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VIA HAND DELIVERY

July 23, 2013

Cathy Stepp, Secretary
Wisconsin Department of Natural Resources
101 S Webster Street - AD/8
Madison, WI 53703

**RE: Petition for a Contested Case, FTS International Services, LLC,
Construction Permit No. 12-POY-079.**

Dear Secretary Stepp,

Please find attached a verified petition for review of the above matter. By hand delivery of this letter, I am serving the same on FTS International Services, LLC in accordance with Wis. Admin. Code § NR 2.03.

Sincerely,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.

Jimmy Parra

Cc: Capitol Corporate Services Inc., registered agent for FTS International Services, LLC

MIDWESTADVOCATES.ORG

**BEFORE THE
WISCONSIN DEPARTMENT OF NATURAL RESOURCES**

In the matter of Construction Permit No.
12-POY-079 Issued to
FTS International Services, LLC

Case No: _____

**PETITION FOR A CONTESTED CASE HEARING PURSUANT
TO WIS. STAT. §§ 227.42 AND 285.81**

To the Department of Natural Resources:

In accordance with Wis. Stat. §§ 285.81(2) and 227.42(1) Paul Winey, Nancyanne Winey, Kary Jonas, Peter Jonas, Margaret Olsen, Beth Killian, Donna Brogan, Bert Hodous, Rebecca Larsen, and Shirley Roberts (“the Petitioners”) hereby request a contested case hearing regarding the decision by the Department of Natural Resources (“DNR” or “the Department”) to issue a construction permit (“air pollution control permit”) to FTS International Services, LLC (“FTS”) to operate a sand mine and processing plant (“the FTS Facility”) near the City of Arcadia, Trempealeau County, Wisconsin.

FTS plans to construct an industrial sand mine and processing facility that will extract and process sand by blasting and crushing rock, and washing, drying, storing and transporting sand. The FTS Facility will emit particulate matter from stack emissions and fugitive dust sources throughout the facility. FTS will also emit nitrogen dioxide from its blasting operation. The City of Arcadia is about 1 mile west of the proposed facility, and there are a number of rural residences and farms located nearby. Trempealeau County has 26 operating and proposed industrial sand mines and processing facilities.

For the reasons stated below, each of the Petitioners hereby requests that the DNR hold a contested case hearing pursuant to Wis. Stat. §§ 285.81(2) and 227.42(1). Wisconsin Stat. §

285.81 provides a right to a hearing to anyone who meets the requirements of Wis. Stat. § 227.42(1)¹ or who submitted comments in the public comment period if the person files a petition with the DNR that sets forth specifically the issue sought to be reviewed, the interest of the petitioner, the reasons why a hearing is warranted and the relief desired within 30 days after the date of the permit action.

In support of their petition, Petitioners state:

I. AGENCY ACTION THAT IS THE BASIS FOR THE HEARING

The DNR decision to issue an air pollution control permit, Construction Permit No. 12-POY-079, to FTS for its proposed sand mine and processing facility near Arcadia, Wisconsin.

II. BASIS FOR FINDING THAT THERE IS NO EVIDENCE OF LEGISLATIVE INTENT THAT THE INTEREST IS NOT TO BE PROTECTED

There is nothing in Wis. Stat. § 285.81 or chapter 285 that evinces a legislative intent that the Petitioners' interests in clean air are not to be protected. In fact, there is clear evidence of legislative intent to protect the affected interests. The legislature has directed the DNR to "[o]rganize a comprehensive and integrated program to enhance the quality, management and protection of the state's air resources." Wis. Stat. § 285.11(5). The DNR's issuance of air pollution control permits is a part of that program. The plain language of Wisconsin Stat. § 285.81 explicitly grants a right to a contested hearing to the public for the review of "any permit, part of permit, order, decision or determination by the department under ss. 285.39, 285.60 to

¹ Section 227.42(1) grants any person the right to a contested case hearing upon timely filing of a written request that provides:

- (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
- (b) There is no evidence of legislative intent that the interest is not to be protected;
- (c) The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and
- (d) There is a dispute of material fact.

285.69 or 285.75.” There is no evidence of a legislative intent that Wisconsin citizens’ interest in clean air is not to be protected.

III. PETITIONERS’ SUBSTANTIAL INTERESTS INJURED OR THREATENED WITH INJURY BY THE AGENCY ACTION THAT ARE DISTINCT FROM THE INJURY TO THE GENERAL PUBLIC

The Petitioners live near the proposed facility and recreate in the area in which air quality will be affected by the issuance of the air pollution control permit. The air quality in and around their homes and properties is threatened by issues of the adequacy, reasonableness, and enforceability of the terms and conditions or lack thereof in the air pollution control permit. Additionally, Petitioners are reasonably concerned about the failure of permit terms and conditions to protect their health, their community’s health, and the environmental integrity of the community.

The Petitioners’ actual and threatened injuries are different in kind or degree from the injury to the public caused by the agency action because:

- A. The Petitioners live near the proposed facility. The Petitioners are concerned that the FTS Facility, as approved by the DNR, will affect their health and the health of their families. In particular, the Petitioners are concerned about the well-known health hazards of breathing respirable silica dust. Many peer reviewed studies have linked silica dust with Chronic Obstructive Pulmonary Disorder (“COPD”), tumors leading to lung cancer, silicosis and cardiovascular disease. There are OSHA standards to protect workers from silica dust, but no such enforceable standards exist for the homes of people in the area.
- B. Many of the Petitioners, and their families and friends, use and enjoy their properties and recreational facilities near the proposed facility. The Petitioners are concerned about how

the FTS Facility will affect their health and quality of life. Many of the Petitioners and their families are reasonably concerned that air emissions, including dust which may include silica particles, from the proposed facility will limit their ability to use and enjoy their property.

The Petitioners' substantial interests are injured or threatened with injury in the following ways:

A. Paul Winey resides at N28690 Paul Sonsalla Lane, Arcadia, WI 54612, where he has lived for 11 years. He lives about 2 miles from the FTS Facility and drives by it to and from his job as a physician's assistant. Paul attended the DNR's public hearing on the draft FTS air pollution control permits, and submitted oral and written comments to the DNR on the permits. Paul is reasonably concerned that his health, his family's health and his patients' health will be harmed by air pollution as a result of the DNR's issuance of this air pollution control permit to FTS. As a health professional, Paul knows that the increase in fine particulate matter is linked with an increased incidence of cardiovascular and pulmonary problems, among others. He is reasonably concerned that the DNR has failed to consider the cumulative impact to air quality that the issuance of this permit to FTS will have along with the numerous other permitted industrial sand mines and processing facilities. Paul is reasonably concerned about the health of his neighbors, including children, who live in subdivisions adjacent to the FTS Facility.

B. Nancyanne Winey resides at N28690 Paul Sonsalla Lane, Arcadia, WI 54612, where she has lived for 11 years. She and her husband Paul have 4 young children. Nancyanne is reasonably concerned about the risk of long-term health effects

associated with prolonged exposure to unsafe levels of air pollution. She is reasonably concerned that, in issuing the air pollution control permit to FTS, the DNR has failed to take into account the cumulative impacts of air pollution from numerous industrial sand mines in the area. Nancyanne knows of 8 mines in a 5-mile stretch between her property and the Town of Arcadia. She is reasonably concerned that FTS will contribute air pollution to her community and threaten her health and the health of her family. Nancyanne submitted public comments to the DNR during the public comment period on the draft FTS's air pollution control permits and also attended the public hearing.

C. Kary and Peter Jonas reside at N29254 Kujak Lane, Arcadia, WI 54612, which is approximately 1350 feet from the FTS Facility. They have lived there since April of 2011, and have lived in Arcadia since 2008. They are reasonably concerned that air pollution as a result of the DNR's issuance of this permit to FTS, and FTS's likely noncompliance, will lead to health effects in the future. They are also reasonably concerned that with the DNR's admitted staffing shortages and the lack of monitoring and enforceable permit terms, the FTS facility will cause further air pollution that will threaten their health and the health of their children. Kary attended the DNR's public hearing on the draft FTS air pollution control permits, and provided oral comments at the hearing.

D. Margaret Olsen resides at 20045 West Mill Road, Galesville, WI 54630. She has lived there for 45 years. Margaret is reasonably concerned that the lack of monitoring in the air pollution control permit and the lack of DNR staff to enforce the permit will lead to air pollution that will endanger her health and the health of her community. The

Arcadia County Club is about two miles from the FTS facility and is located along highways that carry industrial sand facility truck traffic. Margaret is reasonably concerned about how air emissions from the FTS Facility and truck traffic will affect the health of the young people in her community who play golf at the country club.

- E. Beth Killian resides at N26509 Joe Rossa Lane, Arcadia, WI 54612, and has lived there since 1975. She is reasonably concerned about the increased air pollution that will result from the DNR's decision to issue a construction permit to FTS and the impact that will have on her health and the health of her community. Beth attended the DNR's public hearing on the FTS air pollution control permit and provided oral comments.
- F. Donna Brogan resides at W20691 Coddie Klink Road, Blair, WI 54616, where she has lived for 10 years. She is reasonably concerned about how air pollution from the FTS Facility will affect air quality and her health. Donna attended the DNR's public hearing on the draft FTS air pollution control permits and provided oral comments.
- G. Bert Hodous resides at W20691 Coddie Klink Road, Blair, WI 54616, where he has lived for 10 years. Bert is a physician and he is reasonably concerned about how air pollution from the FTS Facility will affect his health and the health of his community, which includes his patients. Bert submitted written comments to the DNR regarding the draft FTS air pollution control permits.
- H. Rebecca Larsen resides at N31102 Square Bluff Road, Blair, WI 54616, where she has lived for about 9 years. Rebecca is reasonably concerned about how air pollution from the FTS Facility will affect air quality in her community, her health and the health of her community.

I. Shirley Roberts resides at W20581 Howley Lane, Arcadia, WI 54612, where she has lived for 23 years. Shirley is reasonably concerned about how air pollution from the FTS Facility will affect air quality in her community. She is reasonably concerned about the risk of silicosis from air emissions from this facility. Shirley is also reasonably concerned about how air pollution from FTS will affect livestock and other animals, and the environment.

IV. ISSUES OF LAW AND FACT FOR REVIEW

The following are the specific issues on which the Petitioners request a contested case hearing on the FTS air pollution control permit. The Petitioners have articulated the discrete disputes of material fact² and legal questions that relate to each issue. They are entitled to a contested case hearing on all issues for the following reasons.

A. Issue One: Whether the DNR complied with Wis. Stat. § 285.63(1)(b) in issuing an air pollution control permit to FTS.

The DNR erroneously issued the air pollution control permit to FTS because the facility, as permitted, does not satisfy the requirements of Wis. Stat. § 285.63(1)(b). Pursuant to that subsection, the department may approve the application, and issue a permit, only if it properly finds that “[t]he source will not cause or exacerbate a violation of any ambient air quality standard” under Wis. Stat. §285.21(1). Wis. Stat. § 285.63(1)(b). The DNR promulgated ambient air standards for particulate matter in Wis. Admin. Code § NR 404.04. The FTS Facility

² Several of the Petitioners submitted oral and written comments to the DNR during the public comment period on the draft air pollution control permits for FTS, including Paul and Nancyanne Winey, Beth Killian, Kary Jonas, Donna Brogan, and Bert Hodous. Thus, the Petitioners have a statutory right to a hearing pursuant to Wis. Stat. § 285.81(2) whether or not they raise disputes of material fact or establish that the other requirements in Wis. Stat. § 227.42(1) are met.

will cause an exceedance in the 24-hour ambient air standard for fine particulate matter, known as PM2.5.³

In this case, the DNR conducted modeling of potential air emissions from FTS to determine whether, as permitted, FTS will comply with ambient air standards. The DNR's modeling analysis demonstrated that FTS would take up 100% of the ambient air standard for 24-hour PM2.5 concentrations in the ambient air. However, this modeling did not take into account fugitive dust sources and was based only on stack emissions. While the air pollution control regulations and FTS's air pollution control permit requires FTS to control fugitive emissions, there is no permit or other limit that require FTS to limit fugitive dust to zero emissions. In fact, the DNR estimated that fugitive sources would account for 65% of the facility's particulate matter emissions. Had the DNR appropriately factored the facility's fugitive dust emissions into the modeling, the model would have shown that the facility will cause or exacerbate a violation of the 24-hour PM2.5 ambient air standard.

This issue raises the following disputes of material fact:

1. Whether, as permitted in the air pollution control permit, fugitive dust sources will contribute to FTS's total particulate matter emissions.
2. Whether it was reasonable for the DNR to refuse to include fugitive dust sources in its modeling for compliance with particulate matter ambient air standards.

B. Issue Two: Whether the DNR complied with Wis. Stat. § 285.63(1)(a) in issuing an air pollution control permit to FTS.

The DNR may issue an air pollution control permit only if the DNR determines that the “source will meet all applicable emission limitations and other requirements promulgated under

³ PM2.5 is particulate matter that has an aerodynamic diameter of less than or equal to 2.5 micrometers. Wis. Admin. Code § NR 400.02(123e). PM10 is particulate matter that has an aerodynamic diameter of less than or equal to 10 micrometers. Wis. Admin. Code § NR 400.02(123s).

this chapter.” Wis. Stat. § 285.63(1)(a). One such requirement promulgated under Chapter 285 provides that “[n]o person may cause, allow or permit particulate matter[, nitrogen oxides or nitrogen compounds] to be emitted into the ambient air which substantially contributes to exceeding of an air standard, or creates air pollution.” Wis. Admin. Code §§ NR 415.03, 428.03. Air pollution is defined as “the presence in the atmosphere of one or more air contaminants in such quantities and of such duration as is or tends to be injurious to human health or welfare, animal or plant life, or property, or would unreasonably interfere with the enjoyment of life or property.” Wis. Admin. Code § NR 400.02(16). Additionally, the DNR is required to include compliance testing in air pollution control permits that assures compliance with permit terms. Wis. Admin. Code § 407.09(4)(a)1. As discussed in more detail below, the FTS Facility’s nitrogen dioxide and PM_{2.5} emissions will cause air pollution, and the facility, as designed, will not meet its permit limit.

1. Nitrogen dioxide emissions will cause air pollution.

On January 22, 2010, the United States Environmental Protection Agency (“EPA”) established a new one-hour National Ambient Air Quality Standard (“NAAQS”) for nitrogen dioxide at 100 parts per billion ppb (approximately 189 mcg/m³). 75 C.F.R. § 6474. The EPA has determined that ambient concentrations that exceed that standard are injurious to human health and would unreasonably interfere with the enjoyment of life or property. The DNR has not yet adopted an ambient air standard for Wisconsin that is at least as stringent as this requirement, but it is required to do so. Wis. Stat. § 285.21(1).

The DNR calculated that the maximum theoretical emission rate of nitrogen dioxide from blasting at the FTS Facility is 255 lbs/hr. The DNR did not perform modeling to determine whether the FTS Facility will comply with federal ambient air quality standards for nitrogen

dioxide or set a limit on the facility's nitrogen dioxide emission. At the high emission rate calculated by the DNR, the FTS Facility will cause violations of federal ambient air standards for nitrogen oxides and will therefore cause air pollution that is injurious to human health and welfare and that interferes with the enjoyment of life and property.

2. Particulate matter emissions will cause air pollution.

The EPA has established a NAAQS for the permissible annual average concentration of PM_{2.5}. The federal NAAQS for an annual average of PM_{2.5} is 12 mcg/L. Wisconsin has also established an ambient air quality standard for annual PM_{2.5} emissions—15 mcg/L—but has failed to update it to make it as stringent as the federal standard. Ambient concentrations that exceed those standards are injurious to human health and would unreasonably interfere with the enjoyment of life or property.

Based on the DNR's modeling, the FTS facility will take up 67% of the state ambient air quality standard of 15 mcg/L for an annual average of PM_{2.5} emissions. This modeling did not include fugitive sources. Taking those into account, the FTS facility will likely exceed both the state ambient air standard and the more stringent federal annual NAAQS for PM_{2.5}, concentrations over which are injurious to human health and welfare and interfere with the enjoyment of life and property.

3. FTS cannot meet the emission limits for PM_{2.5}.

In addition to failing to account for fugitive dust emissions, the DNR set low emission limits in the air pollution control permit for stack sources of PM_{2.5} emissions. The DNR set very low limits in an attempt to ensure that the FTS facility will comply with the state ambient air standards for PM_{2.5}, though as explained above, the DNR failed to account for fugitive

sources. Not only do the limits fail to ensure compliance with state ambient air standards for PM2.5, but the FTS Facility will not even be able to comply with the PM2.5 permit limits.

FTS has elected to use baghouses to control particulate matter emissions sufficient to meet permit limits. A typical baghouse will not be able to achieve the low emission limit in the FTS air pollution control permits for PM2.5. Additionally, baghouse efficiency and its ability to effectively remove particulate matter from air emissions declines over time due to natural wear and tear. Not only is it unlikely that the baghouses will be able to achieve the low PM2.5 emission limits when first installed, it is very likely that the baghouses will not be able to meet the low emission limits as the efficiency of the baghouse deteriorates. Without a higher permit limit, the baghouses cannot achieve compliance with PM2.5 emission limits.

This issue raises the following disputes of material fact:

1. Whether the FTS facility will cause air pollution because of nitrogen dioxide emissions.
2. Whether the FTS facility will cause air pollution because of particulate matter emissions.
3. Whether the pollutant controls selected by FTS, baghouses, are able to achieve the low emission limits for particulate matter in FTS's air pollution control permits; and
4. Whether the pollutant controls selected by FTS, baghouses, lose efficiency over time.

C. Issue Three: Whether the DNR violated state law by issuing the FTS air pollution control permit without including required monitoring.

The DNR has the authority to include monitoring conditions in air pollution control permits to ensure compliance with Wis. Stat. § 285.63, the DNR's rules, and the federal Clean Air Act. Wis. Stat. § 285.65. Wisconsin Stat. § 285.63 provides that the DNR may issue a permit only if it finds that the source will meet all emissions limits and will not cause air

pollution or violate ambient air standards. Wis. Stat. § 285.63(1)(a), (b). Additionally, the permit must include monitoring sufficient to yield reliable data that show that the facility is meeting the applicable limits on a continuous basis. Wis. Admin. Code § NR 439.04.

Based on the above—that the FTS Facility was modeled to take up 100% of the ambient air standard for the 24-hour PM_{2.5} standard, not including fugitive sources, and includes unachievable permit limits—the DNR must include compliance emission testing in order to make the threshold determination that this facility, as permitted, will comply with permit limits and ambient air standards and will not cause air pollution.

However, the air pollution control permit does not require FTS to conduct compliance emission testing for its stack emissions. The permits provide that the DNR may, in the future, require compliance emission testing, but the only permit requirement for monitoring stack emissions is that FTS must record the pressure drop across the baghouses—the pollution controls used to limit stack emissions of particulate matter. These are insufficient to determine compliance with the low emission limits for PM_{2.5} and will not ensure compliance over the permit term, as baghouses decrease in effectiveness over time.

Additionally, industrial sand mines such as FTS are required to conduct ambient air monitoring for particulate matter unless the facility requests and is granted a variance by the DNR. Wis. Admin. Code § NR 415.075(4). Particulate matter is not defined in chapter NR 415. In the chapter with general air pollution control definitions, particulate matter is defined to include all sizes of particulate matter, including both PM₁₀ and PM_{2.5}. Wis. Admin. Code § NR 400.02(118), (123e), (123s).

The air pollution control permit does not contain sufficient, explicit monitoring requirements for particulate matter from the facility and, therefore does not satisfy the

requirements of Wis. Admin. Code § 415.075 and Wis. Stat. § 283.63(1). To be sufficient, the permit must include monitoring sufficient to yield reliable data that show that the facility is meeting the applicable limits on a continuous basis. Wis. Adm. Code § NR 439.04.

The air pollution control permit requires FTS to submit an ambient air monitoring plan for particulate matter unless FTS requests and receives a variance. Similar permits for other industrial sand mines contain the same language, but the DNR has allowed facilities to monitor only for PM10, ignoring PM2.5. The specific monitoring requirements for the ambient air monitoring plan are not specified in the air pollution control permit.

This issue raises the following disputes of material fact:

1. Whether compliance emission tests are necessary to assure compliance with the terms and conditions of the permit.⁴
2. Whether site- and facility-specific conditions—including impacts from nearby facilities and the fact that the PM limits are unachievable—warrant ambient air monitoring for both types of particulate matter and more stringent and specific requirements for ambient air monitoring in the permits.

D. Issue Four: Whether the DNR complied with Wis. Stat. § 1.11 and Wis. Admin. Code ch. NR 150.

The Wisconsin Environmental Policy Act (“WEPA”) requires that all agencies prepare an environmental impact statement for major actions significantly affecting the quality of the human environment. Wis. Stat. § 1.11. A major action is one whose magnitude and complexity will

⁴ Questions of reasonableness or necessity are questions of fact. *City of Jefferson v. Eiffler*, 16 Wis. 2d 123, 130-31, 113 N.W.2d 834 (1962) (“The questions of such public necessity, negligence, and delay, in any given case, are questions of fact, to be determined on evidence.”); *Sewerage Comm’n of City of Milwaukee v. Dep’t of Natural Res.*, 102 Wis. 2d 613, 624, 307 N.W.2d 189 (1981) (suggesting that the words “reasonableness” and “necessity” implicate questions of fact in review pursuant to Wis. Stat. § 283.63, although determining that the statute also encompassed review of questions of law).

have significant effects upon the quality of the human environment. Wis. Admin. Code § NR 150.02(16).

The DNR has classified the issuance of an air pollution control permit for the construction of a new source that could result in increased emissions of PM or a hazardous air pollutant as a Type III action. Wis. Admin. Code § NR 150.03(8)(b)1.a. Type III actions require an environmental assessment where case-specific factors warrant a more thorough review of environmental impacts and alternatives. *See* Wis. Admin. Code § NR 150.20(1)(b)4.

The DNR erred in failing to require an EA or EIS given the site-specific factors present. There now 26 existing or proposed industrial sand mines and processing facilities in Trempealeau County, resulting in significant cumulative impacts on residents and the surrounding environment. Based on information in the record, the DNR has failed to consider the cumulative impacts of these facilities when deciding whether it should prepare an EA or an EIS. Thus, the DNR's decision to not conduct an EA or EIS is erroneous given the cumulative impacts caused by the rapid development of industrial sand mining in and around Trempealeau County.

This issue raises the following disputes of material fact:

1. Whether the DNR considered cumulative impacts of numerous frac sand mines and processing facilities in the area; and
2. Whether the DNR made a determination that none of the factors in Wis. Admin. Code § NR 150.20(1)(b)4 were triggered by the issuance of an air pollution control permits to FTS.

V. REASONS THAT A HEARING IS WARRANTED

A hearing is warranted on all of the above issues to resolve these disputes of fact and law and to determine whether the DNR's decision complied with the laws that are designed to protect air quality, public health and the environment.

VI. RELIEF DESIRED

The Petitioners respectfully request the following relief:

- A. The DNR revoke the FTS air pollution control permit because it was issued in violation of the law.
- B. Upon revocation, the DNR conduct adequate modeling to ensure compliance with ambient air standards and to prevent pollution, develop achievable permit limits, and include legally adequate monitoring.
- C. Before reissuance, the DNR develop an environmental assessment, and if necessary, and environmental impact statement.
- D. In the alternative to the above requests, the DNR modify the FTS air pollution control permit to include achievable permit limits and adequate monitoring to protect ambient air quality standards, based on legally appropriate modeling and emissions estimations.

Dated at Madison, Wisconsin this 23rd day of July, 2013.

MIDWEST ENVIRONMENTAL ADVOCATES INC.

A handwritten signature in cursive script, reading "Sarah Williams", positioned above a solid horizontal line.

Sarah Williams
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PETITIONERS

Paul Winey
Nancyanne Winey
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Peter Jonas
Margaret Olsen
Beth Killian
Donna Brogan
Bert Hodous
Rebecca Larsen
Shirley Roberts