



McGILLIVRAY
WESTERBERG
& BENDER LLC
ATTORNEYS

December 11, 2014

Via Hand Delivery

Clerk of Courts
Dane County Circuit Court, Rm 1000
215. S. Hamilton Street
Madison, WI 53703-3285

Re: *Midwest Environmental Defense Center, Inc. and Clean Wisconsin v.
Wisconsin Department of Natural Resources*

Dear Clerk:

Enclosed please find the original and two copies of the Petition for Judicial Review, along with a check for the filing fee of \$129.50.

Thank you for your assistance.

Sincerely,

MCGILLIVRAY WESTERBERG & BENDER LLC

David C. Bender

Encl.

cc (via Hand Delivery w/encl): Cathy Stepp, DNR Secretary

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

Branch __

MIDWEST ENVIRONMENTAL
DEFENSE CENTER, INC.
P.O. Box 2443
Madison, WI 54701, and

CLEAN WISCONSIN,
634 W Main St #300
Madison, WI 53703

Case No. 14-cv-_____

Case Code: 30607
Administrative Agency Review

Petitioners,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES
101 South Webster Street
Madison, Wisconsin 53707

Respondent.

PETITION FOR JUDICIAL REVIEW

Midwest Environmental Defense Center, Inc. and Clean Wisconsin, on behalf of their respective members in Wisconsin, hereby petition the Court, pursuant to Wis. Stat. §§ 227.52, 227.53, and 285.62(9), for judicial review of the Department of Natural Resources' ("DNR") failure to: (a) promulgate ambient air quality standards for sulfur dioxide, nitrogen oxides, and particulate matter similar to those promulgated by the United States Environmental Protection Agency ("EPA") pursuant to section 109 of the

Federal Clean Air Act, as required by Wis. Stat. § 285.21(1)(a); and (b) promulgate ambient air increments for particulate matter consistent with the ambient air increments established pursuant to the Federal Clean Air Act, as required by Wis. Stat. § 285.21(2).

Petitioners further show to the Court as follows:

PARTIES

1. Petitioner Midwest Environmental Defense Center ("MEDC") is a Wisconsin non-profit non-stock corporation that represents the interests of its members in protecting the environment from pollution. MEDC's members live, work and recreate in Wisconsin, including in areas downwind from large sources of air pollution.

2. Petitioner Clean Wisconsin is a Wisconsin non-profit non-stock corporation with over 20,000 members and supporters, many of whom are affected by air pollution generated by large emission sources in Wisconsin. Formed in 1970 as Wisconsin's Environmental Decade, Clean Wisconsin represents the interests of its members in environmental protection, including ensuring that polluting facilities operate under legal environmental permits which impose the proper limits on allowable emissions.

3. Respondent DNR is an independent agency of the State of Wisconsin, created under Wis. Stat. § 15.34, whose principal office is located at 101 South Webster Street, Madison, Dane County, Wisconsin, and which has the responsibility for the regulation of sources of air emissions pursuant to Wis. Stat. ch. 285.

ADVERSE EFFECTS ON PETITIONER'S INTERESTS

4. MEDC's and Clean Wisconsin's members are adversely affected by air pollution and reasonably fear that emissions from large stationary sources are harmful to their health and welfare and seek to ensure that the DNR only issues permits that contain limits sufficient to ensure compliance with all ambient air quality standards promulgated under the Clean Air Act. MEDC's and Clean Wisconsin's members are adversely affected and aggrieved by the DNR's ongoing failure to promulgate air quality standards and ambient air increments comparable to those established by the EPA by the date required by Wisconsin law.

5. EPA has revised its national standards and increments to be more protective of public health and welfare, and DNR's failure to implement standards at least as stringent, as mandated by Wis. Stat. §§ 285.21(1)(a) and (2), means that MEDC's and Clean Wisconsin's members are exposed to more air pollution than DNR could permit if it had complied with its statutory obligations in a timely fashion.

6. Because they seek to protect their members' interests through, *inter alia*, reviewing and commenting on pollution permits for local facilities, and plans to review, comment on, and potentially seek review and/or enforcement of those permits, MEDC and Clean Wisconsin are adversely affected by DNR's failure to timely enact standards required by law.

FACTS

7. The Clean Air Act ("CAA" or "the Act") was passed to protect and enhance the quality of the nation's air so as to promote the public health and welfare and the productive capacity of the United States' population. 42 U.S.C. § 7401(b)(1). The EPA Administrator is required to promulgate standards for ambient air quality for pollutants for which criteria have been issued pursuant to sections 108 and 109 of the Act, 42 U.S.C. §§ 7408, 7409. States, including Wisconsin, then promulgate standards for air pollution emissions to ensure that the ambient air quality standards are met. 42 U.S.C. § 7410.

8. The Federal Clean Air Act requires the EPA to set National Ambient Air Quality Standards ("NAAQS") for various harmful air pollutants at levels necessary to protect the public health and welfare. 42 U.S.C. §§ 7401, 7409. States then have some responsibility for implementing the ambient air standards, including developing state laws specifying how it will achieve and maintain compliance with the air quality standards. 42 U.S.C. § 7407(a).

9. In 1977, Congress amended the Act to add the Prevention of Significant Deterioration provisions to protect the air quality in national parks and similar areas of special scenic or recreational value, and in areas where pollution was within the national ambient standards, while assuring economic growth consistent with such protection. 42 U.S.C. § 7470. One part of that program is the establishment of maximum

allowable increases over baseline concentrations – also known as “increments” – for certain pollutants. 42 U.S.C. §§ 7473, 7476(a).

10. Among other requirements, when issuing any air pollution control permit the Department of Natural Resources is required to ensure that emissions from the permittee facility will not cause pollution in the ambient air in amounts or quantities that cause or exacerbate a violation of an ambient air quality standard or an increment. Wis. Stat. § 285.63(1)(b).

11. The protection of the federal Clean Air Act and Wisconsin air pollution statutes are not fully realized unless and until the Department of Natural Resources undertakes its legal obligation to implement the law by updating air quality standards. The DNR has failed to do so.

FIRST CLAIM: FAILURE TO PROMULGATE AMBIENT AIR QUALITY STANDARDS SIMILAR TO THE FEDERAL STANDARDS FOR SULFUR DIOXIDE, NITROGEN OXIDES, AND PARTICULATE MATTER

12. Pursuant to Wis. Stat. § 285.21(1)(a), “[i]f an ambient air quality standard is promulgated under section 109 of the federal clean air act, the department shall promulgate by rule a similar standard...”

A. Sulfur Dioxide Ambient Air Standard

13. Sulfur dioxide air pollution has long been recognized as an environmental threat. Following the 1970 amendments to the Clean Air Act, the U.S. Environmental Protection Agency established the first National Ambient Air Quality Standard for sulfur dioxide at 0.03 ppm (80 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$), a primary 24-hour

standard at 365 $\mu\text{g}/\text{m}^3$ (140 parts per billion), and a secondary 3-hour standard at 1300 $\mu\text{g}/\text{m}^3$ (500 parts per billion). 36 Fed. Reg. 8,186 (April 30, 1971). More recently, however, the U.S. Environmental Protection Agency determined that such standards—based on pollution averages over long periods—do not adequately protect human health because adverse respiratory effects occur with short term exposure over periods of as little as five minutes. 75 Fed Reg. 35,520, 35,546 (June 22, 2013).

14. To protect the public from short term spikes in harmful sulfur dioxide pollution, the U.S. Environmental Protection Agency established a new ambient air standard based on one-hour (99th percentile of the annual distribution of the daily maximum 1-hour average concentrations). On June 2, 2010, the U.S. Environmental Protection Agency promulgated an ambient air quality standard for sulfur dioxide of 75 parts per billion daily maximum 1-hour concentration. 75 Fed. Reg. 35,519 (June 22, 2010) (codified at 40 C.F.R. 50.17). That standard is promulgated pursuant to section 109 of the Federal Clean Air Act, 42 U.S.C. § 7409.

15. Due to both the shorter averaging time and the lower concentration standard, the 2010 1-hour sulfur dioxide ambient air quality standard is far more protective of public health than the prior standards. The 2010 standard is projected to have enormous beneficial effects for public health: the Environmental Protection Agency estimates that 2,300-5,900 premature deaths and 54,000 asthma attacks a year will be prevented by the new standard. Env'tl. Prot. Agency, *Final Regulatory Impact*

Analysis (RIA) for the SO₂ National Ambient Air Quality Standards (NAAQS) tbl. 5.14
(2010).

16. The Department of Natural Resources has not promulgated a standard similar to the 75 parts per billion maximum daily 1-hour concentration sulfur dioxide standard.

17. The Department of Natural Resources issued a Statement of Scope on January 10, 2011, initiating a rulemaking to adopt ambient air standards for sulfur dioxide consistent with the Federal Clean Air Act standard. *See* <https://health.wisconsin.gov/admrules/public/Rmo?nRmId=10843> (last visited October 24, 2014). In October, 2011, Department staff asked the Natural Resources Board to authorize public hearings on a proposed rule. *Id.* However, despite finding sufficient time and resources to adopt numerous other regulations at the behest of polluters since 2011 that allow more pollution without regulation or oversight, the Department has not met its statutory obligation to promulgate standards for sulfur dioxides consistent with the federal standard.

B. Nitrogen Oxide Ambient Air Standard

18. Nitrogen Oxide is a dangerous air pollutant that poses health threats in its primary form, 75 Fed Reg. 6,474, 6,479 (Feb. 9, 2010), and adversely affects human health, vegetation, materials, and visibility by combining with volatile organic compounds (VOC) and sunlight to form ground level ozone, which is also known as smog, 61 Fed. Reg. 52,852, 52853 (Oct. 8, 1996).

19. In 2010, the U.S. Environmental Protection Agency determined pursuant to the Federal Clean Air Act that the existing air quality standards for nitrogen oxides were inadequate to protect human health, especially during short term pollution spikes and adopted a more stringent one-hour air quality standard.

20. On January 22, 2010, the U.S. Environmental Protection Agency promulgated an ambient air quality standard for nitrogen oxides of 100 parts per billion daily maximum 1-hour concentration. 75 Fed. Reg. 6473 (Feb. 9, 2010) (codified at 40 C.F.R. § 50.11(1)(b)). That standard is promulgated pursuant to section 109 of the Federal Clean Air Act, 42 U.S.C. § 7409.

21. This new standard was based on the federal agency's findings that air pollution concentrations over longer periods (i.e., weeks) were not indicative of the adverse health effects that result from exposures during periods of minutes to hours. 75 Fed. Reg. at 6,475, 6,489. Thus, the agency set the standard at 100 parts per billion (or 188 $\mu\text{g}/\text{m}^3$) based on the maximum one-hour concentration per day. *Id.*

22. The Department of Natural Resources has not promulgated a standard similar to the 100 parts per billion maximum daily 1-hour concentration nitrogen oxide standard.

23. The Department of Natural Resources issued a Statement of Scope on January 10, 2011, initiating a rulemaking to adopt ambient air standards for nitrogen oxides consistent with the Federal Clean Air Act standard. *See* <https://health.wisconsin.gov/admrules/public/Rmo?nRmoId=10843> (last visited

October 24, 2014). In October, 2011, Department staff asked the Natural Resources Board to authorize public hearings on a proposed rule. *Id.* However, despite finding time and resources to adopt numerous other regulations at the behest of polluters since 2011 that allow more pollution, the Department has not met its statutory obligation to promulgate standards for nitrogen oxides consistent with the federal standard.

C. Fine Particulate Matter Ambient Air Standard

24. Fine particulate matter, or PM_{2.5}, is linked to premature death, aggravates respiratory and cardiovascular disease (as indicated by increased hospital admissions for asthma, emergency room visits, absences from school or work, and restricted activity days), changes lung function and increases respiratory symptoms. 72 Fed. Reg. 20,586-87 (Apr. 25, 2007). Exposure to PM_{2.5} is linked to lung cancer, infant mortality and development problems (such as low birth weight in children), and hospital admissions for cardiopulmonary disease, increased respiratory symptoms. 71 Fed. Reg. 2,620, 2,627 (Jan 17, 2006); 71 Fed. Reg. 61,144, 61,145 (Oct. 17, 2006). PM_{2.5} causes coughing and shortness of breath, asthma and bronchitis, increased susceptibility to respiratory infections, and heart attacks. *Id.* Particulate Matter, including PM_{2.5} and larger particles, also impairs visibility and negatively impacts vegetation and ecosystems. *Id.* at 61,145. In 1997, USEPA promulgated a 15 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) annual and 65 $\mu\text{g}/\text{m}^3$ 24-hour ambient air quality standard for PM_{2.5}, then subsequently revised the 24-hour standard to 35 $\mu\text{g}/\text{m}^3$. 62 Fed. Reg. 38,652, 38,711 (July 18, 1997); 71 Fed. Reg. at 61,144.

25. The courts remanded the U.S. Environmental Protection Agency's 2006 ambient air standards for fine particulate matter as insufficiently protective of public health. *American Farm Bureau Federation v. EPA*, 559 F.3d 512 (D.C. Cir. 2009). The Environmental Protection Agency then adopted the newer, more stringent, standard at issue in this case.

26. On December 14, 2012, the U.S. Environmental Protection Agency promulgated an ambient air quality standard for fine particulate matter (measured as particulate matter with a diameter of 2.5 microns and smaller, or "PM_{2.5}") of 12 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) on an annual average. 78 Fed. Reg. 3086 (January 15, 2013) (codified at 40 C.F.R. § 50.18(b)). That standard is promulgated pursuant to section 109 of the Federal Clean Air Act, 42 U.S.C. § 7409.

27. The Department of Natural Resources has not promulgated a standard similar to the 12 $\mu\text{g}/\text{m}^3$ annual average standard for fine particulate matter. No rulemaking proceeding has even been initiated by the Department to comply with its obligation to adopt a standard for fine particulate matter consistent with the federal Clean Air Act standard.

28. The Department's failure to promulgate standards similar to those adopted by the U.S. Environmental Protection Agency pursuant to section 109 of the Federal Clean Air Act, 42 U.S.C. § 7409, for sulfur dioxide, nitrogen oxides and fine particulate matter violates its obligation pursuant to Wis. Stat. § 285.21(1)(a).

29. The Department's failure to promulgate standards as required by Wis. Stat. § 285.21(1)(a) constitutes an "[a]dministrative decision... by... inaction... negative in form" that is subject to review by the court in this case pursuant to Wis. Stat. § 227.52.

**SECOND CLAIM: FAILURE TO PROMULGATE AMBIENT AIR INCREMENTS
FOR FINE PARTICULATE MATTER**

30. Pursuant to Wis. Stat. § 285.21(2), "[t]he department shall promulgate by rule ambient air increments for various air contaminants in attainment areas. The ambient air increments shall be consistent with... ambient air increments under the federal clean air act...."

31. On September 30, 2010, the U.S. Environmental Protection Agency established ambient air increments for PM_{2.5} under the federal clean air act. 75 Fed. Reg. 64,864 (Oct. 20, 2010).

32. The Department has not adopted any ambient air increments for PM_{2.5}, in violation of Wis. Stat. § 285.21(2). No rulemaking process has even been initiated by the Department to promulgate an increment for fine particulate matter consistent with the increments under the federal Clean Air Act.

33. The Department's failure to promulgate increments for PM_{2.5} as required by Wis. Stat. § 285.21(2) constitutes an "[a]dministrative decision... by... inaction... negative in form" that is subject to review by the court in this case pursuant to Wis. Stat. § 227.52.

RELATED CASE

34. Petitioners contend that the issues in this action are related to the standards that must be applied to permit reissuance for the permit at issue in pending *Midwest Environmental Defense Center, et al. v. Wisconsin Department of Natural Resources*, Dane County Circuit Court case 14-cv-2816. Wis. Stat. § 285.63(1)(b). If the relief requested in this case (adoption of air quality standards consistent with federal standards) is not granted until after the permit renewal requested in Case 14-cv-2816, the DNR will be required to reopen that permit. Wis. Admin. Code § NR 407.14(1). Therefore the two cases are related.

PRAYER FOR RELIEF

WHEREFORE, Petitioners MEDC and Clean Wisconsin respectfully request judgment in their favor as follows:

1. Declare the DNR's failure to promulgate ambient air quality standards for sulfur dioxide, nitrogen oxide, and fine particulate matter consistent with the federal clean air act standards to be a violation of law;
2. Declare the DNR's failure to promulgate ambient air quality increments for PM_{2.5} consistent with the federal clean air act increments to be a violation of law;

3. Ordering DNR to promulgate ambient air quality standards for sulfur dioxide, nitrogen oxides, and fine particulate matter consistent with the standards adopted under the federal Clean Air Act;
4. Ordering DNR to promulgate ambient air increments for PM_{2.5} consistent with the increments adopted under the federal Clean Air Act;
5. Order that all permits currently pending be issued only after determination that the permitted emissions will comply with the 1-hour NO_x and SO₂ and annual 12 µg/m³ PM_{2.5} ambient air standards and PM_{2.5} increments at issue in this case;
6. Award costs and attorneys fees pursuant to Wis. Stat. § 814.245; and
7. Granting such other relief as the Court may deem just and equitable.

Dated this 11th day of December, 2014.

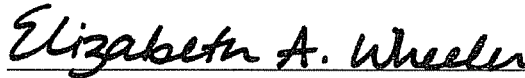
Midwest Environmental Defense Center by

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