BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of: Air Pollution Control Permit #03-POY-328 dated April 26, 2004 Issued To Madison-Kipp Corporation	Case No: IH-04-02

RESPONSE BRIEF OF MADISON-KIPP CORPORATION

INTRODUCTION

Madison-Kipp Corporation ("Kipp") is an aluminum die casting company which manufactures parts for the automobile industry, including General Motors. Tr. 883-884 (Meunier). Kipp opened its current facility on Madison's Eastside, at 2824 Atwood Avenue, over 100 years ago, in a neighborhood that was designed by John Nolen specifically for manufacturing. Ex. 289, p. 2. Today, Kipp employs 500 highly skilled workers, and has one of the most diverse work forces in Madison. Tr. 888 (Meunier), Ex. 289, p. 2. Kipp's owners and management team are very committed to staying in Madison. Tr. 894 (Meunier).

Because of competition in the die cast industry, Kipp has not been able to raise its prices in recent years. Tr. 889-891 (Meunier). Kipp did not even make a profit last year. Tr. 902 (Meunier). Competition is so tough in the die casting industry that five other die cast facilities ceased operation or filed for bankruptcy in the months preceding the hearing in this case. Ex. 287.

Kipp's response to such challenges is to compete by offering customers excellent service. Tr. 890 (Meunier). In an effort to provide parts "just in time"

(Tr. 890, Meunier) to customers such as Harley Davidson (Tr. 884, Meunier), Kipp filed an application with the DNR to modify its air permit. Tr. 891-892 (Meunier). Specifically, Kipp requested permission to increase its Total Suspended Particulates ("TSP") emissions from two reverberatory furnaces from one-and-a-half pounds per hour to eight-and-a-half pounds per hour, the level allowed by law. Tr. 891 (Meunier).

As confirmed by the DNR, Kipp has simply "requested the limit be changed to what s. NR 415.05, Wis. Adm. Code allows." Ex. 201, p. DNR 459. Even then, discharges at the eight-and-a-half pound level per hour, or even three pounds per hour, will occur very infrequently. Tr. 891-892 (Meunier).

Before it granted the permit modification, the DNR conducted a comprehensive analysis of Kipp's permit application and operations. Ex. 201. The DNR also conducted a public hearing on February 6, 2004, and received substantial comments from the public, including CAM, which it considered before acting on Kipp's request. Exs. 70, 103, 108, 226.

On April 26, 2004, the DNR granted the permit modification through issuance of Permit 03-POY-328. Ex. 200. This contested case proceeding is a review of that permit modification by the DNR.

At the contested case hearing, CAM itself conceded that this permit is a modification of an existing permit that had already been issued. Tr. 290 (Klafka). CAM also conceded that the permit modification only affected the emission limits for the two furnaces described as "RCI-1" and "RCI-2." Tr. 290-291 (Klafka). These furnaces emit through two 100 foot stacks described as S16 and S17. Ex.

200, p. 2. The Preliminary Determination issued by the DNR (Ex. 201) contains a chart of all 20 emission points from which Kipp is permitted to emit, including the only two affected by this permit—S16 and S17. Ex. 201, p. DNR 462. The other 18 emission points were authorized in previous permits issued years ago.

CAM admitted at the hearing that except for S16 and S17, there will be no emission increases from any other stacks as a result of Permit 03-POY-328. As CAM's only witness, Mr. Klafka, testified:

> Q And under this permit that you're challenging there will be no emission increases for any of the stacks or emission points on this page [Ex. 201, p. DNR 462] with the exception of S16 and S17, isn't that correct?
>
> A That's correct.

Tr. 300 (Klafka).

CAM also agreed that other than the modified limits for S16 and S17, the emission limits for all other processes at the Atwood facility and Fair Oaks facility were established in other permits. Tr. 293 (Klafka).

This brief will demonstrate that the permit modification granted by the DNR should be affirmed. First, the DNR is entitled to great weight deference with regard to the modeling which it undertook and the professional judgments which it made in conducting that modeling. Moreover, CAM's attack on the DNR is wholly without merit and based upon unapproved models, mistaken factual assertions, and requests that the ALJ invalidate longstanding permitting methods used by the DNR.

Second, the DNR was correct in its determination that there will be no exceedances of the TSP standard (150 mcg/m^3 on a 24 hour basis) as a result of

issuing Permit 03-POY-328. Even CAM concedes this determinative point. After testifying that the maximum impact of the two furnaces which emit through S16 and S17 would be at Lowell Elementary School, CAM admitted that, even using its own non-approved methodology there will be no exceedances with respect to TSP at Lowell School:

> Q And if you, in your report, could turn to Pages 22 through 24, that's a section entitled Air Quality Impacts at Lowell Elementary School, is that correct?
>
> A That's correct.
>
> Q And Page 24 contains your modeling results with respect to Lowell Elementary School, don't they?
>
> **A That's correct.**
>
> * * *
>
> Q And on Page 24 you conclude, do you not, that even using your own methodology, which we dispute, that there will not be an exceedance with respect to TSP at Lowell School, right?
>
> **A That's correct.** (Emphasis added.)

Tr. 302-304 (Klafka).

CAM also was forced to concede that homes *closer* than the point of maximum impact from S16 and S17 at Lowell School will be spared such maximum emissions:

> Q On your Exhibit 221 you drew some boxes in a vertical line, did you not?
>
> A That's correct.
>
> Q And those are the homes of residents who live near the Kipp plant, isn't that right?
>
> A That's correct.
>
> **Q And it's your position that the houses depicted on this exhibit are spared the maximum emissions from the Kipp furnaces, correct?**
>
> **A That's correct.** (Emphasis added.)

Tr. 304-305 (Klafka).

Third, because there will be no exceedances from S16 and S17, CAM instead collaterally attacks determinations that were made years ago when the DNR issued Kipp prior permits for other processes. However, this attack violates the holding of *Village of Thiensville v. Department of Natural Resources,* 130 Wis. 2d 276, 386 N.W.2d 519 (Ct. App. 1986). Indeed, CAM's attack has nothing to do with stacks S16 and S17, or the increase to eight-and-a-half pounds per hour of TSP.

Thus, even if the ALJ granted CAM the relief which it requests by reversing the issuance of Permit 03-POY-328, all of CAM's criticisms would still remain. Therefore, in actuality, CAM is trying to reopen previous permit decisions made for stacks other than S16 and S17. However, the only issue properly before the ALJ is whether the DNR's determination to allow an increase in TSP emission rates for S16 and S17 was appropriate under the applicable standard of review.

STANDARD OF REVIEW

The standard of review in this case is great weight deference.

This contested case is a permit review proceeding under Wis. Stat. §§ 285.81(1)(a) and (2). Section 285.81(2) provides that any person other than the permit holder, applicant, or an order recipient may, upon meeting certain conditions, ". . . seek **review** under sub. (1) of any permit, part of a permit..." (Emphasis added.)

Section 285.81(1)(a) states that the person seeking a hearing must file a petition with the Department within 30 days after the date of the action "sought to be **reviewed**" and that the petition shall set forth specifically the issue "sought to be **reviewed**. . ." (Emphasis added.) Accordingly, this contested case proceeding is a review of the DNR's decision to grant the permit modifications, not a *de novo* proceeding.

In another review case before the Division under parallel water permit statutes, the ALJ appropriately held that the DNR is entitled to deference in exercising its regulatory discretion:

> The Department's determination . . . was within its regulatory discretion and authority . . .

In re Waterway and Wetland Alterations Relating to Wisconsin Electric Power Co. Oak Creek Power Plant Expansion, Case Nos. 3-01-41-005-0019 and 1456MW (DHA Nov. 11, 2004).

Since the date of the ALJ's decision in *Oak Creek*, the Wisconsin Supreme Court decided *Clean Wisconsin, Inc. et al. v. Public Service Commission of Wisconsin, et al.* 2005 WI 93, 700 N.W.2d 768, 2005 WL 1513854 (June 28, 2005) (hereafter "*Clean Wisconsin*"). *Clean Wisconsin* confirms that the discretion to be afforded to the administrative agency in cases such as this is great weight deference. *Clean Wisconsin* held:

> Great weight deference, the highest level of deference, is appropriate where:
>
> "'(1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the statute is one of long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statue.'" [citations omitted]

> However, the appropriate test for great weight deference is not whether the agency has "decided a case presenting the precise facts raised by [the present] appeal. . ." *Va. Sur. Co. v. LIRC*, 2002 WI App. 227, ¶ 13, 258 Wis. 2d 665, 654 N.W.2d 306. Rather, the correct test is whether the agency "'has experience in interpreting [the] particular statutory scheme'" at issue. [citations omitted]
>
> Additionally, we should defer to an agency interpretation when the "'legal question is intertwined with factual determinations or with value or policy determinations'" and the agency involved "'has primary responsibility for determination of act and policy.'" [citations omitted] Under the great weight standard, we will uphold an agency's interpretation of a statute so long as it is reasonable, even if a more reasonable interpretation exists. *Id.*

2005 WI 93 at ¶¶ 39-41.

All of the elements in *Clean Wisconsin* for the application of great weight deference standard are present in this case. For example, the record shows a longstanding practice of the DNR to use the ISC3 model (also referred to in the record as the ISCST3 model) until such time as a newer model is approved by the EPA. Therefore, great weight deference must be given as to the DNR's choice of the model and its inputs (*e.g.*, whether to use flagpole receptors and consider terrain, etc.).[1]

Finally, an agency's interpretation and application of its own administrative rules must be given great weight, unless plainly erroneous or inconsistent with the regulation:

> This review also implicates the PSC's interpretation and application of its own administrative rules governing the issuance of CPCNs. "This court has frequently held that great weight should be given to the administrative agency's interpretation and application of its own rules, unless plainly erroneous or inconsistent with the regulation so interpreted. This is especially so in an area calling for special expertise." [citations omitted]

2005 WI 93 at ¶ 45.

[1] In *Clean Wisconsin*, the Court also held: "[t]he PSC clearly has discretion over what inputs are utilized for EGEAS modeling." 2005 WI 93 at ¶ 156.

Even Mr. Klafka testified that deference must be given to the DNR's technical and regulatory expertise and that DNR official, John Roth, and his team member, Gail Good, are experts in the area of regulation of air emissions. Tr. 346-350 (Klafka).

ARGUMENT

I. THE DNR IS ENTITLED TO GREAT WEIGHT DEFERENCE AS TO ITS DETERMINATION THAT THE STANDARD FOR TSP WILL NOT BE EXCEEDED BY ISSUING PERMIT 03-POY-328.

As indicated above, Permit 03-POY-328 only authorizes an increase in the hourly TSP emissions for stacks S16 and S17. The DNR determined that these increased TSP emissions will not cause or exacerbate an exceedance of the TSP standard. Ex. 201, p. DNR 466. Under the modeling conducted by the DNR (discussed in detail in Section III of this brief), the DNR concluded that even under the worst-case scenario, the results will be below the TSP standard. Ex. 201. Under *Clean Wisconsin*, such determination is entitled to great weight deference.

A. The Standard at Issue Here is the Secondary, Non-Health Related Standard for TSP Which Only Exists at the State Level.

The criteria for permit approval relating to ambient air quality standards is contained in Wis. Stat. § 285.63(1)(b). It provides:

> **285.63 Criteria for permit approval.** (l) REQUIREMENTS FOR ALL SOURCES. The department may approve the application for a permit required or allowed under s. 285.60 if it finds:
>
> . . .
>
> (b) *Source will not violate or exacerbate violation of air quality standard.* . . .The source will not cause or exacerbate a violation of any ambient air quality standard . . . .under s. 285.21(1) or (2) . . . .

The ALJ confirmed during the hearing that the only issue remaining after summary judgment was whether issuance of Permit 03-POY-328 will cause or exacerbate a violation of the ambient air quality standard for TSP. Tr. 5-6. Even though the ALJ offered Petitioners the opportunity to amend their pleadings to allege health effects, Petitioners declined to do so. Tr. 6-7.

Significantly, the TSP standard itself is not a health based standard, but instead is established as only a "secondary standard" in Wis. Adm. Code § NR 404.04(3). TSP is not even regulated at the federal level. Tr. 272 (Klafka). TSP is regulated in Wisconsin only as a nuisance to prevent such things as dust accumulating on cars or on laundry hung outside to dry. Tr. 48 (DNR opening statement).

Wis. Adm. Code § NR 404.04(3) establishes the TSP ambient air quality standard in Wisconsin. It provides:

> PARTICULATE MATTER: SECONDARY STANDARD. The secondary standard for particulate matter measured as total suspended particulates is 150 micrograms per cubic meter maximum **24-hour average** concentration, not to be exceeded more than once per year. (Emphasis added.)

The 24-hour standard is important because Wis. Adm. Code § NR. 406.09 requires that an assessment of air quality impact "be determined at such locations where the public might reasonably be exposed for **time periods consistent with the ambient air quality standards for the pollutants for which analysis is carried out.**" (Emphasis added.)

This means that compliance must be modeled or measured over an entire 24-hour period and not instantaneously. Further, compliance with the standard is only necessary at locations where the public might reasonably be exposed for a

continuous 24-hour period. Therefore, measurements in the middle of a roadway or even on balconies where people are not present for 24 hours should not form the sole basis for measuring compliance.

As the DNR correctly stated in its opening statement:

> It'll also be pointed out that DNR has a rule that says, you look at the air quality impacts not only where people will be exposed - - this is in NR 406.09 I believe, where people will be exposed but also where they'll be exposed for the time period of the standard. Here the time period of the TSP standard is 24 hours. So it's a 24-hour exposure. Again, it's not a health standard. It's a secondary standard, which is a welfare standard for, as you know, nuisance conditions or causing dirt on cars or dirt on laundry, that kind of thing. So it's not that it's a health issue. The health - - health standards are not part of this case.

Tr. 48-49 (DNR opening statement).

Finally, one exceedance of the 24-hour standard per year is not a violation of the law. Section NR. 404.04(3) requires a second 24-hour exceedance before a violation occurs.

B. Both the DNR's and CAM's Own Modeling Analysis Show that Emissions from Stacks S16 and S17 Will Not Cause or Exacerbate an Exceedance of the TSP Standard.

The DNR's modeling analysis demonstrated that emissions from S16 and S17 would not cause or exacerbate an exceedance of the TSP standard. Ex. 201, p. DNR 466 and Ex. 101, p. 2. The DNR's finding is entitled to great weight deference.

Moreover, Klafka's own modeling analysis predicts that the maximum air quality impacts of the two aluminum furnaces which emit through S16 and S17 will occur at Lowell School. Ex. 222, pp. 22, 24. Klafka's report states the following:

> Currently, the maximum air quality impacts of the two aluminum furnaces and their 100-foot stacks is at Lowell Elementary School.

Ex. 222, p. 22.

In addition, Klafka prepared a graph summarizing his modeling analysis which also demonstrates his belief that TSP emissions from stacks S16 and S17 will have their maximum impact at Lowell School. Ex. 221; Tr. 302 (Klafka).

However, Klafka admitted that even the maximum impact at Lowell School will not result in an exceedance of the TSP standard:

> Q And if you, in your report, could turn to Pages 22 through 24, that's a section entitled Air Quality Impacts at Lowell Elementary School, is that correct?
>
> A That's correct.
>
> Q And Page 24 contains your modeling results with respect to Lowell Elementary School, don't they?
>
> A That's correct.
>
> ***
>
> Q And on Page 24 you conclude, do you not, that even using your own methodology, which we dispute, that there will not be an exceedance with respect to TSP at Lowell School, right?
>
> A That's correct.

Tr. 302-304 (Klafka).

In fact, Klafka predicts that under a hypothetical worst case situation, Permit 03-POY-328 will result in TSP concentrations at Lowell reaching only 77% of the applicable standard. Klafka report, Ex. 222, p. 24.

> Q And, again, the bottom line is that even using your methodology, instead of the DNR's methodology, there's not going to be an exceedance at Lowell School for TSP if Judge Boldt allows this permit to stand, correct?
>
> A That's correct.

Tr. 307 (Klafka).

Given this record, there is no basis to hold that the DNR did not properly exercise its discretion under the great weight deference standard. Indeed, there is simply no dispute that the TSP emissions authorized by Permit 03-POY-328 will not cause or contribute to an exceedance of the TSP standard at CAM's asserted point of maximum impact which is Lowell School.

C. Likewise, Klafka's Own Modeling Confirms that TSP Emissions from S16 and S17 Will Not Cause or Contribute to an Exceedance of the TSP Standard at Locations Away from Lowell School.

For locations other than Lowell School, Klafka's modeling also demonstrates that TSP emissions from S16 and S17 will have such an inconsequential impact that they likewise will not contribute to or exacerbate an exceedance of the TSP standard. This is because Klafka's modeling predicts that TSP emissions from S16 and S17 contribute a mere 5 micrograms per cubic meter at the maximum point of impact - Lowell School. Tr. 680 (Podrez). Therefore, according to Klafka, as one moves away from Lowell School, the TSP impacts from S16 and S17 will drop. Ex. 221; Tr. 304-305 (Klafka); *See also,* Tr. 680-681 (Podrez). This is an important concession by Klafka because any TSP impact below 5 micrograms per cubic meter is considered "insignificant" from a regulatory standpoint. Tr. 681 (Podrez).

As Mr. Podrez explained, impacts modeled at such a low concentration cannot be considered to contribute to an exceedance of a TSP standard – even if such an exceedance were to exist as suggested by Klafka:

> A …But back when EPA used to regulate TSP, that's [sic] developed what they call significant impact level, a numeric number under which they

> considered the impact to be insignificant, not contribute to any violation; and for TSP that number was five micrograms per cubic meter. So to the extent that you start moving away from Lowell, that impact from S16 and 17 is going to drop below that kind of level and become insignificant, basically not contribute to any exceedance.

Tr. 680-681 (Podrez).

In conclusion, the TSP emissions authorized by Permit 03-POY-328 will not cause or contribute to an exceedance of the TSP standard at Lowell School or any surrounding location.

D. Ambient Air Monitoring Confirms that TSP Emissions from S16 and S17 Will Not Cause or Contribute to an Exceedance of the TSP Standard.

The DNR's conclusion that there will be no exceedance of the TSP standard is confirmed by ambient air monitoring. First, the DNR operated a TSP monitor on the roof of Lowell School for eight years. Exs. 110, 248. However, during this eight-year period, the annual mean TSP concentration measured at Lowell School was between 35.2 and 46.9 mcg/m^3 which is roughly one-third of the TSP standard (*i.e.*, 150 micrograms per cubic meter).[2] Ex. 110. Given Klafka's admissions that the ambient concentrations resulting from the increased emissions from S16 and S17 will be minimal, these monitoring results provide highly relevant evidence today that emissions nowhere near the 150 micrograms standard will occur.

The DNR operated another TSP monitor from 1998 to 2003 at a location much closer to the Kipp facility on the bike trail between Kipp's Atwood and Fair

[2] There was only one TSP reading above the 150 micrograms per cubic meter standard, which occurred on May 6, 1983. However, this reading was attributable to a regional problem experienced throughout the City of Madison on that day (Ex. 110, fn. 1) which had nothing to do with Kipp.

Oaks plants. Exs. 110 and 228. During these six years, the annual mean TSP concentrations monitored at that location were approximately 25% of the applicable standard.[3] Therefore again, it is reasonable to assume that the increased TSP emissions from S16 and S17 will not cause or contribute to an exceedance of the TSP standard near the Kipp facility.

Monitoring also occurred at the residence of one of the Petitioners—Ann Chacon. Exs. 232 and 290.[4] Although the Administrative Law Judge expressed skepticism with regard to such indoor air monitoring, Kipp believes that the Chacon results are highly probative. This is because Ms. Chacon's home directly abuts the Kipp property as was demonstrated during the site view which occurred as part of this hearing. Under the 24-hour TSP standard, the only area on her property where she could reasonably be expected to be for 24 hours or more is inside her residence. Yet, the results measured particulate concentrations at a mere 0.24 micrograms per cubic meter. Ex. 290. Mathematically, this means that the TSP concentrations in her home were 0.16 of one percent of the TSP standard. Therefore, again, it is reasonable to assume that there will be no scenario under the challenged permit where TSP concentrations anywhere near the applicable standard will occur.

[3] During these six years, this monitor recorded only one incident which exceeded the 150 micrograms per cubic meter TSP standard. Exs. 110 and 228. However, this event which occurred in 2000 was attributable to sandblasting at a nearby facility and had nothing to do with Kipp. Ex. 228 and Tr. 452 (Klafka).

[4] CAM has objected to the admission of Exhibits 232 and 290. If the ALJ has not already ruled on their admissibility, Kipp requests the ALJ to do so.

II. CAM'S ATTACK VIOLATES THE HOLDING OF THE *THIENSVILLE* CASE AND PRINCIPLES OF WAIVER.

A. *Thiensville* Prohibits Review of Prior Final Permit Decisions.

In *Village of Thiensville v. Department of Natural Resources*, 130 Wis. 2d 276, 281, 386 N.W.2d 519 (Ct. App. 1986), the Court of Appeals held that an ALJ assigned to review a permit modification was precluded from "reviewing permit terms which might well be years old and which might never have been timely challenged at the basic DNR level."

In *Thiensville*, the municipality had been issued a WPDES permit requiring it to abandon its sewage plant and construct a new interceptor sewer to connect to the Milwaukee Metropolitan Sewerage District by 1981. When the compliance date could not be met, the DNR modified the permit's compliance schedule. The municipality objected to the permit modification and also challenged permit requirements which were not changed by the modification.

Upon the motion of the DNR, the ALJ limited review solely to the modified compliance schedule, and refused to review permit terms established years earlier. The municipality then appealed to the circuit court, which upheld the ALJ's determination.

The Court of Appeals affirmed, holding that although the municipality could challenge the modification, the challenge to the unmodified terms of the original permit would not be allowed. In addition to statutory grounds,[5] the

[5] The contested case proceeding in *Thiensville* was based upon Wis. Stat. § 283.83. Its air pollution counterpart is Wis. Stat. § 285.81.

Thiensville court based its holding on the doctrine of exhaustion of administrative remedies:

> . . . [W]e believe that the policy promoted by our interpretation is sound and in keeping with the exhaustion of remedies doctrine long at the core of administrative law. Under Thiensville's interpretation, a permit modification would enable a petitioner to open all other matters in the original petition for review. **Functionally, this would result in a hearing examiner from the Department of Administration reviewing permit terms which might well be years old and which might never have been timely challenged at the basic DNR level.**[6] (Emphasis added.)

130 Wis. 2d at 281.

B. CAM's Attack Violates the *Thiensville* Holding.

At the hearing in this case, CAM admitted that the permit which it is challenging is a modification of existing permits. Tr. 290 (Klafka). CAM also admitted that with the exception of the new limits for the two reverberatory furnaces (RC-1 and RC-2), all of Kipp's emission limits were established under prior permits:

> Q These two reverberatory aluminum melt furnaces are located only at the Kipp Atwood Avenue building, is that correct?
>
> **A That's correct.**
>
> Q And the permit that you're challenging did not change any other existing emission limits at Kipp's Atwood Avenue facility, did it?
>
> **A No.**
>
> Q And the permit that you're challenging did not change any existing emission limits for the Fair Oaks facility either, did it?
>
> **A No.**
>
> Q And you would agree that the emission limits for the Fair Oaks facility were established in other permits, would you?

[6] Earlier in the instant case on the motion to dismiss, the ALJ applied a secondary but related principle from the *Thiensville* case that the ALJ may not "consider anew" arguments not raised before the agency. 130 Wis. 2d at 282. *See also*, Jeffrey D. Boldt, "Administrative Review of DNR Decisions" *Wisconsin Lawyer*, July, 1993, p. 25.

A That's correct.

Q And the emission limits for the Atwood facility, other than RCI-1 and 2, were established in other permits, correct?

A That's correct.

Tr. pp. 292-293 (Klafka).

The record establishes that Kipp, among other things, holds the following prior permits: Operation Permit no. 113014220-P01 (Ex. 49) and Construction Permits nos. 99-BSP-912, 00-BSP-929, and 00-BSP-944. *See* Ex. 100 (approx. nine pages from cover) and Ex. 227. Among other things, these construction permits authorized the construction of the 100 foot stacks, S16 and S17, from which RCI-1 and RCI-2 emit. Ex. 227, p. 1.

Exhibit 201, p. DNR 462, contains a chart of all stacks and emission points from which Kipp has permits to emit. CAM testified with respect to such chart:

Q Now would you turn to the page marked DNR 462. Are you with me?

A Yes.

Q That's a chart entitled Madison-Kipp Corporation Madison Emission Rates and Stack Parameters, is that correct?

A That's correct.

Q Then this chart includes all stacks and emission points that Kipp is permitted to emit from, correct?

A That's correct.

Q And under this permit that you're challenging there will be no emission increases for any of the stacks or emission points on this page with the exception of S16 and S17, isn't that correct?

A That's correct.

* * *

Q Okay. Other than the change in emission limits for S16 and S17 from one-and-a-half pounds an hour to eight-and-a-half pounds an

hour, there is no other changes that this permit makes that you're challenging in this proceeding, correct?

A **That's correct.** (Emphasis added.)

Tr. 300-301 (Klafka).

Nonetheless, CAM attempts to challenge emissions from stacks other than S16 and S17. This it cannot do under *Thiensville*. *Thiensville* prohibits challenging issues which were determined in earlier permits.

Indeed, virtually all of the objections which CAM makes in this proceeding relate to permit terms and determinations which were not affected or changed by Permit 03-POY-328. Moreover, CAM raised these objections in 2000 and 2001 when those determinations were originally made by the DNR. Yet, CAM acceded to DNR's position by not bringing a contested case proceeding to exhaust its administrative remedies at that time.[7]

Such previous objections by CAM are set forth in Exhibits 227 and 265. In Exhibit 227 dated November 15, 2000, CAM filed written objections with the DNR with regard to permits 00-BSP-944 and 00-BSP-929. The second to last page of Exhibit 227 contains a chart summarizing CAM's criticisms. Significantly, it includes "Flagpole Receptors, Elevated Terrain, Cavity Estimates" and an assertion that "ISC-PRIME" should have been used "to predict concentrations in the building cavity," instead of ISC3. These are the same challenges made in this proceeding.

[7] As indicated earlier, *Thiensville* also bars litigation at this late stage of issues which were determined in earlier permits, but which were not the subject of objections. For example, the orientation of Kipp's various buildings and the coordinate system used to describe such buildings were an essential parts of the prior permits, but not objected to by CAM. Thus, *Thiensville* precludes CAM from raising such issues now.

Likewise, in Exhibit 265, authored by CAM on May 4, 2001, CAM made previous objections with respect to fugitive emissions. Ex. 265, p. 619. It also objected to "Consideration of Downwash from Surrounding Homes." *Id.* at p. 620.

Finally, CAM admitted that it knew at the time it raised its objections in 2000 and 2001, it had a right to request a contested case hearing after the DNR overruled its objections:

> Q Okay. And your position in Exhibit 227, those comments, were that if the DNR issued those prior permits that there would be exceedences with respect to TSP, isn't that right?
>
> **A That's correct.**
>
> Q And the DNR did not accept your objections, did they?
>
> **A No.**
>
> Q Instead, the DNR issued these prior permits over your objections, didn't it?
>
> **A That's correct.**
>
> Q And neither CAM or Madison Clean Air, which I understand was the old name for CAM, Steve Klafka, or anyone else requested a contested case hearing with respect to these prior permits, did they?
>
> **A No.** . . .

Tr. 310 (Klafka).

* * *

> Q Now, had you sought a contested case hearing with respect to the prior permits, you could have raised all of the issues that you raise on Page 5 of Exhibit 227, isn't that right?
>
> **A Yes.**

* * *

> Q You could have - - you know - - you understand as an air expert that there is a remedy for people that object to permit decisions called a contested case hearing?

A That's correct, yes.

Q And you understood that you could have sought a contested case hearing with respect to these prior permits, isn't that right?

A That's correct.

Tr. 314 (Klafka).

DNR Modeling Team Leader, John Roth, confirmed that CAM had made identical objections in prior Kipp permits:

Q Had the citizens opposed to the Madison-Kipp permit raised similar issues in the past about the modeling for previous Madison-Kipp permits?

A Yes, they did. The comments that we received were actually identical to the comments received in 2000 in relation to the operation permit.

Tr. 1005 (Roth).

Thiensville clearly precludes CAM from making in this proceeding any objections it made, or could have made, in a prior proceeding. *Thiensville* is binding on CAM as controlling precedent. *Thiensville* is based upon legislative intent and a sound public policy principle that permittees, regulators, and the public are entitled to finality once permitting decisions are made and not challenged by way of a contested case. This is particularly true in cases such as this where CAM raised objections, the DNR overruled the objections, and CAM acquiesced in the DNR's determination by not bringing a contested case proceeding.

Moreover, based upon the finality of those previous permit determinations, Kipp invested capital, changed its business plans, and made commitments to customers in the same way that the other 3000 permittees throughout the State rely on their own air permit determinations. If CAM's attempt to reopen settled permit

issues at this late stage through a very minor permit modification were accepted, chaos and uncertainty would result throughout the manufacturing sector of Wisconsin's economy, to say nothing of endless challenges and contested case hearings.

Even Mr. Klafka conceded that reliance principles should preclude such an attack:

> Q Would you turn to Page 186 of your deposition. Question at Line 6, "Question, Now, having been issued the permits in 2000 over your objection, don't you think it was reasonable for Kipp to rely on the methodology that the DNR approved in 2000 with these previous permits in making their business decisions in the future? Answer, Yes, though I think they would have considered them to decide whether – you know, on the one hand it's what the DNR would accept to get a permit versus what people – what are people actually being exposed to. They could have considered doing these procedures themselves."
>
> "Question, But it's reasonable if a client, such as the industrial clients that you represent, has filed previous permits and the DNR uses a particular methodology with respect to the previous permits, barring some change in the regulatory structure, it's reasonable for the client to use that same methodology in submitting future permit applications, correct? Answer, That's correct."
>
> Were you asked those questions, did you give those answers?
>
> A. Yes.

Tr. 387-388 (Klafka).

C. CAM's Objections Are Also Barred by Waiver.

CAM's belated objections also violate principles of waiver. Even without the *Thiensville* holding, it is a well-established principle that a party who relinquishes a known remedy waives the right to such remedy in the future:

> Waiver is a voluntarily and intentional relinquishment of a known right. *See, Consumer's Coop. v. Olsen*, 142 Wis. 2d 465, 492, 419 N.W.2d 211, 221 (1988). Evidence sufficient to establish waiver must show that 'the person against whom the waiver is asserted had at the time knowledge, actual or constructive, of the existence of his [or her] rights or facts upon which they depended.' *Id.* (quoted

> source omitted). Intent to waive may be inferred as a matter of law by the conduct of the parties.

Batchelor v. Batchelor, 213 Wis. 2d 251, 256, 570 N.W.2d 568 (Ct. App. 1997).

As indicated above, CAM knew it had a right to a contested case proceeding on all of the issues set forth in Exhibit 227. This includes, but is not limited to, downwash cavity arguments, terrain arguments, and the assertions that flagpole receptors should have been used. Moreover, after the DNR received CAM's objections as set forth in Exhibit 227, it copied CAM with a memorandum responding to such objections and outlining CAM's appeal rights, including a contested case hearing and judicial review. *See* Ex. 259, p. DNR 19. Yet, CAM chose not to request a contested case hearing. Tr. 314 (Klafka). Thus, a waiver occurred and it is too late to assert those arguments now.

III. EVEN IF *THIENSVILLE* IS NOT DISPOSITIVE, CAM'S ASSERTIONS THAT THE DNR FAILED TO PROPERLY CONSIDER TERRAIN, DOWNWASH CAVITY ISSUES, FUGITIVE EMISSIONS, AND FLAGPOLE RECEPTORS ARE WITHOUT MERIT.

As demonstrated above, *Thiensville* is dispositive and, therefore, it is not necessary for the ALJ to address any other issues. However, if such arguments are addressed, CAM's assertions are without merit—especially considering that the DNR's determinations are entitled to great weight deference on each of these issues.

A. The DNR's Determination Regarding Terrain Issues is Entitled to Great Weight Deference.

The DNR determined that S16 and S17 are too high to raise terrain considerations. Tr. 1251-1252 (Podrez). *See also* Tr. 949 (Good) and Tr. 1175-

1176 (Roth). Nonetheless, CAM devotes approximately 25% of its brief to terrain. However, not once does CAM claim that S16 and S17 raise terrain issues and Klafka's report (Ex. 222, p. 13) nowhere addresses terrain with regard to S16 and S17.

Instead, Klafka addresses S19 and S30 which, as indicated above, are the subject of previously issued permits. Ex. 222, p. 13.

As to these shorter stacks, the DNR properly determined that terrain was also not a problem. In a Memorandum dated April 26, 2004, the DNR responded to CAM's terrain concerns and found them unjustified because the topography surrounding Kipp is "gently rolling" and insufficient to impact air flow. The DNR stated:

> 3. Elevated Terrain
> The dispersion model will accept terrain elevations for receptors where the modeler has determined the terrain will have an effect. The topography in the area of Madison-Kipp Corp. (MK) is very gently rolling, and the terrain adjustments within the dispersion model are designed to simulate the flow of air around hills and through valleys. **The slight changes in terrain (Lowell School is 10-15' above MK) surrounding MK do not have an effect on the flow of air.** The atmosphere will adjust to the surface for these elevations, such that what is emitted at ten feet above the ground will still be at ten feet above the ground as the air travels over this terrain. **While the model can accept such low terrain heights, it is not proper use of the model, and could be considered 'gaming' the model.** (Emphasis added).

Ex. 108, p. 6.

Mr. Roth summed it up well:

> Q . . . The next issue raised by Mr. Klafka was the consideration of terrain. What would be your response to his criticism in that regard?
>
> A I would say that this is an inappropriate use of terrain using the ISCST3 model. **The degree of the rise, the slope, meaning the degree of rise per unit distance, is gradual enough that the atmosphere will adjust to those conditions.** There's not going to be a case where you're going to have air from aloft impacting at the surface. So as such, any plumes entrained into that air, would also follow along with the surface, the

> terrain following provision as we've spoke about before. **So I would say that in this instance, utilizing terrain is inappropriate.** (Emphasis added).

Tr. 1018-1019 (Roth). *See also*, Mr. Podrez's report, Ex. 263, p. 13.

CAM's attempts to deprive DNR of its professional judgment and bind it to a 25% guideline which did not go into effect until May, 2004, after Permit 03-POY-328 had been issued. Tr. 1164 (Roth). Even if the guideline had been in effect, such guideline is not mandatory and certainly not a substitute for professional judgment:

> ALJ BOLDT: So there's some flexibility in how you apply the guidelines or I think they're actually called guidelines, the Air Dispersion Modeling Guidelines?
>
> THE WITNESS: I don't know that I would say flexibility, so much as professional judgment.
>
> ALJ BOLDT: And what specifically informed that professional judgment in this case?
>
> THE WITNESS: Looking at topographical maps and consulting with John Roth.

Tr. 950-951 (Good). *See also* Tr. 1020 (Roth).

As the *Clean Wisconsin* court observed:

> As noted previously, "[t]his court has frequently held that great weight should be given to the administrative agency's interpretation and application of its own rules, unless plainly erroneous or inconsistent with the regulation so interpreted. This is especially so in an area calling for special expertise."

2005 WI at ¶ 61.

Finally, CAM argues that DNR considered terrain in five other permits, but failed to do so for Kipp. This is a gross exaggeration of the hearing testimony. Mr. Roth testified that the DNR modeling team completed approximately 450 dispersion modeling projects during the last two years. Yet, there were only five cases that CAM identified where terrain was used. Tr. 1172 (Roth).

In two of these cases, the use of terrain was done by Mr. Klafka himself in applications prepared for *his* clients. Thus, the decision to include terrain was his and his alone. Tr. 1173 (Roth). As to the remaining three cases, each had significant terrain features which made them different from Kipp and, in the DNR's professional judgment, properly warranted using the terrain feature in the ISC3 model. Tr. 1174, 1189-1190 (Roth). Accordingly, Mr. Roth does not believe that the limited number of cases cited by Mr. Klafka are a "fair representation of DNR policy." Tr. 1173 (Roth).

Even Klafka, in his representation of industrial clients, ignores the 25% guideline and exercises professional judgment by not considering terrain. For example, Klafka admitted that had he used the 25% guideline for his Grede Foundry permit, the 150 microgram per cubic meter limit would "possibly" have been exceeded. Tr. 1306 (Klafka).

B. The DNR Determination Regarding Downwash Cavity Issues is Entitled to Great Weight Deference.

1. DNR's Consideration of the Downwash Cavity.

As to S16 and S17, the only stacks at issue here, Mr. Roth appropriately concluded that such stacks were "at GEP height and so would not have any downwash effect." Tr. 1213 (Roth). Klafka himself concurred: "[I]t's likely that those are tall enough to be considered GEP." Tr. 494 (Klafka). He also testified: "GEP stack height [is] the height at which the stack has to be to avoid downwash."

Tr. 495 (Klafka). [8] Therefore, properly represented, the DNR *did* consider downwash issues and concluded that they were "irrelevant" for S16 and S17. Tr. 1213 (Roth). *See also* Tr. 1025-1026 (Roth).

It is also inescapable that CAM's downwash arguments are solely directed at stacks and emissions other than S16 and S17 which were authorized in earlier permit decisions. And as to those stacks, the DNR's determination is also entitled to great weight deference. It considered downwash effects for the other stacks near the residences which abut the Atwood Avenue facility.

CAM asserts that the Kipp downwash cavity is large enough to reach the nearby residences and significantly affect the public. However, such assertion is not factually correct. While the ISC3 model does not calculate concentrations inside the downwash cavity, it *does* report when a receptor is located within the downwash cavity and thereby excluded from the model's calculations. That is, such receptor is assigned a zero impact. This is what CAM improperly refers to as "error messages." Properly represented, the DNR reviewed the ISC3 model outputs to determine how many receptors were excluded and the stacks to which the excluded receptors related.

Based upon such analysis, the DNR determined that the excluded receptors were not significant because they were not at the abutting residences:

> A . . . Looking at the DNR's analysis, all of the receptors along the eastern portion of the Atwood facility have concentrations calculated at them for

[8] Thus, Klafka was forced to admit that he had made a mistake in his report. Ex. 222, p. 14. There, he incorrectly stated that "for MKC, all stacks are less than GEP height, so the air quality impacts associated with cavity or wake effect due to nearby building structures should be determined." At the hearing, Klafka conceded that his report was "misleading" in such regard. Tr. 495 (Klafka).

> all of the roof exhausts or stacks. The only stacks that would have been considered to have a zero impact would have been the furnace stacks, S16 and S17, which we've already testified to are at GEP and so downwash effects are not important.
>
> So I would go on to say that ISCST3 was able to accurately predict concentrations for all of the receptors points on the eastside of the Atwood facility, which is the area of concern.

Tr. 1023 (Roth).

Mr. Roth further stressed this point on his redirect examination:

> Q Okay. Let's look at that. That's Exhibit 94, which was the source receptor combinations for which calculations may not be performed?
>
> A Yes. My testimony on that matter that I gave in my direct phase, talking about the receptor points to the east of the facility use this exact file. And as I stated, none of the point – all of the – in other words, all of the emissions from the die casters, from those roof exhaust fans would have been present on the receptors to the east of the facility. That's what I said and that's what I stand to.
>
> Q That's where the houses are close?
>
> A Correct. If we look in detail at these points rather than just kind of glancing and saying that they exist, you'll see that each point is associated with a specific source ID. The first three of them are actually at the Fair Oaks facility. The next series of points to the east of the facility are from S15, which is a very small particulate matter source.

Tr. 1212-1213 (Roth).

Therefore, CAM is wrong in claiming in its brief that DNR's modeling did not consider downwash issues. As indicated by Mr. Roth's testimony, the ISC3 model determined the locations of the downwash cavity and DNR considered such results in its analysis. Thus, the DNR properly found that the downwash cavity did not affect residents close to the facility. Because the DNR exercised its professional judgment as to the downwash cavity, such determination is entitled to great weight deference.

2. CAM's Request to Use ISC Prime or Other Unapproved Models for Its Downwash Allegations.

Because CAM knows that it cannot prevail on its downwash cavity arguments using ISC3, it requests the ALJ to order the use of an unapproved model such as ISC Prime to bootstrap its downwash allegations.

However, the basic problem with CAM's request is that the DNR is entitled to great weight deference as to which model should be used. All parties at the hearing agreed that the only approved model is ISC3. Exhibit 19 entitled "WDNR Dispersion Modeling Guidelines" unequivocally states:

> **The refined model that the WDNR currently uses is the Industrial Source Complex Short Term model, version 3 (ISCST3 – 02035).** USEPA is currently developing a new refined dispersion model (AERMOD). The WDNR modeling team is awaiting word from USEPA as to the recommended model for regulatory use. **Until that time, the WDNR modeling team will continue using ISCST3 (02035) for all refined modeling applications.** (Emphasis added.)

Ex. 19, p. 9.

* * *

> **As stated previously, the current model approved for regulatory use is ISCST3** (02035). (Emphasis added.)

Id. at p. 14.

Klafka himself also testified that for at least 14 years ISC3 was "the accepted model to be used for permitting:"

> Q How long have you known that the DNR uses ISC3 as the model for refined modeling applications?
>
> A I've been modeling for maybe 14 years, so whenever they switched to ISC3 then I think all permitting would have switched over to that.

Tr. 353 (Klafka).

Klafka further testified at the hearing that "the ISCST3 model [used by the DNR] supports the issuance of the Kipp permit." Tr. 361-362 (Klafka).

In addition, Klafka conceded that an expert witness and consultant such as himself would be justified in **only** using ISC3 to apply for a Wisconsin air permit. Tr. 355 (Klafka). Likewise, Klafka conceded that Kipp's consultants were justified in relying on the approved ISC3 model for the permit in this case. Tr. 358 (Klafka). In fact, Klafka admitted that he had filed numerous air permit applications in Wisconsin for his industrial clients and that the only data ever provided by him to the DNR came from the ISC3 model. Tr. 360 (Klafka).

The hearing testimony also demonstrated that the use of ISC Prime or any other unapproved model would not be proper for several reasons. First, Mr. Roth unequivocally stated that "ISC Prime . . . is not ever going to be the allowed dispersion model that's used." Tr. 1212 (Roth). This is because the EPA has formally rejected ISC Prime as an approved model. Exhibit 275 is a Federal Register notice dated September 8, 2003 showing such rejection of the ISC Prime model by the EPA. As Mr. Podrez explained: "It's clear that [ISC Prime has] not only not been approved, but it is no longer being considered." Tr. 638-639 (Podrez).[9] Instead, the new model which DNR is currently considering for approval is AERMOD. Ex. 120.

Second, ISC Prime was developed for thermally buoyant emission sources such as electric power industry boilers, whereas Kipp's "emission sources are

[9] Mr. Podrez is an expert with regard to ISC Prime because he was one of the beta testers for that model. Tr. 626 (Podrez).

fundamentally different." Tr. 628-629 (Podrez). Third, DNR has a firm policy against utilizing unapproved models for any purpose. Tr. 1236 (Roth). Fourth, according to Klafka, ISC Prime was never tested with regard to TSP. Tr. 278 (Klafka).

Finally, it would be fundamentally unfair and would create chaos if any unapproved model were used. Approximately 1,280 operation permits and 1,861 construction permits had been issued by the DNR as of June 30, 2003. Ex. 269, pp. 38, 53. Out of those approximately 3,000 permits, none of them have used ISC Prime. Tr. 647 (Podrez). To order that ISC Prime be used in this case will put all 3,000 permits in jeopardy or discriminate against Kipp.

Even if the use of ISC Prime was scientifically justified for TSP, Mr. Roth explained that consistency requires using only EPA approved models:

> A Considering that we're a regulatory agency, we need to apply the rules consistently across the state. There are always going to be improvements and advancements, but until they've been deemed sound scientifically, we can't just take the first thing that rolls along, otherwise we'd be changing every few months as every university in the country would output things which were never soundly scientifically tested.
>
> Q Is it your position that ISC Prime has not been soundly scientifically tested?
>
> A It has not been approved by the USEPA.

Tr. 1236 (Roth).

Even Klafka agrees. He testified that it was reasonable for his industrial clients to use that same methodology for future permit applications that DNR had used in the past barring a change in regulatory structure. Tr. 388 (Klafka).

In addition to criticizing the DNR for not using ISC Prime, CAM criticizes the DNR for not using the "AERMOD" model. However, that model also has not yet been approved. Tr. 1163-1164 (Roth).

According to Mr. Roth, the latest draft version of AERMOD is still incomplete. Tr. 1163 (Roth). Thus, Mr. Roth testified that it would be impossible for the DNR to run AERMOD today, even if ordered to do so:

> A . . . So it still would be impossible to even run this new version of AERMOD with the preexisting meteorological data. In other words, we're still waiting on the rest of the pieces to be released by EPA. So, no, we still do not have a final version of AERMOD yet.
>
> Q And it hasn't been approved by EPA yet?
>
> A No, it has not.

Tr. 1163-1164 (Roth).

Moreover, if and when AERMOD is approved, a transition period will be needed to implement it. Klafka himself testified that he is a member of a DNR committee which had recommended a transition period if and when the DNR switches from ISC3 to a different model (such as AERMOD). Tr. 366 (Klafka). *See also*, Ex. 229.

In fact, the EPA has also proposed a one-year transition period if AERMOD is approved:

> We're proposing a one-year transition period after the final revisions to the guideline are promulgated. During that transition period, either AERMOD or ISC-3 may be used as appropriate. After the transition period is completed, ISC-3 will no longer be recommended for use.

Ex. 276, p. 37.

The DNR concurs that such one year transition is appropriate:

> The revised Guideline will list AERMOD as the recommended model, allowing for some number of days until effective rule date (possibly 60) followed by a one year transition period. The intent of this transition period is to allow work that was begun with ISCST3 to be completed. All new projects will be expected to use AERMOD.

Ex. 120.

For the foregoing reasons, Kipp believes that the proper approach is for the ALJ to allow the DNR and the EPA to continue their work to develop and approve a new model such as AERMOD. But until and unless AERMOD or another model is approved and the appropriate transition period is allowed, it would be unfair and chaotic to require use of that model today.

Likewise, the "SCREEN" model should not be used for regulatory purposes. First, Mr. Roth testified: "I do not feel that using a model that either has not been approved or a screening model, which has different algorithms, is an appropriate way to make a regulatory decision." Tr. 1024 (Roth). Second, the DNR has never used "SCREEN" for permit applications. Tr. 945 (Roth). Third, even Klafka testified that the "SCREEN" model was "not appropriate and not accurate and [you] could not use that as a tool." Tr. 449 (Klafka). Klafka also described the "SCREEN" as "a fairly simple model," with only "a couple of inputs." Tr. 448 (Klafka). Finally, even when Klafka used "SCREEN" data, CAM's evidence was limited to S19, which is not a stack or emission point covered by this permit. Ex. 222, pp. 27-28. Even then, the alleged exceedance

which Klafka found with regard to S19 was on *Kipp's property* and, therefore, *not* in a place where the public would be exposed. Tr. 1261-1263 (Podrez).[10]

C. The DNR Determination That There Were No Fugitive Emissions is Entitled to Great Weight Deference.

The DNR investigated the Kipp facilities and found no fugitive emissions. Tr. 1221 (Roth). The DNR's finding is entitled to great weight deference. Further, Klafka conceded that the alleged fugitive emissions addressed in his report did not come from S16 and S17:

> Q So . . . the fugitive emissions that you addressed did not come from these two aluminum furnaces or from Stack 16 or 17, true?
>
> A That's correct.
>
> Q Okay. They related entirely to the process by which hot aluminum is poured into the casting molds, which is the die casting operation, correct?
>
> A That's correct.

Tr. 316 (Klafka).

Mr. Podrez also testified that it is not possible for S16 and S17 to create fugitive emissions. Tr. 674 (Podrez).

Therefore, once again, CAM challenges decisions which were made in prior permits. Indeed, CAM raised these same concerns regarding fugitive

[10] CAM's brief also asserts that "DNR knew exposures in the downwash cavity were a problem," and bases this assertion on Exhibit 35, a 1994 DNR memorandum from Mr. Roth to Mr. Roushar entitled "Dispersion Modeling for Madison-Kipp Corporation." The 1994 memo describes a SCREEN2C analysis of downwash cavity effects from stacks that no longer exist at Kipp. Tr. 513 (Klafka). This analysis modeled emissions from the "RCI East" and "Emergency Generator" stacks, which had relatively high emission rates and short stack heights. *See* Ex. 35, Table 1. However, since neither of these stacks exists at the facility today, the 1994 memo does not provide any substantive information that downwash effects are important for the current Kipp facility configuration. *Id.*

emissions in 2001 in Exhibit 265, pp. 15-16, and the DNR rejected such assertions.

Even if the ALJ chooses to revisit fugitive emissions at this late stage, CAM's problem is that it presented no evidence at the hearing that there were fugitive emissions. First, Klafka testified that he is "not sure" whether any fugitive emissions come from Kipp: "I'm not sure if they exist." Tr. 342 (Klafka).

Instead of evidence, Klafka speculated that there may be fugitive emissions based upon a 1999 report from the engineering firm of Mead & Hunt (Ex. 48) and a 1995 emission inventory report (Ex. 46). However, Klafka was "not aware" (Tr. 335) that Kipp made substantial changes to its ventilation system in June, 2000. Tr. 895 (Meunier). These changes created a roof fan system which automatically activates to create a negative pressure in the Kipp buildings whenever the die casting machines are operated. Tr. 895 (Meunier) and 1257 (Podrez). An experienced DNR engineer also visited the Kipp facility to investigate and found no fugitive emissions following such changes. Tr. 1221 (Roth).

Second, in sharp contrast to Klafka's lack of any scientific testing, Mr. Podrez directed that "smoke bomb" tests be conducted at the Kipp buildings. Such tests confirmed that air moves into the buildings through windows and doors and not the opposite as alleged by Klafka. Ex. 263; Tr. 672 (Podrez).[11]

[11] "Smoke bomb" tests are an EPA approved method for determining whether fugitive emissions are present. Ex. 51, § 8.4; Tr. 1258-59 (Podrez).

D. The DNR's Determination Regarding Flagpole Receptors is Entitled to Great Weight Deference.

The DNR has determined not to use flagpole receptors in modeling any source using ISC3. The DNR's determination is entitled to great weight deference. Nonetheless, CAM asks the ALJ to change DNR's policy and force the use of flagpole receptors for Kipp.

Like most of CAM's other arguments, the flagpole receptor arguments are simply a rehash of objections which CAM made regarding previous permits.[12] For example, Klafka's November 15, 2000 written comments with regard to previous permits, 00-BSP-944 and 00-BSP-929, contain the same arguments made in this case with regard to flagpole receptors. Ex. 227, pp. 2-3, 5.

In a Memorandum dated November 16, 2000, the DNR rejected such arguments stating: "USEPA has only allowed use of flagpole receptors for purposes of model evaluation and not for regulatory (permit) applications." Ex. 259, p. 2. Likewise, the DNR Memorandum dated April 24, 2004 shows that the use of flagpole receptors was again raised with Region V of EPA and rejected. Ex. 26, p. 6.

Klafka also admitted that he had received an email from the EPA in calendar year 2000 which stated flagpole receptor data is not appropriate for a regulatory permit. Yet, he omitted such information in his report to the ALJ in this case. Tr. 430-431 (Klafka).

[12] As demonstrated above, Klafka conceded that the maximum impacts from S16 and S17 will occur at Lowell School without any exceedances. Tr. 437 (Klafka). Therefore, Klafka was forced to admit that a flagpole receptor at Lowell School is unnecessary in light of his own data. Tr. 437 (Klafka). Obviously, the same is true at locations closer than Lowell School.

Significantly, Klafka himself admitted that except for his Kipp report, he has never used flagpole receptor data in his entire professional career and has never provided such data to the DNR for his private clients. Tr. 427 (Klafka).

According to Roth and Podrez, a number of problems will occur if flagpole receptors are used. First, the regulatory defaults in the ISC3 model take ground reflection into consideration whereas ground reflection is not considered when flagpole receptors are used. Tr. 1008-1009 (Roth). Second, elevated external areas such as balconies are not areas where people will be present for 24 hours. Tr. 1011 (Roth), 661 (Podrez). Third, EPA guidance shows that Mr. Klafka is wrong in his opinion that flagpole receptors should be used at open windows and doors. Tr. 662 (Podrez). Fourth, even when Klafka used flagpole receptor data for balconies at condominium units on Maple Avenue, his analysis showed no exceedances. Tr. 669 (Podrez). Finally, Klakfa had been instructed by the EPA that before using flagpole receptors, he should consult with state regulators. Tr. 436-437 (Klafka). Klafka did just that and learned from the DNR "that they would not use them." *Id*.

IV. CAM'S REMAINING ARGUMENTS WERE NOT RAISED BEFORE THE DNR AND ARE WITHOUT MERIT

CAM raises six other arguments, but provides little, if any, explanation or analysis. *See* CAM brief, p. 22. These arguments suffer from various problems.

These arguments were not raised by CAM before the DNR on this permit and, therefore, are not properly a part of this proceeding. In this regard, the Administrative Law Judge has already ruled in this case:

> In general terms, however, *Thiensville* does support limiting the contested case issues to those raised in public comments before the DNR.

See, "Ruling on Motion to Dismiss Issues and Order Granting Partial Summary Judgment," pp. 7-8. (December 6, 2004); *See also, Thiensville*, 130 Wis. 2d at 281-282.

The six arguments are:

- Alleged failure to use the correct building and stack orientation.
- Alleged failure to use the worst-case emission rates from the Fair Oaks facility for stacks S03 and S05.
- Alleged failure to us the correct diameter for the Atwood facility roof vents including S19.
- Alleged failure to recognize the presence of rainhat obstructions on the Atwood facility roof vents.
- Alleged effect of off-site buildings.
- Alleged incorrect flow rates for S19.

Moreover, none of these arguments have merit.

A. The DNR Used Proper Building and Stack Location Orientation.

It is the recognized custom and practice in the engineering profession to use government plat maps in issuing air permits. Tr. 603 (Podrez). Thus, the DNR properly used City of Madison maps in its modeling analysis for Kipp. Tr. 604, 607-608 (Podrez); Exs. 260, 261, 262. There are distinct advantages in using government maps because they show legal property boundaries between parcels of property as well as the surrounding infra-structure such as streets. Tr. 603 (Podrez).

These maps have a generic north/south orientation which is often referred to as "magnetic north." Tr. 604 (Podrez). However, Klafka improperly

superimposed satellite photographs of the Kipp buildings, using a UTM coordinate system, based upon "true north," on to the DNR's receptor grid. Tr. 609-610 (Podrez). In this part of the country, there is roughly a 1.3 degree difference between the UTM and magnetic north coordinate system. Tr. 606 (Podrez). Thus, by comparing apples and oranges, Klafka creates a false impression that the DNR acted improperly. Mr. Podrez explained Klafka's error as follows:

> We're looking at the DNR layout in the plot map projection system, whereas this underlying satellite photo is in the UTM projection system; and so there's some apparent differences. I mean it makes it appear as if DNR modeled one of the Atwood buildings in the middle of the street, but its an apple to-oranges thing going on here. They're not in the same coordinate system.

Tr. 610 (Podrez).

In any event, the mixing of the two coordinates systems makes no difference according to Mr. Podrez's modeling analysis. Tr. 612-613 (Podrez). Mr. Roth also explained:

> The raw meteorological data is actually at 10 degree wind degree increments and the building preprocessor or input program, BPIP as we're calling it, also operates on 10 degree increments. So varying this by two degrees would not appreciably affect anything.

Tr. 1016 (Roth).

Even Klafka admitted that he did not know whether his building location arguments "made a difference." Tr. 444 (Klafka).

B. CAM's Remaining Arguments Can Be Summarily Rejected.

As the following chart demonstrates, CAM's remaining arguments can be summarily rejected:

Allegations	**Record Refutation**
Alleged failure to use worst case scenario emission rates for stacks S3 and S5.	These are different stacks from S16 and S17. The emission rates for S3 and S5, which are in the Fair Oaks facility, were not changed by Permit 03-POY-328. *Thiensville* prohibits such a challenge in this proceeding. As to the merits, Klafka incorrectly argues that the DNR should have used 3.5 lb/hr for the stacks. However, Klafka did not know that the emission rate had been changed to 2.3 pounds per hour. Thus, he acknowledged that he had been "sloppy." *See* Ex. 252, pp.423-425; Tr. 425-426 (Klafka). Klafka also erred in his assumption that under the worst case scenario, all emissions would come from one stack. Because the testimony showed that S3 and S5 are vented into separate stacks, Klafka's scenario is physically impossible. Tr. 602-603 (Podrez).
Alleged failure to use the correct diameter for the S19 Atwood roof vent(s).	Again, nothing to do with changes to S16 and S17 and, therefore, the challenge is barred by *Thiensville*. As to the merits, during the hearing Kipp presented testimony and photographs as to the actual diameter of these vents. Exs. 298 and 301; Tr. 1268-1269 (Podrez). Modeling with the actual diameter shows no significant effect to the DNR's modeling conclusions. Tr. 841-842 (Podrez); Ex. 297.
Allegation that obstructive rain hats are present on stack S19.	Again, nothing to do with changes to S16 and S17 and, therefore, is barred by *Thiensville*. As to the merits, the testimony and photographs showed that no rain hats or obstructions were present. Exs. 296 A-F; Tr. 829, 833, and 1269 (Podrez).
Allegation of effect of off-site buildings such as homes of dispersion modeling from Kipp's stacks.	Again, not related to S16 and S17, and, therefore, is barred by *Thiensville*. As to the merits, because Kipp is the highest structure in the vicinity, off-site buildings will not have an effect on plumes. Tr. 1017 (Roth); *See also* Tr. 616 (Podrez).

Allegation that incorrect flow rates were used for S19.	Again, nothing to do with S16 and S17 and, therefore, barred by *Thiensville*. Further, this testimony was not allowed by the ALJ at hearing because it was not presented in Klafka's report. Tr. 87-90. As to the merits, testimony at the hearing showed an anomaly in the computer program which when addressed showed no effect on the modeling. Exs. 297 and 298; Tr. 1268-1269 (Podrez).

CONCLUSION

As a legal matter, *Thiensville* is dispositive of all of CAM's arguments. There is no need to go further and this review proceeding should be dismissed on this basis alone. If the merits are addressed, the evidence is overwhelming that the DNR properly exercised its discretion and professional judgment in a highly technical regulatory area. The issuance of Permit 03-POY-328 should be affirmed.

Further, additional permit conditions should not be imposed beyond those ordered by the DNR. TSP monitors have already been utilized in the affected area for approximately 15 years. The monitoring data, together with modeling results, demonstrates that expensive additional monitoring would not yield exceedances. Moreover, since the date of the hearing, the DNR, as a result of CAM's advocacy outside of this hearing, has already installed a $PM_{2.5}$ monitor at Lowell School. *See* Exhibit A attached.

Similarly, permit conditions with regard to fugitive emissions are unnecessary. The roof fan system is already interlocked with the operation of the die casting machines. Nonetheless, to demonstrate its good faith, Kipp would

voluntarily accept a permit condition to continue to ensure that the roof fans are switched on whenever the die casting machines are operated.

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Respectfully submitted,

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