In the Matter of:

Air Pollution Control Permit #03-POY-328 dated April 26, 2004 Issued To Madison-Kipp Corporation

Case No: IH-04-02

CLEAN AIR'S REPLY BRIEF

I. INTRODUCTION.

At this point in the litigation a remarkable number of facts are not in issue, and those facts alone compel that the permit be withdrawn with instructions made up of the remedy described in Clean Air's initial brief.

Legally, DNR and Kipp seek to evade consideration of those facts through asserting an extension and expansion of the *Thiensville* decision to a qualitatively different type of case. *Thiensville* is inapplicable here. DNR's alignment with Kipp on *Thiensville* is an artifice of this adversary procedure, and diametrically opposed to positions it took until the adversary procedure was initiated. DNR's invariable practice involves reviewing the overall impacts of the facility from which it receives a permit application. Doing so gives it the opportunity to apply new science and better techniques progressively as they are developed. Never, in its modeling, did DNR separate out the impacts of the S16 and S17 stacks from the impacts of Kipp's facility. Since Clean Air sought review, it has sought to do nothing else.

Thiensville involved a challenge to existing discharge requirements when DNR had only changed the schedule for implementing the requirements. For Kipp's application, the DNR was required to establish new discharge requirements.

Extension and expansion of Thiensville as Kipp advocates would preclude exactly what DNR proclaimed it was *required* to do in its review process, is hostile to the fundamental aims of our state's clean air laws, and would preclude agencies from bringing into play, when a new permit is sought, improvements in air pollution control science.

In addition, the kind of review Clean Air sought, review of the determinations actually made, and the process by which they were made by the agency, was determined to be appropriate in Thiensville.

Last, extending Thiensville as Kipp seeks would trigger due process issues that neither Kipp nor DNR even identified, much less analyzed

Kipp is wrong in its analysis of deference. No deference is due to the DNR decision because no final DNR decision yet exists. What exists is a permit that has been compellingly challenged. The permit advocates confuse the deference due to the reasoning behind a final agency decision by a reviewing court under Chapter 227 with the deference due to agency staff before the matter has been reviewed through the contested case procedure and before a final determination of the agency has been made. The DNR decision on the permit is not final before it is issued by the ALJ. *Sea View Estates Beach Club v. DNR,* 223 Wis.2d 138, 588 N.W.2d 667 (1998).

Kipp asserts issues of fairness. Considerations of fairness weigh heavily against, and not in favor of, the positions taken by Kipp and DNR. All members of the public are similarly situated with respect to the protective aims of the air quality laws. When additional tools need to be employed to achieve the *same level of detection and protection* for people who are uniquely exposed because they are in a downwash cavity, for example, or the contaminant concentrations to which they are exposed are affected by terrain, then the principles of fairness, as articulated in constitutional procedures requiring due process and equal protection, demand that those tools be employed.

DNR's Guidelines acknowledge, "In most cases, ISC cannot calculate a concentration within 25 meters of the source due to limitations of the model." Those people exposed within the 25 meters "failure zone" of ISC 3 are just as entitled to the protection of the law as the people beyond that distance. The same principle applies for are people who are exposed within the downwash cavity, for which ISC 3 is equally incapable of identifying exposures.

DNR's decision to exclude persons who live near Kipp from the protection of the air quality standards ventures far beyond the realm of any discretion that DNR. The legislature, not the DNR, gets to establish the air laws to protect people. "[A] statute should be construed to give effect to its leading idea . . " *State v. Clausen* 105 Wis. 2d 231, 244, 313 N.W.2d 810, 825 (1982) . NR 406.09 Wis. Admin Code, requiring that air contaminant concentrations be measured at locations where

people are exposed, is a reasonable articulation of the statute. DNR's implementation failure undermines instead of effectuates it.

Even if the DNR decision under review here were the final one, it would not be entitled to any deference because DNR cannot demonstrate it engaged in a traceable logical analysis of legal and regulatory requirements in light of the law's aims and the particular circumstances. In other words, it cannot show that it exercised reasoned discretion with respect to the controversies central to the review.

DNR's post hoc assertions about terrain are nowhere supported by any document from the decision making process contemporaneous with the decision, and do not stand up under scrutiny. Cutting and pasting, which DNR substituted for analysis, is not reasoning, and no contemporaneous evidence has been submitted to indicate that DNR actually considered and analyzed - - in light of the law that extends protection of the air quality standards to people - - the critical concerns presented to DNR. DNR did not even visit the site. If it had, it would have been alerted to the presence of many houses close to the site.

Tools were readily available to accurately estimate the exposures to people at those residences and to others who are exposed near Kipp. Nothing exotic was required of DNR to meet its legal responsibilities. Capable procedures are routinely employed by other regulatory agencies across the country. Kipp itself uses the ISC Prime program, which corrects ISC3's deficiency for areas close in to a facility.

Now, however, Kipp proposes to reinterpret NR 406.09 to require an entirely different modeling protocol, apparently one that eliminates the practice of modeling

for maximum exposures. This is untenable. In another assertion Kipp and DNR both imply that the TSP standard should not be enforced because it is a secondary standard. This is equally untenable.

ISC3, as a tool, does not provide DNR with the analytical power needed to fulfill its non-discretionary obligation to measure contaminant concentrations at locations where members of the general public might reasonably be exposed. Fundamentally, DNR has a job. An important job. It cannot do the job with the tool it is using. A soundly scientifically tested tool, one widely and openly used by similarly situated regulators with the active assistance of EPA, is readily available. Under these circumstances, DNR cannot leave people without the protection of the law.

Because of the utter lack of information describing the contaminant concentrations in the areas where they are likely to be the highest, DNR's arguments for its permit decision was not substantially justified. The ALJ should make a specific finding to that effect.

Kipp's permit requires fugitive emissions be minimized, but DNR and Kipp say there are none. The latter claim has been heard before, and found to be false. Neighbor's complaints that seem likely to be associated with fugitive emissions have continued unabated, in spite of Kipp's claims that the problem has been solved. Kipp and DNR can't have it both ways. Fugitive emissions either have to be prohibited, with adequate proof that they are no longer occurring, or they have to accounted for in modeling. Sensitivity analyses show that recognizing just ¼ of the

amount of fugitive emissions modeled by Clean Air, alone, would push Kipp well over the TSP limit. This, despite Clean Air's having modeled fugitive emissions as an area source, i.e., in a way favorable to Kipp.

Respecting flagpole receptors, Kipp and DNR's arguments cannot overcome the simple and convincing fact that people are exposed to emissions at places above ground level, and the law requires that concentrations be measured at places where people are located.

Kipp's brief cites various monitoring results as "evidence" of current conditions while concealing their age and meaning, but some results are too remote in time to be useful, while others are lower than Clean Air's modeling would predict they would be at those locations, indicating that Clean Air's modeling is conservative in a manner favorable to Kipp.

Overall, the respondent's arguments are unconvincing. It is time for people who live near Kipp to finally receive the protection of the air laws.

II. ANALYSIS.

A. *Thiensville* cannot apply to this case in the way proposed by DNR and Kipp.

Thiensville is not relevant in any way other than, as the ALJ has already ruled.

The Kipp/DNR extension and expansion of *Thiensville* imposes no limits what the ALJ may or must consider in determining whether Kipp is entitled to the permit because:

- *Thiensville* involved a challenge to existing discharge requirements when DNR had only changed the schedule for implementing the requirements. For Kipp, the DNR was required to establish new discharge requirements.

- Extension and expansion of *Thiensville* as Kipp advocates would preclude exactly what DNR proclaimed it was required to do in its review pro cess;

- Extension and expansion of *Thiensville* as Kipp advocates is hostile to the fundamental aims of our state's clean air laws:

- Extension and expansion of *Thiensville* as Kipp advocates would preclude agencies from bringing into play, when a new permit is sought, improvements in air pollution control science;

- This case presented here involves a review of a type determined to be appropriate in *Thiensville*, i.e., a review of the kinds of issues the agency had already considered;

- Extending *Thiensville* would trigger due process issues that neither Kipp nor DNR even identified, much less analyzed;

- Kipp and DNR waived any *Thiensville* challenges they might have had by litigating the matter without interposing standing objections and motions to strike.

1. *Thiensville* Imposes No Limits What The ALJ May Or Must Consider In Determining Whether Kipp Is Entitled To The Permit.

The essence of the holding in *Thiensville* is that an ALJ, who is involved in "review," can only "review" issues the agency took into account when making the determination for which review is sought. *Thiensville* 130 Wis.2d 276 at 283. With this limitation in mind, the *Thiensville* court upheld an ALJ's decision to decline to "review" infrastructure requirements established in a 1977 permit that had not been considered by the DNR staff when it made adjustments, in 1981, to the time limit components of the same permit. In this case the overall facility impacts were, and had to be, an issue to be taken into account, so the overall facility impacts can

be reviewed. Any other position precludes review of an action that the agency actually, factually, undertook.

Thiensville does not impose any limits applicable to this matter because DNR was required by law to take into account the overall impacts of the facility, and to do so, DNR had to remodel the entire facility. Every argument and position advanced by Clean Air to challenge the permit is directly connected to that modeling, a process DNR acknowledges it was required to undertake in making its decision on Kipp's permit request. Modeling appraises the overall impacts of the new mix of emissions when new ones are added to old ones, and, most importantly, puts on the table the question of whether Kipp's facility emissions will cause or exacerbate a violation of an air quality standard, a question that comes into play whenever a new permit is sought.[1] Kipp's request for a permit opened up issues because it sought to create a level and mix of emissions and contaminant concentrations that had never previously been permitted.

DNR was obligated to look at the whole new landscape of emissions, and Clean Air was entitled to a review of what DNR looked at (i.e., did DNR look at what it was required to look at under the law), and how it looked at it (i.e., did DNR conduct a sound and legally sufficient analysis).

When new emissions are added at just one or two stacks in a facility that has many stacks, both the absolute and the relative levels of contaminant

[1] The issues Kipp indicates Clean Air waived all arise directly from Clean Air's challenge to the legal sufficiency of DNR's analysis.

concentrations from the facility's combined emissions are certain to change. The mix of emissions, the concentrations of emissions and interactions of emissions all change. Because Kipp's permit application created a wholly new set of circumstances that required DNR to conduct a new overall review, which it did, the matter under review here bears no resemblance to the circumstances in Thiensville.

Under *Thiensville*, those issues an agency had to consider when making the decision for which "review" is sought continue to be "reviewable" by an ALJ. Kipp's *Thiensville* analysis aims to nullify Clean Air's due process right to review the exact decision and process DNR undertook in deciding to grant Kipp its permits.

Thiensville v DNR, 130 Wis.2d 276, 386 N.W.2d 519, involved a 1981 change to time limits that had been incorporated into a water permit when it was first issued in 1977. Time limits and infrastructure requirements are qualitatively different types terms. Furthermore, this is not a water quality case.

The case here involves a permit to increase emissions, a critical difference from *Thiensville*. When considering a permit to increase emissions, DNR must investigate the air quality impacts of an overall facility, i.e., all of its emissions. The kind air quality impacts of one stack - - emissions - - is not qualitatively different from the air quality impact of another stack - - also emissions - - in the way that a time limit is qualitatively different from an infrastructure obligation.

In *Thiensville*, time limits DNR had incorporated into the 1977 water pollution permit for the Village of Thiensville had become unrealistic. In 1981 DNR altered the permit to change those time limits. In doing so, it did not re-evaluate

any qualitatively different requirements such as whether infrastructure obligations established in the 1977 permit should be changed. The 1981 change affected only the time limits of the 1977 permit, and nothing else.

When the Village sought to "review" DNR's limited 1981 decision before an ALJ, the Village also sought to challenge before the ALJ a qualitatively different infrastructure obligation that DNR had imposed in 1977, specifically an obligation to connect to MMSD. In changing time limits, however, DNR had neither needed to re-evaluate, nor had it actually re-evaluated, that qualitatively different obligation. Time limits are an entirely different kind of permit element from a requirement to construct infrastructure. Unlike the emissions from multiple stacks on a single facility, they do not cumulate or interact. You can change the time limits enormously without reconsidering the fundamental, and qualitatively distinct, question of whether the infrastructure must be built.

Granting the Village's request would have put the ALJ in the position, during his 1981 "review," of considering the legality of the infrastructure obligation DNR staff had imposed in 1977 - - an obligation the DNR had not reconsidered or reanalyzed. The ALJ in *Thiensville* in the 1981 proceeding, have before him the record describing how or why the DNR had made the 1977 decision requiring the infrastructure, so there was nothing to "review." To allow the Village to litigate 1977 the infrastructure related term that was not addressed by DNR in making the 1981 decision to change time limits would have been to change the ALJ from a "reviewer" into a decision maker of first impression. The ALJ declined to assume

that job, and limited the scope of the 1981 proceeding to what DNR had considered in 1981, i.e., the time limits. Ultimately the ALJ's decision was affirmed by the court of appeals.

In *Thiensville*, the kinds of terms that were changed in 1981, (dates), were fundamentally different from the kind of term, an infrastructure construction obligation, that DNR did not revisit.

This difference is important. You can change dates while leaving an obligation to invest in infrastructure fixed and unchanged. The relevant permit terms are qualitatively different.

You can ask and answer the question of when an obligation ought to come due without addressing the question of whether the obligation ought to continue to exist. What the *Thiensville* decision turns on is the qualitative difference and ready separabilty of these very different issues. It is this difference that enabled DNR, in the first place, to reconsider one type of issue, the question of "when the deadlines should be," without analyzing the other issue of "whether the Village should be required to connect to MMSD."

By way of contrast, when Kipp sought the permit allowing it to increase the emissions at two emissions points in a facility with many emissions points, the requested changes invariably and inevitably triggered the question of whether the overall emissions of the facility would, after the change, create an exceedence of an air quality standard. Had an exceedence been predicted, Kipp would have been required by DNR to change its infrastructure (i.e. emissions and stacks) to reduce

the facility's impact. The question of the overall impact is inescapable. You cannot add emissions to two emissions points out of many without changing the levels of impacts. When you add impacts you have to model, and if you model, it is a fair question to ask whether you modeled correctly. You cannot answer the question posed by Kipp's permit application - - whether it will cause or exacerbate an exceedence - - without analyzing the interactive and cumulative effects on air quality that occur when the new emissions are added to the other emissions from the facility. You cannot answer that question without modeling. You cannot model without having to model correctly. Therefore, whether you modeled correctly becomes an issue.

These profound differences between the kinds of questions at issue, and the review necessary to answer those questions, make Kipp's cursory interpretation of Thiensville inapplicable here.

While *Thiensville* was concerned with pre-existing terms that were qualitatively different from and readily separated from the terms being changed, the matter here involves interactive or cumulative effects (or both) that are qualitatively the same. They all involve emissions. The change in emissions is contemporaneous with, and inseparable from the DNR decision to issue a permit to Kipp. To determine those effects, DNR has to do an analysis. Once the obligation to conduct an analysis is triggered, then the analysis has to be "done right."

Ultimately, the only real question is whether or not DNR had to analyze the emissions of the overall facility. If DNR had to analyze them, then the agency had

to "do it right," and whatever ends up being litigated to determine whether DNR "did it right" is fair game for consideration. Similarly, whatever Orders logically flow from the consideration of whether DNR "did it right" are proper under Wis. Stat. § 281.81(1)(b).

The permit change under review in Thiensville did not involve new construction, new discharges, or any changes to the facility. When those come into play, DNR undertakes a different analysis - - one that creates a reviewable decision making process like the one reflected in the Preliminary Determination and modeling memorandum in this matter. In such circumstances, the ALJ is in a position to conduct the "review" that the ALJ in *Thiensville* could not conduct.

What DNR may not yet have grasped is that *Thiensville* is a sword that Kipp is honing on both sides of the blade. If it can be used to cut off citizens from review on the grounds cited by Kipp, it can be used against agencies to establish semi-permanent rights to permit conditions. If citizens are cut out from the right to review the exact work that DNR did, then the next logical step is to constrain the review that the agency itself can conduct. The thrust of *Thiensville* as interpreted by Kipp is to shield all issues that were ever considered from further scrutiny, even when they are the same kind of issue, e.g., emissions, as the issue presented by a new construction application. A highly truncated review process would put an end to the long standing practice of bringing into play improved science and new techniques when a polluter applies for a new permit that adds to overall emissions. Under Kipp's extension and expansion of Thiensville, DNR would have no basis for

bringing that improved science into play because it would involve consideration of impacts from stacks for which permit terms had been previously established.

2. What Kipp's extension and expansion of *Thiensville* would preclude is review of exactly what DNR proclaimed it was required to do in its review process.

Approval of each new source permit requires that the entire facility be modeled to assure compliance with the air quality standards. As DNR stated in its ANALYSIS AND PRELIMINARY DETERMINATION ("PD"):

> "The [modeling] results are shown for the whole facility because Madison Kipp has an operation permit and therefore must show facility-wide compliance with standards when applying for new source permits." Ex 102, Air Quality Review, p. 7

The DNR modeling memo also acknowledges that the entire facility must be modeled in order to demonstrate increases would not cause or exacerbate air standard violations. Ex 101, C. Model Results and Conclusions, p. 2.
The "whole facility" includes all the stacks and emissions points at Kipp.
DNR's description of why modeling results must embrace the whole facility, in addition to being a binding admission against interest, accurately portrays DNR's legal obligations. The only way that DNR can meet the obligations of its "job description" which obligates it to verify compliance with the air standards and identify maximum contaminant concentrations at "locations where members of the public might reasonably be exposed..." is to analyze the all emissions when the overall emissions change, and thus determine if the facility will cause or exacerbate a violation of an air quality limit. NR 406.09 Wis. Admin. Code.

In addition to being necessary, the process of reviewing all **impacts** is also a longstanding and invariable practice. Every prior permit modeling example (e.g. TKW1 and TWK2 and 3) discussed in the proceeding by any party involved modeling of the entire along with proposed increases which were small subset of the entire facility. (Tr. 1159, Klafka).

The circumstances here are profoundly different from the *Thiensville* situation in which only time limits are at issue, and where qualitatively different aspects of a permit were not reviewed by DNR in issuing the permit being challenged.

Clean Air's right to review entails, of necessity, the right to review whether DNR's analysis was done accurately. Reviewing whether it was done accurately involves, of necessity, determining whether DNR adhered to its standing practices and guidelines and whether DNR identified, as it must, contaminant concentrations at places where people are exposed.

DNR never hinted in response to public comments that issues such as fugitive emissions, terrain or the downwash cavity were not germane to the permit Kipp was seeking. Nowhere in the DNR modeling analysis were the impacts of Stacks S16 and S17 separated from the impacts of the entire facility.

Throughout the process of modeling, DNR never separated out the emissions from S16 and S17 from other emissions that it modeled. Its belated assertions to the effect that the emissions from S16 and S17 are all that matter, when it never

bothered to separately identify them while it was conducting its own modeling, is just an aspect of the adversary proceeding, not a reflection of its actual practice. ,

DNR might note that the attack on review that it is mounting under Kipp's proposed extension and expansion of Thiensville interpretation could just as easily be turned against the department if, for example, Kipp applies for a permit for added emissions in two years and DNR wants to employ AERMOD to analyze all emissions. Under the Thiensville interpretation advanced by Kipp, DNR would not be able to apply the new model to Kipp's overall emissions. Under Thiensville as extended and expanded by Kipp, permit limits based on inherently defective analysis metamorphosed into the semi-permanent entitlements to pollute.

3. Kipp's extension and expansion of *Thiensville* is hostile to the fundamental aims of our state's clean air laws.

According to DNR's website, "Chapter 285, Wis. Stats., requires and authorizes the Department of Natural Resources to organize a comprehensive and integrated program to enhance the quality, management and protection of the state's air resources and develop plans for the prevention, abatement and control of air pollution in the state." (Emphasis added).

What Kipp's extension and expansion of *Thiensville* would do is require that issues related to stacks permitted at different times be Balkanized - - differently analyzed and resolved - - and then excluded from consideration when the next stack comes up for permitting. This is illogical because the new permits, unlike the

Thiensville circumstance, involves aspects of the facility that are qualitatively the same - - they are all emissions.

Under the *Thiensville* interpretation advanced by Kipp, companies could readily circumvent protection of air quality standards simply by strategically breaking up their permit applications. Kipp, for example, could purposely initially propose an unrealistically low emission limit for S16 & S17 in order to receive a permit under which all sources are modeled. Kipp could later, when a violation is detected request a higher limit confident that the full air quality impacts of the overall facility would escape analysis because the permit terms associated with some stacks had been previously established.

Kipp's interpretation thus has the effect of undermining the "comprehensive and integrated" program" that is supposed to be aimed at enhancing air quality and delivering to Wisconsin citizens the protection of the clean air laws.

4. Extension and expansion of *Thiensville* as sought by Kipp would preclude agencies from bringing into play, when a new permit is sought, improvements in air pollution control science.

As reflected in how DNR treated Kipp, the issuance of every new source permit requires an updated modeling analysis. This analysis will be new and different, and require an evaluation based on new information concerning the facility discharges, availability of new dispersion models, and any new guidance on modeling techniques and any improved procedures. The record reflects ongoing work on models, and there will always be improved dispersion models and modeling methods. Kipp's expert opined about the many models developed by USEPA over

the past 25 years. (Tr. 586, Podrez) To advance air pollution control, new modeling techniques need to be incorporated into permit issuance procedures. Kipp's interpretation of Thiensville would interfere with the orderly implementation of those improvements.

Under Kipp's interpretation of *Thiensville*, this longstanding practice (see, e.g., Exhibits 86 and 89 (TKW Waupaca) would be precluded because it might affect predicted measurements of concentrations from stacks that had been modeled measured before using older procedures. Far from extending deference to DNR, what Kipp is angling for through its attempt to expand *Thiensville* is a dramatic constriction of the options available to anyone other than the permits seeker when expansion is sought. In TKW Plant 1, for example, only four stacks out of thirteen were included in the project. And for TKW Plants 2/3, only two out of 15 stacks at the facility were included in the project approved by DNR. In both of these examples, the DNR modeled the entire facility using its latest modeling procedures. Older stacks and emissions were not grandfathered into older modeling procedures. (Tr. 1159, Klafka, Exhibit 83) Under Kipp's extension and expansion of Thiensville the DNR would have to reject scientific advancement and its better techniques for protecting the general public.

Thiensville, which was decided on facts and permit characteristics so different from the ones in play here, and which involved qualitatively different permit characteristics, cannot be deemed to stand for the proposition that DNR may not review the interactive impacts that DNR must review in order to meet its legal

responsibilities. Nor can it be deemed to stand for the proposition that, once required, the review process must reproduce errors that may have been previously made. Kipp's desired extension and expansion of *Thiensville* would have the effect of repealing the law and precluding DNR from continuing long-standing practices that it is compelled to undertake to meet its legal responsibilities.

5. This Case Involves A Review Of The Type Recognized As Appropriate In Thiensville.

The problem for the Village in *Thiensville* was that, with respect to the matter the Village wanted the ALJ to review, there existed no "first look" to "review" by having the ALJ take a "second look."

The *Thiensville* court emphasized that review involves taking a "second look at something." *Thiensville* at 283, Emphasis.

Irrespective of disagreements about the sufficiency of DNR's review and its Preliminary Determination, it is not in dispute that DNR undertook the review. The review process, which produced the PD and the modeling memo, established a record that describes how the DNR arrived at its decision. The "first look" occurred.

When DNR staff has taken their "first look," petitioning challengers are entitled to a "second look." Because DNR conducted the review and produced the documents, the "prior administrative recourse" that the *Thiensville* court indicated needed to exist in order to entitle a party to review, before an ALJ, of the issues actually considered by the agency, occurred in this case. *Thiensville* at 281.

The nature of DNR's "first look," which involved the selection and running of modeling programs, and the evaluation of some impacts, is the exact process Clean

Air sought review in this proceeding. Therefore, the review to which Clean Air is entitled under *Thiensville* is the exact review it sought here.

The review includes review of the current modeling analysis, including its input assumptions, dispersion models, and procedures.

Clean Air asked for review of the decision to allow the permit. This, of necessity, involved review of the process that the DNR undertook in issuing this permit. In *Thiensville* there was no such process, so no process existed to "review."

Because it does exist here, Clean Air is entitled to bring its full challenge.

This review therefore incorporates review of the issues identified at page 37 of its brief,[2] as well as because all of those issues are material to the legal sufficiency of the DNR determination being reviewed.

6. Extending Thiensville as Kipp proposes would trigger due process issues that Kipp did not even identify, much less analyze.

Because the Village of Thiensville was the permit holder, there were no issues of due process or equal protection of the laws presented in that case. As the permit holder, the Village had had a full opportunity to challenge DNR's infrastructure decision in 1977.

Extending *Thiensville* to the fact situation here as Kipp wants would void Clean Air's due process right to a review of a proceeding that considered the creation of a new landscape of emissions through a new DNR process involving new modeling of all impacts. Clean Air would be denied this right permanently.

[2] Kipp's argument that members of the general public must, before they can seek a contested case, raise at the public hearing issues such as correct location of stacks, the presence or absence of rain hats, etc., is too unreasonable to merit response beyond this sentence and footnote.

Clean Air, a corporation that did not exist until years after Kipp's most previous permit, the Title V permit, obviously had no opportunity to participate in that permit proceeding.[3] Kipp's extension and expansion of *Thiensville* would prevent the guardian of a new baby with severe asthma who lives in the downwash cavity from challenging Kipp's permit to increase overall emissions. Such a result would violate due process. Just like a new baby, Clean Air, as an entity that did not exist, could not have "foregone" the opportunity to challenge Kipp's permit.

A separate due process issue is that, like Clean Air, the configuration, amount, and concentration of emissions created by the new permit is new and has never before existed. Under Kipp's extension and expansion of *Thiensville* from circumstances in which the permit issues are qualitatively different and fully separable to circumstances in which the permit issues (emissions) are qualitatively the same and create a new overall universe and landscape of emissions from Kipp's facility, these new permitted conditions would escape review.

To prevent a party with standing - - any party - - from litigating a the propriety of a permit that creates a new landscape of emissions and concentrations of emissions that it could not have previously litigated because it did not previously exist would violate that party's right to due process of the law.

[3] Contrary to Kipp's conflation of Clean Air Madison Ltd. Inc. with a vague entity it labels "citizens," Clean Air is a corporation with a separate identity. Kipp neither has, nor could, make any showing that Clean Air, in its public interest representative capacity, is representing only the interests of persons who previously had the opportunity to litigate any issue involving Kipp's permits

Kipp's interpretation of *Thiensville* would also create fundamental fairness issues between competitors. The Guidelines change. Methods of analysis are, according to all parties, planned to change. The only way for DNR to maintain fairness among different companies is to apply all of its evolving thinking to each facility as that facility comes before it, unless the issue presented is so fundamentally distinguishable as the difference between a time limit and an infrastructure requirement.

7. Kipp and DNR Waived Any *Thiensville* Challenges They Might Have

Kipp and DNR waived their right to contest the scope of matters addressed in the contested case hearing by consenting to litigation of, and actively litigating, the issues without entering or establishing standing objections to the propriety of doing so.

The governing provision is NR 2.14(2), which states as follows:

> ADMISSIBILITY. Evidence submitted at the time of hearing need not be limited to matters set forth in pleadings, petitions or applications. If variances of this nature occur, then the pleadings, petitions or applications shall be considered amended by the record.

What was litigated, then, is what is up for decision.

B. No Deference is due to the DNR decision because no final DNR decision yet exists. What exists is a permit that has been compellingly challenged.

Whether deference is due is a legal question.

The permit advocates confuse the deference due to the reasoning behind a final agency decision by a reviewing court under Chapter 227 with the deference due to the reasoning of agency staff before the matter has been reviewed through

the contested case procedure and before a final determination of the agency has been made. They imply the deference to be accorded a DNR staff decision to issue a permit is the same deference that a reviewing court is to accord to a final agency decision reached after the reasoning has been through the contested case procedure.

This is illogically contradictory because the decisions *could be different*.

The DNR decision on the permit is not final until after it has been issued by the ALJ and not rejected by the DNR as an agency.

As noted in *Sea View Estates Beach Club v. DNR,* 223 Wis.2d 138, 588 N.W.2d 667 (1998):

> " The DNR has promulgated the following rule pursuant to § 227.46(3)(a), stats.:
>
> > Unless the department petitions for judicial review as provided in s. 227.46(8), Stats., *the decision* [of the DHA hearing officer] *shall be the final decision of the department,* but may be reviewed in the manner described in s. NR 2.20." (Emphasis supplied)

The default outcome under NR 2.155(1) Wis. Admin. Code is for the decision of the hearing examiner to become the final DNR decision. This is what happened, for example, in *Sea View Estates*, where the decision of the hearing examiner was contrary to the determination of DNR staff.

Any justification for deference arises after, not before, the DNR's decision has been either uncontested or reviewed through the prescribed procedure, in this instance, the adversary contested case:

> "... It is clear that the deference is owed to the final legal decision of the DNR, after the full evidentiary record is made and the opportunity for review to the DNR Secretary." *In the Matter of the Air Pollution Control Construction*

Permit Issued to Midwest Energy Resources Company, Superior, Wisconsin, Case No. Case No.: IH-02-04 at p. 16.

A contrary interpretation, one which would give DNR deference in advance of the completion of the process would, in a case like *Sea View Estates*, require different reviewers (the ALJ and the Circuit Court) to accord the same level of deference to the reasoning behind *two diametrically opposing decisions*. This would occur because the decisions were different. The ALJ would be according that deference to reasoning of the DNR staff and the Circuit Court would be according that deference to the reasoning of the ALJ as reflected in the decision adopted by the agency but "reversing" the decision of DNR staff.

Clean Wisconsin, Inc. et al. v. Public Service Commission of Wisconsin, et al. 2005 WI 93, 700 N.W.2d 768, 2005 WL 1513854 (June 28, 2005) confirms that discretion is due only to the final decision. The Public Service Commission, a three-member body, made the decision challenged in Clean Wisconsin *after* a full contested case hearing, i.e. in exactly the same way the decision will be made here

C. The implications of considering fairness weigh heavily against, not in favor, of the positions taken by Kipp and DNR.

Throughout this case and throughout its brief Kipp states or implies it is unfair and disruptive to extend the protection of the clean air standards to people affected by Kipp, e.g.,: it would be fundamentally unfair and would create chaos if any unapproved model were used. (Kipp Brief at 30)

Contrary to Kipp's assertions and implications, the fairness question resolves in favor of extending the same air quality standards to all, including those deprived of it simply because they live close to a facility.

There is no "invidious" discrimination issue in this case. Neither Kipp nor the industry in general is a "protected class." The test in such circumstances comes down to balancing and the rationality of what is sought to be imposed. Contrary to what Kipp implies, a rational basis - - the unique circumstances that require the use of additional tools, which Kipp mislabels as "unapproved models" to achieve the *same level of analysis for all affected persons* - - fully justifies using such tools of analysis, such as ISC-3, AERMOD, or SCREEN II. This is appropriate in some permit applications but not in others because some permit requests present highly unique circumstances and most others do not.

There is no rational basis, however, for treating people who live close to a facility differently from simply ignoring the exposures of persons who live near to Kipp.

All members of the public are similarly situated with respect to the protective aims of the air quality laws. When additional tools need to be employed to achieve the *same level of detection and protection* for people who are uniquely exposed because they are in a downwash cavity, for example, or the contaminant concentrations to which they are exposed are affected by terrain, then a rational basis exists for employing those tools, and the requirements of fairness are satisfied. The entities whose emissions are analyzed using those tools would have no

cognizable complaint about due process, fairness or equal protection.

Moreover it is not just well heeled businesses that are entitled to fair treatment in our system of law. DNR's interpretation of its authority would allow it to deny the protection of the air quality laws to people exposed in the downwash Kipp, specifically by failing to identify the contaminant levels to which they are exposed. The analytical method DNR applied returns error messages for those locations, and DNR did nothing to fill in the gap.

DNR's decision to avoid identifying the contaminant exposures suffered by people who live within the downwash zone creates two classes of persons: those for whom DNR will investigate exposures so that the protection of the law can be provided, as required by NR 406.09, and those for whom it will not. Such disparate treatment of people who have equally vital interests in the protection of the air quality limits, and who are, under all the evidence presented in the proceeding, *more* likely to subjected to violations, is fundamentally unfair. This fundamental unfairness cannot be justified by DNR's administrative convenience.

DNR has no special expertise in constitutional analysis; indeed constitutional questions are always considered de novo by each reviewing body.

The DNR's interpretation of the air quality laws so as to exclude from their protection those who live who are exposed close to Kipp imposes an unconstitutional interpretation on the relevant legal provision. DNR's interpretation deprives those individuals of substantive due process and equal protection of the law. Whatever

DNR may be qualified to do, interpreting law in ways that implicate constitutional rights is not an area of its special expertise.

> "Equal protection analysis and substantive due process have much in common. Under substantive due process analysis the statute must bear a rational relationship to a reasonable legislative goal. Under equal protection analysis there must be a rational relationship between the disparity in treatment resulting under a statute and a legitimate governmental objective. *Estate of Makos v. Wis. Masons Health Care Fund*, 211 Wis. 2d 41, 75, 564 N.W.2d 662 (1997) (Bradley, J., dissenting) (citing State v. Post, 197 Wis. 2d 279, 319, 541 N.W.2d 115 (1995)). *Ferndon v. Wisconsin* 2005 WI 125, ___Wis. 2d ___, ___N.W.2d ___, 2005 Wisc. LEXIS 401, 2005 WL 1639450, slip decision at 30, fn. 51

In this case, the ALJ is confronted with an interpretation, not a statute, but the analysis is the same.

D. DNR Has No Discretion To Write Exceptions Into The Law To Nullify Its Leading Idea.

Even if there were not constrained by a constitutional obligation to treat people fairly, DNR would still be unable to write exceptions into the law that relieve it of its obligation to identify contaminant exposures at locations that happen to be close to a factory. It would be precluded from doing so because it cannot elevate its convenience above an unambiguous legislative directive.

The legislature, not the DNR, gets to establish the policy. Wis. Stat. § 285.63(1)(b) requires DNR to determine whether a source will cause or exacerbate a violation of an air quality standard.

The leading idea behind the statute is obviously to protect people from violations of air quality standards.

> "[A] statute should be construed to give effect to its leading idea . . " *State v. Clausen* 105 Wis. 2d 231, 244, 313 N.W.2d 810, 825 (1982)

NR 406.09, requiring that air contaminant concentrations be measured at locations where people are, is a reasonable articulation of the statute.

A decision to violate the requirements of NR 406.09 by not measuring contaminant concentrations at locations were people obviously are exposed, indeed most exposed, flies in the face of the law.

Any discretion that DNR has must be exercised to serve, not undermine the objectives of the laws it is charged with implementing. An agency interpretation will not be accepted when " . . .the agency's interpretation directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise unreasonable or without rational basis. *State ex rel. Parker v. Sullivan*, 184 Wis. 2d 668, 699-700, 517 N.W.2d 449 (1994) (citing *Lisney v. Labor & Industry Review Com.*, 171 Wis. 2d 499, 506, 493 N.W.2d 14 (1992)).

E. Any entitlement to deference is badly undermined when an agency asserts a position contrary to its own written interpretation of what is required by a rule.

As noted in *Midwest Energy (at 16)*:

> "...the deference owed to the Wisconsin DNR is limited by the fact that the Department took diametrically opposed positions..."

The DNR's willingness to implement its standing policy for modeling for terrain for some locations and not for others raises the same kind of fairness and equal protection questions raised by its decision to exclude the downwash cavity from areas for which it would identify contaminant concentrations.

The interpretations DNR established for the rules most relevant here are reflected in the "guidance document." This document did not spring into existence instantly. It represents the congealed result of DNR's consideration of issues over time, and a statement of existing practices as they developed over the time leading up to when the document was adopted prior to issuance of Kipp's permit.

The Guidance's accurate reflection of DNR practices for incorporating terrain into permits is demonstrated by the multiple permits issued in the year before Kipp's where less significant elevation differences were deemed significant enough to require terrain to be incorporated into the analysis.

DNR has not demonstrated the consistency necessary to earn deference. It has, in fact, demonstrated the opposite. To ignore terrain in this instance the DNR had to reject both the interpretive thinking that went into the guidelines, and to depart from the documented contemporaneous practice of the very same modeler, which was to take into account terrain in circumstances where it was less prominent.

In excluding terrain from the analysis DNR departed from both its demonstrable standing practice, as reflected in modeling conducted by the same modeler in the same time period, and its own explicit guidelines.

The permit proponents have not demonstrated that DNR exercised "discretion" as the law defines "discretion".

"Exercising discretion" as an administrative agency does not mean doing what is most convenient. In order to qualify for deference even after a decision is

final, an agency has to demonstrate that it exercised discretion contemporaneous with its decision. To demonstrate that it exercised discretion it has to show that at the time it made the decision it engaged in a traceable logical analysis of legal and regulatory requirements as they apply in the context of the particular factual situation under consideration.

Discretion has a substantive meaning, and it means something other than taking the course that may have the appeal of convenience because it requires the least work.

> "The exercise of discretion contemplates a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record, and yields a conclusion based on logic and founded on proper legal standards." *Shuput v. Lauer*,109 Wis.2d 164, 177-78, 325 N.W.2d 321 (1982)

DNR failed to gather the basic information that has to precede the exercise of considered judgment. Instead it cut and pasted almost the entire modeling analysis, as well as its responses to critically important public comments. There is no evidence it considered recent developments such as DNR modeling guidelines, professional improvements in modeling procedures, recommendations by USEPA staff, current procedures used by other states issuing air permits, or the unabated history of air quality complaints from surrounding neighborhood residents to the DNR and other government agencies.

Cutting and pasting is not reasoning. Post-hoc assertions about "engineering judgment," which appear for the first time in the context of litigation, and which are unsupported by any documentation reflecting an analytical process that considered

facts in light of legal requirements contemporaneous with the permit decision, do not reflect the "exercise of discretion." DNR was responsible for gathering the facts and for exercising its judgment based on the facts before deciding whether Kipp was entitled to a permit. It neither gathered material facts nor even checked out material factual information given to it respect to terrain. For example, the record shows that DNR made no site visit, and simply ignored its own terrain guidelines.

There is no written record reflecting DNR having conducted any quantitative analysis in which it consciously weighed its guidelines - - the result of years of work, and came to a considered decision.

F. Kipp's novel interpretation of the modeling requirements of NR 406.09 does not match up with the modeling practices for which it seeks deference, or with logic.

Kipp advocates a novel new interpretation of NR 406.09 that would create entirely new modeling requirements that are quite different from the way DNR, and all air pollution regulatory agencies, model contaminant concentrations.

Modeling for contaminant concentrations properly seeks to identify the maximum concentration or "worst case scenario."

What Kipp seems to have trouble with is the universal practice of modeling the maximum impacts a facility will have, often referred to at the "worst case scenario." Kipp apparently would prefer that DNR model for some other scenario that Kipp would prescribe to the agency.

What Kipp fails to acknowledge is that permits are created to put limits on what is *permitted* or *allowed*.

When regulatory agencies model contaminant concentrations for permits regulators model maximum exposures. They do so because maximum exposures reflect the concentration of contaminants that the regulated entity is *permitted* to emit under its permit. Under a permit you are allowed to pollute right up to the maximum before you are in violation of your permit terms.

Analyzing for the maximum is the only acceptable practice. Regulators model to identify the maximum contaminant exposures because they have to determine whether the characteristics of a facility as it operates under the permit sought will allow the facility to cause or exacerbate an exceedence, i.e., violate the law. The only way you can determine if that will happen is by looking at the maximum condition.

To determine the maximum condition you have to consider the maximum emissions permitted and the point of maximum impact of those emissions, i.e., where contaminant concentrations will be highest. This is why the areas in the downwash cavity are so important in this case.

Receptors are to be placed where impact will be the greatest.

As for where a regulator should measure exposures, the DNR Guidelines state at page 15: "Receptors should be placed where impact will be the greatest." Kipp asserts that contaminant concentrations cannot be measured on streets or balconies because people are not exposed there for 24-hour periods. They certainly can be, and the analytical procedures accommodate the possibility that they could. The fact that the same person is unlikely to be exposed there for a full 24-hour period does not matter. NR 406.09 does not speak in terms of one person; it uses the

plural form, referring to "locations where members [plural] of the public might reasonably be exposed for time periods consistent with the ambient air quality standards. . ." The fact that an individual living person is unlikely to be exposed on a balcony for 24 hours only makes it that location the same as every other location. People move around. The fact that members of the public can be exposed on balconies that practically abut Kipp's low stacks makes those locations uniquely appropriate for analysis under the requirements of the law.

The DNR conducted its modeling analysis for Permit #03-POY-328 by predicting concentrations at numerous locations, even in the middle of the road. Another term that corresponds to the phrase "locations where members might reasonably be exposed" in NR 406.09 is "ambient air." The DNR Guidelines (p. 15) indicate that:

> Receptors should be placed in locations such that they are measuring "ambient air" as defined by USEPA. The definition states that "the air everywhere outside of contiguous plant property to which public access is precluded by a fence or other effective physical barrier should be considered in locating receptors. Specifically, for stationary source modeling, receptors should be placed anywhere outside inaccessible plant property." (taken from a USEPA letter from "Regional Meteorologists" to Joseph Tikvart regarding ambient air).

The DNR Guidelines (p. 15) go on to discuss what makes an area "inaccessible" in such a way as to exclude it from consideration for placement of a receptor.

The Guidelines also state:

> The Wisconsin SSMT uses the following in defining a fence: A fence shall be defined as any permanent, effective, physical barrier that impedes public access to a facility at all times. For refined modeling purposes, the air

> everywhere outside this barrier should be considered when locating receptors. For example, receptors should be included over unfenced plant property, over bodies of water, over roadways, and over property owned by other sources. Property that is not completely enclosed by a fence is considered ambient air.

Thus, NR 406.09's requirements for measuring exposures to members of the public over time the time period consistent with mean something entirely different from what Kipp vaguely argues. It simply means that exposures have to be measured at locations where members of the public might reasonably exposed at any point over the course of a full 24 hours, i.e., the rule relieves the agency of an obligation to analyze areas closed to the public by fences that isolate the facility itself. It also means that the averaging periods used for the modeling analysis must be consistent with the averaging periods for air quality standards. For example, predicted 24-hour average concentrations should be used to compare with the 24-hour average air quality standards.

The USEPA regulation that is the source of the DNR's approach to placement of receptors and identify the locations for predicting concentrations is found at 40 CFR, Part 50, Section 50.1(e) which states "Ambient air means that portion of the atmosphere, external to buildings, to which the general public has access."
The Joseph Tikvart letter to which DNR guidelines refer appeared on Page 60 of the Minnesota modeling guidelines (Clean Air Exhibit #40). This letter says:

> "... for modeling purposes the air everywhere outside of contiguous plant property to which public access is precluded by a fence or other effective physical barrier should be considered in locating receptors. Specifically, for stationary source modeling, receptors should be placed anywhere outside inaccessible plant property. For example, receptors should be included over

> bodies of water, over unfenced plant property, on buildings, over roadways, and over property owned by other sources."

DNR does not model for TSP any differently from modeling for contaminants under the Clean Air Act, so this EPA approach, from a letter reproduced in DNR's own Guideline document, certainly applies:

> "under the "Chevron doctrine" set forth by the United States Supreme Court, the USEPA's interpretations of statues and agency–wide policy are given considerable deference in the interpretation of the Clean Air Act Amendments . . ." Midwest Energy at 16.

Regarding the averaging period used for under which exposures are determined for contaminants (a 24 hour standard for TSP), the DNR modeling Guidelines accurately describe current practice as follows:

> All refined modeling is completed over a five-year period using five years of sequential meteorological data. All concentrations calculated by the model are based on a one-hour value averaged over the requisite time period. The modeled concentrations are then compared to the appropriate standard. The monthly, quarterly, and annual standards, PSD increments, and all AAC may never be exceeded, so the first highest value is examined for making the comparison. The short-term NAAQS standards (1 hour, 3 hour, 8 hour, and 24 hour) may be exceeded once per calendar year, so modeled results are given as the highest second-highest value over a five year period.

Modelers do not expect people to be laying down with their breathing orifices glued to ground level for 24-hours. If an individual member of the public must be present anywhere for 24-hours in order to evaluate compliance with 24-hour average air standards, then modeling is never necessary, because no one remains in the same place for 24-hours unless they are dead. It is fundamentally unfair to expect Kipp's neighbors to die in order for them to be entitled to an analysis of contaminant concentrations to which they are exposed.

To determine whether a facility's permitted emissions will cause or exacerbate an exceedence, modelers use the second highest concentration when analyzing for contaminants such as TSP. The second highest is used because, for TSP, two exceedences must occur to establish an exceedence that is also violation. (Polluters are graced with one "free" TSP exceedence.)

All modeling for the Kipp permit, whether conducted by DNR, Clean Air, or by Kipp's consultant during his "deconstruction" of Clean Air's analysis, followed the same protocols with respect to receptor placement and 24 hour averaging to establish maximum concentrations.[4] With the exception of Clean Air's use of the Prime Algorithm in order to identify contaminant concentrations at locations close to Kipp, for which DNR's modeling produced error messages, the differences in modeling results arose not because of these "back end" functions such as averaging, that are handled automatically and identically by the computer programs, but because of differences in the "front end" inputs, such as the location of the buildings, whether there was a roof underneath a stack, the relative elevation (terrain), whether receptor points were established for locations above ground level ("flagpole receptors) etc. and whether receptors were analyzed for average concentrations over

[4] The problems with DNR's analysis do not lie in these procedures for averaging, which are built into the modeling program. The problems arose because the program DNR ran returned only error messages - - giving the DNR no information to analyze- - for critical locations, and DNR did nothing to fix the problem; because DNR did not incorporate terrain though the relative terrain in the area exceeds both the Guideline limit and terrain differences for which DNR was incorporating terrain analyses into other, contemporaneous, permits; because DNR neither prohibited nor modeled fugitive emissions, and because DNR made a host of other errors that are quite important in light of the fact that DNR's enormously favorable (to Kipp) modeling still showed Kipp's TSP emissions to be at 139.3 on a scale where 150 constitutes a violation.

time in a similar way. Receptors were placed where people had access, and that includes access on the permit applicant's property. Other than the relative elevation of the receptor points the twenty four-hour average concentrations for each day were estimated based on the average of 24 consecutive hourly concentrations. The 24-hour average concentrations were compared with the 24-hour average air quality standard under the presumption that members of the public could be exposed at each receptor for the 24-hour period.

For an entity that is advocating deference to Kipp assertions are surprising assertions

Kipp says that DNR must model contaminant concentrations on a "continuous" basis over an entire 24-hour period instead of "instantaneously." Kipp introduces both the words "instantaneously" and "continuous" apparently in an effort to create the appearance of some issue that does not exist. Modelers use algorithms to identify contaminant concentrations by establishing average exposures over the relevant time periods, and there was never any question or issue that all modelers who modeled Kipp's emissions for this case followed this standard procedure.

Even if Kipp's artificial dichotomy were material, it would still be impossible to decipher what Kipp is attempting to get at. If a maximum concentration could occur "instantaneously," it could occur "continuously" throughout a 24-hour period.

DNR models for maximum concentrations. A facility whose (maximum) modeled emissions can exceed the limit "instantaneously" has to be presumed to be capable of exceeding the limit over a 24-hour period.

G. The TSP Standard May Not Be Legally Exceeded Even If It Kipp And DNR Would Rather It Did Not Exist.

The proponents of Kipp's illegal permit argue that the TSP standard is "only" a nuisance standard

All air pollutants are modeled using the same procedures. If the modeling procedure for TSP is faulty, then the analyses used for other air pollutants, including those that the permit proponents would admit protect health, are also faulty. When accurate modeling procedures are used, TSP air standard exceedences are predicted.

The proponents of this permit imply TSP emissions are too unimportant to be regulated, and therefore Kipp should be allowed to violate the limit. Kipp seems to be saying that it does not like the rules, and they aren't all that important, so they should not be enforced.

The implication that "secondary" implies "unimportant" or "unrelated to health" does not stand up to scrutiny. Living in an area where so much TSP is created that you cannot hang out your laundry has implications for your lungs. It should be noted that, in addition to particulate matter, such supposedly unimportant "secondary" standards have been adopted for sulfer dioxide (NR 404(2)(b)), carbon monoxide (NR 404(4)(b)), ozone (NR 404(5)(b)), Nitrogen Dioxide

(NR 404(6)) [primary and secondary standards are identical], Lead (NR 404(7)) [primary and secondary standards are identical], and PM 10 (NR 404(8)(a)2).

To imply that the higher "secondary" levels of pollutants such as TSP, PM 10, carbon monoxide, ozone, nitrogen dioxide or any of the secondary standards, all of which are as high as, or higher than, the primary standards, do not implicate health in some fashion simply because they are labeled "secondary," is not logical.

H. Kipp and DNR's assertions concerning the downwash cavity have no bearing, are predicated on inaccurate premises, are illogical, inappropriately attempt to extrapolate unsupportable propositions from premises Kipp agrees to be flawed, and ignore critically important and dispositive information supporting Clean Air's arguments.

A central assertion propounded by DNR and Kipp is that DNR addressed downwash issues by ignoring them, so therefore they were adequately addressed. DNR's own data and Kipp's own testimony demonstrate the fallacy of the permit proponents' assertions about the downwash cavity

Mr. Klafka initiated his analysis by testing to see whether, if he ran the same program that DNR had run, ISC 3,[5] and used the same inputs, he would come up with the same results. He did. There is no dispute that this "first run," conducted before he incorporated different (corrected) inputs and ISC-PRIME, resulted in the same results DNR had secured when it ran the same program using the same inputs.

3 Q Okay. Can you tell us what Exhibit 94 is?

4 A Exhibit 94 is an excerpt from the ISC output file.

[5] ISC3 is a/k/a ISCST3 and often simply referred to as "ISC" in the hearing.

This was based on the modeling files that DNR had used for Madison Kipp. But these are the files I had run myself in order to have the output files.

Q Okay. Did -- just for purposes of clarification, is this a case where you adjusted the location of the buildings?

A No. This is the DNR original file.

Q Okay. So is this the one that you ran to essentially verify that if DNR ran its file the way -- ISC the way DNR said that it was going to run ISC that it would match up with what you expected?

A Yes. The results that I obtained were identical to the DNR's.

Tr: 1149 (Klafka)

Results of this analysis - - the DNR analysis - - appear in black in white in Exhibit 1 (Clean Air) and 222 (Kipp) and these results are material to key issues, as summarized in Exhibits 1 & 222. The consistency (with DNR results) of the results Mr. Klafka derived when he ran the same program as DNR using the same inputs were never contested or repudiated by the permit proponents, nor could they be, since they are the same as DNR's results. Those results show indisputably that ISC3 was incapable of identifying contaminant concentrations in the downwash cavity and instead returned error messages:

Q Okay. And what does this printout tell us about ISC3's ability to predict concentrations in the downwash cavity?

A That in this exhibit I provide three other pages, after the first -- the first cover page identifies the file name and the next three pages are part of the ISC results, where ISC is indicating that it cannot estimate concentrations for these stack and receptor combinations. And it's because they're within this 3L distance. And if you look at the stacks and their receptor locations, you'll see that some of those are on the east side of the building, some are also on the south side of Atwood building, some are near the Fair Oaks's building as well. So the ISC is not predicting concentrations for these particular stacks and receptor locations.

Q Okay. What's the language in here that -- where ISC indicates that it is not -- cannot predict those concentrations?

A At the very top it says "Source receptor combinations for which calculations may not be performed less than one meter or three ZLB in distance or within open pit

source."

Q Can you translate that?

A Okay. So it's the portion where it says that it's not -- for this combination of stack and the location, it can't predict -- it can't make a calculation or a concentration because -- and in this case for us that's because it's within this 3L distance.

Q So where it says that at the top of the page, is it indicating that it cannot -- I don't understand what Steve said. Is it indicating that it cannot predict concentrations in the downwash cavity for any of the identified stacks?

A It's -- right, it's identifying that for these stacks and the particular location that it cannot predict a concentration. And this -- within this distance, which extends into the backyards, that would include -- the downwash cavity could be part of that.

Tr. 1149-50

When air pollution modeling programs, including ISC3, predict impacts, they predict those impacts for combinations of a) an emission points (e.g., stacks) and b) impact points (receptors). To identify the contamination concentrations for any

given point in a downwash cavity, a program must be able to identify the effects of all stacks together at that point. For each point, the impact of all the stacks has to be identified and added together.

Similarly, to be able to identify contaminant concentrations accurately for the entire downwash cavity (including all its data points [receptors]) a program must identify the impacts of all stacks at all points within the cavity.

DNR modeling results for the cavity are meaningless because the actual total contaminant concentrations due to Kipp are not a result of *some* stacks, but rather the result of *all* stacks that affect that affect *all* points in the cavity. DNR's modeling results do not reveal the effects of all stacks because of the inherent weakness in ISC 3.

Clean Air determined the effect of estimating concentrations in the downwash recirculation cavity using models that could do so - - both the SCREEN model (Exhibit #1 [Clean Air] or 222 [Kipp]) and the ISC-PRIME model (Exhibit #81). In both cases, there were violations of the TSP air standard.

The permit proponents (Kipp brief at 26-27) reference testimony from Mr. Roth in which he indicates that "all of the receptors along the eastern portion of the Atwood facility have concentrations calculated at them for all of the roof exhausts or stacks." Kipp attempts to argue as though this means that all relevant areas within the downwash cavity are analyzed for all stacks. They are not.

As Mr. Roth himself clarified, the "roof exhausts or stacks" to which he referred were only constituted of the series of roof vents exhausting die casters,

noting that he was referring to "in other words, all of the emissions from the die casters, from those roof exhaust fans" Tr.: 1023.

All of these roof vents together constitute just one stack, S19. One out of many. Saying that ISC3 returned numbers from one stack for some receptors within the downwash cavity associated with the Atwood component of Kipp's facility does not even come close to meeting Clean Air's critique. In order to identify the contributions of Kipp's many stacks to contaminant concentrations at the receptors Mr. Roth was referring to on the east side of Kipp's Atwood building, you have to account for the cumulative contributions from all of Kipp's stacks. When you seek to identify the contaminant concentrations at those points taking into account the emissions from all of Kipp's stacks, ISC3 returns error messages and shows no results for certain stacks and receptors. Exhibit 94. This is because ISC 3 is not up to the job.

Moreover, in addition to the limitations identified above, the downwash cavity associated with the Atwood building does not just exist on one side, the east side, of Kipp's Atwood component. It also exists on the west, south, and north. Furthermore, there is another, separate, downwash cavity associated with the low stacks at the Fair Oaks component of Kipp's facility. (Tr. 1160, Klafka)

In passing, we reiterate that S19, the single stack for which Mr. Roth ISC3 produces some results, consists of eleven vents that exhaust die casters. All eleven of those vents are open in summer, but only four in the winter. DNR wrongly modeled the higher summer flow rates, which is not the worst case scenario, so even

for the impacts of the one stack at a few locations, the readings do not reflect the maximum. (See: Clean Air's initial brief at 24-25)

From the meager ability to identify the impacts of one stack on one side of one of Kipp's facility components that are located within one, of a total of two, downwash cavities, Kipp would have the ALJ extrapolate that:

- ISC3 accurately estimated concentrations from all stacks for *all* points within the cavity on the eastern side of Kipp's Atwood facility;
- ISC3 accurately estimated concentrations from *all* stacks within the cavity on the southern, western and northern sides of Kipp's Atwood facility.
- ISC3 accurately estimated concentrations from *all* stacks within the cavity at Kipp's Fair Oaks facility.

ISC3, in fact, can accomplish *none* of these necessary analyses. The law, however, requires all of them because all contaminant concentrations to which people are exposed have to be identified. DNR, whatever its field of discretion, cannot base a decision on a complete lack of evidence.

Even S16 and S17, the stacks that triggered this permit review, expend emissions that unquestionably affect the downwash cavity at the Fair Oaks facility. While the highest emissions from these stacks will be a Lowell School, there will also be substantial impacts at the Fair Oaks location, and, specifically, within the downwash cavity associated with that location.

Clean Air modeling after issuance of the permit determined that for downwash areas near the Fair Oaks component of Kipp's facility, other Kipp stacks will also have an impact. (Exhibit 1 and 222) ISC3 is unable, however to identify

the *combined* impact of other stacks for which it produces contaminant concentration values with the impact from Fair Oaks' own short stacks. This failure arises, again, because ISC3 cannot estimate concentrations from Fair Oaks' own short stacks at locations near to Fair Oaks. Since ISC3 cannot get a reading on the contaminant concentrations from Fair Oaks' own short stacks, it obviously cannot arrive at a total. It cannot combine a non-existent reading with readings that do exist in order to accurately identify overall contaminant concentrations in those areas. This is why ISC3, as a tool, does not provide DNR's with the analytical power needed to fulfill its non-discretionary obligation to measure contaminant concentrations at locations where members of the general public might reasonably be exposed.

Without dispute, members of the general public might reasonably be exposed in the downwash cavity around the Fair Oaks component of Kipp's facility. It will be recalled that walking around and near that component of Kipp's facility involved crossing no fences. Without dispute, contaminant contributions from other Kipp sources that affect that area - - specifically the concentrations contributed by Fair Oaks' own short stacks - - cannot be identified by ISC3. Thus, it cannot be disputed that the interactive and cumulative impacts created by emissions from the stacks being permitted in this proceeding have not been identified. Without identifying those concentrations, DNR has failed it non-discretionary responsibility under the law, and, more directly, there is no factual basis for issuing the permit Kipp seeks.

Because of the utter lack of information describing the contaminant concentrations in the areas where they are likely to be the highest, DNR's arguments for its permit decision was not substantially justified and the ALJ should make a specific finding to that effect.

I. DNR must employ a tool powerful enough to its job and it cannot reasonably dispute that such tools are available.

Kipp and DNR argue that it is up to DNR to choose a program, and that citizens' rights to the protection of the air quality standards must stand down in order to accommodate DNR's convenience. The situation involving Kipp is unique due to the close proximity of homes. Unlike the majority of other industrial facilities, people live and our exposed within the downwash recirculation cavity associated with Kipp. The DNR itself identified very high TSP concentrations within the cavity in its 1994 analysis when using SCREEN. (Clean Air Exhibit #35). Clean Air predicted TSP air standard violations when concentrations in the cavity are considered (Clean Air Exhibit #81 - Scenario "c"). These violations within the cavity are unique to Kipp due to its location in a densely populated neighborhood where homes abut the foundry buildings. Using an alternative model such as SCREEN, ISC-PRIME or AERMOD to estimate concentrations in the cavity would influence few if any other existing facilities unless they have a similar unique situation with homes abutting their buildings. It is also not exotic. Regulators across the country use it.

DNR and Kipp contend that DNR has no responsibility to identify concentrations at locations near Kipp because DNR prefers not to employ analytical

tools sufficient to that task. DNR ignores the acceptance of SCREEN, ISC-PRIME and AERMOD models by other states when evaluating permit issuance. Mr. Klafka entered undisputed testimony that he had been *required* to evaluate downwash cavity concentrations when conducting modeling analyses for permits in other states. He also demonstrated how equally qualified regulatory authorities (delegated under the Clean Air Act) use of SCREEN, ISC-PRIME and AERMOD for modeling during the issuance of permits. There is no dispute the ISC3, without Prime, is not up to the job of estimating concentrations within the downwash circulation cavity. There is no dispute that qualified regulatory agencies with the open assistance of EPA through its SCRAM website have accepted the uses ISC-PRIME and AERMOD models to assure an accurate modeling analysis is conducted prior to permit issuance. EPA's active practice of supporting and assisting with these models through its SCRAM website establishes their adequacy. The notion that they are too exotic or undeveloped for use by DNR is not credible. Mr. Roth had indicated ISC-PRIME has been scientifically proven.

Q The question is it his opinion that ISC Prime has not been soundly scientifically tested?
A I believe it has been tested.
Q Is it your -- would you please answer the question.
A I believe it's been soundly scientifically tested.

Clean Air demonstrated that ISC Prime, in addition to being "soundly scientifically tested," has been used to issue air permits by numerous states. Even Kipp itself, which rails against the program in this proceeding, uses ISC Prime. (Tr.: 217: 2-21). Fundamentally, DNR has a job. An important job. It cannot do the job with the tool it is using. A soundly scientifically tested tool, one widely and openly used by similarly situated regulators with the active assistance of EPA, is readily available. Under these circumstances, DNR cannot leave people without the protection of the law just because it is stubborn. Yet that is exactly what it does, with full knowledge, as shown by this excerpt:

6 Q Is it appropriate to use a model that you know is
7 inaccurate within the 3L downwash cavity area when
8 you're not obliged to do so by federal limitations?
9 A I think it is appropriate for me to use the model
10 that's been approved for use, which is what I've
11 done.
12 Q Even though you know that it's inaccurate?
13 A Yes.

Tr. 986 (Good)

DNR and Kipp rely on the DNR Modeling Guidelines to when justifying the exclusive use of ISC3 and simultaneously reject the Guidelines' unequivocal 25% criteria for determining if terrain should be considered in the modeling analysis,

doing so without even having conducted the measurements.[6] Nothing in the Guidelines requires DNR to use ISC 3 for TSP, even if you accept the demonstrably false assertion that EPA constrains them from doing so on other pollutants. The consistency that seems to tie together DNR's (retrospective) assertion of a right to "judgment" on terrain and DNR's refusal to exercise judgment on use of a scientifically tested and widely used program that can determine the exposures of those most vulnerable to Kipp's emissions. The record strongly suggests that DNR is simply motivated by a desire to evade confronting Kipp.

Every model ever run that was capable of identifying contaminant concentrations in the downwash recirculation cavity has predicted exceedances there. Mr. Roth found problems in 1994. Emissions have since increased substantially, along with complaints of neighbors. Clean Air presented results of its analysis using the ISC-PRIME dispersion model, which unlike the ISC3 model used by the DNR, is capable of estimating concentrations in the downwash recirculation cavity. Had DNR used this model and predicted concentrations in the cavity, it would have predicted TSP air standard exceedences and Permit #03-POY-328 would not have been issued. (Clean Air Exhibit #81 - Scenario "c").

The Guidelines recommend the use of the SCREEN model when evaluating whether a permit should be issued. The SCREEN model is capable of estimating concentrations in the downwash cavity. Mr. Roth, in 1994, had used the SCREEN

[6] The same modeler, contemporaneous to the permitting of Kipp, found these criteria to be necessary on Madison's West side, even though the, degree of terrain is less there than in the case of Kipp.

model himself to estimate concentrations in the cavity associated with Kipp. Mr. Podrez, Kipp's expert, testified specifically that SCREEN results were a sound basis for setting permit limits, (Tr.: 821:4-24)

If the Guidelines establish the universe of acceptable models on which regulatory limits could be placed, then DNR should have used the current version of SCREEN, which unlike ISC3, was capable of estimating concentrations in the downwash cavity.

On another issue, Kipp apparently believes it should not have to comply with the law on the grounds that Mr. Klafka might be a hypocrite in that he did not incorporate terrain before the DNR published its Guidelines and where it was not as apparent. Of course DNR criticizes him for the exact opposite reason, i.e., that he *did* incorporate terrain into permit analyses. Mr. Klafka's primary clients are industrial facilities. It is undisputed that most of the modeling improvements he recommends for the Kipp evaluation such as consideration of terrain, evaluation of cavity concentrations, modeling of fugitive emissions, he has also used as approved modeling methods for his own clients, in Wisconsin and in other states. The others were appropriate because of Kipp's unique circumstances, with homes practically abutting Kipp's facility and public access to areas in the downwash cavity.

When an industrial consultant is retained by a business to help secure a permit, the scope of employment does not include searching for and advising the regulatory agency about deficiencies in the agency's modeling procedures. Mr. Klafka's public policy activities occur in a different forum.

DNR, however, has a different "scope of employment," and it is DNR's analysis that is being tested and that has to be demonstrated to comply with legal requirements. It is the DNR's responsibility to identify and employ accurate modeling procedures that can reliably ascertain compliance with air standards as required by state law.

As DNR's Guidelines acknowledge, "In most cases, ISC cannot calculate a concentration within 25 meters of the source due to limitations of the model." Guidelines (Exhibit ___ at p. 15). This inability is independent of, and in addition to, ISC 3's inability to identify contaminant concentrations in a downwash circulation cavity. As the site visit demonstrated, there are many homes and areas accessible to the public within 25 meters. No fences were crossed during the site visit, and every location visited was accessible to the public, which could walk the same route walked by counsel and the ALJ through the Fair Oaks downwash cavity, and around the Atwood building. The people exposed within those 25 meters are just as entitled to the protection of the law as the people beyond that distance.

J. DNR's post hoc assertions about terrain are nowhere supported by any document from the decision making process contemporaneous with the decision, and, separately, they do not stand up under scrutiny.

DNR's brief (at 7) recognizes that terrain guidelines were being followed by DNR before the date that DNR (but not DNR's website) now says the guidance was adopted. With respect to other facilities and their use of terrain, DNR's brief indicates, "terrain was used where large terrain differences occurred close to the

facility, unlike the situation at MKC." In every one of these cases specific cases reviewed, the degree of terrain difference was less than at Kipp. The terrain at Kipp should have been modeled based on the DNR guidelines. Aside from the criteria in the DNR Modeling Guidelines, DNR has not identified any policy with respect to terrain and modeling. If industry is entitled to consistency from DNR, as Kipp argues, then those affected by emissions are equally entitled to it. DNR was demonstrably inconsistent in its treatment of terrain with respect to Kipp versus the five examples presented at the hearing (Clean Air Exhibit #83). If there is a policy, it almost seems to be a policy of evading a conflict with Kipp,

The thought given to terrain on review and briefing is infinitely greater than what DNR put into the issue when it made its decision. Terrain is a significant modeling consideration ignored by the DNR in its cut and paste modeling analysis. If terrain had been considered, a violation of the TSP air standard would have been predicted and the permit should not have been issued. (Clean Air Exhibit #81). DNR acknowledged that the modeling analysis needed to account for all stacks at Kipp. (Exhibits 101 and 102). All stacks at a facility are considered to determine if terrain must be included in the modeling analysis, not just the tallest stacks at the facility, or those stacks involved in a pending permit application.

Despite what it said at hearing, DNR conducted no analyses of the relative terrain in comparison with the height of the stacks, nor did DNR visit the site to evaluate first hand the changes in elevations. Cutting and pasting a four year old description of the terrain as “gently rolling” is not evidence of exercising discretion

or conducting a comparison, particularly when there Guidelines that have been years in development are available for reference, at least in draft form.

There is no contemporaneous record indicating DNR actually conducted an analysis. Moreover, DNR's backward looking statements that attempt to justify omitting terrain from its analysis are inconsistent with both its own practice elsewhere (Exhibit 83) and with the treatment given terrain by every other regulatory agency discussed as having guidance related to this issue. (Exhibit 1, p.13)

DNR ignored the fact that it had considered terrain for contemporaneous modeling projects with less significant terrain than Kipp and it ignored its own modeling guidelines, which, contrary to Ms. Good's specific testimony (Tr.: 980-81), had been incorporated into a single document by the time, a document she had helped develop. (Tr.: 981)

K. Fugitive emissions are contemplated under, but not controlled by conditions in, Kipp's permit.

Most of what Clean Air established at the hearing and argued in its brief is not contested, and what is not contested disposes of the fugitive emissions issue in Clean Air's favor. Kipp's brief carefully selects just a few words from an extended discussion about the merits of modeling fugitive dust and about the comparison between screening and refined models; DNR's assertions are the same, though differently worded and more cursory. Ultimately the arguments of the permit proponents break up when they hit logic.

The essence of DNR and Kipp's argument is that there are no fugitive emissions to regulate. This assertion, however, flies in the face of Kipp's permit, which requires fugitive emissions be minimized. Neither proponent of the permit explains how this circumstance can exist. It is rather like having quit drinking altogether and simultaneously being down to just three quarts of beer per week. You cannot minimize emissions that do not exist. DNR could have precluded fugitive emissions, and established protocols to ensure legitimate, objectively verifiable, demonstrations that they did not exist. It did not do so.

Clean Air demonstrated a historical problem with fugitives that continued after the fugitive emissions had supposedly been eliminated in the past. The uncontested history of neighborhood complaints confirms the perception of fugitive emissions by Kipp's neighbors. Together with the submitted pictures of open windows and doors and the uncontested analysis demonstrating that very mild pressure differences created by winds can cause fugitive emissions when doors and windows are open leads to the only reasonable conclusion - - that fugitive emissions continue to be a problem. If even a quarter of the fugitive emissions predicted by Clean Air exist, that along triggers an exceedence.

Neither DNR nor Kipp have demonstrated that the roof fan system at the Kipp Atwood foundry is adequate to eliminate uncontrolled fugitive emissions. Clean Air provided documentation showing acknowledgement by Kipp, by Kipp's consultants, and by DNR, that Kipp has had an ongoing problem with fugitive emissions. Moreover Clean Air demonstrated that the DNR previously erred in its conclusion

about the effectiveness of an exhaust system. Presuming there are no emissions based on self-serving assertions that have not been objectively tested does not resolve the fugitive emissions problem. It only allows it to continue.

The unwitnessed smoke bomb tests Kipp conducted cannot be relied upon for anything. It is possible that the tests were staged and orchestrated. The failure to conduct them openly certainly suggests that. The test results were, in any case, rendered fatally unreliable by a series of problems that it was wholly within Kipp's power to avoid, but that Kipp instead chose to create. During the test, the door on the upwind side was purposely closed. This kept the wind from flowing through the facility, a condition that can normally occur. Testing did not meet DNR compliance test requirements; it was not conducted following a test plan approved by the DNR; DNR staff did not independently witness it; it was not conducted following a USEPA-approved test method. No facility operating conditions were included with the test.

Mr. Podrez discussed USEPA guidance to the effect that receptors should not be used to model open windows and air intakes (not "doors" as stated in the Kipp brief). The rationale for this guidance is that pollutant concentrations between outdoors and indoors will be attenuated. Mr. Podrez does not discuss the degree of attenuation, so his analysis is inadequate to negate the potential for Kipp pollutants to enter open windows or air intakes and cause air quality exceedences indoors. Even with attenuation, extremely high indoor concentrations can still result from outdoor concentrations above the air standards. It should be noted that

Mr. Podrez's comments referred to concentrations occurring at open windows and air intakes, not, for example, on a rooftop or exposed balcony. USEPA expects air standards to be applied: "to all ambient air which does include the rooftops and balconies of buildings accessible by the public." (Tr. 223 and Clean Air Exhibits #1, #45 and #70).

If there are no fugitive emissions, then the permit has to be withdrawn so that DNR can, in light of the history, establish objective and reliable documentation protocols. If there are fugitive emissions, then they have to be accounted for in modeling. Either way, the permit must be withdrawn.

L. Kipp and DNR assertions about flagpole receptors ignore the most recent EPA recommendations and the fundamental need to identify contaminant concentrations at locations where people are exposed, including locations above ground.

Flagpole receptors need to be used to identify exposures at locations where the public might reasonably be exposed. The fundamental question is whether people exposed at aboveground locations are entitled to the protection of the law. The question under the law, which extends the protection of air quality standards to people at places where they actually are, is *not* whether DNR *wants* to employ tools capable of determining exposures there. EPA's advice to Mr. Klafka to take questions to DNR does not give DNR freedom to ignore its obligation to conduct the analysis necessary to make that appraisal.

Clean Air showed that the DNR response to public comments for Permit #03-POY-328 regarding the use of flagpole receptors was to cut and paste into its response its earlier response to public comments for Permit #00-BSP-944 prepared

several years earlier*, even though it had received updated information on EPA's position on the use of flagpole receptors*. The DNR ignored contemporaneous 2004 email from USEPA Region V which acknowledged that above ground concentrations should be evaluated for purposes of air standard compliance and that flagpole receptors were an acceptable means to estimate these concentrations. Mr. Roth acknowledged receipt of a 2004 email from Mr. Robinson from USEPA Region V in which Mr. Robinson communicated an updated position on the use of flagpole receptors, (Exhibit 45) and read the key statement from the 2004 email:

> "In those ambient air situations where the public has access, flagpole receptors could be used to estimate concentrations at the appropriate elevations." (Tr. 1043).

Thus, it is uncontested that USEPA has acknowledged that air standards apply to above ground locations such as balconies and rooftops, and USEPA, in the most recent communication, the only one relevant, recommended the use of flagpole receptors for this purpose.

Kipp's brief, at 36, indicates use of flagpole receptors at the Maple Street condominiums do not show exceedences. This is an assertion in search of an argument. The Maple Street condominiums are much further from Kipp stacks than the homes along Marquette and Waubesa Streets. The exposures Kipp references are not the worst-case exposures. Kipp avoids discussions about locations closer to Kipp, where balconies can be at practically the same level as nearby Kipp stacks and practically abut Kipp's building. The specific effect of using flagpole receptors on pollutant concentrations at receptors representing homes along Marquette and

Waubesa Streets is to show a TSP air standard exceedence, which is predicted in the Clean Air modeling analysis (Exhibit #1 and Exhibit 222 Table 4-2).

Kipp also attacks Mr. Klafka for not providing DNR with a year 2000 email from USEPA from the same USEPA staff person. That communication was superseded by the 2004 communication. DNR has ignored the more recent, and more relevant USEPA opinions confirming the propriety of evaluating above ground locations, as well as confirming the use of flagpole receptors as a modeling tool for estimating pollutant concentrations at this location. (Klafka, Tr. Page 1143 to 1147)

M. Monitoring results cited by Kipp are too old to be directly relevant, were not gathered at the location of Kipp's maximum air quality impacts, and, if anything, demonstrate Clean Air's analysis in Exhibit 1 (Kipp Exhibit 222) to be "conservative" in a way that favors Kipp, by under-predicting pollutant concentrations.

Kipp's brief cites various monitoring results as "evidence" of current conditions while concealing their age and meaning.

To be relevant to this decision, monitoring results as old and remote as some presented by Kipp would have to be extrapolated to the present through a very complicated analysis that reflects both the changes in the background and the changes at Kipp. Neither Kipp nor DNR conducted such an analysis. Kipp implies 20-year-old data is representative of existing conditions although the mass of complaints about Kipp has arisen in the last 15 years.

Monitoring conducted at Lowell Elementary School, for example, was conducted nearly 20 years ago, before Kipp began the use of chlorine and before Kipp constructed its facility component on Fair Oaks Avenue. Even Mr. Podrez

agreed the monitoring results were not representative of current conditions. (Tr. 782, Podrez)

> Q Okay. But for purposes of clarification, you would agree with me that it would be inappropriate to use data that is 17 to -- what's this year? That it would be inappropriate to use data that is 17 years old or older to conclude that there is not presently an air quality exceedence in the area of Madison-Kipp?
> A To the extent that emission sources in the area have significantly changed, it could render it no longer representative, yes.

The monitor was not close enough to measure the worst impacts from Kipp emissions, which occur immediately adjacent to the foundry. In addition, Kipp demonstrates its propensity for gaming by comparing the measured *annual average* concentration with the *24-hour average* standard. This is a deceptive apples and oranges comparison, because the highest values, which are of necessity the basis for regulation because they correspond to what a facility is permitted to create, are averaged out with the low ones, and thus the most relevant information (depicting the highest exposures) is concealed. Kipp's analysis has nothing to do with the way compliance with air quality standards is measured. One should compare the 24-hour measurements with the 24-hour air standard. Furthermore, the highest 24-hour concentrations measured at Lowell during this period were 236, 110 and 100 ug/m3. As Kipp noted, the Clean Air modeling results from Table 6-1 in Exhibit #1 estimated a maximum concentration of 77% of the standard or 116 ug/m3. The concentrations monitored at Lowell 20 years ago suggest the CAM modeling results

based on maximum emissions occurring today are reasonable if not under-predicting the impact of Kipp emissions.

Kipp is also deceptively presents the monitoring results from the location north of Kipp along a bike path, which if anything confirm the corrected CAM modeling results shown in Exhibit #1. First, this monitor is located 500 feet from Kipp operations, too far-away to measure the elevated impacts that occur immediately adjacent to each of the components of Kipp's facility. (Tr. 457, Klafka) Secondly, as with the 20-year-old monitoring results from Lowell School, Kipp compares the annual average concentration with the 24-hour standard. This is a deceptive apples and oranges comparison. The 24-hour measurements must be compared with the 24-hour air standard. Thirdly, this monitor was operated on a predictable schedule, enabling Kipp to organize its production schedule so as to evade detection of its highest emissions. Even so, the highest 24-hour average concentrations measured at this location were 180, 117 and 116 ug/m3. "These concentrations are all well below the concentration predicted by the CAM modeling analysis for this location suggesting the CAM analysis is again under-predicting the impacts due to Kipp emissions." (Tr. 457-458, Klafka)

A new monitor needs to be installed at the location where impacts are expected to be highest as shown by an accurate and state-of-the-art dispersion modeling analysis, and if this monitor is operated intermittently, its schedule has to be random, unannounced, and unknown to any party.

Based on modeling conducted by CAM, the maximum air quality impacts of Kipp's operations suggest monitor locations just south of the Atwood facility and northeast of the Fair Oaks facility. (Tr. 449-450, Klafka). The Lowell and bike path monitors were far from these locations.

As for one-time measurements, nothing is known about the conditions under which they were made. It is unknown whether Kipp was operating at all, operating normally, which way the wind was blowing, the speed at which it was blowing and other critical information. Such results are meaningless and have to be ignored.

N. DNR failed to properly align and locate Kipp's buildings.

The close proximity of surrounding homes and the history of air quality complaints by the surrounding neighborhood demanded that the DNR conduct an accurate modeling analysis to verify compliance with air quality standards. DNR needed to properly orientate the Kipp buildings and stacks in to their correct locations relative to each other, surrounding streets and homes, and true north south. Irrespective of Kipp's assertions, true north is the basis for USGS topographic maps, digital elevation files and USEPA aerial photographs, and the meteorological data necessary for dispersion modeling. DNR had simply and improperly used the north-south orientation provided by Kipp rather than conducting its own analysis. Whatever the effect of improperly locating the Kipp buildings and stacks, it indicates that the DNR did not conduct its own original anaylsis, but simply used the orientation provided by Kipp without scrutiny.

Contrary to what Kipp indicates, some of DNR's lesser errors have a real effect, as when DNR modeled a stack as though it stood on bare ground instead of a few feet above a roof. The cumulative impact of small errors when a permit applicant is so close to the limit demands that attention be paid to detail, and DNR was not paying attention to it.

O. Kipp is incorrect on each of the issues it tries to dispose of "summarily."

Clean Air responds to the summary arguments as follows:

1. Improper emission rates for stacks S3 and S5. Page: 63

This issue relates to DNR's obligation to write permits for the worst possible scenario. The air permit issued to Kipp by DNR allows many stack configurations. It allows the discharge of 3.5 lbs/hr from the shorter stacks S03 and S05. The DNR is obligated to evaluate and model the worst-case operating scenario it has approved and Kipp may legally use to discharge its air pollution. Scenario's that are "physically impossible" can be changed because permit holders can physically change their facilities. (Tr. 103 to 104 Klafka)

2. DNR's failure to use the correct diameter for the S19 Atwood roof vent(s).

Mr. Podrez acknowledged that DNR has modeled S19 diameters greater than allowed by Kipp's permit. (Tr. 758 Podrez). DNR had modeling of incorrect stack diameters corroborates the lack of scrutiny in the "cut and paste" modeling analysis conducted by DNR for Kipp's permit.

3. Obstructive rain hats on stack S19

The presence of rainhats or obstructions to the discharge from the S19 roof vents during the hearing is irrelevant. Kipp's permit clearly allowed the use of rainhats and Kipp's building plans showed the presence of rainhats, but DNR did not consider them. This lack of attention further demonstrates the lack of detailed attention DNR paid to this permit, even though modeled emissions were right "on the edge." Permit #03-POY-328.

4. The effect of off-site buildings, such as homes, on dispersion modeling of Kipp's stacks.

Klafka's modeling analysis showed pollutant dispersion from Kipp stacks was affected by nearby homes (Exhibit #24 and Tr. 186 Klafka). In response to public comments on this issue, DNR made no effort to evaluate the effects of off-site homes abutting the Kipp foundry nor did DNR visit the site to verify, an action that would have involved staff to the high number of people and homes exposed in areas where ISC 3 cannot accurately identify emissions. (Tr. 1041 Roth and 948 Good).

5. Incorrect flow rates were used for S19.

These transcript citations Kipp references for Mr. Podrez have nothing to do with the use of incorrect flow rates by DNR when modeling Kipp's emissions. Podrez acknowledged that Kipp would operate would fewer S19 roof fans in the winter than in the summer. (Clean Air Brief In Chief, page 24) The DNR conducted no evaluation to determine the worst-case operation condition, but simply used the higher flow scenario favorable to better dispersion and approval of Kipp's application.

III. CONCLUSION.

DNR ignored information from persons harmed by Kipp's emissions and elected to conduct an analysis that left it utterly without critical facts it must have to do its job under the law. The ultimate warranted legal conclusions are:

1. DNR violated the permit approval criteria under Section 285.63 (1)(b),Wis. Stats., which requires DNR to determine if the source will violate, or exacerbate violation of, an air quality standard;

2. DNR failed to comply with the requirements of s. NR 406.09, Wis. Adm. Code, which require DNR to evaluate the air quality impact, in this case the air quality impact of fugitive emissions, at locations where members of the public might reasonably be exposed, and

3. WDNR was not substantially justified in taking the position in took in this hearing.

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