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**SARAH WILLIAMS**  
Staff Attorney



**VIA U.S. MAIL**

July 23, 2013

Michelle Weisenberger  
Clerk of Courts  
Trempealeau County Courthouse  
36245 Main Street  
Whitehall, WI 54773-0067

*Re: Petition for Judicial Review of Wisconsin Department of Natural  
Resource's Issuance of Construction Permit No. 12-POY-079 to FTS  
International Services, LLC*


Please find enclosed two copies of a Petition for Judicial Review, filed pursuant to § 227.52, Wis. Stat. Please retain the original for the court and return in the envelope provided a date stamped copy for our records.

Copies of all documents have been served on the Wisconsin Department of Natural Resources and FTS International Services, LLC., by copy of this letter.

Please do not hesitate to contact me with any questions. I can be reached at 608-251-5047 ext. 6.

Sincerely,

**MIDWEST ENVIRONMENTAL ADVOCATES, INC**



James Parra

Cc: Secretary Cathy Stepp, Wisconsin Department of Natural Resources  
Capitol Corporate Services Inc., registered agent for FTS  
International Services, LLC

Encl.

MIDWESTADVOCATES.ORG

DONNA BROGAN  
W20691 Coddie Klink Road  
Blair, WI 54616,

BERT HODOUS  
W20691 Coddie Klink Road  
Blair, WI 54616,

PETER AND KARY JONAS  
N29254 Kujak Lane  
Arcadia, WI 54612,

BETH KILLIAN  
N26509 Joe Rossa Lane  
Arcadia, WI 54612,

REBECCA LARSEN  
N31102 Square Bluff Road  
Blair, WI 54616,

MARGARET OLSEN  
20045 W. Mill Road  
Galesville, WI 54630,

SHIRLEY ROBERTS  
W20581 Howley Lane  
Arcadia, WI 54612,

PAUL AND NANCYANNE WINEY  
N28690 Paul Sonsalla Lane  
Arcadia, WI 54612, and

Petitioners,

v.

WISCONSIN DEPARTMENT  
OF NATURAL RESOURCES  
101 South Webster Street  
Madison, WI 53703

Respondent.

Case No. \_\_\_\_\_  
Case Code: 30607  
Administrative Agency Review

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## PETITION FOR JUDICIAL REVIEW

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The Petitioners, Donna Brogan, Bert Hodous, Peter Jonas, Kary Jonas, Beth Killian, Rebecca Larson, Margaret Olsen, Shirley Roberts, Paul Winey, and Nancyanne Winey (“Petitioners”), by their attorneys Midwest Environmental Advocates, petition this Court pursuant to Wis. Stat. § 227.52, *et seq.*, for review of the Wisconsin Department of Natural Resources’ (“DNR”) final decision to issue Construction Permit No. 12-POY-079 (“air pollution control permit”) to FTS International, LLC (“FTS”).

### PETITIONERS

1. Petitioner Donna Brogan is an adult resident of Wisconsin, residing at W20691 Coddie Klink Road in Blair, County of Trempealeau, Wisconsin, where she has lived for 10 years. Her residence is about 4 miles from FTS’s proposed industrial sand mine and processing facility (“the FTS Facility”). 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 permit and provided oral comments.

2. Petitioner Bert Hodous is an adult resident of Wisconsin, residing at W20691 Coddie Klink road in Blair, County of Trempealeau, Wisconsin, where he has lived for 10 years. His residence is about 4 miles from the FTS Facility. 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.

3. Petitioners Peter and Kary Jonas are adult residents of Wisconsin, residing at N29254 Kujak Lane in Arcadia, County of Trempealeau, Wisconsin, 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.

4. Petitioner Beth Killian is an adult resident of Wisconsin, residing at N26509 Joe Rossa Lane in Arcadia, County of Trempealeau, Wisconsin, where she has lived 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.

5. Petitioner Rebecca Larsen is an adult resident of Wisconsin, residing at N31102 Square Bluff Road in Blair, County of Trempealeau, Wisconsin, where she has lived for about 9 years. Her residence is about 7 miles from the FTS Facility. 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.

6. Petitioner Margaret Olsen is an adult resident of Wisconsin, residing at 20045 W. Mill Road in Galesville, County of Trempealeau, Wisconsin. She has lived there for 45 years, and is about 20 miles from the FTS Facility. 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.

7. Petitioner Shirley Roberts is an adult resident of Wisconsin, residing at W20581 Howley Lane in Arcadia, County of Trempealeau, Wisconsin, where she has lived for 23 years. Her residence is approximately 3.5 miles from the FTS Facility. 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.

8. Petitioners Paul Winey is an adult resident of Wisconsin, residing at N28690 Paul Sonsalla Lane in Arcadia, County of Trempealeau, Wisconsin, 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.

9. Petitioner Nancyanne Winey is an adult resident of Wisconsin, residing at N28690 Paul Sonsalla Lane in Arcadia, County of Trempealeau, Wisconsin, 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 permits 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.

10. The Petitioners have been or are likely to be adversely affected, aggrieved, and harmed by DNR's final decision to issue the FTS air pollution control permit. 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 of their homes and property is threatened by issues of adequacy, reasonableness, and enforceability of the terms and conditions or lack thereof in the air construction 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.

11. The Petitioners are concerned that the 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. Many of the Petitioners, and their families and friends, use and enjoy the land on their properties and at recreational facilities near the proposed facility. The Petitioners are concerned about how the 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.

### **RESPONDENT**

12. Respondent DNR is an agency of the State of Wisconsin, which is located at 101 South Webster Street in Madison, Wisconsin 53703. The DNR has been delegated the authority to protect Wisconsin’s air quality by the adoption and implementation of rules related to ambient air quality and the implementation and enforcement of those rules in issuing air pollution control permits. The DNR’s authority to issue air pollution control permits is set forth in Wis. Stat. § 285 and Wis. Admin. Code NR § 400, including specifically NR §§ 404.04(9) and 415.075.

### **JURISDICTION AND VENUE**

13. The DNR decision at issue is an administrative decision reviewable under Wis. Stat. § 227.52, *et seq.*

14. Venue is proper in this Court pursuant to Wis. Stat. § 227.53(1)(a)3 because the Petitioners all reside in Trempealeau County, Wisconsin.

### **LEGAL AND FACTUAL BACKGROUND**

#### **A. The DNR’s Implementation of the Federal Air Pollution Prevention and Control Act**

15. The DNR issues air pollution control permits under a permitting program approved by the United States Environmental Protection Agency to implement and enforce the federal Clean Air Act in Wisconsin. *Sierra Club v. Dep't of Natural Res.*, 2010 WI App 89, ¶¶ 8-9, 327 Wis. 2d 706, 77 N.W.2d 855.

16. Wisconsin's program to regulate air pollution requires any nonexempt fixed source of air emissions to obtain air pollution control permits from the DNR. Wis. Stat. §§ 285.01(41), 285.60(1).

17. The DNR may issue a permit only if it makes certain findings. First, that the "source will not cause or exacerbate a violation of any ambient air quality standard." Wis. Stat. § 285.63(1)(b). The DNR has promulgated ambient air standards for particulate matter in Wis. Admin. Code § NR 404.04.

18. Second, the DNR must find that the "source will meet all applicable emission limitations and other requirements promulgated under [Wis. Stat. ch. 285]." Wis. Stat. § 285.63(1)(a).

19. One such requirement promulgated under Chapter 285 provides that facilities may not cause 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).

20. The DNR must comply with the Wisconsin Environmental Policy Act ("WEPA") when issuing air pollution control permits, as is required for all agency actions. Wis. Stat. § 1.11.



21. WEPA requires that all agencies prepare an environmental impact statement (“EIS”) for major actions significantly affecting the quality of the human environment. *Id.*

22. A major action is one whose magnitude and complexity will have significant effects upon the quality of the human environment. Wis. Admin. Code § NR 150.02(16).

23. 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.

24. Type III actions may require an environmental assessment (“EA”) or an EIS if one of the triggers listed in the regulations are present in a given case. Wis. Admin. Code §§ NR 150.03(3), (8)(b)1.a., 150.20(1)(b)3.-4.

**B. The FTS Sand Mine and Processing Facility**

25. 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.

26. The FTS Facility will emit particulate matter from stack emissions and fugitive dust sources throughout the facility.

27. The FTS Facility will also emit nitrogen dioxide from its blasting operation and from other fugitive sources.

28. 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, including property on which the Petitioners reside.

29. Trempealeau County has 26 operating or proposed industrial sand mines and processing facilities.

### **C. The DNR's Proposal to Issue Air Pollution Control Permits to FTS**

30. FTS submitted its initial application for two air pollution control permits, a construction permit and an operation permit, on March 30, 2012, and subsequently updated its application on numerous occasions over the following year.

31. The DNR issued a public notice requesting comments on the draft FTS construction and operation permits on February 27, 2013. The draft construction and operation permits contain identical permit terms and limitations.

32. Many of the Petitioners, as well as other interested persons, submitted written comments to the DNR regarding the adequacy of the permit to protect public health and the environment and other concerns regarding air pollution.

33. The DNR held a public hearing regarding the draft FTS permits on April 16, 2013.

34. Many of the Petitioners, as well as other interested parties, submitted oral testimony to the DNR regarding the adequacy of the permit to protect public health and the environment and other concerns regarding air pollution.

### **D. The DNR's Issuance of a Final Construction Air Pollution Control Permit to FTS**

35. The DNR issued the final construction permit to FTS on June 24, 2013. The DNR has not yet issued the final operation permit to FTS.

36. The DNR conducted modeling of potential air emissions from the FTS Facility to determine whether, as permitted, FTS will comply with ambient air standards. Based on this modeling, the DNR set permit limits for particulate matter ("PM"), specifically for both PM10

and PM2.5.<sup>1</sup> The DNR set low permit limits, which were necessary so that the facility would not violate ambient air standards. FTS has elected to use baghouses—a pollutant control meant to limit emissions of particulate matter—to meet the limits in its permit.

37. However, the limits and the DNR’s determination that the facility would not cause a violation of ambient air standards were based on modeling that did not include fugitive dust sources and that fail to accurately estimate FTS’s potential to cause a violation of ambient air standards.

38. The air pollution control permit requires FTS to submit an ambient air monitoring plan for particulate matter to the DNR, or apply for a variance. However, the air pollution control permit does not require FTS to conduct compliance emission testing for its stack emissions.

### **ISSUES FOR REVIEW**

#### **ISSUE ONE: WHETHER THE DNR ERRED IN FINDING THAT FTS WILL NOT CAUSE A VIOLATION OF AN AMBIENT AIR QUALITY STANDARD.**

39. Petitioners reallege and incorporate herein each preceding paragraph of this petition, and further allege as follows:

40. 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).

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<sup>1</sup> 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).

41. The DNR promulgated ambient air standards for particulate matter in Wis. Admin. Code § NR 404.04.

42. The FTS Facility will cause an exceedance of the 24-hour ambient air standard for PM2.5.

43. 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.

44. 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.

45. However, this modeling did not take into account fugitive dust sources and was based only on stack emissions.

46. 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 requires FTS to limit fugitive dust to zero emissions.

47. In fact, the DNR estimated that fugitive sources would account for 65% of the facility's particulate matter emissions.

48. 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 24-hour PM2.5 ambient air standard.

49. Because DNR has failed to comply with state law, the Court should, pursuant to Wis. Stat. § 227.57(5) and (8), set aside DNR's issuance of the FTS air pollution control permit and remand to the DNR with directions to include the FTS facility's fugitive dust emissions in the PM2.5 modeling and to properly determine whether the facility will cause or exacerbate a violation 24-hour PM2.5 ambient air standard.

**ISSUE TWO: WHETHER THE DNR ERRED IN FINDING THAT NITROGEN DIOXIDE EMISSIONS FROM FTS WILL COMPLY WITH THE PROHIBITION AGAINST CAUSING AIR POLLUTION.**

50. Petitioners reallege and incorporate herein each preceding paragraph of this petition, and further allege as follows:

51. The DNR may issue air pollution control permits only if the DNR determines that the “source will meet all applicable emission limitations and other requirements promulgated under [Wis. Stat. ch. 285].” Wis. Stat. § 285.63(1)(a).

52. One such requirement promulgated under Chapter 285 provides that “[n]o person may cause, allow or permit 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 428.03.

53. 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).

54. 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/m<sup>3</sup>). 75 C.F.R. § 6474.

55. 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.

56. The DNR has not yet adopted an ambient air standard for Wisconsin that is at least as stringent as the federal NAAQS for nitrogen dioxide, but it is required to do so. Wis. Stat. § 285.21(1).

57. The DNR calculated that the maximum theoretical emission rate of nitrogen dioxide from blasting at the FTS facility is 255 lbs/hr.

58. At the high emission rate calculated by the DNR, the FTS facility will cause violations of federal ambient air standard for nitrogen dioxide and will therefore cause air pollution that is injurious to human health and welfare and that interferes with the enjoyment of life and property.

59. The DNR violated Wis. Stat. § 285.63(1)(a) when it found, as a prerequisite to permit issuance, that the FTS Facility's nitrogen dioxide emissions will not cause air pollution.

60. Because DNR has failed to comply with state law, the Court should, pursuant to Wis. Stat. § 227.57 (5) and (8), set aside DNR's issuance of the FTS air pollution control permit and remand to the DNR with directions to include in the FTS permit limits that are sufficient to prevent nitrogen dioxide emissions from the FTS Facility from causing air pollution that is injurious to human health and welfare and that interferes with the enjoyment of life and property.

**ISSUE THREE: WHETHER THE DNR ERRED IN FINDING THAT  
PM2.5 EMISSIONS FROM FTS WILL COMPLY WITH THE  
PROHIBITION AGAINST CAUSING AIR POLLUTION.**

61. Petitioners reallege and incorporate herein each preceding paragraph of this petition, and further allege as follows:

62. The DNR may issue air pollution control permits only if the DNR determines that the "source will meet all applicable emission limitations and other requirements promulgated under [Wis. Stat. ch. 285]." Wis. Stat. § 285.63(1)(a).

63. One such requirement promulgated under Chapter 285 provides that “[n]o person may cause, allow or permit particulate matter 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.

64. 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).

65. The EPA has established a NAAQS for the permissible annual average concentration of PM<sub>2.5</sub> in the ambient air. The federal NAAQS for PM<sub>2.5</sub> over an annual average is 12 mcg/L.

66. Wisconsin has also established an ambient air quality standard for PM<sub>2.5</sub>—15 mcg/L—but has failed to update it to make it as stringent as the federal standard.

67. Ambient concentrations that exceed these standards are injurious to human health and would unreasonably interfere with the enjoyment of life or property.

68. 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 annual average emissions of PM<sub>2.5</sub>.

69. This modeling did not include fugitive sources.

70. Taking fugitive sources into account, the FTS facility will likely exceed both the state ambient air standards and the federal NAAQS for PM<sub>2.5</sub>, concentrations over which are “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).

71. The DNR violated Wis. Stat. § 285.63(1)(a) when it found, as a prerequisite to permit issuance, that the FTS Facility's PM2.5 emissions will not cause air pollution.

72. Because DNR has failed to comply with state law, the Court should, pursuant to Wis. Stat. § 227.57 (5) and (8), set aside DNR's issuance of the FTS air pollution control permit and remand to the DNR with directions to include in the FTS permit limits that are sufficient to prevent PM2.5 emissions from the FTS Facility from causing air pollution that is injurious to human health and welfare and that interferes with the enjoyment of life and property.

**ISSUE FOUR: WHETHER THE DNR ERRED IN FINDING THAT THE FTS FACILITY WILL COMPLY WITH PERMIT LIMITS FOR PM2.5.**

73. Petitioners reallege and incorporate herein each preceding paragraph of this petition, and further allege as follows:

74. The DNR may issue air pollution control permits only if the DNR determines that the "source will meet all applicable emission limitations and other requirements promulgated under [Wis. Stat. ch. 285]." Wis. Stat. § 285.63(1)(a).

75. 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 emissions of PM2.5.

76. The DNR set very low limits in an attempt to ensure that the FTS facility will comply with the state ambient air standards for PM2.5, though as explained above, the DNR failed to account for fugitive sources.

77. 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 limits.

78. FTS has elected to use baghouses to control particulate matter emissions to meet permit limits.



79. A typical baghouse will not be able to achieve the low emission limit in the FTS air pollution control permits for PM2.5.

80. Additionally, baghouse efficiency and ability to effectively remove particulate matter from air emissions declines over time due to natural wear and tear.

81. 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.

82. Without a higher permit limit, the baghouses cannot achieve compliance with PM2.5 emission limits.

83. The DNR violated Wis. Stat. § 285.63(1)(a) when it found, as a prerequisite to permit issuance, that the FTS Facility, as designed, will meet its PM2.5 permit limit.

84. Because DNR has failed to comply with state law, the Court should, pursuant to Wis. Stat. § 227.57 (5) and (8), set aside DNR's issuance of the FTS air pollution control permit and remand to the DNR with directions to the DNR to include in the FTS permit achievable permit limits for PM2.5.

**ISSUE FIVE: WHETHER THE DNR VIOLATED STATE LAW BY ISSUING THE FTS PERMIT WITHOUT INCLUDING REQUIRED MONITORING.**

85. Petitioners reallege and incorporates herein each preceding paragraph of this petition, and further allege as follows:

86. 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.

87. 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).

88. 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.

89. Based on the above—that the FTS Facility was modeled to take up 100% of the ambient air standard for the 24-hour PM<sub>2.5</sub> 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.

90. However, the air pollution control permit does not require FTS to conduct compliance emission testing for its stack emissions.

91. 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.

92. Records of pressure drops across the baghouses are insufficient to determine compliance with the low emission limits for PM<sub>2.5</sub> and will not ensure compliance over the permit term, as baghouses decrease in effectiveness over time.

93. 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).

94. 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 PM2.5. Wis. Admin. Code § NR 400.02(118), (123e), (123s).

95. 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).

96. 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.

97. The air pollution control permit requires FTS to submit an ambient air monitoring plan for particulate matter unless FTS requests and receives a variance.

98. 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.

99. The specific monitoring requirements for the ambient air monitoring plan are not specified in the air pollution control permit.

100. Because DNR has failed to comply with state law, the Court should, pursuant to Wis. Stat. § 227.57 (5) and (8), set aside DNR's issuance of the FTS air pollution control permit or remand to require the agency to include emission compliance testing and ambient air monitoring requirements that ensure compliance with permit limits and ambient air standards and will not cause air pollution, and that yield reliable data that show that the facility is meeting the applicable limits on a continuous basis.

**ISSUE SIX: WHETHER THE DNR VIOLATED STATE LAW BY  
ISSUING THE FTS PERMIT WITHOUT COMPLYING WITH THE  
WISCONSIN ENVIRONMENTAL POLICY ACT.**

101. Petitioners reallege and incorporate herein each preceding paragraph of this petition, and further allege as follows:

102. The Wisconsin Environmental Policy Act requires that all agencies prepare an environmental impact statement for major actions significantly affecting the quality of the human environment. Wis. Stat. § 1.11.

103. A major action is one whose magnitude and complexity will have significant effects upon the quality of the human environment. Wis. Admin. Code § NR 150.02(16).

104. 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.

105. Type III actions usually do not require an environmental assessment unless case-specific factors warrant a more thorough review of environmental impacts and alternatives. *See* Wis. Admin. Code § NR 150.20(1)(b)4.

106. 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.

107. 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.

108. Because DNR has failed to comply with state law, the Court should, pursuant to Wis. Stat. § 227.57 (5) and (8), set aside DNR's issuance of the FTS air pollution control permit and remand to the DNR with directions to conduct an EA or EIS before issuing the permit.

**WHEREFORE**, Petitioners request that the Court grant the following relief pursuant to Wis. Stat. § 227.57:

- A. That the court set aside and remand the DNR's decision to issue the FTS air pollution control permit with instructions to conduct adequate modeling to ensure compliance with ambient air standards and to prevent pollution, develop achievable permit limits, and include legally adequate monitoring.
- B. Or in the alternative to the above requests, that the court 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.
- C. That the court require the DNR to develop an environmental assessment, and if necessary, and environmental impact statement.

Respectfully submitted this 23<sup>rd</sup> day of July, 2013

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