Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of an Air Pollution Control Construction Permit Issued to FTS International Services, LLC, Located in Trempealeau County, Arcadia, Wisconsin

Case No. DNR-13-043

Permit Number 12-POY-079

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Madison, Wisconsin on April 8, 9 and 10, 2014, in Madison, Wisconsin, and at Whitehall, Wisconsin on April 11, 2014, Jeffrey D. Boldt, Administrative Law Judge presiding. The parties requested an opportunity to submit written closing arguments, and the last was received on August 1, 2014.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

FML Sand, LLC (previously known as FTS International Services)(FML), by

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ISSUES FOR HEARING AND SUMMARY OF RULINGS

The Department granted a contested case hearing on Issue Number One on the following disputes of material fact:

a. Whether, as permitted in the air pollution control [construction] permit, fugitive dust sources will contribute to FTS's total particulate matter emissions, and
b. 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.

Ruling: Fugitive dust emissions will contribute to total particulate matter emissions but are unlikely to cause or exacerbate a violation of any ambient air standard. It was reasonable for the DNR to exclude fugitive particulate emissions from its air dispersion modeling because the permit requires a Fugitive Dust Control Plan, and this complied with the Department's Guidance document on this issue.

The Department granted a contested case hearing on Issue Number Two on the following disputes of material fact:

a. Whether the FTS facility will cause air pollution because of nitrogen dioxide emissions.
b. Whether the FTS facility will cause air pollution because of particulate matter emissions.
c. 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 [construction] permit; and
d. Whether the pollutant controls selected by FTS, baghouses, lose efficiency over time.

Ruling: The petitioners have not shown that the facility will cause a violation of ambient air standards for nitrogen dioxide or particulate matter emissions. The baghouse emission limits are achievable. While baghouse technology does lose efficiency over time, the petitioners have not carried their burden of demonstrating that any deterioration in control efficiency will cause or exacerbate an ambient air standard.

The Department granted a contested case hearing on Issue Number Three on the following disputes of material fact:

a. Whether compliance emission tests are necessary to assure compliance with the terms and conditions of the permit, and
b. 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.

Ruling: The construction air permit does have sufficient and necessary compliance emission tests. The petitioners have demonstrated that the preliminary variance from

required ambient air monitoring should be revoked because the modeled results themselves demonstrate a "significant" level of particulate matter emissions within the meaning of NR 415.075(4)(b).

The Department's permit as issued met all legal requirements and, in terms of the complexity of its analysis, exceeded what was necessary for this minor source for air permitting purposes. The Department reviewed air dispersion modeling which was not required for a minor source of air pollution for Prevention of Significant Deterioration (PSD) purposes. However, the results of the air dispersion modeling, along with certain input assumptions reflected in the modeling but not required in the permit, indicated that under a worst case scenario this source could produce emissions that come very close to an exceedance of the 24-hour PM2.5 ambient air standard.

Accordingly, the permit is modified to revoke the variance from Wis. Admin. Code ch. NR 415.075(4)(a) air monitoring requirements. The ambient air monitoring program requirements as set forth therein should be followed until such time as the permit holder can demonstrate through compliance emission testing that air monitoring requirements are no longer necessary.

All other provisions of the permit shall remain in full force and effect.

FINDINGS OF FACT

1. FTS International Proppants, LLC (FTS International), applied to the DNR for both construction and operation air pollution control permits. (Ex. 200)

2. Following DNR's issuance of the construction permit to FTS International, FML Sand, LLC (FML) became a successor-in-interest to FTS International

3. The FML is proposing a new sand mining and processing operation which will include mining sand, transport and hauling, washing, drying and sorting. There will be one crusher rated at 200 tons per hour. All equipment will run on 3 phase electricity provided by the public utility. The operation will include extracting and processing sand, including mining, crushing, washing, drying, sorting, and hauling. There will be a combination of raw and washed sand stockpiles as well as overburden stockpiles present on the mine. Most, if not all overburden, will be used for making berms and will be seeded according to the reclamation plan. The sand will be a product used for the oil/gas industry.

The site is located within a rural area and occupies 315 acres along the north side of State Highway 95. The City of Arcadia is located about 1 mile west of the operation with few farms and rural residence located nearby. An existing mine is located to the southwest of the subject mine. The terrain is rolling with the highest local elevations present on or near the proposed processing plant. Turton Creek and a tributary to North Creek are located to the south and north of the mine operation, respectively. Both water bodies are tributaries of the Trempealeau River.

The proposed mine is located on a ridge thus the land surface slopes to the south and north toward Turton Creek and North Creek, respectively. (Ex. 101)

4. On June 24, 2013, the DNR issued an air pollution control (the FML Permit) to FTS International. (Exs. 217 and 218)

5. The petition for a contested case was filed on July 24, 2013, and granted on August 13, 2013. A subsequent grant letter was issued on August 29, 2013, that included the individual petitioners by name.

6. On October 17, 2013, the DNR filed a Request for Hearing with the Division of Hearings and Appeals. A hearing was held in Madison, Wisconsin from April 8-10, 2014, followed by a public hearing in Trempealeau County, Wisconsin on April 11, 2014.

7. The DNR conducted an analysis that included air dispersion modeling and made a preliminary determination that the project, when constructed and operated consistent with the application, permit limits, and other parameters set forth in the preliminary determination, would not cause or exacerbate a violation of any ambient air quality standard. (Exs. 202 and 203)

8. FML is a minor source for air permitting purposes. (Hart Pre-filed at 4)

9. DNR's emission modeling uses the highest potential emission rate, based on the worst case scenario conditions, to prescribe limits. (Roth Pre-filed at 10)

10. A stack is modeled with its highest possible emission rate along with a typical flow rate for all allowable hours of operation in each day. Modeled conditions are generally higher than real world conditions in most circumstances. (Roth Pre-filed at 10)

11. The DNR has not found a reliable modelling approach for fugitive emissions. It relies on a non-modelling based approach to minimize fugitive emissions to assure compliance and protect air quality.

12. Numerous DNR witnesses testified that the Department uses means other than modeling to account for fugitive emissions. Results of modeling fugitive dust cannot always predict accurately whether those emissions would cause or exacerbate a violation of an ambient air quality standard. However, fugitive emissions will likely be generated by the crusher, hopper, drilling and blasting process, transport and wind. (Klafka) The primary method used by DNR for addressing fugitive dust from fugitive sources is the preparation and implementation of a fugitive dust control plan. (Yeung Pre-filed at 16)

13. DNR Senior Air management Specialist Jeffrey Sims conducted an analysis that demonstrated compliance with the National Ambient Air Quality Standards (NAAQS). Mr. Sims relied on FML's emission parameters, building heights, a barrier fence and other related modeling inputs via the permit application.

14. The NAAQS are designed to protect the environment and public health. NAAQS are generally not applicable to all fugitive emissions, since a large portion of these emissions occur close to its point of origin, often on company property without public access. Emissions that do not leave company property would not impact ambient air for regulatory purposes. (Sims Pre-filed at 7)

15. A barrier fence can restrict fugitive emissions to company property. There was no binding permit condition that required the barrier fence be constructed as part of the project. (Klafka Pre-filed at 20; Ex. 218) The Petitioners expert, Mr. Klafka, testified that he has seen DNR require fences in conjunction with other air permits.

16. Air dispersion modeling is not a requirement of minor source permit issuance under any state or federal air pollution requirement. (Wis. Stat. § 285.63(11); Johnson Pre-filed at 7)

17. Numerous DNR air program experts testified that no applicable law requires fugitive emission modeling. DNR presented extensive testimony about the shortcomings of fugitive emission modeling framework as the Petitioners propose to apply it here. DNR experts also testified extensively about the permitting approach it uses in place of fugitive modeling, including the requirement for a fugitive dust control plan to regulate fugitive emissions. The DNR's modeling guidance does provide for modeling fugitive emissions in some circumstances: "Non-PSD fugitive sources are not usually modeled by WDNR, but such an analysis could be performed should it be requested by the permit review engineer or an air management supervisor." (Ex. 25 at 22)

18. A Fugitive Dust Control Plan is required for all industrial sand mining operations by Wis. Admin. Code ch. NR 415.075(6) and is required in the FML Permit. (Yeung Pre-filed at 16; Ex. 218)

19. Most fugitive dust does not travel far from its point of generation and is therefore not likely to affect the same locations as the point of maximum impact of stack locations. (Roth)

20. The sand mining operation it is not likely to create large amounts of fine particulate matter during the processing of the industrial sand. At the points in the process where the sand is dry, it is enclosed in structures and mechanical controls are utilized to capture the particulate matter. Fugitive dust tends to be larger particles, which tend to settle out sooner than smaller particles. (Schneider Pre-filed at 4) Only approximately 3 % of fugitive dust emissions are likely to be less than 2.5 micrometers in size. (Schneider Pre-filed at 4)

21. "Frac sand" from these sand operations are "not likely to fracture." (Klafka Test. at 1:39:26)

22. DNR does not model instantaneous releases such as an explosion, blasting, or spill, and testified that no suitable model exists that is approved for regulatory use. FML restricted the amount of blasting by limiting explosives to certain tons per any 12 consecutive

month period. The DNR considers that restriction to limit annual emissions from nitrogen oxides and to ultimately limit all other pollutants associated with that activity.

23. DNR witnesses testified that nitrogen dioxides would not impede attainment of an annual standard because the emissions from blasting would occur in a few seconds and then disperse. The DNR considers nitrogen dioxide to be insignificant in terms of modeling. Mr. Johnson testified persuasively that nitrogen dioxide from blasting sources is of a very short term nature, and would be considered insignificant for purposes of the annual standard. (Johnson hr'g test., Pre-filed at 9)

24. DNR witnesses testified that baghouses are a commonly used and accepted control measure and the Permit allows baghouses only insofar as they yield the required air emissions.

25. The permit specifically establishes an emission limit that the baghouse must achieve.

26. A properly operated and maintained baghouse will effectively control emissions.

27. The construction air permit requires the permittee to adopt measures that will yield compliance with air permit limits.

28. A construction permit performs a different function than an operation permit. The DNR testified that its permitting scheme allows the source to construct and initially operate, conduct the required stack testing, and demonstrate compliance and provide the actual emission rates of those sources.

29. The construction permit requires FML to conduct emissions testing of its stack sources. Specifically, the permit requires FML to conduct compliance emission testing within 90 days after the start of initial operation. The Department may not issue an operation permit until the source has demonstrated compliance as required by the construction permit. The Department has the authority to revise permit conditions after a source has been constructed and if the source failed their initial compliance demonstration testing.

30. The FML Facility was modeled to take up 100% of the 24-hour PM2.5 ambient air standard and 67% of the annual average PM2.5 ambient air standard. (Ex. 3 at 15, 20; Klafka Pre-filed at 22-23)

31. The modeling included only stack sources, and did not consider fugitive sources, which according to the DNR's own emission estimates were approximately 30% of the total PM2.5 emissions from the FML Facility. (Ex. 3 at 15; Klafka Pre-filed at 23)

32. The DNR's modeling review may not have fully taken into account the impact of PM2.5 and PM10 emissions from other nearby facilities because the background concentrations used in the modeling were calculated using ambient air quality data gathered before many of the nearby industrial sand mines and processing facilities were permitted or constructed. (Klafka

hr'g test.) Numerous members of the public testified about their health concerns about air quality in the area in the context of the rapidly growing frac sand mining and processing industry. (Whitehall hearing record on April 11, 2014)

33. Even if the initial stack test—the only compliance emission testing currently required in the FML Permit—shows compliance with the emission limits at startup, as baghouses decline in efficiency over time, they may not continue to meet the low emission limits for PM2.5. (Klafka hr'g test; Klafka Pre-filed at 51)

34. The FML Permit includes a requirement to install and operate a pressure drop monitor for the baghouses at both stacks. (Ex. 4 at 2-3, 7-8)

35. The DNR relies on the pressure drop monitors to determine ongoing compliance with the stack source emission limits. (Ex. 4 at 2-3, 7-8; Klafka Pre-filed at 48-49; Stoffel Pre-filed at 3-4; *See* Wis. Admin. Code ch. NR 439.055(1)(a).

36. Facilities operating with pressure drop monitors for baghouses have failed compliance emission tests where there was no indication from the pressure drop monitor that the baghouses were not functioning properly. (Klafka Pre-filed at 48-49; Klafka hr'g test.; Schneider hr'g test.)

37. Even properly maintained baghouses can develop small holes or tears. (Stoffel hr'g test.)

38. Regular compliance emission testing—or stack testing—is necessary to confirm that the baghouses continue to function at a level that achieves compliance with emission limits. (Klafka Pre-filed at 52)

39. Continuous emission monitors are a reliable method that would provide continuous data regarding the efficiency and function of baghouses, unlike pressure drop monitors, which are examined only periodically. (Klafka hr'g test.; Klafka Pre-filed at 52)

40. Bag leak detection is another sufficiently sensitive method to continuously monitor emissions from the stacks to ensure that any small leaks, tears, or reduced baghouse efficiency are not causing a violation of the emission limits. (Klafka hr'g test.; Klafka Pre-filed at 49-51)

41. The DNR relies on the regulatory authority in Wis. Admin. Code ch. NR 415.075 as a basis to require certain facilities to operate ambient air monitors for PM10. (Roth hr'g test.)

42. The DNR requires other industrial sand mines and processing facilities to install ambient air monitors to sample for PM10. (Klafka Pre-filed at 63)

43. The DNR granted a variance from the particulate matter ambient air monitoring requirement for the FML Facility on August 13, 2013. (Ex. 76) However, on its face the Air

Monitoring Variance indicated that the Department would review the Variance during the operation permit review.

44. Results from PM10 ambient air monitors at other industrial sand mines and processing facilities, assuming conservatively that all PM10 is PM2.5, demonstrates that there are impacts from PM2.5 emissions from industrial sand mines and processing facilities on the ambient air. (Klafka Pre-filed at 63)

45. Studies from similar facilities demonstrate that fine particulates, such as PM2.5 and PM4 constitute between 42% and 61% of PM10 emissions from those facilities. (Klafka hr'g test.; Exs. 77-78)

46. Mr. Klafka's modeling of facility impacts showed impacts above the Significant Impact Level up to 4 miles from the FML Facility. (Klafka Pre-filed at 22; Klafka hr'g test.)

47. Smaller particulate matter particles "can travel very long distances" of nearly 600 kilometers. (Klafka hr'g test.; Ex. 108)

48. It is feasible to develop an effective and enforceable ambient air monitoring system for PM10 and PM2.5, using upwind and downwind monitors to understand the background and the facility impact. (Klafka hr'g test.)

49. Filter-based ambient air monitors allow the facility and the DNR to analyze the particulate matter captured to identify whether it came from the facility being monitored. (Klafka hr'g test.)

50. Given how close the modelling results are to an exceedance of the 24-hour PM2.5 ambient air standard, the petitioners have demonstrated by a preponderance of the credible evidence that the variance from required ambient air monitoring, which was incorporated into the permit, should be revoked. The FML Facility was modeled to take up 100% of the 24-hour PM2.5 ambient air standard and 67% of the annual average PM2.5 ambient air standard. (Ex. 3 at 15, 20) The modeled numbers represent inherently "significant" levels of particulate matter from this facility within the meaning of Wis. Admin. Code ch. NR 415.075.

51. The permit is accordingly modified to retain the required ambient air monitoring as set forth in Wis. Admin. Code ch. NR 415.075(4)(a). The preliminary Variance must be revoked.

52. The permit holder can apply for another Variance from ambient air modeling requirements pursuant to the administrative code if it has results from compliance emission testing that demonstrate that actual emission limits are not as close to an exceedance as the modeled results from air dispersion modeling.

DISCUSSSION

All parties agree that the FML Sand plant is a minor source for purposes of Prevention of Significant Deterioration (PSD) review. The Department typically does not require air dispersion modelling for minor sources. However, it did for this permit review.

The result of the modelling established that the FML Facility was modeled to take up 100% of the 24-hour PM2.5 ambient air standard and 67% of the annual average PM2.5 ambient air standard. (Ex. 3 at 15; 20; Klafka Pre-filed at 22-23) This does not warrant denial of the permit or any major changes to the permit other than to revoke the Variance from the established ambient air monitoring requirements set forth in Wis. Admin. Code ch. NR 415.075 (4)(a).

Revocation of the Variance is appropriate for several reasons. First, the air dispersion modeling results—taking up 100 % of the 24-hour PM2.5 ambient air standard and 67% of the annual average PM2.5 ambient air standard—clearly demonstrate as a matter of law that "the general public will be exposed to significant levels of particulate matter from the source." A single source taking up to 100 percent of any standard applicable to the general public is inherently significant within the meaning of Wis. Admin. Code ch. NR 415.075(4)(b).

Second, the modeling did not take into account fugitive emissions. This was appropriate given both the Fugitive Dust Control plan and the problems with modeling these emissions. But the fact remains that, according to the DNR's own emission estimates, fugitive emissions were approximately 30% of the total PM2.5 emissions from the FML Facility. (Ex. 3 at 15; Klafka Pre-filed at 23) It is also true that most fugitive particulate emissions are likely to be larger than 2.5 micrometers in size. (Ex. 108) However, some portion—3 percent on average according to evidence at hearing-- are likely to be smaller particles that get off-site and into the ambient air.

Third, the modelling inputs included the assumption of a fence barrier around the facility which is not required as part of the air pollution construction permit. (See: Exs.104 and 218) The fence would have helped to restrict fugitive dust emissions to on-site areas which are not part of the regulated ambient air. (Wis. Admin. Code ch. NR 400.02(24)) If the fence barrier is in fact constructed it will help to keep fugitives on site.

Finally, the modeling may not fully take into account the impact of PM2.5 and PM10 emissions from other nearby facilities because the background concentrations used in the modeling were calculated using ambient air quality data gathered before many of the nearby industrial sand mines and processing facilities were permitted or constructed. Numerous members of the public testified about their concerns about air quality in the area in the context of the rapidly growing frac sand mining and processing industry.

The DNR and FML Sand experts suggested that maximum stack and fugitive emissions would not occur at the same time and that the modelling results demonstrating emissions at the brink of a potential exceedance would be the worst case scenario. However, it seems prudent

given the air dispersion modeling results to revoke the Variance to required air emission monitoring. The modeled results are very close to an exceedance. This represents a "significant level" of particulates and warrants revocation of the Variance which was incorporated into the permit. It is premature to grant a variance from air monitoring requirements at this time. The permit holder can apply for another variance after construction is complete and if compliance testing establishes that modeled results reflect real world conditions and input assumptions. The permit should be modified to require that FML Sand NR undertake air monitoring as required by Wis. Admin. Code ch. NR 415.075(4)(a).

Petitioners argue that the Department should have also applied the federal 1-hour NO2 NAAQS and an annual average PM2.5 NAAQS that have been promulgated by the U.S. EPA, even though these standards have not been promulgated yet by the Department. (Pet. Brief at 28-32) There is a well-established process for the Department to promulgate new federal standards into the state regulations, and this process has not yet been completed for the 1-hour NO2 NAAQS or the annual average PM2.5 NAAQS. (Hart hr'g test.) The Department, as a state administrative agency, may not implement or enforce any standard, requirement, or threshold, including as a term or condition of a permit issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been properly promulgated. (*See* Wis. Stat. § 227.10(2m)) Therefore, the Department applied the appropriate standard as part of this permit review even if it has other obligations to comply with federal law.

All other provisions of the permit shall remain in full force and effect.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has the authority to hear contested cases and issue necessary orders in reviews of air permit cases pursuant to Wis. Stat. §§ 227.43(1)(b) and 283.63. Following the hearing the department's action may be affirmed, modified or withdrawn. (Wis. Stat. § 283.63(1)(b))

2. The DNR complied with Wis. Stat. § 285.63(1)(b) in issuing an air pollution control construction permit to FML. However, to ensure that the project does not cause or exacerbate a violation of an ambient air standard, the variance to the ambient air monitoring requirements of Wis. Admin. Code ch. NR 415.075(4)(a) must be revoked.

3. "Ambient air" means the portion of the atmosphere external to buildings and to which the general public has access. (Wis. Admin. Code ch. NR 400.02(24))

4. "Particulate" or "particulate matter" means any airborne finely divided solid or liquid material with an aerodynamic diameter smaller than 100 micrometers. (Wis. Admin. Code ch. NR 400.02(118)) The project will generate particulate or particulate matter within the meaning of this definition.

5. "Particulate matter emissions" means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by an applicable reference method or an equivalent or alternative method specified by the department. (Wis. Admin. Code ch. NR 400.02(119)) The project will generate "particulate matter emissions" within this definition.

6. "PM2.5" means particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers as measured in the ambient air by a reference method based on Appendix L of 40 CFR part 50, incorporated by reference in Wis. Admin. Code. ch. NR 484.04 (6g), and designated in accordance with 40 CFR part 53, incorporated by reference in Wis. Admin. Code ch. NR 484.03(5), or by an equivalent method. (Wis. Admin. Code ch. NR 400.02(123e)) The project will generate "PM2.5" within the meaning of this definition.

7. "PM2.5 emissions" means PM 2.5 emitted to the ambient air as measured by an applicable reference method or an equivalent or alternative method specified by the department. PM2.5 emissions include filterable emissions and gaseous emissions from a source or activity that condense to form particulate matter at ambient temperatures. (Wis. Admin. Code ch. NR 400.02(123m)) The project will generate "PM2.5 emissions" within the meaning of this definition.

8. "PM10" means particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers as measured in the ambient air by a reference method based on Appendix J of 40 CFR part 50, incorporated by reference in Wis. Admin. Code ch. NR 484.04(5), and designated in accordance with 40 CFR part 53, incorporated by reference in Wis. Admin. Code ch. NR 484.03(5), or by an equivalent method. (Wis. Admin. Code ch. NR 400.02(123s)) The project will generate "PM10" within the meaning of this definition.

9. "PM10 emissions" means finely divided solid or liquid material, with an aerodynamic diameter less than or equal to a nominal 10 micrometers, emitted to the ambient air as measured by an applicable reference method or an equivalent or alternative method specified by the department. PM10 emissions include filterable emissions and gaseous emissions from a source or activity that condense to form particulate matter at ambient temperatures. (Wis. Admin. Code ch. NR 400.02(124)) The project will generate "PM10 emissions" within the meaning of this definition.

10. The permit's prohibition on causing or exacerbating a violation of an ambient air quality standard applies to fugitive as well as stack sources.

11. DNR reasonably refused to include fugitive dust sources in its modeling for compliance with particulate matter ambient air standards. Wisconsin law accounts for the shortcomings of fugitive modeling by establishing other means of setting permit terms. Specifically, the DNR considered FML fugitive emissions by a Fugitive Dust Control Plan, not modeling. However, it is also appropriate to consider modelling results in conjunction with fugitive emissions in the context of the variance to required ambient air monitoring for the facility

12. Wisconsin law does not require air dispersion modeling for minor sources, such as FML.

13. DNR considered air dispersion modeling in accordance with the authority granted to it by the legislature.

14. The DNR complied with Wis. Stat. § 285.63(1)(a) in issuing an air pollution control construction permit to FML.

15. The FML facility permit includes the required limit on nitrogen dioxide emissions. Nitrogen dioxide from blasting sources is of a very short term nature, and would be considered insignificant for purposes of the annual standard.

16. The pollutant controls selected by FML, baghouses, are able to achieve the low emission limits for particulate matter in FML's air pollution control construction permit.

17. The Permit requires compliance emissions testing that will reveal whether FML complies with its emission limits.

18. The permit requires the facility to prepare a Malfunction, Prevention and Abatement Plan to address how the facility will maintain a baghouse to preserve its efficiency.

19. The Permit requires compliance with its terms and conditions including conducting emission tests.

20. Wisconsin Admin. Code ch. NR 415.075(4)(a) relating to particulate matter emission limitations for ledge rock quarries and industrial sand mines requires ambient air monitoring in the absence of a variance under sub. (b) The petitioners have established as a matter of law that the required ambient air monitoring is appropriate given "the significant particulate matter that the general public will be exposed" to will be generated from the facility as established by air dispersion modeling and that the variance should be revoked.

21. The permit holder retains the right to re-apply for a Variance from ambient air monitoring requirements if the results of compliance emission testing show the general public is exposed to a less significant level of particulate matter than that reflected in air dispersion modeling results.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, the permit be MODIFIED as follows:

The Variance from Wis. Admin. Code ch. NR 415.075(4)(a) air monitoring requirements is HEREBY REVOKED, and the permit (at p.14 of 29) should be modified to reflect this and that the permit holder can re-apply for a Variance if it has compliance emission testing results which support suspending ambient air monitoring requirements.

IT IS FURTHER ORDERED, that all other portions of the permit remain in full force and effect except as modified above.

Dated at Madison, Wisconsin on December 1, 2014.

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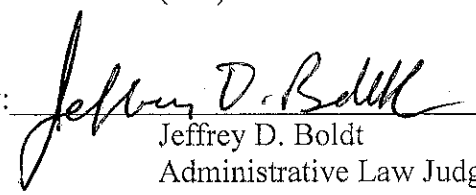
By: 
Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.