



NATURAL RESOURCES DEFENSE COUNCIL

July 13, 2011

**VIA E-MAIL AND FEDERAL EXPRESS**

Mary Ann Dolehanty  
Acting Permit Section Supervisor  
Michigan Department of Environmental Quality  
Air Quality Division  
P.O. Box 30620  
Lansing, MI 48909-7760

**Re: Letter Urging Denial of any Request to Extend the Permit Expiration  
Deadline for the Proposed Consumers Energy Expansion of the Karn-  
Weadock Coal Plant, Permit No. 341-07.**

Dear Ms. Dolehanty,

The Natural Resources Defense Council, Clean Water Action, Great Lakes Environmental Law Center, Midland CARES, and Sierra Club (collectively, the “Citizen Groups”) write to urge the Michigan Department of Environmental Quality (“MDEQ” or “Agency”) to reject any request to extend the August 2, 2011 expiration date for the Clean Air Act Permit to Install No. 341-07 (“Permit”) for Consumers Energy’s (“Consumers”) proposed 930 MW coal-fired power plant (“Proposed Coal Plant”), at the existing Karn-Weadock facility in Essexville, Michigan. The Permit should not be extended and should be allowed to expire on August 2 because Consumers has announced that the Proposed Coal Plant “will not be constructed at this time” due to declining energy demand and lower natural gas prices, and because new regulatory standards for greenhouse gas emissions and other air pollutants have gone into effect since the Permit was issued. If MDEQ improperly decides to extend the August 2 expiration date it must, at a minimum, re-evaluate the emission limits in the Permit, add limits for greenhouse gases, and subject the proposed extension and new limits to public review and comment.

The Permit for the Proposed Coal Plant was issued by MDEQ on December 29, 2009, with an effective date of February 2, 2010. The Permit includes a provision that, unless otherwise authorized by MDEQ, it “shall become void” if construction has not commenced

within 18 months.<sup>1</sup> Consumers has not commenced construction on the Proposed Coal Plant as the company has indefinitely deferred the project since May 2010.<sup>2</sup> As such, the Permit, by its own terms, expires on August 2, 2011.

The Permit's expiration provision represents an incorporation of both Michigan and federal Clean Air Act regulations that foreclose the ability of a company to hold onto a permit for an extended period of time without constructing the facility that the permit was issued for. In particular, Michigan regulations provide that

If the installation, reconstruction, or relocation of the equipment, for which a permit has been issued, has not commenced within, or has been interrupted for, 18 months, then the permit to install shall become void, unless otherwise authorized by the department as a condition of the permit to install.

Mich. Admin. Code R 336.1201(4). Federal regulations include a similar 18-month permit expiration deadline along with a provision allowing for extension of the deadline "upon a satisfactory showing that an extension is justified." 40 C.F.R. § 52.21(r)(2).<sup>3</sup> Pursuant to these provisions, permit termination is automatic and, therefore, MDEQ need not do anything for the Permit to expire on August 2. *Sierra Club v. Franklin County Power of Illinois, Inc.*, 546 F.3d 918, 923 (7th Cir. 2008) (if agency does not act to extend expiration date, permit "terminates by 'automatic expiration'"); *Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979, 984 (9th Cir. 2004).

The 18-month permit expiration deadline serves two primary purposes. First, it helps ensure that major new polluting sources use the "most up-to-date control technology" and comply with current emissions requirements. *Utah Chapter of the Sierra Club v. Air Quality Bd.*, 226 P.3d 719, 728 (Utah 2009); *see also Kentucky Mountain Power v. Energy and Environment Cabinet*, File No. DAQ-29109-039, 2009 WL 6214729, at \*5 (KY Envir. Pub. Prot. Cab. Dec. 1, 2009); *In re West Suburban Recycling & Energy Ctr., L.P.*, PSD No. 97-12, 8

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<sup>1</sup> MDEQ Air Quality Division, Permit to Install 341-07 Issued to Consumers Energy Karn-Weadock Generating Station (Dec. 29, 2009), p. 4, General Condition 2.

<sup>2</sup> CMS Energy Inc., *Consumers Energy, Principal Subsidiary of CMS Energy, Announces It is Deferring Development of Clean Coal Plant in Michigan* (May 27, 2010), available at <http://www.consumersenergy.com/News.aspx?id=2777>

<sup>3</sup> While Michigan has its own approved air permitting regulations, Michigan law specifically incorporates, requires compliance with, and references for guidance federal Clean Air Act standards. For example, the Michigan Air Pollution Control Act provides that any air permit to install:

shall include terms and conditions necessary to assure compliance with all applicable requirements of this part, the rules promulgated under this part, and the clean air act, including those necessary to assure compliance with all applicable ambient air standards, emission limits, and increment and visibility requirements pursuant to part C of title I of the clean air act, 42 USC 7470 to 7492.

M.C.L. 324.5505(5). In addition, Michigan law requires MDEQ to "promulgate rules for purposes of . . . complying with the clean air act," M.C.L. 324.5512(1)(b), and defines the "clean air act" to include the federal statutory provisions and "regulations promulgated under" those provisions. M.C.L. 324.5501(g). MDEQ's regulations also adopt by reference federal permitting rules, 40 C.F.R. 52.21, "for the purpose of clarifying the definitions" in Michigan's rules. Mich. Admin. Code R. 336.1299(3)(b); Mich. Admin. Code R. 336.2801a(a)(ii).

E.A.D. 192 (U.S. EAB Mar. 10, 1999) (“If construction is not commenced within [18 months] the approval to construct becomes invalid . . . [because] it is important that decisions about pollution control methods and associated emission limitations are made based on the most current information possible.”) Second, the 18-month permit expiration period prevents a company from indefinitely tying up allowable air pollution increments that could be put to better use by another proposed facility. *In re West Suburban Recycling*, (“As PSD permits are issued, new emissions consume a portion of the PSD increment, thus shrinking the remaining amount available for new development. A facility with final permit approval, whether constructed or not, consumes PSD increment. Thus, permitted projects that are not constructed can prevent other projects from receiving PSD approval.”).

Both of these purposes demonstrate that MDEQ should not extend the August 2, 2011 expiration deadline for the Permit. First, the available evidence shows that Consumers has no current intention of constructing the Proposed Coal Plant. Instead, the company is sitting on the Permit to wait and see whether significant changes in energy demand, natural gas prices, etc. make pursuit of the Proposed Coal Plant economically viable. For example, Consumers has not applied to the Michigan Public Service Commission (“PSC”) for a certificate of need for the Plant, which would be a pre-requisite to obtaining recovery of the expenses related to the Plant from its ratepayers. In April 2011, Consumers explained in a filing with the Securities and Exchange Commission that:

In May 2010, Consumers announced plans to defer the development of its proposed 830 MW coal-fueled plant at its Karn/Weadock generating complex. This decision reflects reduced customer demand for electricity due to the recession, forecasted lower natural gas prices due to recent developments in shale gas recovery technology, and projected surplus generating capacity in the MISO market. Consumers has been monitoring customer demand, fuel and power prices, and other market conditions, and has not set a timetable for a future decision about the project; however, *the likelihood that the plant will be constructed has diminished significantly.*<sup>4</sup>

On June 10, 2011, Consumers submitted testimony to the PSC stating that “the plant will not be constructed at this time.”<sup>5</sup> It is exactly this kind of wait-and-see approach that the 18-month permit expiration deadline is designed to prevent, as such an approach improperly ties up air quality increments that could be used by other projects in the area. Extension of the permit expiration deadline would simply allow this wait and see approach to continue and, therefore, extension should be rejected.

Allowing a continuation of the wait-and-see approach is especially inappropriate because the factors that led Consumers to defer the Proposed Coal Plant are not projected to change in the foreseeable future in ways that would make Consumers more likely to want to try to pursue the

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<sup>4</sup> Consumers Energy Co., 10-Q Quarterly Report Pursuant to Sections 13 or 15(d) (April 28, 2011), at 23-24 (emphasis added).

<sup>5</sup> Consumers Energy Co., *In re Application of Consumers Energy Company for Authority to Increase its Rates for the Generation and Distribution of Electricity and For Other Relief*, Mich. PSC Case No. U-16794, Testimony of Kenneth C. Jones at p. 18, lines 14-15 (hereinafter “PSC Case No. U-16794”).

Plant. For example, despite some increase in total energy generation in Michigan between 2009 and 2010, the 2010 level remains 6.5% less than it was in 2007,<sup>6</sup> and generation in the first three months of 2011 was 3.3% lower than in the first three months of 2010.<sup>7</sup> While Consumers projects some increase in its system output between now and 2015, it projects total annual system output and maximum demand in 2015 to remain below the 2006 and 2007 levels.<sup>8</sup> As for natural gas prices, the Energy Information Administration projects a gradual increase in Henry Hub spot prices between now and 2035, but notes that the 2035 price will still be below what it was in 2005 through 2008.<sup>9</sup> In short, the Proposed Coal Plant will remain a bad economic gamble for Consumers and its ratepayers well into the future and, therefore, the Permit expiration deadline should not be extended.

The Permit should also be allowed to expire so that, if Consumers ever decides to try to move forward with the Proposed Coal Plant, that Plant would be required to use the most up-to-date pollution control technologies and to satisfy future standards. The Permit for the Proposed Coal Plant was based on a permit application that was submitted in October 2007 and revisions that were complete by January 2009. As such, the permit application analyses are already two-and-a-half to nearly four years old, and an extension of the deadline would provide Consumers with the opportunity to rely on even more outdated analyses. “Pollution control technology tends to improve over time,” *Sierra Club*, 546 F.3d at 927, and therefore, extension of the expiration deadline for the Proposed Coal Plant Permit would be improper.

In addition to pollution control technologies improving, the standards that apply to the Proposed Coal Plant have gotten more stringent since the Permit was issued. For example, one set of new EPA regulations that MDEQ must ensure are complied with are the one-hour NO<sub>2</sub> and SO<sub>2</sub> National Ambient Air Quality Standards, 75 Fed. Reg. 6474, 6525 (Feb. 9, 2010) (final rule establishing new standard for NO<sub>2</sub>); 75 Fed. Reg. 35520 (Jun. 2, 2010) (final rule establishing new standard for SO<sub>2</sub>), both of which necessitate the submission of air quality modeling analyses, which should then be subject to review and comment by the public. Also, Clean Air Act regulations requiring the use of Best Available Control Technology for greenhouse gas emissions went into effect on January 2, 2011, and require a careful evaluation of the use of carbon capture and sequestration, cleaner fuels, and increased efficiency as ways to reduce greenhouse gas emissions. And MDEQ recently announced that it has stopped relying on the PM<sub>10</sub> surrogacy approach and, instead, is directly regulating PM<sub>2.5</sub> emissions from major sources, yet the Permit does not include limits on PM<sub>2.5</sub> emissions. Given that these requirements are not addressed in the Permit, MDEQ should deny any extension of the Permit expiration deadline and require Consumers to apply for a new permit that satisfies all applicable requirements if the Company attempts to pursue a coal plant in the future.

For the foregoing reasons, the Citizen Groups urge MDEQ to uphold the requirements and goals of the Clean Air Act, deny any request for an extension of the expiration deadline for

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<sup>6</sup> Compare U.S. Energy Information Administration, *Electric Power Monthly* (March 2011), at Table 1.6.B with U.S. Energy Information Administration, *Electric Power Monthly* (March 2008), at Table 1.6.B.

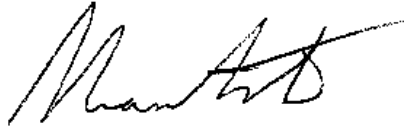
<sup>7</sup> U.S. Energy Information Administration, *Electric Power Monthly* (June 2011), at Table 1.6.B.

<sup>8</sup> PSC Case No. U-16794, Testimony of Lincoln D. Warriner, Exhibit A-10.

<sup>9</sup> U.S. Energy Information Administration, *Annual Energy Outlook 2011* (April 26, 2011), at Figure 86.

the Permit, and allow the Permit for the Proposed Coal Plant to expire on August 2, 2011. We thank you for your time and consideration.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Shannon Fisk", written over a horizontal line.

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On behalf of: Natural Resources Defense Council, Clean Water Action, Great Lakes Environmental Law Center, Midland CARES, and Sierra Club