BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Consumers Energy J.H. Campbell Power Plant,
Permit No. MI-ROP-B2835-2013

Issued by the Michigan Department of Environmental Quality

PETITION TO OBJECT TO THE ISSUANCE OF A STATE TITLE V OPERATING PERMIT

Petition No.:

PETITION OF SIERRA CLUB TO OBJECT TO ISSUANCE OF A STATE TITLE V OPERATING PERMIT

Pursuant to Section 505(b)(2) of the Clean Air Act, 42 U.S.C. § 7661d(b)(2), 40 C.F.R. § 70.8(d) and 40 C.F.R. § 70.7(f) and (g), the Sierra Club hereby petitions the Administrator of the U.S. Environmental Protection Agency ("Administrator" or "EPA") to object to the Title V Renewable Operating Permit No. MI-ROP-B2835-2013[1] ("Title V Permit") reissued on September 18, 2013, by the Michigan Department of Environmental Quality ("MDEQ" or "the Department") for the J.H. Campbell Plant ("Plant") operated by Consumers Energy ("Consumers").

The Administrator must object to the issuance of the Title V permit because (1) MDEQ has failed to assure compliance with applicable New Source Review ("NSR")/Prevention of Significant Deterioration ("PSD") requirements under the Clean Air Act ("CAA") despite strong evidence that Consumers has violated such requirements at the Campbell plant, and (2) MDEQ has failed to establish monitoring requirements necessary to assure compliance with the applicable emission limits for particulate matter.

I. INTRODUCTION

The Plant is a fossil fuel-fired electric steam generating station located in West Olive, Michigan that has the potential to emit more than 100 tons per year each of sulfur dioxide ("SO2"), nitrogen oxides ("NOx") and particulate matter ("PM").[2] The Plant

[1] Attached as Ex. A.
[2] According to 2012 data submitted to the EPA, the Plant emitted over 21,500 tons of SO2 and 6,500 tons of NOx in that year. 2010 data reported by Consumers to MDEQ indicates that the Plant emitted over 120 tons of PM that year.

consists of three coal-fired units. Unit 1 has a heat input capacity of 2,490 mmBTU/hr;[3] Unit 2 has a heat input capacity of 3,560 mmBTU/hr;[4] and Unit 3 has a heat input capacity of 8,240 mmBTU/hr .[5] Unit 1 commenced operation in 1962;[6] Unit 2 in 1967;[7] and Unit 3 in 1980.[8] Because the Plant is a fossil fuel-fired steam electric plant of more than 250 million British units per hour, it constitutes a "major stationary source" within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(a) and a "major emitting facility" within the meaning of Section 169(1) of the Act, 42 U.S.C. § 7479(1).[9]

II. PETITIONER

The Sierra Club is the nation's oldest and largest grassroots environmental organization. An incorporated, not-for-profit organization, Sierra Club has approximately 600,000 members nationwide, including more than 16,900 members in Michigan. Its mission is to explore, enjoy and protect the wild places of the earth, and to educate and enlist humanity to protect and restore the quality of the natural and human environment. Sierra Club has worked diligently to protect and improve air quality in the United States, curb climate change, and promote clean energy.

III. PROCEDURAL BACKGROUND

On October 10, 2012, Sierra Club submitted detailed comments regarding MDEQ's proposal to reissue the Title V Permit for the Plant.[10] Sierra Club raised the objections reiterated in this petition regarding: (1) MDEQ's failure to assure compliance with the applicable NSR/PSD requirements under the CAA, (2) MDEQ's failure to require adequate monitoring to assure compliance with PM emission limits, and (3) MDEQ's failure to include a compliance schedule in the Title V Permit with reasonable specificity in its comments on the draft Title V Permit during the public comment period.

MDEQ submitted the proposed Title V Permit to EPA on July 31, 2013. EPA's 45-day review period ended on September 14, 2013. EPA apparently did not object to the permit, as MDEQ issued it in its final form on September 18, 2013. This Petition to Object is timely filed within 60 days of the conclusion of EPA's review period and failure to raise objections.

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[3] *In re Consumers Energy*, Notice of Violation, EPA-5-08-MI-22 at 5, ¶ 32 [hereinafter "NOV"], attached as Ex. B.
[4] *Id.*
[5] MDEQ's September 10, 2012 Staff Report on the Title V Permit at 15 [hereinafter "Staff Report"], attached as Ex. C.
[6] NOV at 5, ¶ 32.
[7] *Id.*
[8] According to Consumers' web site, http://www.consumersenergy.com/content.aspx?id=1332.
[9] NOV at 4, ¶ 30.
[10] Sierra Club's comment letter on the draft renewable operating permit for the Plant [hereinafter "Sierra Club Comment Letter"] attached as Ex. D.

IV. LEGAL STANDARDS

A. Title V Requirements.

Federal regulations adopted pursuant to Title V of the CAA require that facilities subject to Title V permitting requirements must obtain a permit that "assures compliance by the source with all applicable requirements." 40 C.F.R. § 70.1(b); *see also* Mich. Admin. Code R. 336.1213(2) ("Each renewable operating permit shall contain emission limits and standards, including operational requirements and limits that ensure compliance with all applicable requirements at the time of issuance."). Applicable requirements include, among others, the requirement to obtain a preconstruction permit under the CAA, EPA regulations, and state implementation plans ("SIPs"). 40 C.F.R. § 70.2. Title V permit applications must disclose all applicable requirements and any violations at the facility. 42 U.S.C. § 7661b(b); 40 C.F.R. §§ 70.5(c)(4)(i), (5), (8); Mich. Admin. Code R. 336.1212.

If a facility is in violation of an applicable requirement at the time that it receives an operating permit, the permit must include a compliance schedule. 42 U.S.C. §§ 7661b(b)(1), 7661(3). The compliance schedule must contain "an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance." 40 C.F.R. § 70.5(c)(8)(iii)(C); *see also* Mich. Admin. Code R. 336.1119(a). If any statements in the application were incorrect, or if the application omits relevant facts, the applicant has an ongoing duty to supplement and correct the application. 40 C.F.R. § 70.5(b); Mich. Admin. Code R. 336.1210(2).

Where a state or local permitting authority issues a Title V operating permit, EPA will object if the permit is not in compliance with any applicable requirement under C.F.R. Part 70. 40 C.F.R. § 70.8(c). If EPA does not object, "any person may petition the Administrator within 60 days after the expiration of the Administrator's 45-day review period to make such objection." 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

The Administrator "shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the CAA]." 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(c)(1); *N.Y. Publ. Interest Group v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) [hereinafter "*NYPIRG I*"]. The Administrator must grant or deny a petition to object within 60 days of its filing. 42 U.S.C. § 7661(b)(2). While the burden is on the petitioner to demonstrate to EPA that a Title V permit is deficient, *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009) ["hereinafter "*Sierra Club I*"]; *Sierra Club v. Johnson*, 541 F.3d 1257, 1266-67 (11th Cir. 2008) [hereinafter "*Sierra Club II*"]; *Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 677-78 (7th Cir. 2008), once such a burden has been met, EPA is required to object to the petition. *NYPIRG I*, 321 F.3d at 332-34.

B. New Source Review and Prevention of Significant Deterioration.

The NSR program covers both the construction of new industrial facilities and existing facilities that make any modifications that significantly increase pollution and are not exempt from regulation. 42 U.S.C. §§ 7401(a)(1) & (a)(2); *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 850 (S.D. Ohio 2003). A modification that substantially increases the amount of emissions from a facility triggers PSD review, including the need for emission limits reflecting the use Best Available Control Technology ("BACT").

The CAA defines "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 111(a)(4). The applicable regulation uses similarly sweeping language. 40 C.F.R. § 52.21(b)(2) ("Major modification means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase"). Although the EPA has chosen to exempt a narrow class of activities considered routine maintenance, this exception has been interpreted very narrowly, as federal "courts considering the modification provisions of NSPS and PSD have assumed that 'any physical change' means precisely that." *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 908-09 (7th Cir. 1990) [hereinafter "*WEPCO*"].

V. GROUNDS FOR OBJECTION

A. MDEQ Failed to Evaluate the Campbell Plant's Compliance with NSR Requirements, Despite Strong Evidence Suggesting Violations of Such Requirements.

1. MDEQ Has a Duty to Ensure that a Title V Permit Requires Compliance With All Applicable CAA Requirements.

It is a fundamental purpose of the Title V permitting program to ensure that regulated entities comply with requirements that originate in the Clean Air Act. The Department can only fulfill its obligation to incorporate such necessary conditions if it first determines which requirements are applicable and whether the applicant is in compliance with each such requirement. To that end, federal regulations set forth a series of responsibilities in which applicants must provide all of the information necessary to make decisions regarding applicable requirements and compliance status, after which point the Department must make such determinations and then rely on them to establish permit conditions.[11] Michigan's Title V regulations mirror these requirements.[12]

[11] *See* 40 C.F.R. § 70.5(c) (requiring the applicant to provide all information "needed to determine the applicably of, or to impose, any applicable requirement,"); 40 C.F.R. § 70.5(c)(3)(i) (requiring the applicant to provide any "additional information related to the emissions of air pollutants sufficient to verify which requirements are applicable to the source"); 40 C.F.R. § 70.5(c)(5) (requiring the applicant to provide "[o]ther specific information that may be necessary to implement or enforce other applicable requirements of the Act or of this part or to determine the applicability of such requirements"); 40 C.F.R. § 70.6(a)(1)

Among other requirements, the applicant for a Title V permit must disclose its compliance status and either certify compliance or enter into an enforceable schedule of compliance to remedy violations of the Act. 42 U.S.C. § 7661b(b); 40 C.F.R. § 70.5(c)(8)-(9); Mich. Admin. Code R. 336.1213(4). Similarly, MDEQ must include in every renewable operating permit *either* a schedule of remedial measures for sources that are not in compliance with all applicable requirements at the time of issuance *or* a statement that the source will continue to comply with the requirements for sources that are in compliance with all applicable requirements at the time of issuance. Mich. Admin. Code R. 336.1119(a)(i) & (ii); Mich. Admin. Code R. 336.1213(4)(a); *see also Sierra Club I*, 557 F.3d at 403 ("The Permit must contain a compliance scheduling listing the Act's requirements with which the source (1) already complies, (2) will comply once the permit goes into effect and (3) does not comply along with a schedule of remedial measures designed to bring the source into compliance.").

In its Title V Permit application, Consumers certified compliance with all of the requirements that apply to the J.H. Campbell Power Plant. MDEQ summarily accepted this certification and incorporated it into the Title V Permit, writing only that "[a] Schedule of Compliance is not required." Title V Permit at Appx. 2-2.

MDEQ's approach here was legally insufficient because it is clear from the permit record that the Department failed to make a reasoned determination whether Campbell Plant is in compliance with NSR requirements. Specifically, MDEQ ignored compelling evidence that Consumers improperly avoided NSR requirements governing several modifications that should have triggered PSD review, including the establishment of emission limits that reflect the use of BACT. During the public comment period, the Sierra Club raised this issue in detail and argued that the available evidence demonstrated that MDEQ needed to include in the Title V permit a schedule to bring the Campbell plant into compliance with NSR requirements. At a minimum, MDEQ should have evaluated the modifications identified by Sierra Club and required Consumers to submit any information necessary to determine whether these modifications violated the NSR requirements. (Sierra Club Comment Letter at 1-8). In response to these significant comments, however, MDEQ simply disclaimed responsibility for evaluating NSR issues, not for substantive reasons but for expediency and based on an impermissibly narrow interpretation of the Title V permitting program.[13] Other than its unsupported assertion in

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(requiring the permitting agency to issue a permit that includes all emissions limitations and standards "that assure compliance with all applicable requirements at the time of permit issuance").

[12] *See* Mich. Admin. Code R. 336.1212(1) (noting that an administratively complete application must include all information that is necessary "to implement and enforce all applicable requirements that include a process-specific emissions limitation or standard or to determine the applicability of those requirements"); Mich. Admin. Code R. 336.1210(3) (noting that applicant may be required to provide additional information not requests on the application form that is "necessary to evaluate or take final action on the application [or] needed to determine the applicability of any lawful requirement [or] needed to enforce any lawful requirement"); Mich. Admin. Code R. 336.1213(2) (requiring the permitting agency to issue a permit that includes all emissions limits and standards "that ensure compliance with all applicable requirements at the time of permit issuance").

[13] *See, e.g.* Staff Report at 10 ("[MDEQ] believes that the ongoing USEPA enforcement action is the most efficient mechanism for resolving these NSR/PSD allegations."); *id.* ("[MDEQ] believes that the

the Staff Report that a compliance schedule is not required, MDEQ made no affirmative determination that the identified modifications complied with NSR requirements.

MDEQ all but admits that it has not addressed the apparent NSR violations identified in the Sierra Club's comments. The Staff Report indicates that the Department's failure to incorporate a compliance schedule to remedy these violations in the Title V Permit was not based on any determination that the modifications described complied with NSR. Instead, MDEQ relies on: 1) its mistaken belief that the Title V "Renewable Operating Program is rarely, if ever, the appropriate forum for resolving NSR/PSD disputes"[14] (Staff Report at 10); 2) its desire to "defer" to EPA's ongoing enforcement action[15] (*Id.*); and 3) its erroneous assertion that it need not investigate a modification unless Sierra Club submits emissions data proving that the modification resulted in a significant emissions increase.[16] (*Id.*). In plainer terms, MDEQ has attempted to delegate to EPA and Sierra Club its own statutory duty to ensure that Consumers is in compliance with applicable requirements. Given MDEQ's dereliction of its duty, EPA should object to the Title V permit and require MDEQ to do its job.

Despite maintaining that "[MDEQ] has not identified major modifications at the plant that have not undergone required permitting review" and that Sierra Club has not presented enough evidence to the contrary, the Department essentially admits that Consumers' compliance status is unresolved. *Id.* In particular, MDEQ justifies its inaction by arguing that "the ongoing USEPA enforcement action is the most efficient mechanism for resolving these NSR/PSD allegations at this time." *Id.* MDEQ, however, can cite no legal support for the proposition that it may abdicate its Title V duties on the grounds that Title V is not the most efficient way to accomplish CAA goals. Nor does MDEQ suggest that EPA has asked the Department to refrain from investigating possible NSR violations at the Plant while the enforcement action is underway. Finally, by MDEQ's own admission, it has no way of knowing whether the enforcement action is intended to address the specific modifications Sierra Club has identified. *See id.* ("The USEPA is currently discussing alleged opacity and NSR/PSD violations *of an undisclosed nature* with Consumers Energy.") (emphasis added). As such, there is nothing in the record to justify MDEQ's inaction in the face of strong evidence that Consumers is violating NSR. *See, e.g., United States v. Cinergy Corp.*, 618 F. Supp. 2d 942 (S.D. Ind. 2009), *rev'd on other grounds, United States v. Cinergy Corp.*, 623 F.3d 455 (7th Cir. 2010); *Ohio Edison* , 276 F. Supp. 2d 829.

The Sierra Club requests that EPA object to the Title V Permit and direct MDEQ to obtain from Consumers all information necessary to determine whether these modifications violated the NSR requirements. If, as the available evidence strongly suggests, MDEQ finds that Consumers is not in compliance with the NSR requirements, then the Department must include a schedule to bring the Plant back into compliance with

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Renewable Operating Permit program is rarely, if ever, the appropriate forum for resolving NSR/PSD disputes.").

[14] Discussed *infra* p. 7.

[15] Discussed *infra* pp. 8-9.

[16] Discussed *infra* p. 14-16.

the Act. Otherwise, MDEQ must explain why these physical changes do not constitute major modifications.

2. NSR Provisions Are "Applicable Requirements" For the Purposes of Title V.

MDEQ's claim to the contrary notwithstanding, NSR is an applicable requirement that must be addressed in the context of Title V permitting when evidence of a violation is present. Michigan's PSD regulations state that "a major modification shall apply best available control technology for each regulated new source review pollutant for which it would be a significant net emissions increase at the source." Mich. Admin. Code R. 336.2810(3). Analyzing a nearly identical provision in the Tennessee Administrative Code, the Sixth Circuit concluded that "[t]his provision, by its own terms, creates an ongoing obligation to apply BACT, regardless of what terms a preconstruction permit may or may not contain." *Nat'l Parks Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 480 F.3d 410 (6th Cir. 2007). The Sixth Circuit went on to hold that failing to apply BACT is not only actionable, but that this cause of action "manifests itself anew each day a plant operates without BACT limits on emissions." *Id.* at 419. Consequently, the need to conduct PSD review and to conduct a BACT analysis are applicable requirements, compliance with which MDEQ is required to ensure as part of the Title V permitting process.

As EPA has already explained to MDEQ,[17] the Department's belief that the Title V Permit is "rarely, if ever, the appropriate forum for resolving NSR/PSD disputes", (Staff Report at 10), has no basis in the law and cannot excuse the Department's failure to perform this essential duty as Michigan's Title V permitting authority. In fact, EPA has objected to Title V permits a number of times when a state permitting agency failed to ensure compliance with PSD requirements. *See, e.g., In re Consolidated Envtl. Mgmt., Inc. – Nucor Steel La., Pig Iron and Dri Mfg. in St. James Parish, La.*, Order in Response to Petition VI-2010-02 & VI-2011-03, at 16 (Mar. 23, 2012) (granting petition on the grounds that the title V permit and permit record were inadequate to ensure compliance with PSD requirements) [hereinafter "*Nucor Decision*"], attached as Exhibit E; *In re Williams Four Corners, LLC, Sims Mesa CDP Compressor Station*, Order in Response to Petition VI-2011, at 4-9 (July 29, 2011) (granting petition on PSD grounds and directing the permitting authority to establish a more thorough permit record to justify its determination that the source was in compliance with PSD provisions) [hereinafter "*Sims Mesa Decision*"], attached as Exhibit F; *In re Kerr-McGee Gathering, LLC, Frederick Compressor Station*, Order in Response to Petition VIII-2007 at 2-4 (Feb. 7, 2008) (granting petition on the grounds that the permitting authority failed to respond to comments to the effect that "the title V permit failed to assure compliance with PSD requirements") [hereinafter "*Kerr-McGee Decision*"], attached as Exhibit G. US EPA should object to the Title V permit issuance and require MDEQ to perform its duties under the Title V program.

[17] *See* email from Beth Valenziano, U.S. EPA, to Heidi Hollenbach and Stephen Lachance, MDEQ, Re: Thoughts on BC Cobb Draft Response to Comments (June 17, 2011) (explaining that seeking a schedule of compliance for NSR violations in the context of a Title V permit is appropriate).

3. US EPA's Notice of Violation Provides Evidence That NSR Violations Have Occurred at the Campbell Plant, Not a Basis for MDEQ to Ignore the Issue.

During the public comment period for the Title V Permit, the Sierra Club offered MDEQ substantial evidence demonstrating that PSD review should have been applied to the Campbell Coal Plant. Among other things, the Sierra Club pointed to the fact that in October 2008, EPA issued a Notice and Finding of Violation ("NOV") to Consumers alleging violations of the NSR requirements at a number of the Company's coal-fired power plants units in Michigan, including Campbell Units 1 and 2.[18] This NOV arose from EPA's July 2000 information request to Consumers regarding projects and modifications that could trigger PSD at the Company's coal units.[19] Upon reviewing Consumers' responses, submitted in August 2000 and June 2002, EPA found that projects constituting major modifications had been undertaken at Campbell Units 1 and 2, among other Consumers' units.[20] EPA further found that such projects led to significant net emissions increases of SO2 and/or NOX.[21] Based on these findings, the NOV concluded that Units 1 and 2 at the Campbell Coal Plant, and other Consumers' units, are "in violation of" PSD and NSR requirements of the Clean Air Act.[22] EPA also found that Consumers had failed to submit complete Title V permit applications with information necessary to apply and install BACT for SO2 or NOx at the Campbell Power Plant and other Consumers' units.

At least one court has, correctly, found that the EPA's issuance of an NOV to a facility alone is sufficient evidence to establish that the Agency should object to a Title V permit that fails to include a compliance schedule for the violations identified in the NOV. *N.Y. Pub. Interest Research Group v. Johnson*, 427 F.3d 172, 180 (2d Cir. 2005). Other courts have held that an NOV is one "relevant factor" in determining whether a Title V permit is inadequate. *Sierra Club I*, 557 F.3d at 406-07; *Sierra Club II*, 541 F.3d at 1267. Other relevant factors include:

> (1) the kind and quality of information underlying the agency's original finding that a prior violation occurred, (2) the information the petitioner puts forward in addition to the agency's enforcement actions, (3) the types of factual and legal issues that remain in dispute, (4) the amount of time that has lapsed between the original decision and the current one and (5) the likelihood that a pending enforcement case could resolve some of those issues.

Sierra Club I, 557 F.3d at 406-07. Consequently, the NOV issued by EPA is either sufficient on its own to demonstrate that the Title V permit is out of compliance with the CAA or, at a minimum, is relevant evidence that the Title V permit is insufficient and should be objected to.

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[18] NOV at 5, ¶ 37.
[19] *Id.* at 5, ¶ 36.
[20] *Id.* at 5-6, ¶ 37.
[21] *Id.* at 6, ¶ 38.
[22] *Id.* at 7, ¶ 42.

Instead of acknowledging that the NOV is evidence relevant to Sierra Club's allegations that Consumers' J.H. Campbell Power Plant is not in compliance with the NSR requirements, MDEQ has taken the position that EPA's action excuses the Department from its responsibility to investigate alleged NSR violations before accepting Consumers' certification of compliance in the Title V permitting process. MDEQ is mistaken. The fact that EPA issued an NOV five years ago alleging NSR violations at the Plant's units 1 and 2 does not give MDEQ permission to wash its hands of those potential violations for all time. *See id.* (identifying the time elapsed between the NOV and the Title V permitting decision as a relevant factor in assessing compliance status). Even assuming *arguendo* that the NOV supplants state action on the violations alleged therein, which it plainly does not,[23] MDEQ cannot reasonably contend that the NOV *also* ties the Department's hands with respect to physical changes that were never addressed in the NOV, such as those occurring after the NOV was issued, *see infra* pp. 12-13 (identifying four projects that took place between 2009 and 2012), and at unit 3, *see infra* p. 11 (identifying a project at Unit 3, which was not targeted in the NOV). Yet, that appears to be MDEQ's position. For example, MDEQ implies that EPA is negotiating with Consumers to resolve all of the same NSR violations Sierra Club has alleged. *See* Staff Report at 10 ("[MDEQ] believes that the ongoing USEPA enforcement action is the most efficient mechanism for resolving *these NSR/PSD allegations* at this time, and that issuance of the ROP with currently existing applicable requirements is appropriate.") (emphasis added). In the same document, MDEQ admits that it does not know which potential NSR/PSD violations EPA is negotiating with Consumers. *See id.* at 11 ("USEPA is currently discussing alleged opacity and NSR/PSD violations of an undisclosed nature with Consumers Energy."). MDEQ must not be allowed to treat EPA enforcement on some NSR issues as broad authorization to abandon its statutory duty to assure that the J.H. Campbell Power Plant is in compliance with NSR requirements as part of the Title V permitting process.

4. <u>The Available Evidence Suggests That the Modifications Caused Significant Emissions Increases At the Plant That Triggered the PSD Requirements of the CAA.</u>

In keeping with MDEQ's desire to avoid investigating whether the J.H. Campbell Plant is violating NSR, the Department completely discounted additional evidence Sierra Club submitted detailing major modifications that should have triggered NSR requirements. In particular, Sierra Club recounted excerpts from a series of Consumers' filings with the Michigan Public Service Commission ("Michigan PSC") in which the company described numerous projects replacing and/or upgrading integral components of the J.H. Campbell Power Plant in an effort to reduce derates and outages and prolong the life of the Plant. *See infra* pp. 10-13. MDEQ responded that such evidence does not provide "sufficient information [for MDEQ] to conclude that the stated projects constitute major modifications," insisting that Sierra Club needs to submit "emissions data that can substantiate the claims." (Staff Report at 10). As explained *infra* pp. 13-16,

[23] *See, e.g. Sierra Club I*, 557 F.3d 401 (considering whether NOVs and enforcement actions alone are sufficient to compel the state agency to find that a source is not in compliance for Title V purposes, implying that in any case EPA action does not preclude such a finding).

this approach misstates both Sierra Club's burden and the relevant legal standards. Nonetheless, MDEQ relied on this reasoning to sweep aside Sierra Club's evidence without any substantive explanation of why it believes these physical changes complied with NSR requirements. This amounts to a failure to respond to Sierra Club's significant comment that the projects described herein likely violated NSR requirements and warrant the inclusion of a compliance schedule in the Title V Permit.

a. Sierra Club identified numerous modifications to the Campbell units that MDEQ failed to evaluate.

As Sierra Club recounted for MDEQ in its comments, Consumers' filings with the Michigan PSC describe numerous projects in which the Company replaced and/or upgraded integral components of the J.H. Campbell Power Plant. These capital projects were carried out because those components were reaching the end of their useful lives, and were designed to reverse the declines in availability and reliability that the Plant was experiencing as it aged. Neither Consumers nor MDEQ has denied the occurrence of any of these projects. In short, there is strong evidence that Consumers has modified its aging J.H. Campbell Power Plant in order to extend its life and increase its availability without installing the modern pollution controls that are required if the Plant is to continue legally operating. In its comments, Sierra Club highlighted the following projects as being likely to constitute major modifications:

- **Campbell Unit 1 2004:** In March 2005 testimony filed with the Michigan PSC, Consumers' Director of Staff for Electric Generation David Kehoe submitted an exhibit describing a planned outage at Campbell Unit 1 between January 9, 2004 and February 4, 2004.[24] The purpose of the outage was to replace the boiler waterwall and to fix a turbine governor control oil leak at the unit.[25]

- **Campbell Unit 2 2003:** In December 2004 testimony filed with the Michigan PSC, Consumers' Manager of Equipment Services James Lewis testified to "significant capital expenditures" at the Campbell Coal Plant in 2003, including $1.166 million for waterwall tubing replacements at Campbell Unit 2 and a "total non-Clean Air Act capital expenditure for the Campbell Complex [of] $2,928,420."[26]

- **Campbell Unit 3 2006**: In this same testimony, Mr. Lewis also described a "very extensive" list of additional work planned for Campbell Unit 3 during a long 2006 outage. This work included (a) the replacement of the "obsolete"

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[24] *In re application of the Consumers Energy Company for the Reconciliation of Power Supply Cost Recovery Costs and Revenues for the Calendar Year 2004.* Mich. PSC Case No. U-13917-R, (March 31, 2005) Ex A-8, DBK-3, attached as Ex. H. For ease of reference, we also provide the PDF page number for these cites. [PDF p 220].

[25] *Id.*

[26] *In re application of Consumers Energy Company for the Authority to Increase its Rates for the Generation and Distribution of Electricity and for other Relief.* Mich. PSC Case No. U-14347, (December 17, 2004) JBL Direct Testimony p 22, attached as Ex. I. [PDF p 244].

existing excitation system and voltage regulator for the turbine generator, during which time "[t]he iso-phase buss cooling system will be enhanced to deal with aging effects of this equipment,"[27] and (b) "replacement of the boiler economizer, superheaters, and reheater, and relocating the rear wall of the boiler."[28] In March 2007 testimony filed with the Michigan PSC, Mr. Kehoe further described this 179-day planned outage at Campbell Unit 3 that began on September 29, 2006.[29] According to Mr. Kehoe, "the outage includes extensive repair and refurbishment of the boiler and turbine, conversion to burn 100% western coal, and the installation of a Selective Catalytic Reduction ("SCR") unit."[30] Consumers Vice President of Rates and Regulation Ronn Rasmussen described this as "a major project" at the Campbell Coal Plant.[31] In March 2008 testimony filed with the Michigan PSC, Mr. Kehoe stated that this 179-day planned outage ultimately extended to 213 days.[32] An exhibit submitted along with his testimony further explained that the repairs included "Steam Generator Modifications (including entire replacement of heat recovery area (HRA), entire replacement of secondary platen superheater, primary air heater replacement, secondary air heater modifications and burner / OFA modifications)."[33] While some of this project was related to allowing the unit to burn 100% western coal and the installation of an SCR, it also appears that Consumers undertook modifications to Campbell Unit 3 that were unrelated to those projects and, instead, were designed to replace aging elements of the unit. Noting that these modifications would "increas[e] the unit's capacity," Mr. Kehoe emphasized that "[t]he scope and planned duration of this outage was unprecedented for a Consumers Energy coal-fired plant. In fact, the planned boiler modification and associated balance of plant work scope is believed to be the largest of its kind to be attempted in a coal generating facility in the United States."[34]

- **Campbell Unit 2 2007-2008:** In March 2007 testimony filed with the Michigan PSC, Mr. Kehoe explained that "significant capital expenditures" included the replacement of all 58 secondary superheater outlet pendants and

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[27] *Id.* at p 23. [PDF p 245].
[28] *Id.* at p. 24 [PDF p 246]
[29] *In re application of Consumers Energy Company for the Reconciliation of Power Supply Cost Recovery Costs and Revenues for the Calendar Year 2006 and for other Relief Relating to Pension and OPEB Costs.* Mich. PSC Case No. U-14701-R, (March 30, 2007), DBK Direct Testimony p 7, attached as Ex. J. [PDF p 80].
[30] *Id.*
[31] *In re application of Consumers Energy Company for Authority to Increase its Rates for the Generation and Distribution of Electricity and for other Relief.* Mich. PSC Case No. U-15245, (March 30, 2007). RJR Direct Testimony p 6, attached as Ex. K. [PDF p 7].
[32] *In re application of Consumers Energy Company for the Reconciliation of Power Supply Cost Recover Costs and Revenues for the Calendar Year 2007 and for other Relief Relating to Pension and OPEB Costs.* Mich. PSC Case No. U-15001-R, (March 31, 2008), DBK Direct Testimony p 7, attached as Ex. L. [PDF p 71].
[33] *Id.* at Ex A-19, DBK-3 [PDF p 88].
[34] *Id.* at DBK Direct Testimony p 7 [PDF p 70].

pendant floor tubing at Campbell Unit 2 in 2007 and 2008 because "[m]etalurgical examination indicates that the tubing is at the end of its life."[35]

- **Campbell Unit 1 2008:** In September 2007 testimony filed with the Michigan PSC, Mr. Kehoe described a major generating plant outage scheduled to begin at Campbell Unit 1 on March 1, 2008.[36] According to Mr. Kehoe, the outage was scheduled to last 30 days and would include "a boiler chemical clean, boiler centerwall replacement and burner assemblies replacement."[37] In November 2008 testimony filed with the Michigan PSC, Mr. Kehoe confirmed that in 2008, "Campbell Unit 1 replaced selected boiler equipment including the lower half of the boiler centerwall, the boiler clinker grinder, the furnace outlet oxygen monitors, and 50% of the boiler burner assemblies."[38] While Consumers' PSC filings do not appear to report an exact cost for the Campbell Unit 1 or 2 modifications, an exhibit filed with Mr. Kehoe's testimony, reported overall capital expenditures for Units 1 and 2 were $13,693,000 in 2008 and $27,454,000 in 2009.[39]

- **Campbell Unit 1 2009:** In March 2010 testimony filed with the Michigan PSC, Mr. Kehoe described an 85 day outage at Campbell Unit 1 between February 11, 2009 and May 7, 2009, whose purpose "was to perform a turbine inspection/overhaul and replace boiler tubing."[40]

- **Campbell Unit 2 2010:** In June 2011 testimony filed with the Michigan PSC, Mr. Kehoe explained that in 2010, "Unit 2 replaced the feed water heater and the corroded bin wall panels between the discharge and intake channels were replaced."[41] Critically, these panels "needed to be replaced because a loss of wall integrity would have resulted in a derate (operating at less than full capacity) or shutdown."[42]

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[35] U-15245, DBK Direct Testimony p 12, [PDF p 94].
[36] *In re application of Consumers Energy for Approval of a Power Supply Cost Recovery Plan and for Authorization of Monthly Power Supply Cost Recovery Factors for the Year 2008*, Mich. PSC Case No. U-15415, (September 28, 2007), DBK Direct Testimony p 4, attached as Ex. M. [PDF p 60].
[37] *Id.*
[38] *In re application of Consumers Energy Company for Authority to Increase its Rates for the Generation and Distribution of Electricity and for other Relief*, Mich. PSC Case No. U-15645, (November 14,2008), DBK Direct Testimony p 19, attached as Ex. N. [PDF p 97].
[39] *In re application of Consumers Energy Company for Authority to Increase its Rates for the Generation and Distribution of Electricity and for other Relief*, Mich. PSC Case No. U-15645, (November 14, 2008), Ex A-24, DBK-4, attached as Ex. O. [PDF p 80].
[40] *In re application of Consumers Energy Company for the Reconciliation of Power Supply Cost Recovery Costs and Revenues for the Calendar Year 2009*, Mich. PSC Case No. U-15675-R, (March 31, 2010), DBK Direct Testimony p 7, attached as Ex. P. [PDF p 61].
[41] *In re application of Consumers Energy Company for Authority to Increase its Rates for the Generation and Distribution of Electricity and for Other Relief*, Mich. PSC Case No. U-16794, (June 10, 2011), DBK Direct Testimony p 21, attached as Ex. Q. [PDF p 121].
[42] *Id.*

- **Campbell Unit 1 2011:** In March 2012 testimony filed with the Michigan PSC, Mr. Kehoe described a "major boiler overhaul" at Campbell Unit 1.[43] According to Mr. Kehoe, the 92 day outage, which began on January 15,2011, was intended to "overhaul the unit, which included boiler and turbine work."[44]

- **Campbell Unit 2 2011 and Unit 1 2012:** In September 2012 testimony filed with the Michigan PSC, Mr. Kehoe explained that in 2011, "Campbell Unit 2 replaced a High Pressure Water Heater."[45] In this same filing, Mr. Kehoe stated that "[i]n 2012, Campbell Unit 1 will replace the low pressure heater and external drain. Unit 2 will receive a new high pressure heater."[46]

b. The modifications identified by Sierra Club do not qualify for the narrow routine maintenance exemption.

In its Staff Report, MDEQ raised the issue of whether the projects identified by Sierra Club constitute mere routine maintenance, rather than major modifications. (Staff Report at 10). MDEQ did not make any findings on that issue. As Sierra Club explained in its comment letter, however, it is clear that these capital expenditures do not qualify for EPA's narrow "routine maintenance, repair and replacement" ("RMRR") exemption from the definition of modification. 40 C.F.R. §§ 51.165(a)(l)(v)(C), 51.166(b)(2)(iii), 52.21(b)(2)(iii)(a); Mich. Admin. Code R. 336.2801 (aa)(iii)(A). The CAA defines "modifications" subject to the NSR program as including any physical or operational change without limitation. 42 U.S.C. §§ 7411(a)(4) (emphasis added). Because this definition, read literally, applies the NSR program to even the replacement of a single screw during day-to-day maintenance, the EPA has adopted regulations based on the *de minimis* legal doctrine that provide that RMRR activities are exempt from the definition of modification. 40 C.F.R. §§ 51.165(a)(l)(v)(C), 51. 166(b)(2)(iii), 52.21(b)(2)(iii)(a); Mich. Admin. Code R. 336.2801(aa)(iii)(A); *see also* 67 Fed. Reg. 80,290,80,292 (Dec. 31, 2002); 57 Fed. Reg. 32313, 32316-19 (July 21, 1992); *WEPCO,* 893 F.2d at 905 (7th Cir. 1990).

EPA's long-standing interpretation of the definition of PSD-triggering "physical changes," and the RMRR 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."[47] This narrow interpretation of routine maintenance is consistent with the fact that the RMRR

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[43] *In re application of Consumers Energy Company for Reconciliation of Power Supply Cost Recovery Costs and Revenues for the Calendar Year 2011,* Mich. PSC Case No. U-16432-R, (March 30, 2012), Ex A-9, DBK-3, attached as Ex. R. [PDF p 211].

[44] *Id.* at DBK Direct Testimony p 7. [PDF p76].

[45] *In re application of Consumers Energy Company for Authority to Increase its Rates for the Generation and Distribution of Electric and for Other Relief,* Mich. PSC Case No. U-17087, (September 19, 2012), DBK Direct Testimony p 26, attached as Ex. S. [PDF p 157].

[46] *Id.*

[47] Letter from Doug Cole, EPA, to Alan Newman, Washington Dept. of Ecology (November 5,2001), *available at* http://www epa.gov/region7/air/nsr/nsrmemos/20011105.pdf.

exemption is only lawful (if at all[48]) based on a *de minimis* theory of administrative necessity. *Ala. Power Co.* v. *Costle,* 636 F.3d 323, 360-61, 400 (D.C. Cir. 1979); *see also New York v. EPA,* 443 F.3d 880, 883-84, 888 (D.C. Cir. 2006) (holding that only possible basis for a RMRR is a *de minimis* theory); *In re TVA,* 9 E.A.D. at 392-93; *United States v. S. Ind. Gas & Elec. Co.,* 245 F. Supp. 2d 994, 1019 (S.D. Ind. 2003) (quoting a U.S. EPA determination for Wisconsin Electric's Port Washington plant that the exemptions from the definition of "modification" – including routine maintenance – are "very narrow").

Routine maintenance is the type of project that "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 at 901). Non-routine and therefore nonexempt 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.*

In keeping with this understanding of the RMRR exemption, the federal court in the *Ohio Edison* case found projects quite similar to those undertaken by Consumers to constitute major modifications that trigger NSR requirements. *Id.* at 840-49. MDEQ should have reached a similar conclusion here. Instead, MDEQ refused to even consider whether these projects were modifications, responding to this argument in the Sierra Club Comment Letter only by saying that "[t]he RMRR analysis is a fact intensive, case-by-case determination that involves the consideration of multiple factors, including the nature and extent, purpose, frequency, and cost of the project." (Staff Report at 10). The projects discussed above were expensive endeavors that replaced integral components of the Campbell Coal Plant and would be expected to occur only once or a few times over the expected life of the Plant. The projects were designed to address the fact that the components had reached the end of their useful lives and were leading to increasing numbers of outages and derates. As such, Consumers cannot validly demonstrate that such projects constituted mere RMRR. For the same reason, MDEQ cannot – and *did not* – conclude that such projects constituted mere RMRR.

c. MDEQ's attempt to shift the burden to Sierra Club to show a significant emissions increase ignores Consumers' failure to comply with pre-project projection and post-project reporting requirements.

In a final effort to shirk its duties under Title V, MDEQ dismissed the evidence submitted by Sierra Club suggesting NSR violations at the Campbell plant on the grounds that Sierra Club had not provided "evidence that the emissions from each unit has increased" as a result of the modifications that were carried out. (Staff Report at 10). MDEQ's cursory dismissal, however, ignores the fact that, as the U.S. Court of Appeals

[48] The D.C. Circuit has implied in *dicta* that the RMRR exclusion may be an unlawful "application of the *de minimis* exception, given the limits on the scope of the *de minimis* doctrine." *New York,* 443 F.3d at 888.

for the Sixth Circuit recently held, the NSR regulations place the initial burden of projecting whether there will be an emissions increase on the utility, not on the petitioner. *U.S. v. DTE Energy Co.*, 711 F.3d 643, 644 (6th Cir. 2013). Specifically, the Sixth Circuit found that the NSR regulations require a utility that is seeking to modify an electric generating unit to "make a preconstruction projection of whether and to what extent emissions from the source will increase following" a proposed modification. *Id.* Such pre-construction projection "determines whether the project constitutes a 'major modification' and thus requires a permit" under the Clean Air Act's NSR program, and is subject to verification through post-project emissions reporting. *Id.* at 644. Actual recorded post-project emission increases, however, are not necessary to prove that a modification violated PSD requirements. *See id.* (allowing EPA's enforcement action regarding improper preconstruction projections to proceed over dissenting judge's objection that the post-construction annual emissions report showing no increase in annual emissions for the first full calendar year following the project mooted the case). In other words, contrary to MDEQ's contention, NSR compliance is measured by pre-project emissions projections, not solely by post-project emissions increases.

As Sierra Club explained in its comments, and MDEQ did not dispute, Consumers apparently did not submit to MDEQ any pre-project emissions projections or post-project reporting for any of the modifications identified above. (Sierra Club Comment Letter at 7). As such, there was no way for Sierra Club to provide specific projections of exactly how much the various modifications at the Campbell plant would increase emissions. Instead, Sierra Club explained that Consumers had not complied with its legal duty to report the projected emissions impact of the modifications before it carried them out, and to engage in post-modification reporting regarding such projections. And Sierra Club noted that Consumers' own stated reasons for carrying out such modifications – to reduce random outage rates, and avoid derates and extended outages – would lead to emissions increases by allowing the Campbell units to operate more often. Such evidence is more than sufficient to trigger MDEQ's duty to evaluate NSR compliance at the Campbell plant as part of this Title V permitting process. US EPA should object to the permit issuance and direct MDEQ to undertake such evaluation.

In evaluating the emissions increase issue, it is important to keep in mind that the CAA provides two alternative methods for determining whether modifications led to emissions increases that would trigger PSD requirements: the actual-to-projected-actual test and the actual-to-potential test. Under the actual-to-projected-actual test, actual emissions from the Plant before a project takes place are compared to the actual emissions projected to occur after that project is finished. An applicant can only use the more favorable actual-to-projected actual test if the facility has satisfied pre- and post-project emissions reporting requirements. 40 C.F.R. § 52.21(r)(6) (providing that applicants electing to use the actual-to-projected-actual test must comply with notification and reporting requirements where there is a reasonable possibility that a project may result in a significant emissions increase);[49] 61 Fed. Reg. 38,250, 38,254-

[49] By definition, there is a "reasonable possibility" that a project will result in a significant emissions increase if the owner or operator calculates it will result in a projected actual emissions increase at least 50% of the amount EPA has determined to be significant for the regulated NSR pollutant. Given that

38,255 (July 23, 1996); *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 647 n.25 (M.D.N.C. 2003) (holding that Duke Energy "'opted out' of the *WEPCO* calculus by failing to satisfy the regulatory prerequisite of submitting emissions data for the five year period following the physical change") *rev'd on other grounds by Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007).

Because Consumers failed to comply with the pre-project emissions projection and post-project reporting requirements, the physical changes at the J.H. Campbell Power Plant described *supra* pp. 10-13 must be evaluated against the more stringent actual-to-potential test. Regardless, the publicly disclosed information regarding the purpose, scope and scale of the modifications at Campbell Units 1, 2, and 3, provides strong evidence that these modifications led to emissions increases under either the actual-to-projected-actual or the actual-to-potential emissions tests.

5. Summary of NSR Ground for Objection.

In summary, Sierra Club has carried the burden of proving that Consumers' physical changes at the Plant constituted major modifications as far as possible in the absence of Consumers complying with its required pre-project emissions projections and post-project reporting, and in the absence of further investigation by MDEQ. The Sierra Club Comment Letter catalogued Consumers' testimony before the Michigan PSC revealing the purpose and scale of these projects. Sierra Club advised MDEQ that the projects are analogous to those that federal courts have found to be major modifications. And the Sierra Club explained that Consumers had not complied with its duty to report the projected emissions impact of its modifications before it carried them out, even though such modifications would lead to reduced outages and derates and, therefore, almost certainly increase emissions from the Campbell units.

Having been presented with such strong evidence that unpermitted major modifications were undertaken at the Campbell plant, the Department was required to evaluate such evidence in order to determine the compliance status of the J.H. Campbell Power Plant as part of the Title V permitting process. *See, e.g. Nucor Decision* at 12-14 (granting Title V petition and requiring permitting authority to reexamine whether applicant inappropriately avoided PSD by splitting related projects, where petitioner offered support for that conclusion); *Kerr-McGee Decision* at 4 (requiring Title V permitting authority to respond to comments "rais[ing] issues as to whether there are [PSD-related compliance schedule] deficiencies in the title V permit"); *Sims Mesa Decision* at 5-9 (granting Title V petition where permitting authority had not provided adequate basis in the record for its conclusion that the applicant was in compliance with PSD requirements). Because MDEQ failed to do so, U.S. EPA should object so that the required evaluation of NSR compliance at Campbell Units 1, 2, and 3 can occur.

Consumers carried out the modifications in order to reduce random outage rates, and avoid derates and extended outages, the available evidence suggests that there is more than a reasonable possibility that the modifications at the J.H. Campbell Power Plant met this criterion.

B. MDEQ Failed to Include Monitoring Requirements Necessary to Assure Compliance with PM Emission Limits.

A Title V permit must set forth in one place not only all of the requirements applicable to a pollution source, but also provisions needed to assure compliance with each of those requirements. As EPA explained in the preamble to the Title V regulations, "regulations are often written to cover broad source categories" leaving it "unclear which, and how, general regulations apply to a source." Fed. Reg. 32,250, 32,251 (July 21, 1992). Title V permits bridge this gap by "clarify[ing] and mak[ing] more readily enforceable a source's pollution control requirements," including making clear how general regulatory provisions apply to specific sources. S. Rep. 101-228, 1990 USCAAN 3385, 3730 (Dec. 20, 1989). In short, Title V permits are supposed to link general regulatory provisions to a specific source to provide a way "to establish whether a source is in compliance." *Id.*

Consistent with this purpose, the CAA, the federal Title V regulations, and state-level programs all emphasize the importance of compliance assurance provisions, including adequate monitoring. For example, the Title V provisions of the CAA require that, in addition to "enforceable emission limitations and standards ... [e]ach permit issued under [Title V] shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." 42 U.S.C. § 7661c(a), (c); *cf.* 40 C.F.R. § 70.6(c)(1) (providing that all Title V permits "shall contain" "compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit"). The D.C. Circuit has explained that, under § 70.6(c)(1), "a permitting authority may supplement an inadequate monitoring requirement so that the requirement will 'assure compliance with the permit terms and conditions.'" *Sierra Club* v. *U.S. EPA*, 536 F.3d 673, 680 (D.C. Cir. 2008). Similarly, Michigan's Title V program provides that an operating permit "shall include ... conditions necessary to assure compliance with the applicable requirements." M.C.L. 324.5506(6). The Michigan SIP further provides that:

> The renewable operating permit shall contain terms and conditions necessary to ensure that sufficient testing, monitoring, recordkeeping, reporting, and compliance evaluation activities will be conducted to determine the status of compliance of the stationary source with the emission limitations and standards contained in the renewable operating permit.

Mich. Admin. Code R. 336.1213(3). As Sierra Club emphasized in its comments to MDEQ, the monitoring requirements for PM in this Title V Permit are unlawfully inadequate to assure compliance with the Permit's emission limits.

As discussed in the Sierra Club Comment Letter, the Title V Permit monitoring requirements for PM must be supplemented because they are woefully inadequate to assure compliance with continuously applicable PM emission limits. Specifically, the Title V Permit requires stack tests for PM emissions so infrequently that, as MDEQ

admits, they "do not by themselves indicate continuous compliance with applicable PM limits." (Staff Report at 12).

The Title V Permit establishes limits on PM emissions at Units 1 and 2 of 0.16 pounds per 1,000 pounds of exhaust gas and 0.15 pounds per 1,000 pounds of exhaust gas, respectively. Title V Permit at 20, 24. The PM limits for Unit 3 are 0.10 pounds per MMBtu of heat input and 370 pounds per hour. Title V Permit at 28. The permit states that these limits apply "[a]t all times." Title V Permit at 20, 24, 28. Nonetheless, Consumers is permitted to verify the PM emission rates for these units just "[o]nce every three years." Title V Permit at 21, 25, 31. Under similar circumstances, EPA has granted Title V petitions and ordered permitting authorities to explain how infrequent stack testing is adequate monitoring for continuously applicable PM limits, or to modify permits to ensure that they "contain[] monitoring sufficient to assure compliance with the associated permit terms and conditions." *In re U.S. Steel Corp. – Granite City Works*, Order in Response to Petition Number V-2009-03, 10 (Jan. 31, 2011) (granting petition to object to numerous inadequate monitoring requirements, including a multi-year stack test purportedly measuring compliance with a continuous PM requirement), attached as Exhibit T. Since MDEQ readily admits that the stack tests alone are inadequate for this purpose, Staff Report at 12, the Department bears the burden of explaining how any other monitoring requirements in the permit compensate for the lack of information.

MDEQ's unsubstantiated assertion that Compliance Assurance Monitoring ("CAM") Plans for each boiler remedy this deficiency does not satisfy the Department's burden. The CAM Plans incorporated into the Title V Permit use opacity as a surrogate for PM emissions. *See* Staff Report at 12; *see also* Title V Permit at p. 31 (Unit 3) ("The permittee shall utilize COMS-recorded opacity as an indicator of the emission unit's compliance with the particulate matter limit."), p. 63 (Units 1 and 2) (same). Assuming *arguendo* that opacity is a reliable surrogate for PM at the J.H. Campbell Plant – a proposition MDEQ has not publicly substantiated – the CAM Plans fail to assure compliance with the PM limits for the same reason that triennial stack tests fail to do so. Although the Plant is equipped with continuous emission monitoring systems ("COMS") for opacity, the CAM Plans do not include any continuously applicable opacity requirement. Instead, a CAM excursion is defined as "two or more consecutive 1-hour block average opacity values greater than 20%." Title V Permit at p. 31 (unit 3), p. 64 (units 1 and 2). Under almost identical circumstances, EPA has found that the permitting authority "must explain how the indicator range in the CAM plan provides a reasonable assurance of ongoing compliance with the underlying PM limits in accordance with 40 C.F.R. § 64.3(a)(2)." *In re We Energies Oak Creek Power Plant Administrator*, Order Responding to Petition, 16-18 (June 12, 2009) (where a CAM plan excursion was defined as opacity exceeding 20% for "any three consecutive one-hour average periods" and the PM limits were continuous), attached as Exhibit U. In addition, MDEQ has provided no basis for concluding that a 20% opacity limit is sufficiently stringent to ensure that PM emissions are not exceeding the PM limits included in the permit.

MDEQ offers no explanation of how even the combination of the CAM Plans and triennial stack tests will assure compliance with the continuously applicable PM emission

limits. The fact that the triennial stack test "has been acceptable to [MDEQ]" is not helpful. (Staff Report at 11). "Reliance on past practice without an explanation of the basis for that practice is not an adequate response." *Kerr-McGee Decision* at 4. MDEQ also cites the fact that previous stack tests at the Plant yielded acceptable results. (Staff Report at 11-12). By MDEQ's own admission, those results do not prove compliance with the PM emission limits. (*Id.* at 12). Furthermore, they ring hollow given that MDEQ is aware Consumers is subject to an EPA enforcement action for violating opacity standards – MDEQ's chosen surrogate for PM. (*Id.* at 11). These responses do not justify MDEQ's failure to establish more stringent monitoring requirements in the Title V Permit, as Sierra Club requested in its comments. Sierra Club asks that EPA object to the Title V Permit and direct MDEQ to establish more stringent monitoring requirements for PM emissions, or to explain, if it can, how the current monitoring requirements will assure compliance with continuous PM emission limits.

IV. CONCLUSION

For the foregoing reasons, EPA must object to and reopen the J.H. Campbell Title V Permit, instructing MDEQ to (1) evaluate whether the Plant is in compliance with NSR requirements in light of the physical changes the Sierra Club has catalogued here, (2) if, as the available evidence strongly suggests, non-compliance with the NSR requirements is found, to include a schedule for Consumers to come into compliance as part of the Title V Permit for the Plant, and (3) establish monitoring requirements that assure continuous compliance with the PM limits applicable to each unit.

Respectfully submitted,

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