquarters  
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Mail Code: 1101A  
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Email: McCarthy.gina@epa.gov

Via Federal Express  
Cathy Stepp  
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Louis J. Thorson