STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of an Air Pollution Control Construction Permit Issued to Madison-Kipp Corporation, Located in Madison, Wisconsin, Permit No. 03-POY-328	Case No. IH-04-12

Introduction

Petitioners challenge an air permit granted to Madison-Kipp Corporation by the Department of Natural Resources ("DNR"). In Wisconsin, no source of air pollution may construct, modify, or operate a stationary source of air pollution unless the DNR first issues a permit. Wis. Stat. § 285.60. Before issuing a permit, DNR must follow a prescribed process and ensure that specific conditions are met. Wis. Stat. §§ 285.61, 285.63. Among these conditions, DNR must ensure that the permittee complies with "all applicable emission limitations and other requirements promulgated under [Wis. Stat. ch. 285]… and emission standards for hazardous air contaminants under s. 285.27 (2)." Wis. Stat. § 285.63(1). DNR failed to follow the prescribed process or ensure that Madison-Kipp complies with all applicable emission limits and hazardous air contaminant standards.

DNR and Madison-Kipp request DHA to dismiss Petitioners' challenges to DNR's findings that it "complied with the procedures set forth in s. 285.61, Wis. Stats." and that Madison-Kipp "meets all of the applicable criteria in s. 285.63, Wis. Stats." (Findings of Fact

Conclusions of Law and Decision at 1). DNR and Madison-Kipp's numerous arguments can be distilled into three basic claims. First, DNR and Madison-Kipp argue that Wis. Admin. Code §§ NR 415.03 and NR 445.03 are not "applicable emission limitations" or "emission standards for hazardous air contaminants" pursuant to Wis. Stat. § 285.63. Petitioners will demonstrate, as a matter of law, that NR 415.03 and NR 445.03 are applicable standards and that NR 445.03 is an emission standard for hazardous air contaminants. Moreover, Petitioners will show that when these applicable standards are considered, Madison-Kipp does not comply and DNR cannot issue a permit.

Second, DNR and Madison-Kipp argue that Petitioners failed to exhaust administrative remedies. Specifically, DNR and Madison-Kipp claim that Petitioners failed to cite specific administrative code sections or make specific legal arguments in their public comments to DNR. Such specificity is not required. Moreover, public comments are not a prerequisite to a contested case hearing under the applicable law. Regardless, Petitioners' comments were sufficient.

Lastly, DNR and Madison-Kipp attempt to collaterally attack the sufficiency and timeliness of Petitioners' petition for a contested case hearing. This argument from DNR contradicts the DNR Secretary's decision to grant the hearing. Moreover, these arguments are untimely and inappropriate in this proceeding. The Secretary's decision to grant a contested case hearing is a separate agency decision from the permit decision at issue in this proceeding. Madison-Kipp could have, but failed to challenge the Secretary's decision within the statutory timeframe. It cannot now raise a collateral challenge to that separate decision in this proceeding.

I. DHA SHOULD DISMISS DNR AND MADISON-KIPP'S ATTEMPT TO CONFUSE THE ISSUES BY REFERENCE TO INAPPLICABLE REGULATIONS AND AN INAPPLICABLE NSR DECISION IN THE ELM ROAD CASE.

Many of the arguments raised by DNR and Madison-Kipp are irrelevant. DNR and Madison-Kipp point out that DNR has not yet promulgated an ambient air quality standard for PM2.5 in Wis. Admin. Code ch. NR 404. However, promulgating a standard in NR 404 is not a prerequisite to the application of NR 415.03 and NR 445.03. DNR and Madison-Kipp also point to an order in the Elm Road Generating Station contested case hearing ("ERGS") regarding a coal fired power plant air permit. However, the holding and reasoning in the ERGS order neither stands for what DNR and Madison-Kipp assert, nor is the order applicable to the facts of this case.

A. The ERGS Order Is Not Binding In This Case.

Madison-Kipp argues that Judge Coleman's decision in ERGS "is binding precedent which requires the dismissal of Petitioners' PM2/5 and NR 415/445 claims in this contested case." (Madison-Kipp Br. at 9). Unsurprisingly, Madison-Kipp cites no authority for this argument. It is well established law that administrative agencies are not bound under the doctrine of *stare decisis* by the principles, policies or holdings in prior determinations. 73A CJS *Public Administrative Law and Procedure* 157. In Wisconsin, it is well-established that "administrative agencies are not bound by stare decisis." *Nelson Bros. Furniture Corp., v. Wisconsin Dept. of Revenue*, 152 Wis. 2d 746, 756, 449 N.W.2d 328 (Wis. App. 1989);

Robertson Transport Co. v. Public Serv. Comm., 39 Wis. 2d 653, 661, 159 N.W.2d 636, 640 (Wis. 1968). A determination made by an administrative agency is not bound by prior determinations, but "relates only to the facts and conditions presented upon the pending proceeding." *Dairy Emp. Independent Union at Blochowiak Dairy v. Wisconsin Employment Relations Bd.*, 262 Wis. 280, 283, 55 N.W.2d 3 (Wis. 1952) (citing 73 C.J.S., *Public Administrative Bodies and Procedures* §§ 146-147, p. 480).

Further, Madison-Kipp inappropriately characterizes the ERGS order as a final determination by the agency. (Madison-Kipp Br. at 4, 9). However, the order is not final because "rights remain undetermined [and] the matter is retained for further action." 73A CJS *Public Administrative Law and Procedure* 157. The ERGS order relied on by DNR and Madison-Kipp is interlocutory in nature and may be appealed to the circuit court after the contested case hearing is concluded. Wis. Stat. § 227.52; *Pasch v. Department of Revenue*, 58 Wis. 2d, 346, 354, 206 N.W.2d 157 (Wis. 1973) (review of preliminary or procedural order is not generally reviewable); 73A CJS *Public Administrative Law and Procedure* 157 ("courts will not review preliminary, procedural, interim or interlocutory orders"). It is premature to assume that the ERGS scheduling order establishes any type of final decision in that case, much less any precedent for this case.

B. <u>The ERGS Order Does Not Prevent The Application of Wis. Admin. Code § NR 415.03 and 445.03 to Fine Particulate Emissions.</u>

DNR and Madison-Kipp assert that a DHA scheduling order limiting issues for hearing in the ERGS case prevents Petitioners from raising similar (and dissimilar) issues in this

proceeding. It must be noted, as a threshold matter, that the ERGS proceeding addresses wholly separate air pollution regulations. ERGS concerns New Source Review ("NSR") law, 42 U.S.C. §§ 7470-7479, 7502-7503, which is not at issue in this case. The ERGS order also specifically addresses a claim by the petitioners in that case that NR 415.03 establishes a higher standard for fine particulate matter ("PM2.5") emissions than EPA established as a National Ambient Air Quality Standard ("NAAQS"). (Order at 5-6). Petitioners in this case do not make this claim.

The only issue in common between this case and the ERGS case is the application of NR 415.03 to fine particulate or PM2.5 emissions. The ERGS order does not hold that NR 415.03 does not apply to PM2.5. Instead, the ERGS order addresses specific claims made by the petitioners in that case and applies specific laws and guidance applicable only to NSR laws. The only holding in the ERGS order that is relevant to this case is the determination that NR 415.03 does not require more stringent PM2.5 standards to protect human health than the standards established by EPA to protect health in NAAQS. (Order at 6).

Despite DNR and Madison-Kipp's attempt to interpret the ERGS order otherwise, the order actually supports Petitioners' position that PM2.5 concentrations must be considered under Wis. Admin. Code §§ NR 41.503 and NR 445.03. Section NR 415.03, Admin. Code, prohibits any person from causing, allowing, or permitting particulate matter to be emitted into the ambient air "which substantially contributes to exceeding or an air standard, or creates air pollution." The Administrative Code defines "air pollution" as "the presence in the atmosphere of one or more air contaminants in such quantities and of such duration as is or tends to be

injurious to human health or welfare, animal or plant life, or property, or would unreasonably interfere with the enjoyment of life or property." Wis. Admin. Code § NR 400.02(16).

EPA sets NAAQS at a level sufficient "to protect public health from adverse effects of the pollutant in the ambient air" and to protect public welfare, with an adequate margin of safety. 42 U.S.C. § 7409(b); *Whitman v. American Trucking Ass'n Inc.*, 531 U.S. 457, 473, 121 S. Ct. 903 (2001).

The ERGS order determined that compliance with the NAAQS for PM2.5 cannot, as a matter of law, create "air pollution" under Wis. Admin. Code § 400.02(16), based on its treat to human health. (Order at 6). This holding is a specific response to the ERGS petitioners' claim "that even if ERGS complies with NAAQS for a 'criteria' pollutant (a pollutant, like PM2.5, for which NAAQS has been established), the DNR must make an additional determination that the facility will not cause 'air pollution' with respect to that pollutant." Order at 5-6 (emphasis added). Judge Coleman accepted DNR and We Energy's position in ERGS that "a source may not be deemed to cause 'air pollution' (that is, be injurious to human health or the public welfare) as to a criteria pollutant if the source complies with standards and requirements pertinent to the NAAQS for that pollutant." Order at 6 (parenthetical original).

The corollary to the ERGS decision is: if a source will violate EPA's NAAQS for PM2.5, it is injurious to human health, by operation of law also creates "air pollution" in violation of Wis. Admin. Code §§ NR 415.03 and NR 445.03. This is specifically what Petitioners assert

DNR failed to consider before issuing a permit to Madison-Kipp. If DNR had considered Madison-Kipp's PM2.5 emissions, DNR could not have issued a permit to Madison-Kipp.

Rather than address the reasoning behind the ERGS order, DNR and Madison-Kipp take language out of context from that order to support their argument. Both DNR and Madison-Kipp quote the order's statement that

> To the extent that the Petitioners would seek to demonstrate that emissions from ERGS of PM2.5 or any other pollutant for which NAAQS have been established would result in "air pollution" as that term is employed in Wis. Stat. § 285.01(3) and Wis. Admin. Code §§ NR 400.02(16) and 405.09, those contentions are outside the scope of the regulatory framework and may not be litigated in the contested case hearing under the Petitioner's enumerated issues 3 and 4.

(See Order at 6) (Madison-Kipp Br. at 8; DNR Br. at 6-7). However, DNR and Madison-Kipp fail to recognize the limited context of this statement. When read alone, the statement appears to suggest that PM2.5 cannot cause "air pollution." However, when read in context, the statement addresses very specific facts and legal arguments in the ERGS case and actually supports the application of NR 415.03 to PM2.5 emissions.

The quote relied on by DNR and Madison-Kipp is premised on a preceding finding that the ERGS power plant would comply with PM2.5 NAAQS and addressed the claim that ERGS would violate NR 415.03 <u>despite</u> compliance with NAAQS. (Order at 5-6). When stating that proving PM2.5 would cause "air pollution" is outside the regulatory framework, the ALJ in ERGS was specifically rejecting the claim that regulations prohibiting "air pollution" set a higher

standard than NAAQS. (Order at 6). Instead, the judge held, the standard for "air pollution" and the standard at which NAAQS is set are virtual legal equivalents.

> The primary and secondary NAAQS for PM2.5 constitute uniform national standards for a pollutant at a level that the federal government has determined to be necessary, without regard to the economic costs of meeting the standards, 'to protect the public health from adverse effects of the pollutant in the ambient air' and to protect the public welfare from any known or anticipated adverse effects… Thus, by statutory and regulatory definition, there is no 'air pollution' (or, put another way, there is no injury to public health or welfare) as to the 'criteria' pollutant if standards and requirements attendant to the NAAQS for that pollutant are met.

Order at 6 (parenthetical original).

The ERGS ALJ's reasoning does not support DNR and Madison-Kipp's interpretation: that a pollutant for which NAAQS is established cannot create "air pollution," even if NAAQS is being violated. Indeed, the ALJ equates "air pollution" and NAAQS. (Order at 6). If a source that complies with NAAQS, like the ERGS power plant, cannot by law create "air pollution" it necessarily follows that when a source does violate NAAQS it by law also creates "air pollution." Because the standards are equivalents, it would be unreasonable to find that a violation of a NAAQS, does not also violate the parallel human-health standard in NR 400.02(16) and 415.03.

Petitioners in this case will prove that Madison-Kipp's emission will violate the NAAQS for PM2.5 and will, therefore, create "air pollution" in violation of NR 415.03. (See Order at 6 (equating the injury to public health and welfare component of "air pollution" to NAAQS standards)). Unlike the ERGS petitioners, Petitioners in this case are not attempting to prove that

Madison-Kipp will cause air pollution despite complying with NAAQS, but that it will cause air pollution specifically because it violates NAAQS. Not only does the ERGS order pe\
|mit this showing, it invites it.

C. Unlike the ERGS Case, There Is No Surrogate Approach For Determining Compliance with NAAQS Here Because This Is Not A NSR Case.

1. *The 1997 Memo relied on in the ERGs case does not apply.*

In the ERGs order the ALJ found that DNR ensured compliance with the PM2.5 NAAQS by applying EPA's recommended "surrogate approach." (ERGs Order at pg. 4). EPA's "surrogate approach" is set forth in a 1997 memo that applies only to NSR permitting. Memorandum from John Sietz, the Director of Office of Air Quality Planning & Standards, *SUBJECT: Interim Implementation of New Source review Requirements* (October 23, 1997) ("1997 Memo", attached hereto as Exhibit A. The 1997 Memo specifically "addresses the interim use of PM10 as a surrogate for PM2.5 in meeting new source review (NSR) requirements under the Clean Air Act (Act), including the permit programs for prevention of significant deterioration of air quality (PSD)." (1997 Memo, ¶2).

Madison-Kipp and DNR argue that EPA's NSR surrogate approach should apply to Madison-Kipp's permit. (DNR Br. at 4; Madison-Kipp Br. at 5, 9). However, this is not an NSR case and the guidance does not apply to the air pollution standards at issue in this case. If DNR and Madison-Kipp would rather apply NSR standards in this case, Petitioners would gladly oblige.

Moreover, there is no indication that DNR applied the 1997 NSR guidance memo's "surrogate approach" to PM2.5. Neither the Analysis and Preliminary Determination DNR prepared to justify the permit, nor the DNR's Response to Public Comments mentions that approach. (*See* Analysis and Preliminary Determination for the Construction and Operation Permits for the Proposed Modification of RCI-1 and RCI-2 Aluminum Melting Furnaces for Madison-Kipp Corp, Located at 2824 Atwood and 201 Waubesa, Madison, Dane County, Wisconsin, Permit # 03-POY-328 and 03-POY-328-OP and/or 113014220-P02,Facility ID # 113014220; Response to Comments, attached hereto as Exhibit B). In fact, DNR's Response to Comments only provides a legal argument that DNR is not required by law to consider PM2.5. (See Response to Comments at p. 2). DNR's claim at page 4 of its brief that it followed EPA's surrogate approach guidance when permitting Madison-Kipp is the first time the agency makes that claim.

2. *The 1997 Memo is no longer applicable.*

Even assuming the 1997 Memo once applied to non-NSR permitting, it no longer applies. The 1997 Memo "addresses how to implement PSD for PM2.5 in light of significant technical difficulties which presently exist." (1997 Memo, ¶ 2). The 1997 Memo endorses the use of PM10 as a surrogate for PM2.5 only until technical difficulties "that now exist with respect to PM2.5 monitoring, emission, estimation, and modeling" are resolved. (1997 Memo, ¶1). The 1997 Memo states that "the lack of necessary tools to calculate emissions of PM2.5 and related precursors and project ambient air quality impacts so that sources and permitting authorities can adequately meet the NSR permitting requirement for PM2.5" must be resolved. (1997 Memo, ¶

3). Thus, the 1997 Memo merely defaults into the use of PM10 as a surrogate because there was insufficient knowledge regarding PM2.5 modeling in 1997. (1997 Memo, ¶6).

It is now late 2004. Progress has been made in the seven years since the 1997 Memo was issued. The 1997 Memo is no longer applicable because the underlying technical and informational difficulties that formed the basis for the 1997 Memo have been resolved. DNR has collected sufficient monitoring data, is currently modeling for PM2.5 for some permitting decisions, and can project PM2.5 ambient air quality impacts. Since 1999, DNR has been operating a statewide PM2.5 monitoring network. (Bender Aff., Ex. A at 123). DNR has calculated and made available to the public the PM2.5 background concentrations for areas around the state. (Klafka Aff., Ex. C). Additionally, DNR has created and is employing a 2.5 modeling procedure for permit decisions at a number of sources. For example, PM2.5 modeling was performed for the proposed Weston 4 power plant in Wausau and for the MG&E UW West Campus Co-Generation facility in Madison. (Bender Aff., Ex. B at xxi). Moreover, DNR required PM2.5 modeling to be included in the July 14, 2004 construction permit application submitted by ThyssenKrupp Waupaca, Inc. for its Plant 1 MACT/Upgrade Project. (Klafka Aff. ¶ 5). Clearly, the technical problems justifying the 1997 Memo have been resolved and the memo no longer applies.

3. *The 1997 Guidance Document is not binding*

Whatever persuasive value the 1997 NSR decision might have for NSR permitting, it is explicitly non-binding. The 1997 Memo, itself, states that it does "not bind State and local governments and the public as a matter of law." (1997 Memo, ¶7). Moreover, informal agency

guidance does not have the force of law as if it were a promulgated regulation. *General Electric Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002);*Air Transport Association of America, Inc. v. Federal Aviation Administration*, 291 F.3d 49 (D.C. Cir. 2002).

4. *The 1997 Memo is wrong as a matter of law*

The 1997 Memo's use of PM10 NAAQS compliance as a surrogate for PM2.5 NAAQS compliance contravenes the clear language and the intent behind the PM2.5 NAAQS. EPA determined that the PM2.5 NAAQS was necessary because PM10 standards are insufficient to prevent serious health effects from particulate matter in sensitive populations, including mortality, exacerbation of chronic disease, increased hospital admission, as well as "significant adverse health effects in children" such as increased respiratory symptoms, school absences and decreased lung function. 62 Fed. Reg. 38657.

> Given the significant physical and chemical differences between the two subclasses of PM10 (U.S. EPA, 1996b, pp. V-69-78), it is reasonable to expect that differences may exist between fine and coarse fraction particles in both the nature of potential effects and the relative concentrations required to produce such effects. The Criteria Document highlights a number of specific components of PM that could be of concern to health, including components typically within the fine fraction (e.g., acid aerosols including sulfates, certain transition metals, diesel particles, and ultrafine particles), and other components typically within the coarse fraction (e.g., silica, resuspended dust, and bioaerosols). While components of both fractions can produce health effects, in general the fine fraction appears to contain more of the reactive substances potentially linked to the kinds of effects observed in the epidemiological studies. The fine fraction also contains by far the largest number of particles and a much larger aggregate surface area than the coarse fraction. The greater surface area of the fine fraction increases the potential for surface absorption of other potentially toxic components of PM (e.g., metals, acids, organic

> materials), and dissolution or absorption of pollutant gases and their subsequent deposition in the thoracic region.

National Ambient Air Quality Standards for Particulate Matter, Proposed Rules, 61 Fed. Reg. 65637, 65648-49 (proposed December 13, 1996).

Therefore, EPA's reason for promulgating a PM2.5 standard was the inadequacy of the PM10 standard for protecting human health. The 1997 Memo's attempt to reverse this finding and equate PM10 and PM2.5 NAAQS is an affront to the rulemaking process. To the extent that DNR does apply the 1997 Memo as guidance, DNR acts arbitrarily, capriciously, and in violation of law.

II. THE EXHAUSTION OF REMEDIES DOCTRINE DOES NOT BAR PETITIONERS' CLAIMS IN THIS PROCEEDING.

Madison-Kipp and DNR argue that Wisconsin law prevents Petitioners from challenging DNR's compliance with Wis. Stat. § 285.63 because Petitioners failed to cite specific code sections and make comprehensive legal arguments during the public comment period. (Madison-Kipp Br. at 11; DNR Br. at 8-10). However, neither Wisconsin law nor the facts in this case support these arguments. DNR and Madison-Kipp's arguments regarding exhaustion of remedies fail for four reasons. First, unlike the federal counterpart that DNR relies on, Wisconsin's right to a contested case hearing does not require a petitioner to raise any issues in the public comment period. Second, the *Thiensville v. DNR* case that DNR and Madison-Kipp rely on does not require Petitioners to raise specific issues in the public comment period on an original permit decision, especially when DNR is required by statute to consider all applicable standards, had an opportunity to do so, and in fact claims to have done so. Third, exhaustion of

remedies is never required where, as here, the issue is an interpretation of law and the agency has already announced its interpretation. Lastly, the facts show that Petitioners did raise all relevant issues in the public comment period.

A. Petitioners Are Not Required to Exhaust Remedies Prior to A Contested Case Hearing Under Wisconsin Law.

According to DNR and Madison-Kipp, the common law rules of judicial economy and exhaustion of remedies require Petitioners to take some additional step prior to requesting and receiving a contested case hearing. (MKC Br. at 11-12; DNR Br. at 8-10). It is not clear what, exactly, DNR and Madison-Kipp would have Petitioners do. It appears from the briefs that DNR and Madison-Kipp argue that Petitioners are required to specifically cite all relevant administrative code sections during the public comment period as a prerequisite to raising DNR's failure to comply with those provisions in a contested case hearing. (MKC Br. at 11; DNR Br. at 9). This argument fails to find support in either common sense or the applicable statutes.

DNR relies on federal statutes and rules that require a person petitioning the EPA Administrator to object to a Clean Air Act Title V permit to first raise specific objections in the public comment period. (DNR Br. at 10 (citing 42 U.S.C. § 7661d(b)(2) and 40 C.F.R. 70.8(d)). The federal regulations are irrelevant. Petitioners did not petition the EPA Administrator. Instead, Petitioners requested the DNR Secretary to grant a contested case hearing under Wis. Stat. §§ 227.42 and 285.81, which he did. Unlike the standard for review under federal law, Wisconsin law does not require those petitioning for a contested case hearing to first raise the

specific objections in the public comment period. In fact, Wis. Stat. § 285.81 specifically provides a right to a hearing to those who did not submit public comments. The statute provides that:

> Any person who is not entitled to seek a hearing under [Wis. Stat. § 285.81(1)] and who meets the requirements of s. 227.42 (1) or who submitted comments in the public comment process under s. 285.62 (4) or (5) may seek review under sub. (1) of any permit, part of a permit, order, decision or determination by the department under ss. 285.39, 285.60 to 285.69 or 285.75.

Wis. Stat. § 285.81(2) (emphasis added). The use of the word "or" is usually disjunctive, meaning "in the alternative." *Chmill v. Friendly Ford-Mercury of Janesville, Inc.*, 144 Wis. 2d 796, 424 N.W.2d 747 (Ct. App. 1988) (citing *Brody v. Long*, 13 Wis. 2d 288, 295-96, 108 N.W.2d 662) (1961)), *rev'd on other grounds* 154 Wis. 2d 407; *See also State v. Johnson*, 171 Wis. 2d 175, 180, 491 N.W.2d 110 (Ct. App. 1992). In other words, the plain language of Wisconsin's contested case hearing statutes not only do not require a petitioner to raise issues during the public comment period as a prerequisite to a contested case hearing, but the statutes explicitly provide a contested case hearing for those who did not submit public comments.

Just as the relevant statutes do not require Petitioners to raise issues in public comments as a prerequisite to a hearing, neither does the caselaw that Madison-Kipp and DNR rely on. The Court of Appeals in *Thiensville v. DNR* did not establish a broad rule requiring every contested case petitioner to raise all issues in public comments before qualifying for a contested case hearing. 130 Wis. 2d 276, 286 N.W.2d 519 (Ct. App. 1986). The holding in *Thiensville* is based on the facts in that case and is much narrower.

The *Thiensville* court addressed two issues: 1) whether a hearing examiner must hear a permittee's challenges to the original permit terms while conducting a hearing specifically granted for review of limited permit modifications, 130 Wis. 2d at 279 ("we first address Thiensville's argument that the hearing examiner erred in refusing to consider terms of the original permit which were not changed by the modified permit"); and 2) whether a hearing examiner must allow a permittee to present evidence of facts occurring after DNR issued permit modifications. 130 Wis. 2d at 282 ("Thiensville further argues that the hearing examiner erred in refusing to extend his inquiry to matters after the permit modification."). Neither of these issues exists in this case. Rather than addressing issues collateral to DNR's permit decision, Petitioners challenge DNR's affirmative determinations that it followed all procedures in Wis. Stat. § 285.61 and that Madison-Kipp will comply with all applicable limits in Wis. Stat. § 285.63. (Findings of Fact Conclusions of Law at 1). Petitioners ask DHA to review these determinations.

The *Thiensville* court was concerned with allowing an ALJ to decide issues outside the scope of the agency's decision being reviewed. *Id.* at 180-81. The contested case hearing at issue in *Thiensville* involved a DNR decision to modify specific and limited provisions in an existing water pollution permit. *Id.* The agency did not address, was not required by statute to address, and did not have an opportunity to address provisions of the original permit, other than those limited provisions modified by DNR. *Id.* The village petitioner in *Thiensville* failed to petition for a contested case hearing after the original permit was issued to contest the terms. Instead, the village attempted to collaterally attack the original permit terms years later in the contested case hearing on the modifications. *Id.* The court noted that the village was attempting

to reopen other permit terms, which there was a statutory process for doing. For all of these reasons, the court held that the village could not effectively reopen its non-modified permit provisions in a contested case hearing that was granted for specific permit modifications. *Id.*

The *Thiensville* reasoning does not apply to this case. This case involves an original permit action. DNR was required by statute to ensure that Madison-Kipp would comply with all applicable air pollution limits and other requirements before granting a permit to Madison-Kipp. Wis. Stat. § 285.63(1). DNR claims to have considered all applicable limits and requirements and to have determined that Madison-Kipp would comply. (Finding of Fact Conclusion of Law at 1).

To the extent that DNR claims that it should be permitted to have the "first opportunity" to determine whether Madison-Kipp will comply with NR 415.03 and NR 445.03 (DNR Br. at 10), DNR is admitting that it never considered those facts before issuing a permit to Madison-Kipp. DNR should not be able to avoid DHA review of DNR's failure to comply with statutorily required findings by claiming at the hearing that DHA cannot review what DNR has not yet considered.

B. Even if the Exhaustion of Remedies Doctrine Applies, Petitioners' Claims Fall Within the Well-established Exceptions.

The exhaustion doctrine is not a mandatory rule. Instead, it is a common law rule of discretion that does not apply in circumstances where a reviewing court considers questions of law, even if those questions were not considered in the underlying administrative process below. *See Foundation of Economic Trends v. Heckler*, 756 F.2d 143, 156 (D.C. Cir. 1985). In fact,

Madison-Kipp and DNR allege that Petitioners were required to exhaust remedies on the legal issue of whether Wis. Admin. Code §§ 415.03 and 445.03 apply to Madison-Kipp's emissions. This is specifically the type of agency decision that does not require exhaustion because its is an interpretation of law and the agency "is not deprived of the opportunity to develop the factual record or to apply its expertise to the problem." *Commonwealth of Mass. v. Lyng*, 893 F.2d 424 (1st Cir. 1990); see also *Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991); *Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation*, 792 F.2d 782 (9th Cir. 1986); *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983).

Further, the exhaustion policy does not apply when additional steps at the agency level would be futile because the agency has already considered the issue and made its understanding of the law clear. *El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*, 959 F.2d 742 (9th Cir. 1992); Arens v. Bowen, 852 F.2d 49 (2d Cir. 1988); *Youghiogheny and Ohio Coal Co. v. Warren*, 841 F.2d 134 (6th Cir. 1987) (agency adherence to interpretation that has been challenged previously shows that attempt to raise before the agency would be futile); *Porter Cty. Chap. Of Izaak Walton League v. Costle*, 571 F.2d 359, 363-64 (7th Cir. 1978). In this case, neither DNR nor Petitioners would have benefit if Petitioners' public comments had specifically cited to Wis. Admin. Code §§ NR 415.03 and 445.03. DNR makes clear in its brief that the agency simply does not consider NR 415.03 and 445.03 to applicable to Madison-Kipp's emissions. (DNR Br. at 5-8).

Exhaustion is not required when the "exhaustion of administrative remedies would be futile because the administrative agency will clearly reject the claim." *Taylor v. United States*

Treasury Dept., 127 F.3d 470, 477 (5th Cir. 1997); *League of Women Voters v. Outagamie County*, 113 Wis. 2d 313, 320-21, 334 N.W.2d 887 (Wis. 1983); *Nodell Inv. Corp. v. Glendale*, 78 Wis. 2d 416, 425 n. 12 (citing *Cooper*, Cooper, State Administrative Law 577-78 (1965); Jaffe, Judicial Control of Administrative Action 426 (1965); Admin. Law Treatise, §§ 20.04, 20.05, 20.07, 20.10 (1958)). Even if Petitioners had specifically cited Administrative Code sections NR 415.03 and NR 445.03 the parties would nevertheless be exactly where they are now: arguing the legal issue of whether NR 415.03 and NR 445.03 apply to Madison-Kipp. This needless circuity is not required by the exhaustion of remedies doctrine. *Dairyland Power,* 52 Wis. 2d at 54, 55-56.

C. Public Comments Did Give DNR Notice That It Failed To Consider The Specific Characteristics of Madison-Kipp's Emissions That Constitute The Operative Standards In NR 415.03 and NR 445.03.

As noted above, Wis. Admin. Code §§ NR 415.03 and 445.03 prohibit emissions of particulate matter and hazardous substances in quantities, concentrations, or durations that are injurious to human health or to plant or animal life. Wis. Admin. Code §§ NR 400.02(16), NR 415.03, NR 445.03. Additionally, NR 415.03 prohibits emissions of particulate matter "in such quantities and of such duration as… would unreasonably interfere with the enjoyment of life or property." Wis. Admin. Code §§ NR 400.02(16), NR 415.03. Despite DNR and Madison-Kipp's assertions to the contrary (DNR Br. at 8-9; MKC Br. at 11-12) the public comments submitted in this proceeding did address the relevant standards in NR 415.03 and 445.03. The only thing missing from the public comments are specific cites to administrative code sections. However, public comments are not formal legal documents that would require attorneys to draft.

Public comments must be read broadly, "in the context of the broad public purpose of public participation rules… the public must have a genuine opportunity to speak on the issue of protection of its waters on federal, state and local levels." *Adams v. U.S. EPA*, 38 F.3d 43, 51 (1st Cir. 1994) (internal cites and quotes omitted) (addressing public comments submitted regarding a Clean Water Act permit). In *Adams* the First Circuit held that arguably vague public comments were sufficient because of the important public purpose of public comments. *Id.* at 52. Although the petitioner in *Adams* did cite to a public law forming the basis for one of his challenges to a water pollution permit, the *Adams* court held that public comments need not contain precise scientific and legal challenges. *Id.*

> It would be inconsistent with the general purpose of public participation regulations to construe the regulations strictly. Such a strict construction would have the effect of cutting off a participant's ability to challenge a final permit by virtue of imposing a scientific and legal burden on general members of the public who, initially, simply wish to raise their legitimate concerns regarding a wastewater facility that will affect their community, in the most accessible and informal public stage of the administrative process, where there is presumably some room for give and take between the public and the agency.

Id.; *See also In re Sutter Power Plant*, 8 E.A.D. 680, 687-88 (EAB 1999) (petitions for EAB review need not contain "sophisticated legal argument or to employ precise technical or legal terms").

A review of the written comments submitted to DNR shows that the comments did address the issues relevant to Petitioners' challenge in this proceeding. The comments note that a large percentage of the particulate emissions from Madison-Kipp will be less than 2.5 microns

in size and that such emissions cause significant health risks. Specifically, Clean Air Madison's comments stated:

> Approval [of] the permit is based on compliance with the 150 ug/m3 air quality standard for total suspended particulate matter (TSP). This standard was adopted by the USEPA as a national air standard in 1971 and is decades old. In 1997 USEPA adopted a new 65 ug/m3 air quality standard for particles less than 2.5 microns in size (PM2.5). This new standard addresses the serious health effects of very small particles. The PM emissions from MKC are generated by the aluminum furnaces and condensation of die casting lube oil, so a large percentage of the emissions will [be] particles in this small size range.
>
> To accurately assess the impacts of the foundry emissions, the DNR should compare the foundry impacts with the new, more restrictive PM2.5 air quality standard. Based on the modeling results presented by the DNR preliminary determination, the impact of [Madison-Kipp] operations alone, not considering background concentrations, would exceed the PM2.5 air quality standard. This exceedence [sic] of the new standard demonstrates the need for control of the foundry emissions to assure the protection of neighborhood residents.

See Comments of Clean Air Madison at 10, attached hereto as Exhibit C.[1]

Another commenter, Dr. Robert Moore, submitted written comments which stated, in part:

> No information is provided about the nature of the aluminum salts. How can the toxicity of these salts be evaluated?
>
> No information is provided about the size distribution for particulate matter. As I'm sure you are aware, particulate toxicity depends greatly on the size of the particles. All other things being equal, particles 20 um in diameter would be far less toxic than an equal concentration (by weight) of particles 1 um in diameter because the

[1] Notably, Petitioners did not claim that the federal NAAQS applies to Madison-Kipp's emissions, but that it is instructive as to the "safe" level of air pollutant concentrations for the neighborhood. As Judge Coleman pointed out, the NAAQS is the equivalent to the human health-based "air pollution" standard in Wis. Admin. Code § NR 415.03.

> former would not get very far into the respiratory passageways whereas the latter would deposit largely in the alveoli.
>
> Similarly, no information is provided about the chemical nature of the particles. The potential toxicity of these particles cannot be determined without knowing, at minimum, their elemental composition and the molecular identity of the major constituents. There is absolutely no scientific grounds for regulating particles as if "a particle is a particle."
>
> …
>
> In closing, the bottom line is that the information posted on the DNR Web site is inadequate to make regulatory decisions that conform to the DNR requirement that "No person may cause, allow, or permit emissions into the ambient air of any hazardous substance in such quantity, concentration, or duration as to be injurious to human health" …

(Comments of Robert Moore, attached hereto as Exhibit D). The underlined language is almost verbatim the language of Wis. Admin. Code § 445.03. DNR responded to these comments by identifying hazardous substances and acknowledging its authority to regulate them. DNR's response states:

> Based on the permit application, description of raw materials and proposed permit requirements, the hazardous air pollutants expected from these operations have been reviewed. Chlorine, hydrogen chloride, aluminum salts, 2,3,7,8-tetrachlordibenzo-p-dioxin, and particulate matter were found to be the potential pollutants emitted at Madison-Kipp Corp. that the DNR has the authority to regulate.

(Response to Comments at 4).

In summary, while public comments submitted to DNR never specifically cited Section NR 415.03 and NR 445.03 of the Administrative Code, the comments did notify DNR that the proposed permit would allow emissions of hazardous substances, including fine particulate matter, in quantities, concentrations, or durations that are injurious to human health. In fact, the public comments submitted by Dr. Moore quote NR 445.03 and specifically note that DNR fails

to satisfy its non-discretionary duty to ensure that emissions of hazardous substances will not be injurious to human health.

Public comments are not a prerequisite to a contested case hearing in Wisconsin. Exhaustion of remedies does not apply to this case. But nevertheless, Petitioners did sufficiently notify DNR of their objections to DNR issuing a permit to Madison-Kipp. Public comments cannot be expected to meet highly technical or legal specificity standards if the public is truly expected to participate.

III. THE SPECIFIC PARTICULATE MATTER LIMITS IN NR 404 AND NR 415.05 DO NOT REPEAL, PREEMPT, OR DISPLACE THE GENERAL LIMITS IN NR 415.03 AND 445.03

DNR argues that because the limits in NR 415.03 and 445.03 are "general" limits, they are superceded by the "specific" limits in NR 415.05(1)(g) and (2) and NR 404. (DNR Br. at 5-7). This argument is premised on DNR's misunderstanding of the canons of statutory construction. DNR implies that a specific statute always displaces a general statute. (DNR Br. at 6). However, DNR misinterprets the cannon of construct to which it alludes. The Wisconsin Supreme Court in *State v. Dairyland Power Coop*. rejected the very argument made by DNR in this case. 52 Wis. 2d 45, 53, 285 N.W.2d2d 604, 611 (1971).

In *Dairyland Power* the state sued a power plant to abate a nuisance caused by "air fumes, smoke, gases, soot and other particles and chemicals for a sufficient duration and in a sufficient quantity so as to contaminate and pollute the atmosphere and air…" *Id.* at 47. The Supreme Court held that specific statutes regulating air pollution do not

preclude the application of a more general nuisance statute to air pollution. *Id.* at 50-51. In fact, the Supreme Court rejected an argument by an amicus utility company that "where a general and a specific statute relate to the same subject matter, the specific controls." *Id.* at 53. The court held that "the rule that the more specific governs the more general… requires more than the mere existence of one general and one specific statute. It is also necessary that there be an irreconcilable conflict between the two provisions in question." *Id.* at 53 (emphasis added). "[A]s the rule specifically states, a specific statute controls over a general statute only when the two statutes are in conflict." *Mack v. Joint Sch. Dist. No. 3*, 92 Wis. 2d 476, 490, 285 N.W.2d 604 (1979); see also *City of Muskego v. Godec*, 167 Wis. 536, 543-44, 482 N.W.2d 79 (1992); *Employees Local 1901 v. Brown Cty.*, 146 Wis. 2d 728, 735, 432 N.W.2d 571 (Wis. 1988); *Moran v. Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 553, 150 N.W.2d 137 (Wis. 1967).

Chapter NR 404 and Section NR 415.05 do not preclude the application of Section NR 415.03 because these standards do not conflict. Madison-Kipp can comply with the requirements of NR 415.05 and NR 404, as well as complying with the requirement that it not emit pollutants in a quantity, concentration, or duration that could injury health, impair plant or animal life, or create a nuisance. *See* Wis. Admin. Code §§ NR 400.02(16), NR 415.03, and NR 445.03.

DNR also attempts to create a regulatory black hole for fine particulate matter. First DNR states that it has not yet promulgated a PM2.5 ambient air quality standard under Wis. Stat. § 285.21(1). (DNR Br. at 2). DNR points out that adoption of a NAAQS by EPA is not the same as adoption by DNR into NR 404. (DNR Br. at 2-3). Therefore, PM2.5 is not regulated as

a criteria pollutant in Wis. Admin. Code ch. NR 404. (DNR Br. at 2) Later DNR claims that PM2.5, or fine particulate matter, is not a "hazardous air contaminant" under Wis. Admin. Code § NR 445.01(2)(7) because the definition of hazardous air contaminant excludes air contaminants for which an ambient air quality standard is set in NR 404. (DNR Br. at 7). DNR wants it both ways. How does DNR explain is conflicting claims that PM2.5 is not regulated under an air quality standard set in NR 404 and that it is excluded from the definition of a "hazardous air contaminant" because it is regulated by an air quality standard in NR 404? Apparently by looking to the future and applying future laws. DNR states that "[w]hile is true that the PM2.5 ambient standards are not yet set forth in ch. NR 404, Wis. Admin. Code, when DNR promulgates the PM2.5 standards, they will go in NR 404, Wis. Adm. Code." (DNR Br. at 7). DNR asks DHA to apply this bizarre logic and create a gap in current regulations to excuse DNR's failure to consider PM2.5 under any regulation. Such an absurd result must be rejected.

IV. DNR IS REQUIRED TO ADEQUATELY CONSIDER PUBLIC COMMENTS DURING THE PUBLIC COMMENT PROCESS.

Madison-Kipp contends that Petitioners cannot claim that DNR did not consider comments received from the public. But, that is precisely what Petitioners are claiming. Petitioners have been granted the opportunity to present evidence to the effect that DNR did not adequately consider comments submitted by the public during the public comment period and the public hearing on Construction permit 03-POY-328 and Petitioners intend to show just that. As noted by the United States Court of Appeals for the District of Columbia "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977). As the *Home Box Office* court

noted, agency response to public comments is mandated so that a reviewing court can "assure itself that all relevant factors have been considered by the agency. *Id.* The agency must consider comments with an open mind. A "consideration of comments as a matter of grace is not enough." *McLouth Steel Products Corporation v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1987).

During the public comment period for Madison-Kipp's construction permit individual commenters raised issues for consideration by the DNR that the DNR neither adequately considered nor responded to.

DNR did not address the toxicity of fine particulate matter. Dr. Moore noted that "particulate toxicity depends greatly on the size of the particles." (CITE) Moreover, Dr. Moore stated that DNR had insufficient information to conclude that Madison-Kipp would comply with the requirement that "no person may cause, allow, or permit emissions into the ambient air of any hazardous substance in such quantity, concentration, or duration as to be injurious to human health." (CITE)

None of these significant comments were addressed by DNR, indicating that they were not even considered. This violates Wis. Stat. § 285.61(8), which requires DNR to consider public comments before issuing a permit.

V. DNR GRANTED PETITIONERS CONTESTED CASE HEARING AND PETITIONERS COMPLIED WITH ALL PROCEDURAL REQUIREMENTS

On July 1, 2004 DNR Secretary Scott Hassett granted Petitioners request for a contested case hearing on three specific issues. The decision by Secretary Hassett was the final decision

by DNR to grant Petitioners contested case hearing and was a distinct agency action to DNR's decision to grant a permit to Madison-Kipp. If DNR believed that Petitioners petition was insufficient under Wisconsin Statute section 285.81, DNR should have, and would have, denied Petitioners request. But, DNR did not deny Petitioner's request, therefore, the contested case hearing is properly authorized by DNR.

Section 227.42(2), Stats., provides that a denial of a request for a hearing is an separate agency decision that is reviewable under Wis. Stat. ch. 227. Wis. Admin. Code AP § 227.42(2). Although the section states that a denial of a hearing request is reviewable and does not address a grant of a contested hearing, it clearly demonstrates that the decision to grant a contested case petition is a distinct agency decision decision.

If Madison-Kipp believes that the DNR Secretary erred by granting this contested case hearing, Madison-Kipp could have and should have challenged that decision. However, the time for challenging the decision has passed and Madison-Kipp cannot now collaterally attack the Secretary's decision. Wis. Admin. Code § NR 2.05 (time for challenging agency action is 30 days unless otherwise specified).

Conclusion

Petitioners request Madison-Kipp's Motion be denied.

Respectfully submitted this 15th day of October, 2004.

Porter, Jablonski & Assoc., S.C.

By: _____

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