

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of an Operating Permit for the  
Appleton Coated, LLC plant, Outagamie  
County, Wisconsin

Source ID: 445031290  
Permit No. 445031290-P10  
Petition No. V-2013-\_\_\_\_\_

PETITION OF THE SIERRA CLUB, CLEAN WATER ACTION COUNCIL, AND  
MIDWEST ENVIRONMENTAL DEFENSE CENTER REQUESTING THAT THE  
ADMINISTRATOR OBJECT TO ISSUANCE OF THE PROPOSED TITLE V  
OPERATING PERMIT FOR THE APPLETON COATED, LLC PLANT

McGillivray Westerberg & Bender LLC  
David C. Bender  
James N. Saul  
211 S. Paterson Street, Ste 320  
Madison, WI 53703  
Phone: (608) 310-3560  
Fax: (608) 310-3561

---

Pursuant to section 502(d)(1) of the Clean Air Act, 42 U.S.C. § 7661a(d)(1), each state must develop and submit to the United States Environmental Protection Agency (“EPA”) an operating permit program that meets the requirements of Title V of the Act. EPA granted interim approval of Wisconsin’s program, effective April 5, 1995, and final approval effective November 30, 2001. 40 C.F.R. pt. 70, Appx A. Wisconsin purported to apply its program in issuing the renewal permit to the Appleton Coated, LLC (“AC”) plant at issue here. However, the proposed renewal permit contains at least one serious error that necessitates an objection by the Administrator in response to this Petition.

Pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d), the Sierra Club, Clean Water Action Council, and Midwest Environmental Defense Center (together herein as “Petitioners”) hereby petition the EPA Administrator (“the Administrator”) to object to a proposed Title V Operating Permit for the AC plant, Permit Number 445031290-P10 (“Permit”). The Permit was proposed to EPA by the Wisconsin Department of Natural Resources (“DNR”) more than 45 days ago. A copy of the proposed Permit is attached as Exhibit A.

Petitioners and others provided comments to the DNR on the draft permit and the revised draft permit in 2010 and, because DNR opened a new public comment period in 2012, again in 2012. True and accurate copies of Petitioners’ comments are attached at Exhibit B. DNR’s response to comments is attached as Exhibit C.

This petition is filed within sixty days following the end of EPA's 45-day review period, as required by Clean Air Act ("CAA") § 505(b)(2).<sup>1</sup> The 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, or fails to include any "applicable requirement," she must object to issuance of the permit. 42 U.S.C. § 7661b(b); 40 C.F.R. § 70.8(c)(1) ("The [EPA] Administrator will object to the issuance of any permit determined by the Administrator not to be in compliance with applicable requirements or requirements of this part."). "Applicable requirements" include, *inter alia*, any provision of the Wisconsin State Implementation Plan ("SIP"). 40 C.F.R. § 70.2. The Wisconsin SIP, in turn, includes the Prevention of Significant Deterioration ("PSD") program. *In re Wis. Power and Light Co. Columbia Generating Station*, Order (EPA Adm'r, Oct. 8, 2009). "Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured." *Id.* at 2. In doing so, EPA determines whether the state's application of the PSD program requirements was unreasonable or arbitrary. *Id.* at 3; *see also* 42 U.S.C. §§ 7661a(a), 7661c(a); 40 C.F.R. § 70.1; *In re Monroe Elec. Gen. Plant, Entergy Louisiana, Inc.*, Petition No. 6-99-2 (EPA Adm'r, June 11, 1999); 57 Fed. Reg. 32,250, 32,250-51 (July 21, 1992).

This petition seeks an objection by the Administrator for a single, but critically important, reason: the permit lacks applicable new source review program requirements

---

<sup>1</sup> DNR proposed the permit to EPA on August 6, 2013. EPA's forty-five (45) comment period expired no earlier than September 20, 2013. The public's time for petitioning the Administrator extends through, at least, November 19, 2013.

because the Wisconsin DNR applied an erroneous interpretation of the “routine maintenance” exemption to determine that these requirements do not apply. Application of the exemption, and therefore of the PSD program in the state’s SIP, is an appropriate and necessary determination in Title V permitting and in EPA consideration of petitions like this one. *See e.g., In re Tenn. Valley Authority Paradise Fossil Fuel Plant*, Order (EPA Adm’r, May 2, 2011) (hereinafter “TVA T5-Order”).

Part C of the Clean Air Act establishes the PSD program of the Clean Air Act. 42 U.S.C. §§ 7470-7479. Pursuant to the PSD program, no major source may be constructed or modified in an area designed as attainment or unclassified<sup>2</sup> without obtaining a permit. 42 U.S.C. § 7475(a)(1). Additionally, each new or modified facility must comply with emission limits that are “best available control technology” (BACT) and must demonstrate that their emissions do not cause or contribute to a violation of either a national ambient air quality standard (NAAQS) or a limit on incremental air quality degradation known as “increment.” 42 U.S.C. § 7475(a)(3), (4). EPA has promulgated implementing regulations at 40 C.F.R. §§ 51.166 and 52.21. Every facility must comply with these requirements, and compliance must be assured via the facility’s Title V permit. 40 C.F.R. § 70.2.

AC replaced superheater tubes on the ACCL Boiler 10 sometime after September, 2005. *See* Appleton Coated’s Response to U.S. EPA’s Request for Information. Pursuant to 42 U.S.C. § 7413, Response to Question 13 (attached in part as Exhibit E) (hereinafter, Resp. to Quest 13). The DNR initially indicated, tentatively, that the project might be exempt from the requirements in Wis. Admin. Code NR 405 (i.e., Wisconsin’s PSD

---

<sup>2</sup> At all relevant times, Outagamie County was designed as attainment or unclassified. *See* [http://www.epa.gov/airquality/greenbk/anay\\_wi.html](http://www.epa.gov/airquality/greenbk/anay_wi.html).

program) pursuant to the “routine maintenance repair and replacement” provision. *See* Wis. Admin. Code § NR 405.02(b)(1). However, DNR’s initial assessment was tentative; DNR asked for EPA’s concurrence, which was never provided. *See* Letter from Steven Dunn, DNR, to Susan Siepkowski, EPA Region 5 (August 13, 2004) (stating that DNR “is requesting Region V’s opinion as to whether this analysis was done correctly and whether the Region concurs with the Department’s conclusion...”) (attached as Exhibit F). Despite never receiving confirmation from EPA that the superheater modification was exempt from the Clean Air Act’s PSD program, AC undertook the modification anyway.<sup>3</sup> Because the modification is not routine maintenance, as set forth below, the PSD requirements in NR 405 are applicable

---

<sup>3</sup> Contrary to a letter from Cathy Stepp, DNR Secretary, to Susan Headman, EPA Region 5 (August 10, 2012), the Wisconsin DNR never made a formal “determination” of routine maintenance. The Stepp letter incorrectly implies that there was a formal process and determination, rather than a letter containing a preliminary opinion from a DNR staff engineer to EPA Region 5, which explicitly sought EPA’s input because the state was not sufficiently confident in its preliminary assessment. Moreover, contrary to the Stepp letter’s contention of unfairness to AC (which knowingly undertook a project triggering PSD requirements despite the lack of EPA concurrence), equitable considerations are not relevant legal factor in the routine maintenance analysis, nor in responding to a Title V petition such as this. The DNR can address any issues of “fairness” through a compliance schedule, allowing the facility time to comply with applicable PSD requirements. Furthermore, the courts have rejected the type of arguments made in the Stepp letter. A delay in determining the application of PSD requirements, and therefore in installing the pollution controls necessary to comply with such requirements, is a benefit to the facility. *Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979, 988-89 (9<sup>th</sup> Cir. 2004). The fact that AC was able to benefit from delay for eight years by not having to comply with PSD requirements does not make it “unfair” not to extend perpetual immunity. *Id.* That is, the longer the delay in determining that PSD applies the greater the *benefit*—not the prejudice—to the facility. *Id.* The public, however, is prejudiced by the delay because each day that the facility operates without complying with PSD is another day in which the air is more polluted than it should lawfully be. Giving the facility effective immunity due to delay would exacerbate that prejudice to the public. Lastly, the delay between the superheater project and this petition is entirely Wisconsin DNR’s fault. DNR was required to issue a Title V permit renewal within 18 months of the complete application, which was January 4, 2007. *See* 42 U.S.C. § 7661b(c); Wis. Stat. § 285.62(7)(a). The DNR missed that statutory deadline by more than five years. For the Secretary of the DNR to decry the delay that occurred before EPA had the opportunity to review DNR’s errors during this permit renewal review that DNR is absurd. DNR’s illegal inaction caused the delay.

requirements for purposes of Title V and must be included in the permit. These include, *inter alia*, Best Available Control Technology (“BACT”) and air quality impact analyses. Wis. Admin. Code §§ NR 405.08-405.16.

The Clean Air Act defines “modifications” subject to the PSD program as including any physical or operational change without limitation. 42 U.S.C. §§ 7411(a)(4), 7475(2)(C). Because this definition, read literally, applies the PSD program to even the replacement of a single screw during day-to-day maintenance, EPA adopted regulations based on the *de minimus* legal doctrine that provide that “routine maintenance, repair, and replacement” activities are exempt from the definition of modification. 40 C.F.R. §§ 51.165(a)(1)(v)(C), 51.166(b)(2)(iii), 52.21(b)(2)(iii)(a); *see also* 67 Fed. Reg. 80,290, 80,292 (Dec. 31, 2002); 57 Fed. Reg. 32313, 32316-19 (July 21, 1992) (explaining the need for the routine maintenance exemption to avoid PSD “encompass[ing] the most mundane activities at an industrial facility (even the repair or replacement of a single leaky pipe, or a change in the way the pipe is utilized.”); *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 905 (7<sup>th</sup> Cir. 1990) (noting that “the potential reach of these modification provisions is apparent: the most trivial activities-- the replacement of leaky pipes, for example-- may trigger the modification provisions...”)) (hereinafter “*WEPCO*”).

#### A. Petitioners’ Public Comments.

Petitioners submitted public comments during the comment period that specifically raised the issue of the superheater replacement on Unit 10, and Petitioners commented that the draft permit did not ensure compliance with NSR, PSD and NSPS requirements. *See* Ex. B. Specifically, Petitioners noted that DNR’s preliminary

---

determination that the superheater replacement was “routine maintenance” was incorrect. As Petitioners noted, DNR’s preliminary assessment was not made during the course of a public process where Petitioners could weigh in or challenge DNR’s preliminary determination, and EPA had never agreed with DNR’s preliminary determination. Moreover, DNR’s preliminary determination conflicted with EPA guidance and decisions and with the majority of caselaw interpreting the scope of the routine maintenance exemption. *Id.*

#### **B. DNR’s Response To Comments**

In DNR’s Response to Comments (RTC), it acknowledged Petitioners’ comments but asserted that it would not reconsider its preliminary determination that the superheater replacement was “routine.” Ex. C, Response to Comments at 3 of 10. As set forth below, DNR’s preliminary analysis that the superheater project was “routine maintenance” was incorrect, based on EPA guidance, EPA decisions, caselaw and DNR’s own decisions.

#### **C. EPA’s Letter to Wisconsin DNR**

In response to Petitioners’ comments, EPA Region 5 wrote to the Wisconsin DNR on June 25, 2012. A copy of that letter is attached as Exhibit D. In that letter, EPA notes that “after carefully reviewing all the information, and in light of the relevant factors, EPA believes WDNR may have incorrectly determined that the proposed project was ‘routine’...” *Id.* at 2. Reciting several of the facts about the superheater replacement, the letter notes that “EPA believes that the project in question was not routine.” *Id.*

#### D. DNR Erred In Applying The Routine Maintenance Exemption to the Superheater Replacement

The Clean Air Act makes the provisions of the PSD program applicable to each newly constructed or modified existing source. 42 U.S.C. § 7475(a), 7479(2)(C). EPA, however, created an exemption to this requirement through a rule, 40 C.F.R. §§ 51.166(b)(2)(iii), 52.21(b)(2)(iii)(a)—asserting that broad language of the Act could “encompass the most mundane activities at an industrial facility (even the repair or replacement of a single leaky pipe, or a change in the way that pipe is utilized).” 57 Fed. Reg. 32,314, 32,316 (July 21, 1992)<sup>4</sup>. The “routine maintenance” exemption was never challenged as part of the litigation over EPA’s 1980 rulemaking. *See generally Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1980) (not addressing any challenges to the “routine maintenance” exemption); *id.* at 361 (noting that EPA’s “de minimis” exemption authority had not been challenged by the parties for situations other than those addressed by the court’s opinion). However, the D.C. Circuit has recently questioned the legality of the Routine Maintenance exemption, stopping short of vacating it because it was not directly challenged and therefore not within the Court’s jurisdiction at the time. *New York*, 443 F.3d 880, 888 (D.C. Cir. 2006) (citing *Shays v. FEC*, 414 F.3d 76, 113-14<sup>5</sup>). The exemption is therefore lawful, if at all, only based on and within the narrow confines

---

<sup>4</sup> This statement, if taken alone, actually overstates the issue. Simply fixing a leaky pipe would not automatically be a major modification, subject to NSR requirements. An emission increase must still occur (i.e., be estimated based on applicable emission increase tests applied prior to the project).

<sup>5</sup> In *Shays*, the D.C. Circuit held that “there are limits” to agencies’ ability to create *de minimis* exceptions to statutory schemes, including: (1) that the “*de minimis* exemption power does not extend to ‘extraordinarily rigid’ statutes”; and (2) that it “does not extend to a situation where the regulatory function does provide benefits, in the sense of furthering regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs’.” 414 F.3d at 114.



---

of a *de minimis* theory of administrative necessity. *Alabama Power Co. v. Costle*, 636 F.2d 323, 360-61, 400 (D.C.Cir. 1979); *see also* 57 Fed. Reg. 32313, 32316-19 (July 21, 1992) (explaining the need for the routine maintenance exemption to avoid PSD “encompass[ing] the most mundane activities at an industrial facility (even the repair or replacement of a single leaky pipe, or a change in the way the pipe is utilized.”); *New York v. EPA*, 443 F.3d 880, 883-84, 888 (D.C. Cir. 2006) (holding that the only possible basis for a RMRR is a *de minimis* theory); *In re Tennessee Valley Authority*, 9 E.A.D. at 392-93 (citing *O’Neil v. Barrow County Bd. of Comm’rs*, 980 F.2d 674 (11<sup>th</sup> Cir. 1993); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982)).

Consistent with the *de minimis* legal basis for exemptions to PSD, EPA’s long-standing interpretation of the definition of PSD-triggering “physical changes,” and the routine maintenance exemption, “is to construe “physical change” very broadly, to cover virtually any significant alteration to an existing plant and to interpret the exclusion related to routine maintenance, repair and replacement narrowly.” *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 87 (U.S. 2000); *Rugiero v. United States DOJ*, 257 F.3d 534, 543 (6<sup>th</sup> Cir. 2001); *Shays v. FEC*, 414 F.3d 76, 113-14 (D.C. Cir. 2005) (“situations covered by a *de minimis* exemption must be truly *de minimis*.”); *In re Tenn. Valley Auth.*, Petition No. IV-2010-1, Order Responding to Petition to Object to Title V Permit at 7 (Adm’r, May 2, 2011) (“The plain language of [42 U.S.C. §§ 7411(a)(4), 7475(a), and 7479(2)(C) and 40 C.F.R. § 52.21(b)(2)(i)] indicates their sweeping scope. Both the Clean Air Act and its implementing regulations define “modification” as including any physical or operational change. In light of that breadth, any regulatory exemption from the statutory and regulatory requirements should be interpreted in a limited way.”

(internal citations omitted))<sup>6</sup>; Letter from Doug Cole, EPA, to Alan Newman, Washington Dept. of Ecology (November 5, 2001) (expressing EPA's longstanding interpretation of PSD "to cover virtually any significant alteration to an existing plant and to interpret the exclusion related to routine maintenance, repair and replacement narrowly.")<sup>7</sup>. In fact, because the routine maintenance exemption conflicts with the literal, plain language used by Congress that applies the PSD program to *any* physical change, the exemption must be limited to the very mundane daily activities that would overwhelm permitting agencies if subjected to permitting. Cf. *WEPCO*, 893 F.2d at 909 (warning that the routine maintenance exemption cannot be interpreted to "open vistas of indefinite immunity from the provisions of ... PSD"); *Ohio Edison*, 276 F. Supp. 2d at 855; *Sierra Club v. Morgan*, Case No. 07-c-251-s, Order at 25 (W.D.Wis. Nov. 7, 2007); *In re TVA*, 9 E.A.D. at 410-11 (rejecting an interpretation of the exemption that would "constitute 'perpetual immunity' for existing plants, a result flatly rejected by Congress and the circuit courts in *Alabama Power* and *WEPCO*").

Courts have similarly interpreted the "Routine Maintenance" exception narrowly. See e.g., *U.S. v. So. Indiana Gas & Elec. Co.*, 245 F.Supp. 2d 994, 1019 (S.D.Ind. 2003) (exemptions from the definition of "modification"—including routine maintenance—are "very narrow"). Courts have identified three hallmarks of the Routine Maintenance exemption:

First, the exemption applies to a *narrow range of activities*, in keeping with the EPA's limited authority to exempt activities from the [CAA]. Second, the exemption applies only to activities that are *routine for a generating unit*. The

---

<sup>6</sup> Available at [http://www.epa.gov/region7/air/title5/petitiondb/petitions/tva\\_paradise\\_response2010.pdf](http://www.epa.gov/region7/air/title5/petitiondb/petitions/tva_paradise_response2010.pdf)

<sup>7</sup> Available at <http://www.epa.gov/region7/programs/artd/air/nsr/nsrmemos/20011105.pdf>

exemption does not turn on whether the activity is prevalent within the industry as a whole. Third, *no activity is categorically exempt*. EPA examines each activity on a case-by-case basis, looking at the nature and extent, purpose, frequency, and cost of the activity.

*United States v. Ohio Edison*, 276 F. Supp. 2d 829, 834 (S.D. Ohio 2003) (quoting *SIGECO*, 245 F.Supp. 2d at 1008) (emphasis added, original emphasis omitted); *see also* *Sierra Club v. Morgan*, 2007 U.S. Dist. LEXIS 82760, at \*33-34 (W.D. Wis. 2007).

Whether a project falls within the narrow Routine Maintenance exemption depends on a four-factor assessment, focusing on: (1) the nature and extent of the project; (2) the project's purpose; (3) the frequency of the project; and (4) the project's cost. *See WEPCO*, 893 F.2d at 909-11; *SIGECO*, 245 F.Supp. 2d at 1008; *United States v. Ohio Edison*, 276 F. Supp. 2d 829, 855 (S.D. Ohio 2003); *United States v. Cinergy Corp.*, 495 F. Supp. 2d 909, 930 (S.D. Ind. 2007); Memorandum from Don R. Clay, Acting Assistant Administrator for Air and Radiation, to David A. Kee, Air and Radiation Division, Region V, at 3 ("Clay Memo")<sup>8</sup>. The EPA has applied this test to plants in Michigan. Letter from Francis X. Lyons, Regional Administrator, EPA Region V, to Henry Nickel (May 23, 2000) ("Detroit Edison")<sup>9</sup>.

Certain types of projects, categorically, cannot be considered routine maintenance. These categorically non-routine projects include:

- Projects approved by management, planned by a central office, using outside contractors, and involving replacements of entire components. *Ohio Edison*, 276 F. Supp. 2d at 834, 859; *In re TVA*, 9 E.A.D. at 481, 484-85, 490-91, 493-94.
- Projects which include modifying or replacing numerous parts and redesigned, custom, or "upgraded" parts. *See Cinergy*, 495 F. Supp. 2d at 934.

<sup>8</sup> Available at <http://www.epa.gov/region7/air/nsr/nsrmemos/wpc02.pdf>

<sup>9</sup> Available at <http://www.epa.gov/region7/air/nsr/nsrmemos/detedisn.pdf>

- Projects that have a purpose of improving operations by extending the operational life of the unit or resulting in fewer needed shutdowns to perform repairs are not routine maintenance. *WEPCO*, 893 F.2d at 911-12 (holding that a project that rehabilitates aging units as an alternative to retiring them is not routine); *Cinergy*, 495 F. Supp. 2d at 935 (finding a project non-routine based, in part, on the fact that the purpose was to “improve[] operating efficiency’ with less [sic] potential outages.”); *Ohio Edison*, 276 F. Supp. 2d at 858, 860 (finding a project non-routine that “reduc[ed] forced outages and improv[ed] availability and reliability of the unit(s)”).
- Projects paid for with funds other than a plant’s operating and maintenance budget, or which are treated as capital expenses on balance sheets are not routine. *Cinergy*, 495 F. Supp. 2d at 933; *Ohio Edison*, 276 F. Supp. 2d at 834, 859, 862.

In short, routine maintenance “occurs regularly, involves no permanent improvements, is typically limited in expense, is usually performed in large plants by in-house employees, and is treated for accounting purposes as an expense.” *Ohio Edison*, 276 F. Supp. 2d at 834 (citing *WEPCO*, 893 F.2d 901). Non-routine and, therefore non-exempt, projects include “capital improvements which generally involve more expense, are large in scope, often involve outside contractors, involve an increase of value to the unit, are usually not undertaken with regular frequency, and are treated for accounting purposes as capital expenditures on the balance sheet.” *Id.*

#### i. Nature and Extent

Under the first factor-- nature and extent—the relevant question is whether major components are being modified or replaced, including whether the parts are “of considerable size, function, or importance to the operation of the facility.” TVA T5-Order at 10; Memo from Steve Dunn, WDNR, to UW-Charter Street Title V Renewal File at p. 3 (May 8, 2007) (“Charter St. Memo”) (attached as ExhibitG). Thus, a project that replaces of most or all of a major component of the source is not routine. *Detroit Edison* at 10 (Explaining that the analysis examines “[w]hether major components of a

facility are being modified or replaced; specifically, whether the units are of considerable size, function, or importance to the operation of the facility, considering the type of industry involved.”).

The use of outside contractors, use of new materials or equipment, and duration<sup>10</sup> of the project (possibly including a shutdown of the unit) each indicates a non-routine project. *Id.*; *Cinergy*, 495 F. Supp. 2d at 933-34; TVA T5-Order at 11. Similarly, projects that require the approval of upper-level management are considered non-routine. *Ohio Edison* at 859 (finding a project to be non-routine where approval was “handled by [the utility’s] central office” and not the plant manager); *Cinergy*, 495 F. Supp. 2d at 939.

EPA has interpreted the “routine maintenance” exemption in the context of replacing boiler tubes (such as the project at issue in this Petition) by contrasting the replacement of a single, or up to a couple, worn or damaged tubes on an as-needed basis, which may be routine maintenance, with those projects that are categorically different, and non-routine, because they involve replacing all of the tubes in a component section of a boiler. *See* Letter from Robert B. Miller, EPA, to Steven Dunn, Wisconsin DNR (Jan. 29, 2003)<sup>11</sup> (distinguishing between a project to replace numerous tubes in a boiler component with “the more typical maintenance activities that are performed annual in that it involves a complete replacement of the tubes in a major component of the boiler, as opposed to replacement of just a few worn or damaged tubes on an as-needed basis.”); Letter from Doug Cole, EPA, to Alan Newman, Washington Dept. of Ecology at 3 (Nov. 5, 2001) (“a wholesale change to a major component of [a boiler] does not occur

---

<sup>10</sup> Routine projects to repair boiler tubes typically “take no more than a day or two.” *See* Ltr. from Robert Miller to Steven Dunn at 2 (P.H. Glatfelter).

<sup>11</sup> Available at <http://www.epa.gov/region7/air/nsr/nsrmemos/20030129.pdf>

annually, or on any regular basis. This is not a matter of merely replacing only a few worn or damaged tubes on an as-needed basis”<sup>12</sup>; Letter from Gregg M. Worley, EPA, to Barry R. Stephens, Tenn. Dept. of Env't. and Conservation at 4 (September 14, 2001) (“This replacement differs from the more typical maintenance activities that are performed annually in that it involves complete replacement of all the tubes in a major component of the boiler, as opposed to replacement of just a few worn or damaged tubes on an as-needed basis.”)<sup>13</sup>.

EPA has also noted that a change that requires the facility to be shut down for the work, rather than performing the work during full functioning, is not routine. *See* TVA T5-Order at 11. Even projects that involve a shutdown of “several days to accomplish” are not routine. *See* Ltr. from Winston Smith, USEPA, to James P. Johnson, Georgia Env'tl. Protection Division at 3 (Jan. 28, 2002) (changes to boiler after 17 years not frequent and not routine)<sup>14</sup>. And, obviously, a project that adds parts to existing equipment that did not previously exist is not routine. TVA T5-Order at 18.

The nature and extent of the superheater replacement at the AC mill was not routine. The project involved replacing the entire superheater component in one project, which is far beyond typical routine maintenance that may involve, at most, the replacement of one or two damaged tubes as needed. For example, AC provided a list of all boiler work done between 2005 and the end of 2010. Over that five year span, many repairs were done but none was even close to the extent of the full superheater replacement project at issue here. *See* Appleton Coated's Response to EPA's Request for

---

<sup>12</sup> Available at <http://www.epa.gov/region7/air/nsr/nsrmemos/20011105.pdf>

<sup>13</sup> Available at <http://www.epa.gov/region7/air/nsr/nsrmemos/pca2001.pdf>

<sup>14</sup> Available at <http://www.epa.gov/region7/air/nsr/nsrmemos/20020128.pdf>

Information Pursuant to 42 U.S.C. § 7413, Response to Question 20 (attached as Exhibit H) (hereinafter "Resp. to Quest. 20"). Additionally, the company provided a list of all capital projects ever done at the facility costing more than \$100,000.00. Ex. E, Resp. to Quest. 13. Except for the superheater tube purchase and installations that are the subject of this Petition, the company never had a tube repair project in the boiler approaching the size of the one at issue here. *Id.* According to DNR's August 13, 2004 letter to EPA, the replacement involved replacing all 105 superheater tubes, which represented about 4.7% of the total number of tubes in the entire boiler. *See* Ex. F, Letter from Steven Dunn to Susan Siepkowski at 1. Notably, this is *more* tubing than the Waupun Correctional superheater replacement project that DNR found was *not* routine maintenance at approximately the same time. *See* Letter from Steven Dunn to Neil Howell, Re: Request for Assistance in Determining Whether Replacement of Superheater Tubes in a Boiler is Routine Replacement under the PSD Program (August 14, 2003) (attached as Exhibit I) (hereinafter the "Waupun Determination"). Compared to prior determinations, and application of EPA's guidance, the nature and extent of the project precludes a Routine Maintenance determination.

Furthermore, the project was anticipated to extend a planned outage for the boiler by almost 100%: from 12 days to 22 days. *See* Appleton Coated's Response to U.S. EPA's Request for Information at AC 003335 (attached in relevant part as Exhibit J), *see also id.* at 3347 ("A planned outage [to replace the superheater tubes] would coincide with the annual maintenance work done on #10 boiler, lengthening the outage. The work is expected to take three full weeks of around the clock labor."). The decision to undertake the project involved significant correspondence and analysis. *See* Ex. J,

generally. The project was undertaken by outside contractors and planned well in advance of the actual work. The idea originated from a study of superheater tube thickness in 2003. Ex. J at AC 003333. Special materials had to be ordered from an off-site supplier. *Id.* at AC 003339-45. Labor to remove the existing superheater and install the new one was also provided by outside contractors. *Id.* at AC 003356-66. Planning for the project, and the purchase of the materials, was approved in March, 2004. *Id.* at AC003330, 3347. At least four different individuals signed the approval. *Id.* at AC 003331.

The project itself involved cutting a large access hole into the boiler penthouse to access the superheater tubes, erecting scaffolding and railings inside the boiler, cutting out and removing all of the existing superheater boiler tubes, replacing the superheater, and repairing the lagging and refractory before closing the boiler back up and pressure testing. *Id.* at AC 003358.

ii. Purpose

Under the second factor—purpose—the overall objective of the project is compared to the purpose of a truly routine maintenance task. Whether a project is a “life extension” is important to the “purpose” factor, in that life extension projects are not routine maintenance, but other facts can weigh against a routine maintenance finding under the “purpose” factor. The purpose of truly routine maintenance is to fix a piece of equipment on an as-needed basis, with no expectation that the fix will improve the plant’s operations by, for example, reducing the frequency of future tube ruptures and forced outages. *TVA*, 9 E.A.D. at 406, 485; *Morgan*, 2007 U.S. Dist. LEXIS 82760, at \*36. By contrast, projects that are expected to make a unit more reliable or increase unit



---

availability by avoiding future tube failures clearly go beyond “mere maintenance” and fall well outside the Routine Maintenance exemption. *Ohio Edison*, 276 F. Supp. 2d at 860; *see also WEPCO*, 893 F.2d at 911-12; *Morgan*, 2007 U.S. Dist. LEXIS 82760 at \*38-3, \*41 (finding that a project intended “to increase the reliability and availability of the boilers and to . . . allow the boilers . . . to remain in operation” was not routine maintenance); *Cinergy* at 935 (declining to extend the Routine Maintenance exemption to a project that resulted in “significantly improved operating efficiency with less potential outages anticipated.”) (internal quotations omitted); TVA T5-Order at 11; Ex. G, Charter St. Memo at 3 (noting that projects allowing “enhanced operation”, including “increased utilization” are not routine). Therefore, Wisconsin DNR has previously determined that the purpose of a project to replace parts that were “worn out,” or to address the cause of frequent tube leaks and thereby avert future leaks, is not routine. Ex. G, Charter St. Memo at 3-4. Even where projects may be routine “if performed regularly as part of standard maintenance procedure while the plant was functioning or in full working order” were nevertheless not routine if “performed as part of an exhaustive rehabilitation project.” TVA T5-Order at 10 (internal quotations omitted). For example, in the Glatfelter Decision, EPA did not conclude that the project was a life extension. Instead, EPA noted that the project might be a life extension, but also noted that “the proposed project can be viewed as a significant repair of a major boiler component.” Glatfelter Decision at 2.

Additionally, the “purpose” of a project inquires whether the component being replaced was “was near, or had exceeded, its useful life,” not whether the boiler as a whole was at the end of its life. Boise Cascade Decision at 4. Therefore, where a

component part of a boiler (i.e., a superheater) is worn and the component's overall condition counsels for replacement, the project is not routine maintenance. *Id.*; *see also* Packaging Corp. Decision at 3 (noting that the project would "substantially increase the life of *the tubes*" and not only extend the life of the unit (emphasis added)).

The purpose of the superheater replacement project at the AC plant was not routine. As EPA previously noted, the purpose of the superheater replacement at issue was to "essentially extend[] the life of the boiler," which had reached the end of its useful life; this is not a routine maintenance purpose. Ex. D at 2. Moreover, according to company documents, the estimated life of the original superheater was 15 years and when it was replaced the superheater had already exceeded that useful life by at least four years. Ex. J at AC 003334 ("The typical life span of a superheater tube in a boiler of this design is fifteen years. BLR10 is in its nineteenth year of operation."). The repair was not merely a typical repair—to address only a rupture or leaking tube and return the unit quickly back to service. In fact, the facility was planning the repair far in advance and noted that the timing of the project was flexible—depending on when sufficient capital funds could be available. *Id.* at AC 003334. The intent was to improve the boiler by reducing the potential for future unplanned outages. *Id.* at AC 003356. These purposes, based on caselaw, EPA's guidance and DNR's own Waupun Determination, precludes a determination that the project was routine maintenance.

### iii. Frequency

Under the third factor—frequency—the analysis looks to how often the same project occurs at the unit in question or a typical unit's life. TVA T5-Order at 11 ("Whether the change is performed frequently in a typical unit's life."); Ex. G, Charter St.

Memo at 3. The routine maintenance exemption applies only to projects that occur in the ordinary course of operations at the unit in question, or at most, in a typical unit's life. Routine maintenance projects are "regular, customary, or standard undertaking[s] for the purpose of maintaining *the plant* in its present condition." Clay Memo at 3-4 (emphasis added). EPA has indicated that only those projects that "occur annually, or on a[] regular basis" at a particular unit are routine. *See* Letter from Doug Cole, EPA, to Alan Newman, *supra* at 3.

Simply stated, projects that "normally occur once or twice during *a unit's expected life cycle*" are not routine. *WEPCO*, 893 F.2d at 912 (emphasis added); *Detroit Edison* at 20-21; *TVA*, 9 E.A.D. at 407 ("Although TVA introduced evidence that it and others in the industry had made similar replacements at other facilities, the evidence did not show that these replacements were other than uncommon in the lifetime of the unit."); Letter from Robert Miller to Steve Dunn, *supra* at p. 2 ("Moreover, the infrequency of such replacement *at this boiler* supports our understanding that complete boiler tube replacements are not performed on a frequent basis." (emphasis added)); Letter from Winston A. Smith, EPA, to James P. Johnson, Georgia Env'tl. Protection Dept. (finding that frequency did not support a finding of routine where "the previous owner of the mill never performed the same changes *at the No. 3 Recovery Boiler* during its entire 17-year operating history." (emphasis added)); Letter from Doug Cole, EPA, to Alan Newman, *supra* (finding a project not routine because "EPA is not aware of [the unit at issue] undergoing such an extensive boiler tube replacement project since it started up . . . more than twenty years ago"); Letter from Gregg M. Worley, EPA, to Barry R. Stephens, Tenn. Dept. of Env't. and Conservation (finding a project not routine where it has only

occurred once in the “entire 40-year operating history” of the unit)<sup>15</sup>. Although EPA has recognized that the frequency of a type of project in the industry as a whole may provide some context for the routine maintenance analysis, *see, e.g., TVA*, 9 E.A.D. at 394, the relevant inquiry is frequency at a “typical” (i.e., singular) unit. TVA T5-Order at 11; Clay Memo at 5 (looking to frequency at the units at issue). EPA has never interpreted this as determining routine maintenance based on the prevalence of a project generally in the source category.

The majority of courts that have applied the routine maintenance analysis have also found that the touchstone for the frequency factor is whether the project is routine for the particular facility at issue. In *SIGECO*, for example, the District Court agreed with EPA’s interpretation that the exemption “applies only to activities that are routine for a generating unit . . . [not] the industry as a whole.” 245 F.Supp.2d at 1008. *See also Ohio Edison*, 276 F. Supp. 2d at 861 (concluding that an “industry-wide standard” as to what is routine would “render the exemption meaningless”); *Morgan*, 2007 U.S. Dist. LEXIS 82760, at \*36-37.

Courts looking to occurrences in the industry—detached from any context of how many units are in the industry and over how many years of operation project occur—are in the clear minority, and fail to give weight to the Act’s plain language or deference to EPA’s longstanding interpretation of its own regulation. *See, e.g., Nat’l Parks Conservation Ass’n v. TVA*, 2010 U.S. Dist. LEXIS 31682, at \*49 (E.D. Tenn. March 31, 2010) (citing *United States v. E. Ky. Power Coop., Inc.*, 498 F.Supp.2d 976, 993-94 (E.D. Ky 2007)). If this minority interpretation of the routine maintenance exception was

---

<sup>15</sup> Available at <http://www.epa.gov/region7/air/nsr/nsrmemos/pca2001.pdf>

---

applied, it would drag the exception out of the narrow category of exemptions allowed by the *de minimis* doctrine, making the rule itself unlawful. See *New York*, 443 F.3d at 883-84, 888; *Shays*, 414 F.3d at 113-14. It would also turn the Act on its head, exempting virtually all existing facilities from the PSD program by granting them “indefinite immunity” from its pollution control requirements—the opposite of what Congress intended. *WEPCO*, 893 F.2d at 909; see also *New York*, 443 F.3d at 888; *In re Tenn. Valley Auth.*, 9 E.A.D. at 410-11.

Notably, Wisconsin DNR, itself, has applied the same source-specific frequency metric. See e.g., Memorandum from Steven Dunn to Stan Mermall, Re: PSD Applicability for Menasha Utilities at (August 16, 2008) (noting that the project was not routine because certain items “have not been undertake[n] at the facility recently or on any regular basis”).

The superheater project at issue here was the first-ever tube replacement project on this boiler and the company did not expect to retube the superheater again for another 15-20 years. See DNR August 13, 2004, Letter to Region 5. As EPA has already noted for the superheater project at issue: “the boiler at Appleton Coated was installed in 1985, and had not undergone a superheater tube replacement project prior to 2006. A one time replacement is not frequent.” Ex D at 2. Therefore, it is not expected that a superheater replacement would occur more than two or three times, at the most, during the life of the boiler. This infrequency precludes a determination of routine maintenance.

#### iv. Cost

Under the fourth factor-- cost--numerous courts and EPA have found the method of accounting for the project central to the analysis: routine maintenance projects are

certain to be treated as ordinary expenditures under a source's annual operating budget, whereas non-routine projects are approved separately from the annual operating budget and are usually capitalized. *Cinergy* at 936-37; *Ohio Edison* at 860 ("A straightforward and logical construction of the term "maintenance," let alone "routine maintenance," would exclude from its scope any amounts defined as capital expenditures"); *Morgan*, 2007 U.S. Dist. LEXIS 82760, at \*42; *Detroit Edison* at 11; *TVA T5-Order* at 11.

An assessment of the cost of a change is also intended to compare the cost, and the facility's treatment of that cost, to the cost of a typical repair or replacement project on the relevant component to assess its magnitude compared to typical repairs. For example, in the *Glatfelter Decision*, EPA compared the project cost in that case, \$450,000, to "a typical tube repair [which] cost would be approximately \$50,000" to conclude that "[t]he project cost is significantly higher than the expected maintenance general replacement costs." *Glatfelter Decision* at 2. Additionally, EPA compares the cost to the typical maintenance costs for a boiler. *Packaging Corp. Decision* at 4 (comparing the \$924,000 project cost to the "normal [boiler] annual maintenance costs that have ranged from \$629,968 to \$979,969"). EPA has not relied on the fact that a physical change costs only a fraction of the cost of a new boiler. *Id.* (taking note that the project costs "less than one percent of the cost of a new comparable... boiler" but finding the cost to nevertheless weigh against Routine Maintenance).

The superheater project at AC was treated as a capital project. See Exhibit J, generally (repeatedly noting that the project was a capital expenditure). This weighs against a finding of routine. Moreover, while AC commonly incurs boiler tube repairs

that cost a few thousand dollars to tens of thousands of dollars, *see* Exhibit H<sup>16</sup>, the cost of the superheater replacement project at issue here was an order of magnitude, or two, larger. Courts and EPA have found projects that cost in the tens to hundreds of thousands of dollars or more to be non-routine. *See e.g., Morgan*, 2007 U.S. Dist. LEXIS 82760, at \*39 (finding that a \$ 77,000 cost was not routine), *id.* at \*44 (same for a \$90,700 project); *Cinergy*, 495 F.Supp.2d at 938, 942-43, 947 (finding a projects costing \$665,000 to \$1,490,800 not to be routine); Letter from Robert B. Miller, EPA, to Steven Dunn, Wisconsin DNR (finding a project costing \$50,000 not to be routine).

Here, the cost to purchase the materials for the superheater replacement was estimated at more than \$150,000, Ex. J at AC 003339, and the cost for the labor to install them was estimated at approximately \$350,000. *Id.* at AC 003362. This is actually at least \$50,000 more than the \$450,000 represented by DNR to EPA in the August 13, 2004, letter from Steven Dunn to Susan Siepkowski.

The cost of the project was projected to be \$450,000, which represents the entire annual maintenance cost for the boiler during a typical year according to what the company told Wisconsin DNR.<sup>17</sup> However, records from the company indicate that the annual maintenance expenditures for Boiler 10 are significantly less in normal years. *See* Exs. H, K. In fact, the \$470,000 appears to refer to annual outage during which numerous repairs and inspections are done, and not a typical single repair or replacement

---

<sup>16</sup> Because Exhibit H is lengthy, the expenditures that appear to be boiler tube repairs were extracted and are contained in Exhibit K.

<sup>17</sup> The Letter to EPA states that the “annual maintenance cost during a ‘normal’ maintenance shutdown is approximately \$470,000/year.” It is not clear if maintenance shutdowns occur annually, or less frequently. These comments assume that one maintenance shutdown occurs each year. If such shutdowns occur less frequently, that fact would further reinforce the conclusion that the project is not Routine Maintenance.

project. That is, the amount represents an aggregate cost for many projects and not for any particular, or typical, repair or replacement.

But, regardless of whether the typical annual maintenance budget for Boiler 10 is \$470,000 or something less, the project to replace the superheater on the plant was significant compared to the cost of individual repairs to the boiler over the course of a typical year. The cost of the shutdown during which the superheater was replaced was \$700,000 per year. This shows that the superheater portion was 65% of the entire maintenance cost that year, including all other maintenance projects. Consistent with the EPA's guidance, a single project that costs almost as much as the entire normal annual maintenance budget is not routine. *See* Packaging Corp. Decision at 4 (finding a \$924,000 project not to be routine compared to "normal [boiler] annual maintenance costs that have ranged from \$629,968 to \$979,969"). Here, the project cost significantly more than the typical cost to repair a ruptured tube (\$50,000 or less). *See* Glatfelter Decision at 2; Exs. H, K. As EPA has already noted for this project, the \$450,000 cost "which was the approximate equivalent of what Appleton Coated spent on its entire annual maintenance outage at the time," leads to the conclusion that "the project in question was not routine." Ex. D at 2. Therefore, the cost of this project also precludes a determination of routine maintenance.

#### **E. Superheater Replacements Have Been Found Not To Be Routine Maintenance**

As a practical matter, the Administrator can rely on the fact that full superheater replacements are simply never routine repair projects. No EPA or court determination, applying the correct interpretation of the routine maintenance exception, has found a full



superheater replacement to be a routine repair.<sup>18</sup> The Environmental Appeals Board found superheater replacements to not constitute routine maintenance in *In re Tennessee Valley Authority*, 9 E.A.B. 357, Appx A (EAB September 15, 2000) (finding non-routine for superheater replacements at Bull Run #1, Cuberland #1 and 2, Sevier #3, Kinston #6 and 8, Shawnee #1 and 4, Widows Creek #5). In *U.S. v. Cinergy*, Judge McKinney found in summary judgment that a superheater replacement on the Miami Fort Unit 7 was not routine maintenance. 495 F.Supp.2d 909, 945-48 (S.D.Ind. 2007). Moreover, EPA has issued Notices of Violation to Wisconsin facilities that have also cited superheater replacements as violations of the PSD program, finding them not to be routine maintenance. See e.g., *In re Wisconsin Public Service Corp. Green Bay, Wisconsin*, EPA-5-10-WI-02, Notice of Violation ¶ 32 (Nov. 18, 2009); *In re Alliant Energy Corp., et al.*, EPA-5-10-WI-01, Notice of Violation Appx A (Dec. 14, 2009).<sup>19</sup>

The AC tentative determination at issue here is also the only instance where Wisconsin DNR determined that a full superheater replacement is routine. DNR determined that a superheater replacement at the Waupun Correctional heating plant was not routine. See Ex. I, Waupun Determination. That determination occurred at approximately the same time as the AC modification at issue here, but came to the exact opposite—and correct—conclusion.

---

<sup>18</sup> EPA has also concluded, as a general rule, that replacing any entire boiler section, rather than individual boiler tubes, is not routine. See e.g., Glatfelter Decision at 2 (“the infrequency of such replacement at this boiler supports our understanding that complete boiler tube replacements are not performed on a frequent basis”); Boise Cascade at 4 (referring to replacement of two components- the generating bank and economizer- as a “wholesale boiler tube replacement” and finding that such a project is not frequent).

<sup>19</sup> These NOVs are attached to the Petitioners’ comments, which are Exhibit B.

Because EPA has never found a superheater replacement to be routine, no court applying the correct analysis has found a superheater replacement to be routine, and Wisconsin DNR itself has found all superheater replacements except for the one at issue here to be routine, EPA can conclude that full superheater replacements are not routine maintenance repair and replacement projects.

**F. AC Has the Burden to Show That the Superheater Replacement is Routine.**

It should also be noted that the entity seeking the benefit from a regulatory exemption to a statutory obligation bears the burden of proof and persuasion that the exemption applies. The routine maintenance exemption here, which Wisconsin DNR relied on to determine that the AC Boiler 10 is not subject to PSD, is an exemption from an otherwise applicable statute providing that all physical changes that result in an emission increase trigger PSD applicability. This means that AC, as the entity seeking its benefit, has the burden to show that it qualifies for the exemption. *Sierra Club*, supra, at 27; *United States v. Cinergy*, 2006 WL 372726, \*4 (S.D.Ind. Feb. 16, 2006) (citing *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967)); *Ohio Edison*, 276 F. Supp. 2d at 856; see also *In re Tennessee Valley Authority*, 9 E.A.D. 357, 391 n.31, 2000 WL 1358648 (EAB Sept. 15, 2001), *rev'd on other grounds Tenn. Valley Auth. v. U.S. Ent'l. Protection Agency*, 278 F.3d 1184 (11<sup>th</sup> Cir. 2002).

**G. The Actual-to-Potential Test Applies To the Superheater Replacement.**

Here, the Wisconsin DNR erred by determining that PSD requirements are not applicable requirements for the AC Boiler 10. Therefore, the Administrator should object to that finding and send the permit back to Wisconsin DNR to correct this error. See e.g.,

---

*In re Wis. Power and Light, Columbia Generating Station*, Order at 7-10 (EPA Adm'r, October 8, 2009) (objecting to improper analysis by Wisconsin DNR on one aspect of PSD applicability and requiring the state agency to "reexamine its decision in light of the correct standard"). Further findings regarding the applicability of PSD requirements, such as the emission increase, were not analyzed by the state agency and need not be found by EPA for an object.

However, if the Administrator seeks to provide further guidance to the Wisconsin DNR, he should find that the superheater replacement at issue here was a major modification. In the Glatfelter Decision, EPA concluded that:

a modification that results in a significant emissions increase comparing the unit's past actual to its future potential emissions, requires the modification to go through PSD review. The exception to this is the provision commonly known as the "WEPCO test," where past actual emission[s] are compared to projected future emissions. It is our opinion, the unit in question is not an electric utility steam generating unit, and would therefore not be eligible for the WEPCO test.

Glatfelter Decision at 2; *see also* Letter from Sam Portanova, USEPA, to Steven Dunn, WDNR Re: Request for a PSD Applicability Determination for Murphy Oil, Superior, Wisconsin at 4 (September 24, 2005) ("the relevant analysis for the emissions from the new emissions unit(s) is actual-to-potential (PTE)") (Murphy Oil Decision); Letter from R. Douglass Neeley, EPA, to Donal R. van der Vaart, North Carolina Dept. of Environment (Aug. 8, 2001) ("even if that change does not affect the unit's design capacity, utilization, or emission factor for any pollutant that the net emissions increase calculus must be performed to determine if the change is a major modification.")<sup>20</sup>

---

<sup>20</sup> Available at <http://www.epa.gov/region7/air/nsr/nsrmemos/calcemis.pdf>

Indeed, EPA has already determined that the actual to potential test applies to the AC superheater replacement at issue. *See Ex. D* at 2.

Here, the actual-to-potential test applies to AC's non-routine project to replace the superheater. Because it is not clear exactly which day construction commenced on the superheater replacement at AC, the following shows the emissions during several years to give AC the benefit of the highest 2-year baseline between 2004 and 2007, and the historical emissions show that an increase would occur under the applicable actual-to-potential test:

**AC Boiler 10 (B23) Emissions Compared to Potential to Emit**

Pollutant	2004	2005	2006	2007	Highest 2-year annual average	PTE <sup>21</sup>	Actual to Potential Increase	Significance Threshold, NR 405.02(27)(a)	PSD Triggered?
PM	24.666	22.603	8.411	8.973	23.6345	164.44	140.81	25	Yes
PM10	1.984	1.839	1.838	1.949	1.9115	164.44	162.529	15	Yes
SO2	1,193.9	1,092.24	1,064.3	1136.4	1143.0615	1674.3	531.239	40	Yes
NOx	607.646	556.587	628.3	665.98	647.1635	1046.4	399.237	40	Yes
CO	265.728	247.833	76.89	81.24	256.7805	254.13	-2.6505	100	No
VOC	43.814	40.751	37.18	37.79	42.2825	45.11	2.8275	40	No

The emission increase for SO<sub>2</sub>, PM, PM10 and NO<sub>x</sub> is "significant." The emission increase for CO and VOC is not. Therefore, the project triggered PSD requirements for SO<sub>2</sub>, PM, PM10 and NO<sub>x</sub> and those are applicable requirements that should have been included in the permit.

<sup>21</sup> From page 45 of Preliminary Determination for Permit 07-DCF-019

### G. There Was a Significant Net Emissions Increase.

The Administrator has noted that determining whether PSD requirements are applicable to a facility requires a showing of both an emission increase and a net emission increase. *In re Georgia-Pacific Consumer Products*, Order (EPA Adm'r, July 23, 2012). This is derived from the two steps in Wis. Admin. Code § NR 405.02(24)(a) (2004). *Id.* However, for the second step to be relevant to a determination that a project was a major modification, it must show that a net emission increase is lower than the emission increase in step 1. That is, if the emission increase from the superheater project is significant in the first step—as shown above for PM, PM10, SO<sub>2</sub>, NO<sub>x</sub> and CO—adding “[a]ny other increases... in actual emissions” in step two would always show a significant increase. Therefore, the only truly relevant inquiry for purposes of this petition is whether there were any decreases that were contemporaneous and otherwise credible. Wis. Admin. Code § NR 405.02(24)(a)2. (2004). Only if there were, and such contemporaneous and credible decrease was sufficient to make the net increases shown in the table above smaller than the “significance” threshold, would the conclusion of step 2 result in a different determination than the conclusion in step 1 would dictate.

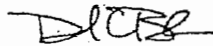
There are no creditable decreases here. Such a decrease would have been required during the five years preceding the project and must be federally enforceable at and after construction commences (in addition to other requirements). Wis. Admin. Code § NR 405.02(24)(b)1., (f)2. There is no evidence in the record, in DNR's permit database, or anywhere else, that emission reductions occurred during the five years prior to the

superheater replacement at issue—much less, that any reduction was federally enforceable through a federally enforceable regulation or permit.<sup>22</sup>

### Conclusion

Because Wisconsin DNR erred in applying the Routine Maintenance, Repair and Replacement exemption, it erred in determining whether PSD requirements are applicable and included in the operating permit. The Administrator should object to Wisconsin DNR's determination and require the state to apply a correct interpretation of the routine maintenance exemption, and then determine whether the superheater project was a major modification that triggered the applicability of PSD requirements.

MCGILLIVRAY WESTERBERG & BENDER LLC



David C. Bender

---

<sup>22</sup> There were permits issued for projects that increased emissions in the 5 years prior to the superheater replacement, *see.g.*, Permits 02-DCF-170, 00-RV-162-R1; 04-DCF-069, but no evidence of any federally enforceable emission reductions.

---

CERTIFICATE OF SERVICE

---

STATE OF WISCONSIN   )  
                                   ) ss  
COUNTY OF DANE         )

I make this statement under oath and based on personal knowledge. On this day I caused to be served upon the following persons a copy of Sierra Club's forgoing Petition to the United States Environmental Protection Agency regarding the Appleton Coated, LLC

To Administrator McCarthy via electronic mail to:

McCarthy.Gina@epa.gov

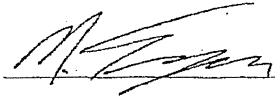
And via Certified Mail, Return Receipt Requested to:

Regina A. McCarthy  
US EPA Administrator  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Mail Code 1101A  
Washington, DC 20460

Wisconsin Dept. of Natural Resources Secretary  
101 S Webster St  
PO Box 7921  
Madison, WI 53707-7921

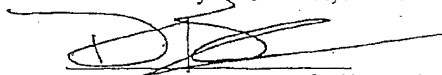
Appleton Coated, LLC  
c/o CT Corporation System, Registered Agent  
8040 Excelsior Drive, Ste 200  
Madison, WI 53717

Dated : October 28, 2013.



---

Signed and sworn to before me.  
This 28<sup>th</sup> day of October, 2013.



Notary Public, State of Wisconsin.  
My commission is permanent.