

The Great Lakes Environmental Law Center

*Protecting the world's greatest freshwater resource
and the communities that depend upon it*

440 Burroughs Street, Box 70
Detroit, Michigan 48202
www.glelc.org

May 11, 2011

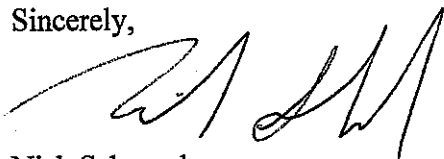
Ingham County Circuit Court
Veterans Memorial Courthouse
313 W. Kalamazoo Street
Lansing, MI 48933

Dear Clerk,

Enclosed please find for filing: 1) the original of Natural Resources Defense Council and Sierra Club's Petition for Review of the Michigan Department of Environmental Quality Air Permit to Install No. 25-07; 2) an extra copy of the Petition for case assignment and time stamp to be returned to me; 3) self addressed postage paid envelope for the return of the time stamped Petition; 4) \$150.00 filing fee; and 5) Proof of Service.

Please do not hesitate to contact me should you have any questions.

Sincerely,



Nick Schroeck
Great Lakes Environmental Law Center
440 Burroughs Street, Box 70
Detroit, MI 48202
(313) 820-7797
nschroeck@wayne.edu

STATE OF MICHIGAN
INGHAM COUNTY CIRCUIT COURT

NATURAL RESOURCES DEFENSE COUNCIL,
A New York non-profit corporation, and
SIERRA CLUB, a California non-profit
corporation,

Petitioner,

Case No. _____AA

vs.

Hon. _____

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY, a Department
in the Executive Branch of the State of Michigan,
and DAN WYANT, Interim Director of the Michigan
Department of Environmental Quality.

Respondents.

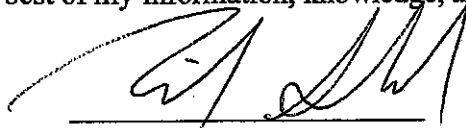
PETITION FOR REVIEW OF THE
MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY
AIR PERMIT TO INSTALL NO. 25-07

PROOF OF SERVICE

On May 11, 2011 I sent by first-class mail a copy of the Petition for Review of the Michigan Department of Environmental Quality Air Permit to Install No. 25-07 to:

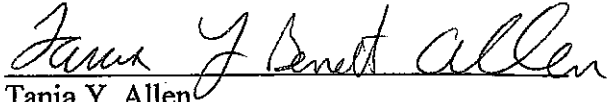
Michigan Department of Environmental Quality
Director Dan Wyant
Constitution Hall, 6th Floor
525 W. Allegan St.
P.O. Box 30473
Lansing, Michigan 48909-7973

I declare that the above statement is true to the best of my information, knowledge, and belief.



Nick Schroeck

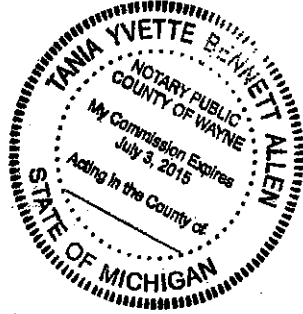
SUBSCRIBED and SWORN to me on May 11, 2011.



Tania Y. Allen

Notary Public, Wayne County

My Commission Expires: 7-3-2015



**STATE OF MICHIGAN
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NATURAL RESOURCES DEFENSE COUNCIL,
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**PETITION FOR REVIEW
OF THE
MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY
AIR PERMIT TO INSTALL NO. 25-07**

Jessie Rossman (MI Bar No. P72869)
Natural Resources Defense Council
2 N. Riverside Plaza, Suite 2250
Chicago, IL 60660
(312) 651-7923
jrossman@nrdc.org

Nick Schroeck (MI Bar No. 70888)
Great Lakes Environmental Law Center
440 Burroughs Street, Box 70
Detroit, MI 48202
(313) 820-7797
nschroeck@wayne.edu

David C. Bender
McGillivray, Westerberg & Bender, LLC
211 S. Paterson St., Suite 320
Madison, WI 53703
(608) 310-3560
bender@mwbattorneys.com

PETITION FOR REVIEW

For their Petition for Review (“Petition”) of Air Permit to Install No. 25-07 (“Permit”) issued by the Michigan Department of Environmental Quality (“MDEQ”)¹ for the Holland Board of Public Works’ (“HBPW”) proposed expansion of the James DeYoung coal-fired power plant (“Proposed Coal Plant”) in Holland, Michigan, the Natural Resources Defense Council and Sierra Club (collectively “Petitioners”), on behalf of their members, state as follows:

INTRODUCTION

1. This Petition arises out of the MDEQ’s February 11, 2011 issuance of Air Permit to Install No. 25-07, pursuant to the Clean Air Act, 42 USC 7475, Michigan regulations implementing the Act, 2011 AC, R 336.2801 *et seq.*, and the Michigan Air Pollution Control Law, MCL 324.5503 and 324.5505.
2. The Permit authorizes HBPW to install the Proposed Coal Plant and to annually emit into the air up to:
 - 568.3 tons of carbon monoxide (“CO”)
 - 478.3 tons of sulfur dioxide (“SO₂”)
 - 341.6 tons of nitrogen oxides (“NO_x”)
 - 49.9 tons of particulate matter (“PM”)
 - 102 tons of particulate matter smaller than 10 microns (“PM₁₀”)
 - 22.7 tons of sulfuric acid mist (“H₂SO₄”)
 - 13.6 tons of volatile organic compounds (“VOCs”)

¹ At the time that the Permit issued, the MDEQ was known as the Michigan Department of Environmental Quality Natural Resources and Environment (“MDNRE”). Pursuant to Executive Order 2011-01 issued by Michigan Governor Rick Snyder, MDNRE was divided into the MDEQ and the Michigan Department of Natural Resources as of March 13, 2011. We will use the name MDEQ throughout this Petition in order to avoid confusion.

- 160 pounds of lead (“Pb”)
 - 5.32 pounds of mercury (“Hg”)
3. The Proposed Coal Plant would also emit approximately 181,440 tons of carbon dioxide (“CO₂”) every year; emissions which the Permit does not regulate or limit.
4. MDEQ’s issuance of the Permit was arbitrary, capricious, and not authorized by law because:
- MDEQ improperly ignored the lack of the need for the Proposed Coal Plant and rejected cleaner energy alternatives, such as energy efficiency, wind, solar, combined heat and power, and existing natural gas combined cycle capacity;
 - MDEQ improperly concluded that the Proposed Coal Plant “netted” out of Clean Air Act requirements for SO₂, NO_x, and H₂SO₄ emissions by improperly counting emissions decreases from a separate electric generating unit that HBPW proposes to shut down;
 - MDEQ failed to establish emission limits in the Permit that reflect the use of Maximum Achievable Control Technology (“MACT”) for hazardous air pollutants;
 - MDEQ erroneously based emission limits in the Permit on the basis of worst-case fuels, rather than the cleaner fuels required by the Clean Air Act;
 - MDEQ failed to require HBPW to engage in pre-construction air quality monitoring, as required by the Clean Air Act;
 - MDEQ failed to apply regulations regarding control of CO₂ emissions and SO₂ air quality standards in effect on the day the Permit was issued; and
 - MDEQ failed to directly regulate emissions of fine particulate matter (“PM_{2.5}”) from the Proposed Coal Plant, including its failure to set limits specific to PM_{2.5} and failure to conduct sufficient air quality impact analysis for PM_{2.5}.

JURISDICTION AND VENUE

5. This Court has jurisdiction to grant the relief requested in this Petition pursuant to the Revised Judicature Act (“RJA”), MCL 600.631, and MCL 324.5505(8), which provides that when MDEQ issues a permit to install for a new source, a petition for review pursuant to the

RJA “shall be the exclusive means to obtain judicial review of such a permit and shall be filed within 90 days after the final permit action.”

6. MDEQ issued the Permit on February 11, 2011. This Petition is being filed within 90 days of the issuance of the Permit and, therefore, is timely filed.
7. Venue is appropriate in this Court pursuant to MCL 600.631, which provides that a petition for review challenging a final agency action may be filed in the Circuit Court of Ingham County.

PARTIES

8. Petitioner Natural Resources Defense Council is a national, non-profit, environmental organization with more than 447,000 members nationwide, including 9,706 members in Michigan, and 195 members in Ottawa County. NRDC’s mission is to “safeguard the Earth” by working to “restore the integrity of the elements that sustain life” and protecting “nature in ways that advance the long-term welfare of present and future generations.” NRDC is dedicated to the protection of the environment and public health and, as part of achieving its mission, has actively worked on behalf of its members for more than 30 years to protect air quality, ensure effective enforcement of the Clean Air Act, and challenge climate change. The Natural Resources Defense Council has a number of members who live near and/or downwind of the site for the Proposed Coal Plant whose health, property, recreational, and/or aesthetic interests would be adversely impacted by the Proposed Coal Plant and the air pollution emissions allowed by the Permit.
9. Petitioner Sierra Club is the nation’s oldest grassroots organization, with more than 1.3 million members and supporters nationwide. The organization’s Michigan Chapter has

16,976 members statewide, including 346 in Ottawa County and 177 in Allegan County. Sierra Club's mission is to explore, enjoy, and protect the wild places of the earth and educate and enlist humanity to protect and restore the quality of the natural and human environment. Since its founding over a century ago, Sierra Club has become a national leader in working to reduce air pollution, avoid climate change, and promote clean energy sources. Many of the Sierra Club's members live near and/or downwind of the site for the Proposed Coal Plant and will experience adverse impacts to their health, property, recreational, and/or aesthetic interests from the Proposed Coal Plant and the air pollution emissions allowed by the Permit.

10. Respondent Michigan Department of Environmental Quality is a department within the Executive Branch of the State of Michigan with primary responsibility for administration and enforcement of Michigan's environmental laws and rules.
11. Respondent Dan Wyant is the Director of MDEQ and its principal executive officer. His principal office is in the City of Lansing, Ingham County, Michigan.

LEGAL BACKGROUND

Clean Air Act

12. The Clean Air Act, 42 USC 7401 *et seq.*, is designed "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 USC 7401(b)(1).
13. The Clean Air Act seeks to achieve this goal by establishing National Ambient Air Quality Standards ("NAAQS") that limit the concentration of identified pollutants that can be in the ambient air. 42 USC 7409(b).

14. The Clean Air Act also establishes a Prevention of Significant Deterioration (“PSD”) program, 42 USC 7470-7479, which sets forth requirements for the permitting of new major sources of air pollution in order to “protect public health and welfare” and “prevent significant deterioration of air quality.” 42 USC 7470(1) & (4).
15. Michigan has an approved PSD State Implementation Plan (“SIP”), Rule 336.2801 *et seq.*, which provides MDEQ with the authority to administer the PSD program in the state. MDEQ must administer the program in a manner that is consistent with and at least as stringent as the federal Clean Air Act requirements.
16. The PSD program requires in the permitting of major new sources of air pollution the establishment of emission limits reflecting the use of Best Available Control Technology (“BACT”) for each air pollutant subject to regulation under the Clean Air Act that the source would emit in significant amounts. 42 USC 7471, 7475(a)(2), 7479(3); 40 CFR 51.166(j),(q); 2011 AC, R 336.2810.

17. BACT is defined as:

an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

42 USC 7479(3); Rule 336.2801(f).

18. Clean Air Act regulations establish the following levels of pollution as “significant” for purposes of triggering PSD permitting for a source that would emit such pollutant:

- SO2 – 40 tons per year

- NO_x – 40 tons per year
- VOCs – 40 tons per year
- H₂SO₄ – 7 tons per year

40 CFR 51.166(b)(23)(i); 2011 AC, R 336.1119(e).

19. In evaluating whether a proposal will emit a “significant” amount of a pollutant, MDEQ is allowed to subtract from the amount of new pollution associated emission reductions achieved from the retirement of an existing unit, but only so long as the emissions reductions are (1) a reduction from the “baseline actual emissions” of the existing source, as defined in Rule 326.2801(b); (2) “contemporaneous,” meaning it occurred in the period starting 5 years before construction of the new unit and the date the new unit begins operation; and (3) “otherwise creditable.” Rule 326.2801(ee)(i)(B). This is sometimes referred to as “netting” because it looks to determine the net increase or decrease of emissions.
20. In calculating the baseline actual emissions for an existing source for purposes of netting, MDEQ is required to adjust the rate “downward to exclude any noncompliance emissions that occurred while the source was operating above an emission limitation that was legally enforceable during the 24-month period” used as the baseline. Rule 326.2801(b)(i)(B),(ii)(B). Such legally enforceable requirements include BACT limits and New Source Performance Standards.
21. The Clean Air Act requires in the permitting of major new sources of air pollution the establishment of emission limits for hazardous air pollutants (“HAPs”), which are identified at 42 USC 7412(b), that represent the Maximum Achievable Control Technology (“MACT”). 42 USC 7412(g).

22. MACT is defined as:

the emission limitation which is not less stringent than the emission limitation achieved in practice by the best controlled similar source, and which reflects the maximum degree of reduction in emissions that the permitting authority, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable by the constructed [] major source.

40 CFR 63.41; 2011 AC, R 336.1299(e).

23. To help ensure that a major new source of air pollution will not lead to a violation of the NAAQS, the PSD program requires an applicant to “conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source.” 42 USC 7475(a)(7). A permitting agency may not issue a permit for a major new source of air pollution that would lead to a violation of the NAAQS or other applicable air quality standards. 42 USC 7475(a)(3); 2011 AC, R 336.2811.

24. In order to facilitate the evaluation of the air quality impacts of a proposed major source of air pollution, the full PSD review must “be preceded by an analysis... by the State... or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected...” 42 USC 7475(e)(1). This “preconstruction” analysis “shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the [NAAQS or PSD increment].” 42 USC 7475(e)(2); see also 40 CFR 51.166(m)(1)(iv); 2011 AC, R 336.2813.

25. The Clean Air Act requires MDEQ to provide for meaningful public participation in the permitting of a major new source of air pollution and to consider and respond to comments

that are received from the public. The Act provides that a permit for a major new source of air pollution may be issued “only after careful evaluation of all of the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decision making process.” 42 USC 7470(5). The Act also requires that “a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations.” 42 USC 7475(a)(2); 2011 AC, R 336.2817(2)(e). MDEQ is required to “consider all written comments that are submitted.” Rule 36.2817(2)(f).

FACTUAL BACKGROUND

The Proposed Coal Plant and Shut Down of Existing Unit 3

26. HBPW is proposing to build a 78 megawatt power plant in Holland, Michigan, at the site of the company’s existing James DeYoung facility. While the plant is expected to primarily burn coal, the permit also authorizes HBPW to use petcoke, tire derived fuel, sewage sludge, and wood waste as fuel. The plant is designed to use natural gas as a supplemental fuel for, at a minimum, periods of startup.
27. The Proposed Coal Plant qualifies under the Clean Air Act as a major new air pollution source that would emit PM, PM₁₀, SO₂, NO_x, CO, VOC, and H₂SO₄ in significant amounts.
28. The existing James DeYoung facility is made up of the 11.5MW Unit 3, 22MW Unit 4, and 29MW Unit 5. While these units are primarily coal-fired, at least two of the units are capable of burning natural gas to produce electricity and have used natural gas at various periods previously to power the boilers.

29. In conjunction with the Proposed Coal Plant, HBPW is also proposing to shut down the existing 11.5 megawatt Unit 3 boiler at the James De Young facility.
30. In calculating whether the Proposed Coal Plant's emissions would be "significant" for purposes of triggering Clean Air Act requirements, MDEQ allowed HBPW to subtract the Unit 3 "baseline" emissions from the projected emissions for the Proposed Coal Plant. Through such netting calculation, MDEQ concluded that the net emissions for SO₂, NO_x, VOCs, and H₂SO₄ would not be "significant" (that is, they would not increase above the thresholds set forth above) and, therefore, that the Proposed Coal Plant would "net out" of the Clean Air Act's PSD permitting requirements for those pollutants.
31. In the late 1990s and early 2000s, HBPW undertook a series of modifications to Unit 3 that should have triggered the requirement to install BACT-level pollution controls for the emission of SO₂, NO_x, VOCs, and H₂SO₄ from Unit 3. As such, most of Unit 3's emissions during the "baseline" period were illegal and MDEQ was prohibited from including them in the baseline actual emissions for Unit 3 and/or they were not "creditable" against the emissions from the Proposed Coal Unit. Had MDEQ not illegally credited those Unit 3 emissions, the Proposed Coal Plant would not have "netted out" of the Clean Air Act's PSD permitting requirements for SO₂, NO_x, VOCs, and H₂SO₄.
32. As a result of MDEQ's improper netting analysis, the Agency did not establish BACT emission limits for SO₂, NO_x, VOCs, or H₂SO₄, nor require the use of additional pollution controls and cleaner fuels that would be required as BACT.

The Public Health Impacts of the Pollutants the Proposed Coal Plant Would Emit

33. The Permit authorizes the Proposed Coal Plant to emit up to 478.3 tons per year of SO₂. At elevated concentrations, SO₂ directly impairs human health by causing and exacerbating respiratory conditions, such as asthma, and cardiovascular illness. See generally U.S. EPA, *National Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide) – Final Decision*, 61 FR 25,566, 25,570-76 (May 22, 1996). The U.S. EPA recently found the existing SO₂ NAAQS, which had not been modified since 1971, inadequate to protect human health. As a result, the U.S. EPA finalized a more stringent NAAQS on June 22, 2010, which was set as a maximum concentration over a 1-hour period in order to address adverse respiratory impacts of short-term SO₂ exposure. U.S. EPA, *Primary National Ambient Air Quality Standard for Sulfur Dioxide – Final Rule*, 75 FR 35,520 (June 22, 2010). EPA determined that there are adverse health impacts from exposure to elevated SO₂ concentrations for as little as five minutes. The new 1-hour SO₂ NAAQS went into effect on August 23, 2010.
34. The Permit authorizes the Proposed Coal Plant to emit up to 341.6 tons of NO_x and 13.6 tons of VOCs per year. NO_x can adversely affect human health, vegetation, materials, and visibility by combining with VOC and sunlight to form ground level ozone, which is also known as smog. U.S. EPA, *National Ambient Air Quality Standards for Nitrogen Dioxide: Final Decision*, 61 FR 52,852-01, 52,853 (Oct 8, 1996). It also poses health threats as oxides of nitrogen. U.S. EPA, *Primary National Ambient Air Quality Standards for Nitrogen Dioxide*, 75 FR 6474 (Feb 9, 2010). Ozone pollution can lead to throat irritation, aggravation of asthma, bronchitis, heart disease, and emphysema, and lung tissue damage, and can also make plants more susceptible to disease and insect pests by reducing plant's ability to produce and store food. Nitrogen oxides cause respiratory illness and breathing difficulties,

especially among asthmatics and children. NO_x and SO₂ also combine with other pollutants to form acid rain, which acidifies lakes and streams, destroys crops and other vegetations, and can impact areas hundreds of miles away from the pollution source.

35. The U.S. EPA recently found that the existing NO_x NAAQS, which had not been modified since 1971, inadequate to protect human health. As a result, the U.S. EPA finalized a more stringent 1-hour NO_x NAAQS on February 9, 2010. U.S. EPA, *Primary National Ambient Air Quality Standard for Nitrogen Dioxide – Final Rule*, 75 FR 6,474 (Feb 9, 2010). The new 1-hour NO_x NAAQS went into effect on April 12, 2010.
36. The Permit authorizes the Proposed Coal Plant to emit up to 102 tons of PM₁₀, including PM_{2.5}, per year. Short term exposure to PM has been associated with hospital admissions for cardiopulmonary disease, increased respiratory symptoms, and possibly premature mortality. U.S. EPA, *National Ambient Air Quality Standards for Particulate Matter*, 71 FR 61,144-01, 61,145 (Oct 17, 2006). PM_{2.5}, meanwhile, can cause coughing and shortness of breath, aggravation of respiratory conditions such as asthma and bronchitis, increased susceptibility to respiratory infections, and heart attacks or even premature death in people with heart and lung disease. *Id.* There is no established safe level of PM_{2.5}. Each incremental increase in PM_{2.5} emissions and concentration in the ambient air is associated with increased health risk. The U.S. EPA is currently revising the PM_{2.5} NAAQS following a remand by the Court of Appeals for the D.C. Circuit and is expected to make the existing standards more stringent to better protect public health based on the U.S. EPA's studies showing lower standards are required to protect health from PM_{2.5} exposure. Both types of particulate matter also impair visibility and negatively impact vegetation and ecosystems. *Id.* at 61,145.

37. The Permit also authorizes the Proposed Coal Plant to emit significant amounts of mercury and other hazardous air pollutants (“HAPs”). These pollutants have been identified as hazardous because the U.S. Congress and U.S. EPA have determined that they may pose a threat of adverse human health or environmental effects through ambient concentrations, bioaccumulation, deposition, or other vectors of exposure. 42 USC 7412(b)(2). For example, mercury is a highly toxic and persistent pollutant that deposits into rivers, lakes, and streams, and then bioaccumulates in the food chain. U.S. EPA, *Regulatory Finding on the Emission of Hazardous Air Pollutants From Electric Utility Steam Generating Units*, 65 FR 79,825, 79,828 (Dec 20, 2000). Fetuses or young children that are exposed to elevated mercury levels may experience developmental disabilities, including cerebral palsy, reduced neurological test scores, and delays and deficits in learning abilities. *Id.* at 78,929. Other HAPs – such as arsenic, cadmium, chromium, nickel, dioxins, hydrogen chlorides, and hydrogen flourides – have carcinogenic or other adverse health effects. *Id.* at 79,827.
38. The Proposed Coal Plant would also emit approximately 181,440 tons of CO₂ per year. CO₂ emissions cause and exacerbate climate change, which numerous scientific studies link directly with significant public health, environmental, economic, and ecological impacts. Such impacts include direct heat-related effects, extreme weather events, climate-sensitive disease impacts, air quality effects, agricultural effects (and related impacts on nutrition), wildlife and habitat impacts, biodiversity impacts, impacts on marine life, property damage, and social disruption (such as population displacement). MDEQ did not regulate the Proposed Coal Plant’s CO₂ emissions in the Permit.

The Permit Application and Draft Permit

39. HBPW submitted its initial application for the Permit to the MDEQ on January 17, 2007.
40. On November 14, 2008, MDEQ issued a draft Permit for the Proposed Coal Plant.
41. MDEQ held an informational session on the draft Permit on December 16, 2008, and public hearings on the draft Permit on January 12 and 13, 2009, all in Holland, Michigan. MDEQ accepted public comments through January 30, 2009.
42. On January 29, 2009, Petitioners, along with a number of other organizations, filed comments on the draft Permit with MDEQ. Those comments raised numerous concerns about the draft Permit, including that MDEQ had improperly failed to:
- Evaluate the need for and existence of cleaner alternatives to the Proposed Coal Plant;
 - Include BACT limits for NO_x, SO₂, H₂SO₄, and other pollutants due to the erroneous conclusion that the Proposed Coal Plant would “net” out of Clean Air Act requirements for those pollutants due to the proposed retirement of an existing 11.5MW coal unit;
 - Directly address and limit PM_{2.5} emissions from the Proposed Coal Plant;
 - Include limits on CO₂ emissions from the Proposed Coal Plant;
 - Establish limits that reflect MACT for emissions of mercury and other HAPs from the Proposed Coal Plant;
 - Require HBPW to engage in the year of pre-construction air quality modeling needed to assess the air quality impacts of the Proposed Coal Plant. Instead, MDEQ allowed HBPW to rely on unrepresentative air quality data from Grand Rapids without even assessing whether the EPA’s standards for allowing waiver of such pre-construction monitoring requirement had been satisfied; and
 - Base BACT and MACT limits in the permit on the use of cleaner fuels. Instead, MDEQ relied on “worst case assumptions” regarding the pollution content of the fuel to be used.

Petitioners did not directly address the lack of analysis for the 1-hour NO_x and 1-hour SO₂ standards in their January 29, 2009 comment letter because, at that time, neither standard had

been promulgated. After the standards were promulgated, Petitioners urged MDEQ to analyze compliance with the 1-hour NO_x and SO₂ NAAQS in a February 9, 2011 comment letter.

Need and Alternatives Analysis

43. On April 1, 2009, MDEQ and the Michigan Public Service Commission (“MPSC”) entered into a Memorandum of Understanding regarding the role of each agency in carrying out an analysis of need for and alternatives to the Proposed Coal Plant, as requested by Petitioners and authorized under Section 165(a)(2) of the CAA and 2011 AC, R 336.1817(e)(2).
44. On April 7, 2009, MDEQ “in response to comments received during the public comment period and consistent with state and federal law” requested that HBPW submit an analysis of need for and alternatives to the Proposed Coal Plant.
45. Nearly a year later, on April 1, 2010, HBPW submitted the requested Electric Generation Alternatives Analysis (“EGAA”) to MDNRE and the MPSC.
46. HBPW’s EGAA concluded that the least cost option for meeting future energy needs would be to convert boilers at its existing James DeYoung plant into a natural gas combined cycle plant. (EGAA at 7-10). Pursuit of the Proposed Coal Plant was estimated to cost 7.2% more than the least cost option. (EGAA at 7-15).
47. In its EGAA, HBPW also stated that:

Coal generation has the greatest impact on the emissions profile of the region as it typically has the highest rate of emissions for every unit of fuel burned. In contrast, natural gas fired resources have the lowest emission rates amongst all fossil fuels. Renewable resources including wind, solar, and hydro units do not have any emissions at all.

(EGAA at 8-1), and that:

Several peaking, intermittent, intermediate, and baseload resource alternatives appear to be available to HBPW to meet its resource needs including partial

ownership purchases, market purchases, natural gas fired combined cycle and simple cycle, supercritical pulverized coal, CFB, landfill gas, hydroelectric, biomass, solar PV, wave, and wind.

(EGAA at 9-1).

48. On April 30, 2010, Petitioners and other public interest organizations submitted comments supported by a technical analysis from expert consultant Schlissel Technical Consulting that the EGAA failed to demonstrate either a need for or a lack of cleaner alternatives to the Proposed Coal Plant.
49. On June 8, 2010, Petitioners and other organizations submitted comments on the EGAA to MDEQ reiterating their belief that the Proposed Coal Plant was not needed given the existence of cost competitive cleaner energy alternatives.
50. On July 7, 2010, the MPSC Staff issued a report regarding the EGAA. Findings of the MPSC Staff Report included that:
- “Holland failed to adequately demonstrate the need for the proposed facility as the sole source to meet its projected capacity requirements” (MPSC Report at 6);
 - HBPW’s electricity demand growth estimate “appears overly optimistic” (*Id.*);
 - The EGAA’s assumption regarding demand reduction potential through energy efficiency and demand-side management “appears unduly conservative,” which “results in a projected capacity need which may not fully materialize” (*Id.* at 7);
 - “Due diligence requires a more thorough assessment of biomass opportunities, prior to locking in a decision to build a baseload power plant” (*Id.* at 49);
 - HBPW provided “an incomplete report regarding area wind resources and an incomplete analysis of wind electricity production options” and is “overly concerned about system integration costs that might be associated with the introduction of growing quantities of variable output generation options, such as wind and solar” (*Id.* at 50);
 - HBPW provided “incomplete or overly pessimistic analysis of solar energy’s ability to contribute to peak power production and peak load reductions,” failed to “model more options for PV installations of various sizes and smaller-scale solar thermal conversion technologies,” and did not incorporate widely expected increasing performance and declining cost of solar power (*Id.* at 53);

- HBPW “did not provide any assessment of the potential for CHP [combined heat and power] in or near its service territory,” but CHP could “contribute toward reducing, or postponing, the overall amount of future capacity needed” (*Id.* at 57);
- HBPW has “not yet completed a sufficient analysis of renewable energy resources and technologies available to serve customers in its service territory” (*Id.*);
- “Staff’s overall conclusion regarding HBPW’s presentation of renewable energy resource options is that the Utility’s estimates of renewable energy resources resource availability are too low, sometimes plainly incomplete, and its estimates of the commodity cost of electricity from various renewable energy resources conversion technologies is generally too high, especially for future years in the planning period. In addition, HBPW has failed to account for various economic benefits associated with distributed renewable energy resources generators as part of its analysis of alternative generation technologies. The result is that HBPW appears to have disregarded many opportunities for viable, advantageous renewable energy resources technologies to contribute more significantly to meeting HBPW customers’ future energy needs” (*Id.* at 57-58);
- The Proposed Coal Plant is only “one alternative out of a range of alternatives that may be used to fill the projected capacity need” (*Id.* at 67);
- The EGAA identified “other less costly alternatives” that could be selected instead of the Proposed Coal Plant (*Id.*); and
- Options that could be used to meet all or some of HBPW’s electric needs include “a combined cycle natural gas plant, purchase power options or a combination of alternatives that could lead to lesser amounts of purchased power, energy efficiency and load management, and renewable generation resources.” (*Id.*).

51. On August 20, 2010, MDEQ denied HBPW’s application “pursuant to Section 165(a)(2) of the Clean Air Act and Rule 1817(2)(e) of Michigan’s Air Pollution Control Rules for failure to demonstrate a need for the proposed facility.”

HBPW Appeal of Permit Denial

52. On August 10, 2010, HBPW filed a complaint in the Ottawa County Circuit Court seeking a writ of mandamus and declaratory judgment ordering MDEQ to grant its permit application.

53. On September 10, 2010, HBPW filed an amended complaint seeking, among other things, a writ of mandamus ordering MDNRE to issue the requested permit retroactively as of March 26, 2009 or August 7, 2010; declaratory judgments as to when HBPW's permit application was complete, that MDNRE purportedly does not have the authority to evaluate the need for and alternatives to the Proposed Coal Plant; and a petition for review challenging the denial of HBPW's permit application as arbitrary, capricious, and unlawful.
54. On October 13, 2010, Petitioners filed a motion to intervene as defendants in HBPW's suit.
55. On November 29, 2010 the Ottawa County Circuit Court denied Petitioners' motion to intervene. *City of Holland v Mich Dep't of Natural Resources & Environment*, unpublished order of the Circuit Court of Ottawa County, entered November 29, 2010 (Case No. 10-002031-AA).
56. On December 15, 2010, the Ottawa County Circuit Court denied Petitioners' motion for reconsideration of the denial of their motion to intervene. *City of Holland v Mich Dep't of Natural Resources & Environment*, unpublished opinion & order of the Circuit Court of Ottawa County, entered & issued December 15, 2010 (Case No. 10-002031-AA).
57. On that same day, the Ottawa County Circuit Court reversed MDEQ's denial of HBPW's permit application and required MDEQ to re-evaluate HBPW's permit application within 60 days. In ordering MDEQ to reconsider HBPW's permit application, the Ottawa County Circuit Court foreclosed MDEQ from denying the permit application "based solely upon perceived or projected electric generating need" and held that MDEQ should evaluate the application based on standards in place as of August 20, 2010, rather than the date of the final permit decision. *Id.* at p 8 (emphasis added).

58. On January 4, 2011, MDEQ appealed the Ottawa County Circuit Court's December 15, 2010 ruling to the Michigan Court of Appeals, Appeal No. 301921.
59. On January 5, 2011, Petitioners appealed the Ottawa County Circuit Court's November 29, 2010 denial of their motion to intervene and December 15, 2010 denial of their motion for reconsideration of the denial of their motion to intervene to the Michigan Court of Appeals, Appeal No. 302031.
60. On February 4, 2011, the Michigan Court of Appeals denied MDEQ's motion for a stay of the Ottawa County Circuit Court's ruling. *City of Holland v Dep't of Natural Resources & Environment*, unpublished order of the Court of Appeals, entered February 4, 2011 (Docket No. 301921).
61. On February 16, 2011, the Michigan Court of Appeals approved MDEQ and HBPW's stipulation dismissing Appeal No. 301921. *City of Holland v Dep't of Natural Resources & Environment*, unpublished order of the Court of Appeals, entered February 16, 2011 (Docket No. 301921).

The Final Permit and Response to Comments

62. On February 9, 2011, Petitioners and other groups submitted comments to MDEQ regarding the Agency's re-evaluation of HBPW's permit application. Those comments made the following points:

- The Ottawa County Circuit Court decision did not foreclose MDEQ from denying HBPW's permit application. Instead, the Court decision foreclosed denial if such denial was based "solely" on a lack of "need" for the Proposed Coal Plant. The Agency had authority to deny the permit application due to a lack of need or the existence of cleaner alternatives if such denial was tied to specific air quality concerns. For example, that MDEQ must allocate limited air resources among various existing and potential future industries and that it can reserve limited air quality increments for those industries most beneficial to the state and the community by denying permits for facilities that are less

beneficial (such as power plants that are not needed, will increase electricity rates, and will consume much of the available air resource and thereby preclude other businesses from locating in the area).

- The Proposed Coal Plant would have significant air quality impacts that justified denying HBPW's permit application in light of the lack of need for and existence of cleaner alternatives to the Proposed Coal Plant.
- The law requires MDEQ to apply the regulatory requirements in effect on the day that the permit re-evaluation decision was made. As such, MDEQ needed to apply the CO₂ BACT and SO₂ NAAQS requirements that went into effect after the August 20, 2010 regulatory cut-off date selected by the Ottawa County Circuit Court for MDEQ's re-evaluation of the HBPW permit application.

63. On February 11, 2011, MDEQ issued the final Permit for the Proposed Coal Plant, which authorizes the construction of the Proposed Coal Plant and sets forth, inter alia, emission limits and monitoring, recordkeeping, and reporting requirements for the Plant.
64. The final Permit does not include any limits on the emission of CO₂ or other greenhouse gases from the Proposed Coal Plant.
65. The final Permit does not include BACT limits on the emissions of SO₂, NO_x, H₂SO₄, or VOCs from the Proposed Coal Plant.
66. The final Permit was issued without an analysis of the Proposed Coal Plant's compliance with the 1-hour SO₂ and NO_x NAAQS.
67. The final Permit was issued without HBPW engaging in pre-construction air quality monitoring. Instead, MDEQ allowed HBPW to rely on air quality data collected from up to 30 miles away as the basis for assessing the air quality impacts of the Proposed Coal Plant's emissions.
68. Along with the final Permit, MDEQ also issued a "Response to Comments" document that purports to address the comments regarding the draft Permit made by the public. The Response to Comments document does not address the MPSC Staff's comments regarding

HBPW's EGAA or Petitioners' February 9, 2011 comment letter, and does not justify MDEQ's almost complete failure to modify the Permit in response to comments submitted by the public or the MPSC Staff.

69. There was no analysis of the impacts on PM_{2.5} ambient air concentrations that included all particulate matter emission sources and demonstrates, as required for issuance of a permit, that the facility will comply with the PM_{2.5} NAAQS.

COUNT I

(Failure to Identify a Need for or Lack of Cleaner Alternatives to the Proposed Coal Plant)

70. The Petitioners restate and incorporate the preceding allegations.

71. Petitioners and other members of the public, and the MPSC Staff, submitted comments questioning the need for the Proposed Coal Plant and identifying numerous cost effective cleaner alternatives to the Proposed Coal Plant, including energy efficiency, combined heat and power, wind, solar, and natural gas combined cycle.

72. HBPW's own analysis concluded that conversion of existing coal-fired units at the James DeYoung plant to natural gas combined cycle units would cost less and emit less pollution than the Proposed Coal Plant, and that there are "several" alternatives available for meeting HBPW's energy needs.

73. MDEQ's ignoring the lack of need for the Proposed Coal Plant, rejection of alternatives to the Plant, and issuance of the Permit was arbitrary, capricious, and not authorized by law because:

- MDEQ failed to independently and objectively evaluate the need for and cost and availability of alternatives to the Proposed Coal Plant in order to satisfy its obligation to allocate limited air resources;

- MDEQ improperly deferred to HBPW' claims regarding the cost and availability of alternatives to the Proposed Coal Plant;
- MDEQ failed to respond to comments from the public and the MPSC Staff demonstrating a lack of need for the Proposed Coal Plant and the feasibility of cleaner and less costly alternatives to the Proposed Coal Plant;
- MDEQ ignored the air quality concerns related to the Proposed Coal Plant that further justify the public's comments regarding the lack of need for and existence of cleaner and less costly alternatives to the Proposed Coal Plant;
- MDEQ erroneously concluded that the Ottawa County Circuit Court's decision foreclosed the agency from fully considering the need for and alternatives to the Proposed Coal Plant; and
- MDEQ relied on collateral economic benefits of the Proposed Coal Plant while failing to explain why such benefits could not be provided by cleaner alternatives and while ignoring other collateral benefits offered by cleaner alternatives.

74. MDEQ's rejection of alternatives is contrary to Section 165(a)(2) of the Clean Air Act and 2011 AC, R 1817(2)(e), which require an objective evaluation of the need for and alternatives to the Proposed Coal Plant for satisfying energy needs.

75. The violations described above require that this Permit be remanded to the MDEQ so that the evaluation of need and alternatives required by law can occur.

COUNT II

(Improper Netting Analysis Regarding SO₂, and NO_x Emissions)

76. The Petitioners restate and incorporate the preceding allegations.

77. The Proposed Coal Plant would emit significant amounts of SO₂ and NO_x.

78. MDEQ allowed HBPW to use emission reductions from the shutdown of Unit 3 at the James DeYoung plant to net out of PSD requirements for SO₂ and NO_x. As a result, the Permit does not include BACT emission limits for SO₂ and NO_x emissions from the Proposed Coal Plant, and MDEQ did not evaluate the impact of the Proposed Coal Plant's SO₂ and NO_x

emissions on compliance with SO₂ and NO_x NAAQS and other applicable air quality standards.

79. HBPW has undertaken modifications at Unit 3 of the James DeYoung plant without complying with BACT emission limits for SO₂ and NO_x emissions that the Clean Air Act requires to accompany such modifications. Had such limits been met, the baseline actual emissions reductions related to the shutdown of Unit 3 would be far less than the levels MDEQ and HBPW assumed in the netting analysis for the Proposed Coal Plant.
80. MDEQ's decision that the Proposed Coal Plant netted out of PSD permitting requirements for SO₂ and NO_x was arbitrary, capricious, and unauthorized by law because the agency relied on an improper calculation of baseline actual emissions from Unit 3 and used emissions reductions that are not otherwise creditable.
81. The violations described above require that this Permit be vacated and remanded to MDEQ so that MDEQ can determine whether the James DeYoung plant was subject to lower emission raets, whether baseline emissions were illegal, and what level of baseline emissions must be excluded from a proper netting analysis. As a result of that proper analysis, MDEQ must also establish BACT limits (including evaluation of cleaner fuels and additional pollution controls) for SO₂ and NO_x emissions from the Proposed Coal Plant and evaluate of the impact of the Proposed Coal Plant's SO₂ and NO_x emissions on compliance with the NAAQS, increments, and other applicable air quality standards, as required by law.

COUNT III

(Failure to Establish MACT Limits for Hazardous Air Pollutants)

82. The Petitioners restate and incorporate the preceding allegations.

83. The Proposed Coal Plant would be a major source of HAPs, including hydrogen chloride (“HCL”), hydrogen fluoride (“HF”), and mercury.

84. The emission limits in the Permit for HCL, HF, and mercury fail to satisfy the MACT requirements because:

- MDEQ failed to establish MACT limits that reflected the emission reductions achieved by the best controlled similar source;
- MDEQ improperly factored the cost of controls in identifying the MACT floor;
- MDEQ neglected to evaluate beyond-the-floor controls;
- MDEQ failed to require either a dry polishing scrubber or wet flue gas desulfurization for control of HCL and HF emissions.

85. The violations described above require that this Permit be vacated and remanded to MDEQ so that the agency can establish limits for HCL, HF, and mercury emissions from the Proposed Coal Plant that satisfy the requirements of the Clean Air Act’s MACT requirements.

COUNT IV

(Improper Reliance on “Worst Case” Fuels)

86. The Petitioners restate and incorporate the preceding allegations.

87. The Proposed Coal Plant is capable of burning a range of fuels, including natural gas, wood waste, bituminous and sub-bituminous coal, petcoke, tire derived fuel, and sewage sludge.

88. Each of these fuels has different pollution profiles with some, such as natural gas and wood waste, leading to significantly lower emissions than others, such as petcoke and coal.

Moreover, even the dirtiest fuels are distinguishable from each other. Petcoke has the worst sulfur emission rate—even worse than coal.

89. The emission limits in the Permit are based on the "worst case" fuel for each pollutant, rather than on a maximization of the use of cleaner fuels.
90. The Clean Air Act and federal and state regulations implementing the Act require the evaluation of cleaner fuels as a control option to be factored into the BACT and MACT analyses and the establishment of limits based on the cleanest fuel that can be used without changing the facility's fundamental purpose.
91. MDEQ's failure to evaluate or establish emission limits on the basis of cleaner fuels is arbitrary, capricious, and not authorized by law. MDEQ's refusal to base the limits on cleaner fuel is based on an erroneous interpretation and fundamental misunderstanding of the law.
92. The violations described above require that this Permit be vacated and remanded to MDEQ so that the BACT and MACT limits in the Permit can be established on the basis of the use of cleaner fuels, as required by law.

COUNT V

(Failure to Regulate CO₂ Emissions)

93. The Petitioners restate and incorporate the preceding allegations.
94. The Proposed Coal Plant would emit approximately 181,440 tons of CO₂ per year, which makes the Plant a major source of CO₂ emissions.
95. The Permit does not include any limits on the emission of CO₂ from the Proposed Coal Plant, and MDEQ did not engage in an analysis of BACT for CO₂ emissions through the use of cleaner fuels, higher plant efficiencies, or installation of CO₂ controls. MDEQ improperly

concluded that it did not need to establish BACT limits for CO₂ emissions from the Proposed Coal Plant because that requirement purportedly did not go into effect until January 2, 2011.

96. The Clean Air Act and federal and state regulations implementing the Act require the establishment of BACT limits for CO₂ emissions from the Proposed Coal Plant because CO₂ is a pollutant “subject to regulation” under the Act.
97. MDEQ’s failure to regulate CO₂ emissions from the Proposed Coal Plant is arbitrary, capricious, and not authorized by law.
98. The violations described above require that this Permit be vacated and remanded to MDEQ so that the BACT limits for CO₂ emissions from the Proposed Coal Plant (including evaluation of cleaner fuels, higher plant efficiencies, and installation of CO₂ controls) can be established, as required by law.

COUNT VI

(Failure to Ensure Compliance with SO₂ NAAQS)

99. The Petitioners restate and incorporate the preceding allegations.
100. The Proposed Coal Plant would emit significant amounts of SO₂ emissions.
101. The U.S. EPA’s 1-hour SO₂ NAAQS was in effect prior to the date that MDEQ issued the Permit.
102. MDEQ improperly concluded that it did not need evaluate the Proposed Coal Plant’s SO₂ emissions because the 1-hour SO₂ NAAQS did not go into effect until after August 20.
103. The Clean Air Act and federal and state regulations that MDEQ ensure that all applicable air quality standards will be complied with before issuing a permit for a major new source of air pollution.

104. MDEQ's failure to evaluate the impacts of the Proposed Coal Plant's SO₂ emissions on compliance with the 1-hour SO₂ NAAQS was arbitrary, capricious, and not authorized by law.

105. The violations described above require that this Permit be vacated and remanded to MDEQ so that the impact of the Proposed Coal Plant's SO₂ emissions on compliance with the SO₂ NAAQS can be assessed, as required by law.

COUNT VII

(Failure to Directly Regulate PM_{2.5} Emissions)

106. The Petitioners restate and incorporate the preceding allegations.

107. The Proposed Coal Plant would constitute a major source of PM_{2.5} emissions.

108. The Permit does not directly regulate PM_{2.5} emissions from the Proposed Coal Plant.

109. In lieu of directly regulating PM_{2.5} emissions from the Proposed Coal Plant, MDEQ purported to treat PM₁₀ as a surrogate for PM_{2.5}.

110. MDEQ's failure to directly regulate PM_{2.5} emissions from the Proposed Coal Plant and reliance on PM₁₀ as a surrogate for PM_{2.5} was arbitrary, capricious, and unauthorized by law because:

- The Clean Air Act and federal regulations implementing the Act require direct regulation of PM_{2.5} as a pollutant "subject to regulation" under the Act;
- Different and more stringent NAAQS and PSD increments apply to PM_{2.5} than to PM₁₀;
- BACT for PM₁₀ is not necessarily BACT for PM_{2.5}, and, in fact, there are controls that are more effective at controlling PM_{2.5} than PM₁₀; and
- PM_{2.5} has different and more severe public health impacts than PM₁₀.

111. Moreover, even if PM₁₀ could lawfully be used as a surrogate for PM_{2.5} in an air impact analysis, the PM₁₀ modeling results must be compared to PM_{2.5} NAAQS to determine compliance. Here, the modeling results for PM₁₀ exceed the PM_{2.5} NAAQS and, therefore, even applying a “surrogacy” approach, the HBPW permit does not comply with 42 USC 7475 and 2011 AC, R 336.2804 and cannot be issued.
112. Moreover, any modeling analysis that was done by the HBPW and/or MDEQ specifically for PM_{2.5} was deficient for two reasons. First, it was not done prior to the public comment opportunity, in violation of Section 165(a)(2) of the Clean Air Act, 42 U.S.C. § 7475(a)(2), which requires that “a public hearing [be] held with an opportunity for interested persons... to appear and submit written or oral presentations *on the air quality impact...*,” and Section 165(e)(3)(B) and (C) of the CAA, 42 U.S.C. § 7475(e)(3)(B) and (C), which requires that air quality impact analyses to “be available *at the time of the public hearing on the application.*” Second, the only PM_{2.5}-specific modeling in the record, submitted by HBPW on May 21, 2010, specifically excludes some particulate matter emission sources from the analysis. These emission points must be included. There is no lawful basis to exclude them. Each of the excluded sources contributes to the overall ambient air impacts from the facility. Moreover, these types of emission points are the most likely to cause violations of the ambient air standards for PM_{2.5}.
113. The violations described above require that this Permit be vacated and remanded to MDEQ so that the BACT limits for PM_{2.5} emissions from the Proposed Coal Plant can be established, as required by law, and so MDEQ can accurately and appropriately analyze the air quality impacts from PM_{2.5}.

COUNT VIII

(Improper Waiver of Preconstruction Monitoring Requirements)

114. The Petitioners restate and incorporate the preceding allegations.
115. HBPW did not engage in pre-construction air quality monitoring as part of its application for a permit for the Proposed Coal Plant.
116. Instead, MDEQ allowed HBPW to use air quality data from existing monitors located as much as 30 miles away from the Proposed Coal Plant as the basis for air quality analyses for the Plant.
117. The Clean Air Act requires that a permit application for a major new source of air pollution “be preceded by an analysis... by the State... or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected...” 42 USC 7475(e)(1). This “preconstruction” analysis “shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the [NAAQS or PSD increment].” 42 USC 7475(e)(2); see also 40 CFR 51.166(m)(1)(iv); Rule 336.2813.
118. To the extent that a waiver from such pre-construction air quality monitoring is authorized, EPA and MDEQ regulations allow such waiver only if valid, sufficient, and representative air quality data already exists, as defined by 40 CFR part 51 Appendix W.
119. The record in this case does not contain a basis for demonstrating that the substituted background air quality data used by HBPW and MDEQ satisfies the requirements for valid, sufficient and representative data. MDEQ’s failure to require pre-construction air quality monitoring or to ensure that any waiver of such monitoring was valid was arbitrary, capricious, and not authorized by law.

120. The violations described above require that this Permit be vacated and remanded to MDEQ so that pre-construction air quality modeling can be carried out, as required by law.

REQUEST FOR RELIEF

121. For the reasons stated above, Petitioners respectfully request that the Court:
- a. Declare that the MDEQ's issuance of the Permit was arbitrary, capricious, and not authorized by law;
 - b. Vacate the Permit and remand this matter to MDEQ;
 - c. Grant the Petitioners cost and attorneys fees as authorized by law; and
 - d. Grant the Petitioners such other relief as may be required under the circumstances, including all other relief that is reasonable, equitable, and just.

Respectfully Submitted,

Jessie Rossman (Ns)

Jessie Rossman (MI Bar No. P72869)
Natural Resources Defense Council
2 N. Riverside Plaza, Suite 2250
Chicago, IL 60660
(312) 651-7923
jrossman@nrdc.org



Nick Schroeck (MI Bar No. 70888)
Great Lakes Environmental Law Center
440 Burroughs Street, Box 70
Detroit, MI 48202
(313) 820-7797
nschroeck@wayne.edu

David C. Bender
McGillivray, Westerberg & Bender, LLC
211 S. Paterson St., Suite 320
Madison, WI 53703
(608) 310-3560
bender@mwbattorneys.com