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June 12, 2008

**Hand Delivery Via Federal Express**

Ms. Erika Durr  
U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board  
1341 G Street, N.W., Suite 600  
Washington, D.C. 20005

Re: Petition for Review  
PSD Permit Number: 60-07 (Michigan)  
Northern Michigan University

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2008 JUN 13 AM 11:00  
ENVIR. APPEALS BOARD

Dear Ms. Durr:

Enclosed for filing is one original and three copies of Sierra Club's Petition for Review of the above-referenced PSD permit. If you have any questions about this filing or if I can be of any further assistance please call me at 608.256.1003.

Sincerely,  
GARVEY McNEIL & McGILLIVRAY, S.C.



David C. Bender

Attorney for Petitioner

Enclosures



BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

IN THE MATTER OF:  
NORTHERN MICHIGAN  
UNIVERSITY

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APPEAL NUMBER: \_\_\_\_\_

PSD PERMIT NUMBER: 60-07

ENVIR. APPEALS BOARD

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PETITION FOR REVIEW AND REQUEST FOR ORAL ARGUMENT

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## TABLE OF CONTENTS

INTRODUCTION .....	1
THRESHOLD PROCEDURAL REQUIREMENTS.....	2
ISSUES PRESENTED FOR REVIEW.....	2
STATEMENT OF FACTS .....	4
SUMMARY OF PREVENTION OF SIGNIFICANT DETERIORATION REQUIREMENTS.....	5
ARGUMENT.....	8
I.    THE PERMIT DOES NOT INCLUDE SUFFICIENT BACT LIMITS .....	8
A.    The DEQ Failed To Conduct A BACT Analysis for PM2.5.....	8
B.    The Draft Permit Lacks BACT Limits For CO <sub>2</sub> and N <sub>2</sub> O .....	11
1.    CO <sub>2</sub> Is Currently Regulated .....	13
2.    N <sub>2</sub> O is Currently Regulated .....	17
II.   THE BACT DETERMINATIONS FOR THE BOILER DID NOT INCLUDE A SUFFICIENT ANALYSIS OF CLEANER PRODUCTION PROCESSES AND FUELS.....	18
A.   DEQ's Basis For Rejecting Clean Biomass Fuel In Favor Of Worst-Case Coal Fuel Contravenes The Requirements of BACT and Congressional Policy .....	22
1.   DEQ's Rejection of The Planned Clean Fuel to Establish BACT Undermines The BACT Requirement.....	23
2.   The Record Lacks Any Evidence To Support DEQ's Conclusion....	30

- B. Even If NMU Cannot Meet A Biomass-Based BACT Limit During Infrequent Weather Events, BACT Limits Should Not Assume Worst-Case Fuel For All Periods of Operation .....32
- III. EVEN IF 100% BIOMASS COULD BE REJECTED IN A TOP-DOWN ANALYSIS, BACT MUST BE ESTABLISHED BASED ON LOW SULFUR COAL.....34
  - A. DEQ Failed To Respond to the Substance of Petitioner’s Comments .....35
  - B. DEQ’s BACT Is Erroneous Because Clean Forms of PRB Coal Are Available And Would Result in Lower Emission Rates.....36
- IV. THE STARTUP/SHUTDOWN PLAN MUST BE INCORPORATED INTO THE PERMIT AND SUBJECT TO PUBLIC NOTICE AND COMMENT...38
- V. DEQ’S ATTEMPT TO ACCOUNT FOR INCREMENT CONSUMING EMISSIONS FROM THE NEARBY PRESQUE ISLE PLANT IS ERRONEOUS AS A MATTER OF LAW .....39
- VI. THE PERMIT MUST ENSURE THAT THE ASSUMPTIONS MADE FOR MODELING ARE ENFORCEABLE .....42
- VII. NMU DID NOT CONDUCT THE REQUIRED PRECONSTRUCTION MONITORING.....45
  - A. The Clean Air Act And Implementing Regulations Mandate Site-Specific Pre-Construction Monitoring.....46
  - B. DEQ’s Failure To Conduct Preconstruction Monitoring Violates Established EPA Policy .....48
  - C. If DEQ Had Attempted To Make The Necessary Findings For Substituting Regional Monitoring Data, It Would Have Determined That the Regional Monitors Are Insufficient.....50
    - 1. Monitor Location.....50
    - 2. Data Quality.....53
    - 3. Data “Currentness” .....53

VIII. DEQ UNLAWFULLY USED SIGNIFICANT IMPACT LEVELS AND  
ARBITRARY DISTANCES TO AVOID ANALYSIS OF CLASS I  
INCREMENT .....54

CONCLUSION.....58

## INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a) (2007), the Sierra Club ("Petitioner"), petitions for review of the conditions of the Prevention of Significant Deterioration (PSD) Permit Number 60-07 which the Michigan Department of Environmental Quality Air Quality Division ("DEQ") issued to Northern Michigan University (NMU), on May 12, 2008. A copy of the PSD permit is attached as Sierra Club Exhibit 1. The State of Michigan is authorized to administer the PSD permit program pursuant to a delegation of authority by the United States Environmental Protection Agency ("EPA"). The Permit authorizes the applicant to construct a new coal-fired boiler and associated equipment on the NMU campus in Marquette, Michigan. Petitioner contends that the DEQ failed to include necessary permit conditions, make certain necessary findings, made some erroneous conclusions, and failed to undertake certain required analysis, based on DEQ's clearly erroneous conclusions of law, and also that this petition involves important policy considerations that the Board should review.

Petitioner also requests oral argument in the above-captioned matter. Oral argument would assist the Board in its deliberations on the issues presented by the case because the issues raised herein involve important, potentially recurring issues for the Board and the U.S. Environmental Protection Agency are a source of significant public interest, and are of a nature such that oral argument would materially assist in their resolution.

## THRESHOLD PROCEDURAL REQUIREMENTS

Petitioner satisfies the threshold requirements for filing a petition for review under 40 C.F.R. Part 124. Petitioner has standing to petition for review of the permit decision because Petitioner and its members participated in the public comment period on the draft permit. 40 CFR § 124.19(a). *See generally*, Comments of Sierra Club (attached as Exhibit 2). Notice of the permit decision by the Michigan Department of Environmental Quality (DEQ) was mailed on May 12, 2008 (attached as Exhibit 3). The issues raised by Petitioner below were raised with DEQ during the public comment period. Consequently, the Board has jurisdiction to hear Petitioner's timely request for review. 40 C.F.R. § 124.19(a).

## ISSUES PRESENTED FOR REVIEW

Petitioner respectfully requests Board review of the following issues:

- (1) The Permit lacks best available control technology (BACT) limits that satisfy the statutory requirements, this Board's prior decisions, and applicable Environmental Protection Agency policy for the following pollutants:
  - a) Particulate matter smaller than 2.5 microns in diameter (PM<sub>2.5</sub>);
  - b) Carbon dioxide (CO<sub>2</sub>);
  - c) Nitrous oxide (N<sub>2</sub>O).
- (2) The BACT limit for sulfur dioxide (SO<sub>2</sub>) does not satisfy the statutory definition of BACT because it fails to account for clean fuels that the applicant plans to burn at the proposed boiler.

- (3) The Permit relies on a "Startup, Shutdown and Malfunction Plan" that was not reviewed by the agency nor subject to public notice, review, and comment prior to issuance of the Permit, in violation of the applicable regulations and this Board's prior decisions.
- (4) DEQ erred, as a matter of law, in its attempt to account for the increment-consuming emissions from the nearby Presque Isle Power Plant when calculating increment impacts.
- (5) The applicant did not demonstrate that emissions from the proposed emission sources will not cause or contribute to a violation of ambient air quality standards or maximum allowable increase (increment), as required by applicable regulations and EPA policy, because the emission rates used to model air impacts are not enforceable and are not the maximum emission rates during the relevant averaging periods.
- (6) Neither the applicant, nor DEQ conducted the mandatory pre-construction ambient air monitoring.
- (7) The agency erred, as a matter of law, in failing to notify the Federal Land Manager of the Forest County Potawatomi Tribe Class I area, ensure that the proposed plant does not cause or contribute to violations of increment limits in nearby Class I areas, and substituting unlawful and arbitrary distance limits and Significant Impact Levels for the requirements of the Clean Air Act.

## STATEMENT OF FACTS

NMU filed an application for this permit on February 5, 2007. *See* Permit to Install Application for a New Circulating Fluidized Bed Boiler, Northern Michigan University – Ripley Heating Plant (available at <http://www.deq.state.mi.us/aps/downloads/permits/CFPP/2007/60-07/PTI%2060-07%20Original%2002-05-2007.pdf>) (“Application,” attached as Exhibit 4). NMU proposes to construct circulating fluidized bed boiler rated at up to 205 million British Thermal Units (MMBtu) per hour, Application at iv, at the site of existing boilers located at 1401 Presque Isle Avenue, Marquette, Michigan. Ex. 4, Application at 1. The power plant would have a power output equivalent of 10 megawatts and has a proposed maximum operating schedule of 8760 hours per year (i.e., continuously). *Id.* at 3; Public Participation Documents, Permit Application No. 60-07 at 1 (October 19, 2007) (“Statement of Basis” or “SOB,” attached as Exhibit 5). The boiler is intended to burn 100% wood chips (biomass) as the primary fuel, and the applicant would like the flexibility to also burn up to 100% of coal and natural gas. *See* Ltr. from Michael G. Hellman, NMU, to Mary Ann Dolehanty, DEQ (February 5, 2007) (accompanying the Application, Ex. 4). Specifically, the applicant explained its plans as follows:

In support of the Governor’s 21<sup>st</sup> Century Energy Plan, this project will be designed to allow operation on Renewable Resources (specifically wood chips) up to 100% of the total heat input, with the capability to operate on subbituminous coal, and natural gas if the Renewable Resource fuel is unavailable or not economically feasible. The application requests that all fuels be allowed up to 100% of the total heat input into the boiler. It is anticipated that NMU may blend these solid fuels as needed, to support the heat input

required with the Renewable Resource fuel given preference whenever feasible. Natural gas is only intended to be used startup, shutdown and backup purposes.

*Id.*

DEQ issued a draft PSD permit on or about October 19, 2007. Resp. to Comments at 2 (attached as Exhibit 6). A public hearing was held on November 27, 2007. *Id.* The comment period closed on December 27, 2007. *Id.* DEQ issued its response to comments and final permit<sup>1</sup> on May 12, 2008. *Id.* Notice of that decision was mailed. Ex. 3. The notice provides that review to the Board may be requested on or before June 16, 2008. *Id.* This petition for review is filed within the time provided by 40 C.F.R. § 124.19(a).

#### **SUMMARY OF PREVENTION OF SIGNIFICANT DETERIORATION REQUIREMENTS**

The Clean Air Act's Prevention of Significant Deterioration (PSD) program applies to the construction or modification of any major emitting facility located in an area that is either in compliance with national ambient air quality standards (NAAQS) or that has not been designated as not attaining the NAAQS. 42 U.S.C. §§ 7407(d), 7475, 7479. Among the prerequisites for construction or modification of a major source are: (i) a PSD permit that includes all applicable PSD limits; (ii) a review by the permitting agency pursuant to all applicable regulations and an opportunity for public comment; (iii) a demonstration by the applicant that the source will not cause or contribute to air pollution in excess of NAAQS or "maximum allowable increase... for any pollutant... more than one time per

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<sup>1</sup> Petitioner refers to the "final permit" as the permit issued on or about May 12, 2008 by the DEQ. However, the permit is not effective, pursuant to 40 C.F.R. § 124.15(b)(2), because review is requested and the Regional Administrator has not issued the final permit decision.

year" (increment); (iv) the source is subject to best available control technology (BACT) emission limits; and (v) notification to the Federal Lands Manager for any Class I airshed that may be affected and all Class I protections and procedures are met. 42 U.S.C. §§ 7475(a), (d).

Establishing an appropriate BACT limit for each pollutant subject to regulation is a critical component of the PSD program. *In re ConocoPhillips Co.*, PSD Appeal No. 07-02, Slip Op. at 4 (June 2, 2008). "BACT is a pollutant emission limitation that is based on what is achievable using the most effective pollutant control option available, after taking into account energy, environmental, and economic impacts and other costs." *Id.* at 5.

The Environmental Protection Agency (EPA) typically follows the 1990 draft guidance document, New Source Review Workshop Manual (Draft October 1990) (NSR Manual), when issuing PSD permits. *Id.* at 6. The NSR Manual provides a five-step process for establishing BACT limits:

- (1) identify all available control options for the pollutant;
- (2) analyze the control options' technical feasibility (exclude non-feasible options);
- (3) rank the feasible options in order of effectiveness;
- (4) evaluate the environmental, energy, and economic impacts of the ranked, feasible control options; and
- (5) select the highest-ranked control option that does not result in site-specific, sufficiently-adverse environmental, energy or economic impacts.

NSR Manual at B.5-B.9; *ConocoPhillips, Slip Op.* at 6; *In re Knauf Fiber Glass*, 8 E.A.D. 121, 129-31 (EAB 1999). While the top-down process is not expressly required by applicable regulations, a "careful and detailed analysis of the criteria identified in the regulatory definition of BACT is required." *In re Cardinal FG Co.*, 12 E.A.D. 153, 162 (EAB 2005). Therefore, if an applicant or permitting agency does not follow the NSR Manual's top-down approach, the resulting BACT limits are suspect and "scrutinize[d]... carefully to ensure that all regulatory criteria were considered and applied appropriately." *Knauf*, 8 E.A.D. at 129-130, n.14.

There are also important procedural requirements for the issuance of a PSD permit. As noted above, the public has a right to comment on "the air quality impact of [the] source, alternatives [to the source], control technology requirements, and other appropriate considerations." 42 U.S.C. § 7475(a)(2). The permitting agency must respond to comments "[a]t the time that any final permit decision is issued," and must "[b]riefly describe and respond to all significant comments on the draft permit or the permit application... raised during the public comment period, or during any hearing." 40 C.F.R. § 124.17(a). These procedural requirements are critical, as they "serve an important function related to the efficiency and integrity of the overall administrative scheme." *ConocoPhillips, Slip Op.* at 12. The response to comments is an essential part of the administrative record, must include the agency's rationale for its decision, and is reviewed by the Board to ensure that sufficient "considered judgment" was exercised in support of the permit decision. *Id.* at 24.

## ARGUMENT

### I. THE PERMIT DOES NOT INCLUDE SUFFICIENT BACT LIMITS

#### A. The DEQ Failed To Conduct A BACT Analysis for PM<sub>2.5</sub>.

The controlling law requires a BACT limit “for each pollutant subject to regulation under the Act that it would have the potential to emit in significant amounts.” 40 C.F.R. § 52.21(j)(2). PM<sub>2.5</sub> is “a pollutant subject to regulation under the Act” because EPA established a NAAQS for PM<sub>2.5</sub> in 1997. 62 Fed. Reg. 38,652, 38,711 (July 18, 1997); 40 C.F.R. § 50.7.

PM<sub>2.5</sub> will be emitted from the new and modified emission sources at the NMU plant in a “significant” amount because it will be emitted at “any emission rate.” 40 C.F.R. § 52.21(b)(23)(ii); *see also* Ex. 4, Application at 15 (noting that emissions of PM<sub>2.5</sub> will be subject to BACT). Therefore, a PM<sub>2.5</sub> BACT limit should be required. 70 Fed. Reg. 66,042 (“[t]he requirements applicable to NSR SIPs for and the obligation to subject sources to NSR permitting for PM<sub>2.5</sub> direct emissions are codified in the existing federal regulations and can be implemented without specific regulatory changes.”). Petitioner preserved this issue for review by raising it in comments. Ex. 2, Comments of Sierra Club at sec. II.A., pp. 6-8. However, the DEQ responded to Petitioner’s comments by stating that there was no requirement to include a BACT limit for PM<sub>2.5</sub> and that substitution of a PM<sub>10</sub> BACT limit was sufficient. Ex. 6, Resp. to Comments at 18. This is wrong as a matter of law and reviewable pursuant to 40 C.F.R. § 124.19(a)(1).

On May 16, 2008 – after Sierra Club’s comments on the NMU permit but before the final permit was issued by DEQ – EPA promulgated regulations to implement the PSD program for PM<sub>2.5</sub>. 73 Fed. Reg. 28,321 (May 16, 2008). Those regulations established a “significant increase” value of 10 tons per year (or 40 tons of SO<sub>2</sub> or NO<sub>x</sub>, which are precursors of PM<sub>2.5</sub>). *Id.* at 28,349 (to be codified at 40 C.F.R. § 52.21(b)(23)(i)). Those regulations also purport to substitute PM<sub>10</sub> for PM<sub>2.5</sub> for permit applications submitted prior to July 15, 2008. 73 Fed. Reg. at 28,349. However, such regulations do not control the permit for NMU at issue in this case.

First, by their own terms, the regulations are not effective until July 15, 2008. *Id.* at 28,322. For permits issued prior to July 15, 2008, including the NMU permit at issue here, the version of 40 C.F.R. § 52.21 in effect prior to May 16, 2008, applies and requires BACT limits for PM<sub>2.5</sub>. 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j). In other words, there is no provision nor legal basis in the regulations applicable at the time that this Permit was issued for substituting PM<sub>10</sub> BACT for PM<sub>2.5</sub> BACT.

Second, the provision in the May 16, 2008 rulemaking that purports to waive the requirement to implement PM<sub>2.5</sub> BACT by substituting PM<sub>10</sub> BACT is unlawful. It is expected that this provision will soon be challenged in the United States Court of Appeals for the District of Columbia. Among the reasons that the rule is invalid and will be vacated are: (1) the EPA has no authority to waive applicable requirements of the Clean Air Act, which the “transition” provision substituting PM<sub>10</sub> for PM<sub>2.5</sub> does for plants with applications pre-dating July 15, 2008; and (2) that the Federal Register notice, itself, states

that the basis for the very October 23, 1997, guidance memo incorporated into the regulation ("practical difficulties" in measuring PM<sub>2.5</sub>) has been resolved, so there is no basis for the attempted waiver by EPA. 73 Fed. Reg. at 28,340; *see also* 72 Fed. Reg. 54,112 (Sept 12, 2007); 70 Fed. Reg. at 66,043 (recognizing that the "practical difficulties" identified in the Seitz memo "have been resolved in most respects.").

Further, substituting PM<sub>10</sub> for PM<sub>2.5</sub> is arbitrary. PM<sub>10</sub> is simply not the same as PM<sub>2.5</sub>. They have different health impacts and PM<sub>2.5</sub> is more dangerous at lower concentrations. *In re So. Montana Elec. Generation and Transmission Coop., Highwood Generating Station*, Case No. BER 2007-07 AQ, Slip Op. at 26 (Mont.Bd.Env'tl.Rev. May 30, 2008) ("*Highwood*"), available at <http://www.deq.mt.gov/ber/2008Agendas/SME/Order.pdf>. According to EPA, decreasing PM<sub>2.5</sub> in the ambient air by only 0.5 ug/m<sup>3</sup> can prevent as many as 25-50 premature deaths each year." 70 Fed. Reg. at 66,006. Indeed, the entire premise for EPA promulgating PM<sub>2.5</sub> standards was a determination that the existing PM<sub>10</sub> standards were not sufficient to protect health. 62 Fed. Reg. 38,652, 38,655-58, 38,665-67 (July 18, 1997). DEQ and EPA cannot pretend, for expediency in permitting, that these pollutants are the same.

There are significant additional differences between PM<sub>2.5</sub> and PM<sub>10</sub> that make substitution of PM<sub>10</sub> limits for PM<sub>2.5</sub> limits arbitrary. Condensable fraction PM comprises a much larger fraction of PM<sub>2.5</sub> than of larger PM. 73 Fed. Reg. at 28,334. Additionally, controls for PM<sub>10</sub> are not necessarily controls for PM<sub>2.5</sub> and, more importantly for BACT

determinations, top-ranked controls for PM<sub>10</sub> are not necessarily top-ranked controls for PM<sub>2.5</sub>. *Highwood* at 9, 25 (“[t]he Seitz memo’s guidance to rely on BACT analysis for PM<sub>10</sub> does not ensure maximum achievable reductions in emissions of PM<sub>2.5</sub>.”), 30 (finding that the vendor instructed applicant that it could deal with PM<sub>2.5</sub> BACT limits by installing more efficient bags, but that the applicant should avoid tipping off the state agency “to avoid any tighter restrictions being placed upon us.”). Additionally, as Sierra Club noted in its comments, common control technologies, such as the fabric filters proposed for the new NMU plant boiler, are highly effective at controlling PM and PM<sub>10</sub>, but less effective at capturing finer-grain PM<sub>2.5</sub>; PM<sub>2.5</sub> emissions are more aggressively controlled by controlling the pollutant’s precursors. Ex. 2, Comments of Sierra Club at 8.

Because PM<sub>2.5</sub> is a pollutant subject to regulation and which will be emitted at a significant amount, a top-down BACT analysis is required. There is no dispute that DEQ included a PM<sub>2.5</sub> limit in the Permit, but that the limit corresponds to the PM<sub>10</sub> limit and is not the result of an independent, top-down (or equivalent) BACT determination for PM<sub>2.5</sub>. DEQ’s failure to include a sufficient PM<sub>2.5</sub> BACT limit is a clearly erroneous conclusion of law. The Board should remand.

#### **B. The Draft Permit Lacks BACT Limits For CO<sub>2</sub> and N<sub>2</sub>O.**

The Permit lacks required BACT limits on CO<sub>2</sub> and N<sub>2</sub>O. Petitioner preserved this issue by raising it in comments. Ex. 2, Comments of Sierra Club at sec. II.B., pp. 8-12. In response to Petitioner’s comments regarding this requirement, DEQ asserts that no such limits are required by law.

### AQD Response

The MDEQ is required to review and consider the applications for permits in accordance with applicable existing state and federal law. There is no applicable emission standard of performance under the Clean Air Act for carbon dioxide or nitrous oxide emissions from electric generating units. Similarly, there are no state rules requiring limits on carbon dioxide or nitrous oxide emissions from electric generating units. The DEQ cannot suspend the processing of permits until such standards are promulgated.

Ex. 6, Resp. to Comments at 18-19. DEQ is wrong as a matter of law.

The Clean Air Act prohibits the construction of a new source except in accordance with a prevention of significant deterioration (PSD) construction permit. 42 U.S.C. § 7475(a); 40 C.F.R. § 52.21(a)(2)(iii). One of the requirements, contained in § 165(a)(4) of the Act, is that every PSD permit must include a BACT emission limit "for each pollutant subject to regulation under this chapter emitted from, or which results from" the facility. 42 U.S.C. § 7475(a)(4); *see also* 40 C.F.R. § 52.21(b)(50)(iv) (requiring BACT for "any pollutant that otherwise is subject to regulation under the Act"). Therefore BACT applies to pollutants "subject to regulation," not merely pollutants for which there is an "applicable emission standard of performance," as DEQ asserts. CO<sub>2</sub> and N<sub>2</sub>O are subject to regulation under the Act. Moreover, as pollutants covered by 40 C.F.R. § 52.21(b)(23)(ii), the addition of the NMU plant here will result in a "significant increase" because it will result in "any" increase. *See* Environmental Protection Agency, AP 42, Fifth Edition, *Compilation of Air Pollution Emission Factors*, Volume I, Chapter 1: External Combustion Sources, Tables 1.1-19 (N<sub>2</sub>O for circulating fluidized bed), 1.1-20 (CO<sub>2</sub> by type of coal), available at <http://www.epa.gov/ttn/chief/ap42/ch01/final/c01s01.pdf>; *see also* 73 Fed. Reg. at 28,333 (recognizing that a pollutant subject to regulation, for which no

other significant emission rate value is set, are subject to an "any emissions rate" trigger). That the addition of a 205 MMBtu/hour boiler will result in an increase in CO<sub>2</sub> and N<sub>2</sub>O emissions is not in dispute. The only dispute by DEQ is whether a BACT limit is required as a matter of law.

Carbon Dioxide (CO<sub>2</sub>) has been *regulated* under the Clean Air Act since 1993. And, on April 2, 2007, the Supreme Court held that carbon dioxide and other greenhouse gases are "pollutants" under the Clean Air Act—clarifying that they are, indeed, "*subject to regulation.*" *Massachusetts v. EPA*, 127 S.Ct. 1438, 1460-62 (2007); *see also* 42 U.S.C. § 7651k, note; 40 C.F.R. § 75.1, *et seq.* Therefore, DEQ's position is a clearly erroneous conclusion of law and should be remanded.

#### **1. CO<sub>2</sub> Is Currently Regulated.**

Section 821(a) of the Act provides:

*Monitoring.* - The Administrator of the Environmental Protection Agency shall promulgate regulations within 18 months after the enactment of the Clean Air Act Amendments of 1990 to require that all affected sources subject to the Title V of the Clean Air Act shall also monitor carbon dioxide emissions according to the same timetable as in Sections 511(b) and (c). The regulations shall require that such data shall be reported to the Administrator. The provisions of Section 511(e) of Title V of the Clean Air Act shall apply for purposes of this section in the same manner and to the same extent as such provision applies to the monitoring and data referred to in Section 511.

42 U.S.C. § 7651k note; Pub.L. 101-549; 104 Stat. 2399 (emphasis added). In short, Congress specifically ordered EPA "to promulgate regulations" requiring that facilities