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BEFORE THE ADMINISTRATOR
OF THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

SIERRA CLUB, WISCONSIN'S)
ENVIRONMENTAL DECADE, CLEAN WATER)
ACTION COUNCIL OF NORTHEASTERN)
WISCONSIN, CITIZENS FOR SAFE WATER)
AROUND BADGER, CITIZENS FOR A BETTER)
ENVIRONMENT, WISCONSIN INTERFAITH)
CLIMATE CHANGE COALITION, WISCONSIN)
PUBLIC INTEREST RESEARCH GROUP,)
Petitioners,)
V.)
ADMINISTRATOR CHRISTINE TODD)
WHITMAN & REGIONAL ADMINISTRATOR)
THOMAS V. SKINNER, U.S. ENVIRONMENTAL)
PROTECTION AGENCY,)
Respondents.)

**PETITION SEEKING THE U.S. EPA TO PROTECT WISCONSIN
FAMILIES FROM AIR POLLUTION BY ISSUING THE STATE A
NOTICE OF DEFICIENCY FOR FAILING TO ADEQUATELY
ADMINISTER ITS TITLE V PERMIT PROGRAM**

I. SUMMARY

Dangerous levels of air pollution, including smog, soot and cancer-causing air pollutants threaten millions of Wisconsin residents, thirty years after Congress enacted the 1970 Clean Air Act to eliminate this serious public health risk. A significant portion of Wisconsin's air pollution is from the State's 610 "major sources" of air pollution, including its numerous paper mills and coal-fired power plants, each of which annually emit hundreds of thousands, even millions, of pounds of air pollution. Environmental Defense, Scorecard, <http://www.scorecard.org> (last visited Dec. 5, 2002) and Environmental Protection Agency, Toxic Release Inventory Program, <http://www.epa.gov/tri> (last updated Oct. 15, 2002).

This air pollution causes premature death, cancer and a wide range of other respiratory diseases. Environmental Defense, Scorecard, http://www.scorecard.org/env-releases/def/cap_gen.html (last visited Dec. 5, 2002). Smog, one of the most common problems caused by air pollution, causes shortness of breath, chest pains, and has been linked to new cases of childhood asthma. Even healthy adults who exercise or engage in manual labor outdoors are vulnerable to adverse health effects from smog.¹ On at least four days this past summer the millions of residents of the severe smog nonattainment area in Eastern Wisconsin were forced to breathe smog levels that exceeded the federal one-hour health standard. Press Release, WI Dep't of Natural Resources, "High Ozone Levels Put Off Redesignation Request" (June 26, 2002), Ex. 1.²

In 1990 Congress targeted the nation's largest sources of air pollution by adding Title V to the 1970 Clean Air Act [hereinafter "CAA"]. Title V directed states to develop operating permits programs for all major sources of air pollution. 42 U.S.C. § 7661-7661f (2002).

Wisconsin's deadline to issue all initial operating permits was April 5, 1998. Id. § 7661b(c).

¹ See generally, National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,855 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50).

Twelve years after Congress adopted Title V, 280 (or 46%) of Wisconsin's major sources are still releasing pollutants without operating permits. Environmental Protection Agency [hereinafter EPA], Region 5 Title V Air Permits, <http://www.epa.gov/region5/air/permits/oper/table.htm> (last modified Nov. 20, 2002), Ex. 2. Dozens of the major sources located in the Eastern Wisconsin smog nonattainment area lack permits, as do three of the State's five largest sources of the smog precursors known as volatile organic compounds: General Motors (Rock County), Tenneco Packaging Inc. (Lincoln County), and Consolidated Papers Inc.-Kraft Div. (Wood County). Environmental Defense, [Wisconsin] Facilities With Emissions of Criteria Pollutants In 1999 (ranked by VOC's), <http://www.scorecard.org> (2002) (last viewed Dec. 4, 2002), Ex. 3;³ E-mail from Jeffrey Hanson, Air Program, Wisconsin DNR, to Bruce Nilles, Sierra Club (Nov. 15, 2002) [hereinafter "DNR T5 Spreadsheet"], Ex. 5.⁴

Moreover, as of October 1, 2002, the State still has not issued operating permits for four of the State's five largest sources of cancer-causing air pollutants. Environmental Defense, [Wisconsin] Facilities Releasing Recognized Carcinogens To Air [in 1999], <http://www.scorecard.org> (Last visited Dec. 5, 2002), Ex. 4.⁵ These unpermitted major polluters are Marshfield Doorsystems (a.k.a. Weyerhaeuser Company Door Division),⁶ Wausau Paper Company, Crucible Materials Corp., and Red Star Yeast. DNR T5 Spreadsheet, Ex. 5.

This citizen petition seeks EPA intervention to remedy this situation. Specifically, this petition targets the failure of the State of Wisconsin to administer and to enforce its Title V

² Available at <http://www.dnr.state.wi.us/org/caer/ce/news/rbnews/2002/062602Aco.htm>.

³ Available at http://www.scorecard.org/env-releases/cap/rank-facilities.tcl?how_many=25&pollutant=voc&fips_state_code=55.

⁴ The Excel Chart has been manipulated to remove irrelevant columns and sorted by County and Facility Name.

⁵ Available at http://www.scorecard.org/ranking/rank-facilities.tcl?how_many=100&drop_down_name=Recognized+carcinogens+to+air&fips_state_code=55&sic_2=All+reporting+sectors.

⁶ Marshfield Doorsystems, the State's second largest source of known carcinogens was formerly Weyhaeuser Door Systems, the name used in DNR's database (<http://www.marshfielddoors.com>).

operating permit program for the State's largest sources of air pollution consistent with the minimum requirements established by Title V, 42 U.S.C. §§ 7661a-7661f, and EPA's implementing regulations, 40 C.F.R. § 70 (2002). Wisconsin's Title V program fails to comply with federal law in four ways:

1. Wisconsin is violating the requirement to take action on 245 initial major source permit applications by no later than April 5, 1998 and 35 permit applications received after April 5, 1996 within 18 months of receipt of the applications. 42 U.S.C. § 7661b(c).
2. Wisconsin is violating the requirement to charge major sources sufficient permit fees to "cover the permit program costs." 40 C.F.R. § 70.9(a) (2002).
3. Wisconsin is violating the prohibition against using any funding source other than permit fees to administer its Title V program by using federal grant monies to pay for program support staff. See generally 40 C.F.R. § 70.9(a) (requirement that all permitted sources pay fees sufficient to cover the permit program costs).
4. Wisconsin is violating the requirement to be at all times adequately enforcing its program. 40 C.F.R. § 70.10(b). The State has not issued as single administrative consent order in the past 26 months, the State has never prosecuted a single criminal violation of Title V, and the DNR has 169 unresolved enforcement cases dating back over the past seven years.

Based on these serious shortcomings, Petitioners respectfully request EPA to issue Wisconsin a Notice of Deficiency [hereinafter "NOD"]. Petitioners request that EPA submit such an NOD to the Federal Register within no more than sixty (60) days of receipt of this Petition. Sixty days is a reasonable amount of time because EPA Region 5 has been aware of the deficiencies cited herein for more than twelve months.

If within 90 days of EPA's issuance of an NOD Wisconsin fails to take "significant action" to remedy these identified deficiencies, Petitioners further request that EPA apply each of the sanctions listed in 40 C.F.R. § 70.10(b)(2), including program withdrawal and withholding federal transportation funding. Three of the four deficiencies documented in this petition are grounds for program withdrawal. They include: "failure to issue permits" (Id. §

70.10(c)(1)(ii)(A)), “[f]ailure to collect fee. . . revenue consistent with §70.9 (Id. § 70.10(c)(1)(ii)(D)), and “failure to enforce the. . . program” (Id. § 70.10(c)(iii)).

A short timetable for imposing sanctions is appropriate because the effects of air pollution are often irreversible, the State deliberately underfunded its Title V program for more than four years, and Governor-Elect Jim Doyle must submit his FY 2003-05 budget to the Legislature no later than the last Tuesday in January 2003. Wis. Stat. § 16.45 (2001). Beginning the sanctions clock promptly will provide Wisconsin’s new Governor and Legislature with a clear choice during the 2003 spring budget negotiations: either remedy the Title V program deficiencies, including the inadequate fee schedule, or face EPA sanctions and program withdrawal.

II. PETITIONERS HAVE WORKED FOR MANY YEARS TO ENSURE CLEANER AIR FOR WISCONSIN RESIDENTS

Sierra Club and Midwest Environmental Advocates, Inc. is submitting this petition on behalf of the Citizens for a Better Environment, Citizens for Safe Water Around Badger, Clean Water Action Council of Northeastern Wisconsin, Wisconsin’s Environmental Decade, Wisconsin Interfaith Climate Change Campaign, and Wisconsin Public Interest Research Group, (WISPIRG). All petitioners have a long history of working to ensure clean air.

Citizens for a Better Environment (CBE) is a not-for-profit environmental organization with headquarters in Milwaukee, Wisconsin. Founded in 1971, CBE works to change personal, corporate and government behavior with the goal of achieving clean air, clean water, and healthy communities. Its efforts emphasize research, public education, and individual empowerment and activism. CBE serves nearly 100,000 members and supporters in Wisconsin and over 200,000 members and supporters throughout the Great Lakes region.

Citizens for Safe Water Around Badger (CSWAB) began as a "kitchen table" organization in 1990 when rural neighbors of Wisconsin's Badger Army Ammunition Plant discovered their drinking water wells were polluted with high levels of carcinogenic solvents. CSWAB seeks to directly address social and environmental justice issues by raising public awareness, engaging community members in campaigns to change public policy, defending the community's right to know, and ultimately reducing risks to human health and natural systems. The organization has gone on to receive national recognition for its work and is now supporting other communities across the country battling military toxins.

Clean Water Action Council of Northeastern Wisconsin, Inc. is a 501(c)(3) non profit public interest environmental organization that has consistently worked to protect the environment in and around Green Bay. Clean Water Action Council represents 850 members who reside in northeastern Wisconsin.

The Sierra Club is a national conservation organization with over 600,000 members nationwide. Wisconsin is home to more than 15,000 Sierra Club members and their families. For over three decades, the Sierra Club has worked to enact, strengthen, and enforce the CAA and its regulations to reduce air pollution in the United States.

Wisconsin's Environmental Decade is an independent environmental group founded in 1970 to protect the great outdoors and preserve the quality of life for Wisconsin families. Environmental Decade is a nonprofit organization with over 6,000 members statewide that has protected Wisconsin's clean air and water through sophisticated lobbying, litigation, enforcement and education.

Wisconsin Interfaith Climate Change Campaign is a faith-based advocacy and educational organization. As a project of Wisconsin Interfaith IMPACT, the Campaign focuses

on global warming change, clean air and clean energy. Fourteen religious faiths are represented in the coalition.

Wisconsin Public Interest Research Group (WISPIRG) is a nonprofit, nonpartisan public interest advocacy group working to protect the environment, protect consumers and promote democracy. WISPIRG has about 15,000 members and supporters across Wisconsin. WISPIRG has been working to increase protections for public health by reducing air pollution for many years.

Each of the Petitioners has worked for decades to improve air quality in Wisconsin and support a strong Title V program for the State's major sources of air pollution. Members of Petitioners' organizations raise their families, work, recreate, and hunt and fish in the shadow of the State's major sources of air pollution. For each major source lacking a permit, Petitioners and their members are being denied the public health benefits and public involvement opportunities afforded by Title V.

Petitioners support major sources paying the entire cost of the permit program because when industry has to pay higher fees per ton of pollution it provides additional incentives to reduce pollution and increase investment in cleaner methods of production.

III. THE CLEAN AIR ACT'S TITLE V PROGRAM REQUIREMENTS

Congress' primary goal in establishing the Title V program was to provide a broad-based tool to aid effective implementation of the CAA and to enhance enforcement. Specifically, Title V requires operating permits for every major source of a regulated air pollutant and any other source covered by a current permit program. 42 U.S.C. § 7611a(a) (2002). Prior to 1990 there was no federal requirement that existing sources of air pollution have a federally-enforceable operating permit. Congress also required that each state's Title V program be self-sufficient and

includes provisions authorizing states to collect fees for the permitting program. Id. §

7661a(b)(3)(A). The central requirements of Title V include:

- Recording in one document all the air pollution control requirements that apply to a source. Id. § 7661c(a).
- Requiring the source to make regular reports on how it is tracking its emissions and the controls it is using to limit emissions. Id.
- Requiring monitoring, testing, and record keeping, to ensure that the source complies with its emission limits or other air pollution control requirements. Id. § 7661c(c).
- Requiring the source to certify each year whether or not it had met the air pollution control requirements in its Title V permit. Id. § 7661b(b)(2).
- Making terms of a Title V permit federally enforceable by EPA, States, and individuals. Id. § 7661a(a); Id. § 7613 (federal enforcement); Id. § 7604 (citizen enforcement).

These improvements were important because before Title V it was oftentimes unclear which substantive requirements applied to a given major source. Title V applies to all “major sources” of air pollution. Id. § 7661a(b).⁷ Title V also established the right of citizens to participate during the review process for each Title V permit. Id. § 7661a(b)(6).

EPA has promulgated regulations establishing the minimum elements of a state’s Title V permit program and the process for reviewing, approving, and overseeing states’ permit programs. 40 C.F.R. § 70. For states that are unwilling or unable to administer an operating permits program in accordance with federal standards, EPA has established a stepped intervention and oversight procedure. 40 C.F.R. § 70.10(b). First, EPA must notify the state of its determination that the state is not adequately administering and enforcing its program and publish a notice of deficiency in the Federal Register. Id. § 70.10(b)(1). Second, if 90 days after issuing the notice the state still fails to take “significant action” to assure adequate administration

⁷ A source of air pollution is defined as a “major source” depending on the type of pollutant emitted and the air quality designation of the area where the source is located. 40 C.F.R. § 70.2. For example, in an area such as Milwaukee County which is designated as severe smog nonattainment, a pollution source is considered “major” if, among other things, it emits more than 25 tons per year of the group of smog precursors known as volatile organic compounds (“VOCs”). Id. § 70.2. By contrast in Dane County, an area currently designated as a smog attainment

and enforcement, EPA may take one or all of the following actions: 1) withdraw approval of the program; 2) withhold federal transportation funds and/or increase the offset requirement for major sources in nonattainment areas; and 3) promulgate, administer and enforce a federal operating permits program. Id. §§ 70.10(b)(2)(i-iii). Third, if eighteen months after giving notice the state still has not remedied the deficiency, EPA shall impose sanctions. Id. § 70.10(b)(3). Fourth, if the problems persist two years after giving notice of the deficiency, the EPA shall promulgate, administer and enforce a federal operating permits program in that state. Id. § 70.10(b)(4). EPA is also authorized to charge additional permit fees to cover its program costs, even if the major sources have already paid the state permit fees. Id. § 70.10(d).

EPA's final interim approval of Wisconsin's Title V program became effective on April 5, 1995. 60 Fed. Reg. 12,128 (Mar. 6, 1995) (to be codified at 40 C.F.R. pt. 70). EPA conditioned future full approval on the state remedying eight deficiencies. 60 Fed. Reg. at 12,135-36. Wisconsin subsequently submitted program revisions to address each of the deficiencies and on December 4, 2001 EPA granted Wisconsin's Title V program full approval. 66 Fed. Reg. 62,951 (Dec. 4, 2001).

IV. WISCONSIN'S TITLE V OPERATING PERMITS PROGRAM DOES NOT MEET THE MINIMUM FEDERAL REQUIREMENTS ESTABLISHED BY CONGRESS AND EPA

Despite the EPA's grant of full approval, Wisconsin's Title V program violates federal requirements in four ways: first, Wisconsin has violated the deadline for acting on permit applications; second, Wisconsin has failed to establish a fee schedule that raises sufficient revenue to administer its Title V program; third, Wisconsin is illegally using federal grant monies to administer and enforce its Title V program; and fourth, Wisconsin is not enforcing its

area, the emission threshold for a pollution source to be designated a "major source" of VOCs is 100 tons per year.

Title V program. Each violation is a separate basis for EPA to issue a Notice of Deficiency pursuant to 40 C.F.R. § 70.10.

1. Wisconsin Has Violated the Deadline for Acting on Permit Applications.

The CAA required Wisconsin to take final action on all initial Title V permit applications within three years of EPA's approval of the State's Title V program. Since Wisconsin's Title V program received approval on April 5, 1995, all initial Title V permits should have been issued by April 5, 1998.

Wisconsin has grossly failed to meet this deadline. As of October 1, 2002, Wisconsin has not acted on 280 permit applications. DNR T5 Spreadsheet, Ex. 5. At least 245 of these overdue permit applications were received during the first year of the program, i.e. before April 6, 1996. Id. Consequently, Wisconsin has violated the unambiguous April 5, 1998, statutory deadline for acting on 245 permit applications.

For another 35 applications received after April 6, 1996, Wisconsin is violating the requirement at 40 C.F.R. § 70.7(a)(2) that it act on an application it receives within 18 months. Id. In 1998, DNR Secretary Meyer conceded that: "the Department has already failed to meet the CAA's April 1998 deadline for processing . . . federal operating permit applications." DNR FY1999-2001 Budget Request, Ex. 6 at 66.

Although Wisconsin is not alone among the states for failing to meet the CAA deadline for taking final action on permit applications, Wisconsin has the notorious distinction of having the worst permit issuance rate in the Nation. A March 2002 EPA Inspector General Report concluded Wisconsin had acted on a lower percentage of overdue permit applications than any other state in EPA Region 5. Office of Inspector General Evaluation Report, EPA and State Progress In Issuing Title V Permits, Report No. 2002-P-00008 (Mar. 29, 2002) [hereinafter

Id. § 70.2.

“Inspector General Report”], Ex. 7 at 48.⁸ The report concluded no other state in the country with more than 400 major sources had a worse permit issuance rate than Wisconsin, not even Louisiana, which has nearly twice as many major sources. Inspector General Report, Ex. 7 at 47-50. Wisconsin’s large number of major sources cannot explain its poor permit issuance rate because Illinois, Indiana and Ohio all have more major sources than Wisconsin, and Michigan and Minnesota have less. Inspector General Report, Ex. 7 at 48.

In 2000, DNR Secretary Meyer conceded that “it will be impossible to process the existing initial applications by September 2003.” Memorandum from Secretary George Meyer to Secretary George Lightbourn, (Oct. 2, 2000) (“2000 Meyer Memo”), Ex. 8. Indeed, at the current processing rate Wisconsin will not complete its first round of issuing permits until 2009, or more than 11 years after the statutory deadline of April 5, 1998.⁹

This backlog is further fueled by another permitting backlog - permit renewals. The permits issued in 1996 and 1997 are due for renewal as their five-year terms expire in 2001 and 2002 and so will further exacerbate an already serious problem.

The seriousness of Wisconsin violating the statutory deadline to issue all initial Title V permits cannot be underestimated. None of the protections afforded by Title V are effective unless and until the State processes and issues a permit. Permits are the lynchpin of the Clean Air Act – without permits there is effectively no Title V program. For the 280 major sources lacking permits they are under no enforceable obligation to comply with the monitoring, record-keeping and reporting requirements mandated by Title V. EPA itself has praised Title V as

⁸ Available at <http://www.epa.gov/oigearth/eroom.htm>.

⁹ During the ten-month period beginning December 31, 2001, and ending October 31, 2002, Wisconsin processed 33 permit applications. Compare Inspector General Report, Ex. 6 at 48 which lists Wisconsin as permitting 297 permits as of December 31, 2001 with <http://www.epa.gov/region5/air/permits/oper/table.htm>, which lists Wisconsin as issuing 330 permits as of November 1, 2002. The difference is 33 permits.

having “resulted in the reduction of air emissions, as companies rectify past noncompliance or improve ongoing compliance through better monitoring.” Letter from John Seitz to Congressman Goode (Oct. 14, 1997), Ex. 9 at 1.¹⁰ Such public health benefits remain illusory for Wisconsin’s residents as long as the State remains in violation of the strict deadline to issue all Title V permits and EPA takes no remedial action.

2. Wisconsin Has Failed To Establish A Fee Schedule That Raises Sufficient Revenue to Administer Its Title V Program.

Wisconsin’s fee schedule violates the CAA because it does not generate the necessary resources to cover “the reasonable costs of the permit program.” 42 U.S.C. § 7661a(b)(3)(B)(i). Congress required that states’ operating permits programs be self sufficient, and included provisions in the CAA authorizing a state to assess and collect fees to fund its permitting program. *Id.* § 7661a(b)(3)(B); 40 C.F.R. §§ 70.4(b)(7), 70.9. Congress intentionally put the cost of administering the program on the pollution sources necessitating the need for a permit program in the first instance. It is essentially a polluter-pays program – under most circumstances the more air pollution, the greater the fees.

States can demonstrate an adequate fee schedule in one of two ways: 1) a state can submit to EPA a detailed fee demonstration showing why its fees are adequate. *Id.* § 70.9(b)(4); or 2) EPA will presume that a fee schedule meets its requirements if the state demonstrates that its fee schedule in the aggregate is equivalent to \$25 tons per year (as adjusted by the CPI) times the total emissions of each regulated pollutant. *Id.* § 70.9(b)(2)(i). However, if a state’s fee schedule generates less revenue than EPA’s presumptive minimum “or information casting doubt on fee adequacy otherwise comes to EPA’s attention,” a state must submit a detailed fee

¹⁰ Available at <http://www.epa.gov/Region7/programs/artd/air/title5/t5memos/perm-fee.pdf>

demonstration. Memorandum from John Seitz to Air Division Directors, Regions I-X (Aug. 4, 1993), Ex. 10;¹¹ see also, 40 C.F.R. § 70.9(b)(5)(ii).

a. Wisconsin Is Not Using EPA’s Presumptive Fee Schedule And Has Not Submitted A Detailed Fee Demonstration.

Wisconsin is not using EPA’s presumptive fee schedule and therefore is in violation of the requirement to submit to EPA a detailed fee schedule to demonstrate its fees are adequate. After using EPA’s presumptive fee schedule for the first four years of its Title V program, Wisconsin changed its fee schedule in 1999. Wis. Stat. § 285.69(2) (2001), amended by 1999 Wis. Act. 9. That year Wisconsin lawmakers eliminated the annual CPI increase, imposed a one-time \$0.86 per ton increase and raised the emission cap per source from 4,000 to 5,000 tons. The increase in the cap from 4,000 to 5,000 tons and a one-time \$0.85 per ton increase did increase revenue in the short term. However, because Wisconsin eliminated automatic fee increases, in approximately one to two years, Wisconsin’s fee schedule will generate less revenue than EPA’s presumptive fee schedule as the revenue generated stagnates and overall program costs, such as salaries and other fixed costs, increase. In short, because Wisconsin’s fee schedule is not consistent with EPA’s presumptive fee schedule Wisconsin should have submitted a detailed fee schedule to EPA for its review. 40 C.F.R. § 70.9(b)(5)(ii).

b. There Is Overwhelming Evidence That Wisconsin’s Fee Schedule Fails To Generate Sufficient Revenue To Fully Fund Its Title V Obligations.

Regardless of whether Wisconsin’s fee schedule meets EPA’s presumptive fee schedule, the overwhelming evidence shows that the current fee schedule is wholly insufficient to cover the State’s program costs. The DNR, EPA Region 5, EPA’s Office of Inspector General and Petitioners all agree Wisconsin’s fee schedule is too low. In 1998 DNR Secretary Meyer conceded that “[f]rom the onset of the program, the amount of billable tonnage was unable to

¹¹ Available at <http://www.epa.gov/ttn/oarpg/t5pgm.html>.

keep up with the expenditure needs to support a minimally efficient program.” Memorandum from George Meyer to Mark Bugher (Nov. 16, 1998), Ex. 11. To remedy this shortfall Secretary Meyer requested the legislative authority to raise permit fees by \$1,530,600 and hire six new staff. *Id.* at 6. Failure to increase fees, he argued, “would prevent the Department from demonstrating adequate state resources are in place to administer the federal operation permit program.” *Id.* EPA Region 5 Administrator agreed with the DNR and wrote to the Wisconsin Legislature urging it to enact a fee increase:

The USEPA is concerned that Wisconsin’s current operating permit program emission fees have not kept pace with DNR’s estimates of what is necessary to implement all required title V permit program activities. . . . The USEPA understands that in Wisconsin’s current fiscal year, the DNR anticipates that emission fees will be \$1.4 million below authorized spending. This shortfall has resulted in a freeze on filling operating permit program positions and a reduction in expenditures for necessary services and equipment to support operating permit program activities. . . . [I]t is essential that the DNR has the necessary resources.

Letter from Francis Lyons to WI Joint Finance Committee Co-Chairs (May 20, 1999), Ex. 12 at 1-2 (emphasis added).¹² Despite DNR and EPA efforts, Wisconsin’s Governor and Legislature cut \$888,600 and six staff positions from the State’s Title V program authorization levels. DNR FY1999-2001 Budget Summary, Ex. 13 at 62.

The March 2002 Inspector General Report that detailed Wisconsin’s unacceptable permit issuance rate also “found that insufficient resources was a primary contributor to delays in issuing permits.” Inspector General Report, Ex. 7 at 22. The report highlighted how Wisconsin’s lack of funding is hurting its ability to implement Title V:

According to officials at the Wisconsin [DNR], for the last three biannual budgets, the state legislature did not provide authority to increase fees. Insufficient fees resulted in lower collections, causing Wisconsin to put a freeze on hiring. Wisconsin estimated there were 12 vacancies because of the freeze.

¹² Available at <http://yosemite.epa.gov/r5/ardcorre.nsf/36ae8bf3212bb6b28625650c0079f5da/284f897de8b85c6986256789006a2086?OpenDocument>.

Wisconsin spent about \$10 million in 2000, but estimated for 2002 it actually needs \$12.3 million to fully implement the program.

Inspector General Report, Ex. 7 at 9. All of this evidence, including the DNR Secretary's own statements that the State lacks adequate funding to administer its Title V program, overwhelmingly rebuts the presumption that Wisconsin's fee schedule is adequate to cover the DNR's program costs. In fact the evidence demonstrates the DNR lacks the funding to adequately administer and enforce Wisconsin's Title V program. 40 C.F.R. § 70.9(b).

3. Wisconsin Is Illegally Using Federal Grant Monies to Administer and Enforce Its Title V Program.

Wisconsin is violating the requirement that only fee revenue may be used to fund its Title V program. 42 U.S.C. § 7661a(i). EPA's guidance succinctly describes the prohibition against states using grant monies for Title V operating programs. "Since section 502 [of the CAA] requires that Title V program costs be funded solely from the fees collected and that the fees collected be used only for that purpose, Title V permit program costs cannot be funded through a section 105 grant." Memorandum from Mary Nichols to Regional Administrators, Regions I-X (July 21, 1994) (emphasis added), Ex. 14.¹³ Despite this clear prohibition, twelve months ago Wisconsin Governor McCallum submitted to the EPA a supplement to its Title V program that included the following candid admission:

The final budget specifies that legal and information technology services for the air program are to be funded not by operation permit fees but rather by federal indirect funds. In spite of this funding change, the air program continues to receive legal and information technology services. Please consider this submittal our formal notice of this change in the use of collected operation permit fee revenue.

¹³Available at <http://www.epa.gov/ttn/oarpg/t5pgm.html>.

Letter from Gov. McCallum to EPA Region V Administrator (Nov. 27, 2001) (emphasis added), Ex.15 at 1. A Senior DNR Air Program Manager described in an email to a State Auditor her opinion that the action was illegal:

There are 5.5 FTE [full-time employees] recommended to be moved from Emission Fee funding to Federal Indirect funding. The positions include “support staff” including programmers and legal.

Title V and Part 70 require our Title V fees to support our operation permit program. Our first submittal to EPA for our part 70 program clearly showed we had the fees/revenue for such support as legal, programmers, contracts, etc. By moving the funding of Title V support (for example legal) to a funding source that is not emissions fees revenue, we expect EPA will not be able to approve our Part 70 submittal.

The EPA Office of Inspector General had done a preliminary investigation of our Title V funding situation and will conduct a fully-fledged audit sometime soon. This proposal might call attention to the intent of Wisconsin officials to avoid the requirements of the Federal Clean Air Act Amendments of 1990 which require emission fees to pay for 100% of the costs of the Title V permitting program.

E-mail from DNR Manager to Legislative Fiscal Bureau (May 3, 2001) (emphasis added), Ex. 16. In light of these admissions there can be no dispute that legal assistance and computer programmers are reasonable direct and indirect costs associated with Wisconsin’s Title V permit program. Wisconsin cannot be allowed to continue to use taxpayer funds for its Title V program when Congress explicitly put the funding burden on the polluters that make a Title V program necessary in the first instance. 42 U.S.C. § 7661a(i). EPA must put a prompt end to this practice. In addition, EPA should require the State to repay all illegally used grant monies. The obvious source for repayment would be a one-time surcharge on the major sources that have been enjoying a bargain-basement fee schedule and no operating permits for far too long.

4. Wisconsin Is Not Enforcing Its Title V Program.

Wisconsin's Governor and State Legislature have starved the DNR's Title V enforcement program of the resources necessary to implement an effective enforcement program. In 2000, DNR Secretary Meyer minced no words about the effect of the Governor and Legislature failing to authorize permit fee increases: the DNR, he asserted, was "avoiding a deficit only through severe expenditure cuts." 2000 Meyer Memo, Ex. 8 at 3. Without a significant funding increase he warned, its entire enforcement capability was in jeopardy: "[I]t will seriously affect . . . issuing notices of violation . . . enforcement initiatives with USEPA, preparing inspection reports and case documentation, prosecuting environmental violations in cooperation with the state attorney general's office." *Id.* at 4. In the same memo Secretary Meyer noted that "USEPA has expressed concern about the Department's efforts, or reduction of, on numerous occasions." *Id.* at 6 (emphasis added).

Secretary Meyer's warnings and EPA concerns have been realized. During the past 26 months DNR has not settled a single administrative case. In the period 1995-2000 DNR issued eleven administrative consent orders. E-mail from Kristen Larson, Compliance and Enforcement Specialist, DNR, to Bruce Nilles, Sierra Club (Oct. 21, 2002) [hereinafter "Judicial Referrals"], Ex. 17. Wisconsin has never commenced a single criminal enforcement action in the history of its Title V program. E-mail from Steven Sisbach, DNR to Bruce Nilles, Sierra Club (Oct. 30, 2002), Ex. 18. The judicial enforcement record is almost as bleak; in the first nine months of 2002 the DNR referred just three cases to the state Department of Justice for enforcement. Judicial Referrals, Ex. 17. The DNR also has a backlog of 169 unresolved Title V enforcement cases, including nineteen cases from 1995, nineteen cases from 1996, twenty-three cases from 1997, twenty-two cases from 1998, twenty-one cases from 1999, twenty cases from 2000 and

twenty cases from 2001. E-mail from Kristen Larson, Compliance and Enforcement Specialist, DNR, to Bruce Nilles, Sierra Club (Nov. 19, 2002), Ex.19.

Clearly, Wisconsin is violating the requirement to adequately enforce its Title V program. EPA's regulations provide that "[f]ailure to act on violations of permits or other program requirements" is an independent basis for EPA to withdraw its approval of Wisconsin's program. 40 C.F.R. § 70.10(c)(iii)(A).

V. CONCLUSION

Based on the reason set forth in the Petition, Petitioners respectfully request that EPA grant the relief sought above. Without EPA's intervention, Wisconsin's air pollution problems will persist, hundreds of the State's largest polluters will continue to operate outside of the law for the foreseeable future, and the Clean Air Act's promise of healthy air, already decades overdue, will remain broken.

Respectfully submitted on this ____ Day of December, 2002.

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