



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of an Air Pollution Control
Construction Permit Issued to Madison-Kipp
Corporation, Located in Madison, Wisconsin,
Permit No. 03-POY-328

Case No. IH-04-12

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Pursuant to due notice hearing was held at Madison, Wisconsin, on April 11-15 and May 3 and 12, 2005, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. The parties requested an opportunity to submit written briefs, and the last brief was received on September 12, 2005.

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

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Executive Summary

CAM raised numerous alleged defects in the air permit as issued, all relating to whether or not there would be violations of the air quality standard for total suspended particulate emissions (TSP). There were several issues relating to whether the DNR properly modeled particulate emissions, and, more fundamentally, whether the DNR used the proper modeling program in reviewing the permit application. The Division finds that the DNR reviewed the permit utilizing the ISC-3 program preferred under its own Draft Modeling Guidelines. Further, that the choice of air dispersion models is a technical policy determination best left to the discretion of the DNR.

However, there was testimony from experts for both Kipp and CAM which indicated that the ISC-3 model does not do a good job in modeling two types of potential emissions related to this facility: the “downwash cavity” impacts expected on properties immediately to the south of the Kipp facility, and those in areas at higher elevations due to changes in terrain near either Kipp plant. Accordingly, the permit has been modified to require two new continuous TSP emission air monitors at these locations. One TSP monitor shall be placed in front of the Kipp Atwood Avenue facility, and one at or near Lowell School.

The permit has also been modified to require that there shall be no fugitive emissions, and requires that Kipp maintain a negative air pressure to draw in ambient air into the facility by the operation of roof fans whenever die casting machines are in use.

With these modifications, the Division finds that the permit changes will not “cause or exacerbate a violation” of the TSP standard.

FINDINGS OF FACT

1. Madison-Kipp Corporation (Kipp) is an aluminum die cast company located at 2824 Atwood Avenue, Madison, Wisconsin, 53704, which manufactures parts for the automobile industry, including General Motors. (Meunier) Kipp also has an adjoining facility on Fair Oaks Avenue. The two plants are considered one source for purposes of their air pollution control permit. (TR p. 551)

2. Petitioner Clean Air Madison, Ltd. (CAM) is a non-stock corporation whose principal office is located at 2726 Center Avenue, Madison, Wisconsin, 53704. Its members include all of the individually named Petitioners and also Steven Klafka (Klafka) who served as CAM’s expert witness in this proceeding. All of the individual Petitioners (and Klafka) are residents of the neighborhood near Kipp’s facilities. (Petition for Contested Case Hearing)

3. Kipp filed an application with the Department of Natural Resources (DNR or the Department) to modify its air permit. Specifically, Kipp requested permission to increase its Total Suspended Particulate (TSP) emissions from two reverberatory furnaces

from one-and-a-half pounds per hour to eight-and-a-half pounds per hour. (Meunier; Ex. 201)

4. The furnaces are subject to Wis. Admin. Code § NR 415.05. The existing operation permit and permit 00-BSP-044 contained a particulate matter emission limit of 1.51 pounds per hour for each furnace. The company has requested the particulate matter emission limit be changed to the maximum allowed by rule. The applicable particulate matter emission limit is the more restrictive of 0.3 pound per 1000 pounds of exhaust gas and that provided by the process weight equation $E = 3.59P^{0.62}$. The one given by the process weight rate equation is more restrictive and at a process weight rate of 4 tons per hour, the allowable emission rate will be 8.5 pounds per hour.

5. Due to product demand requirements, discharges at the eight-and-a-half pound level per hour, or even three pounds per hour, will occur very infrequently. (Meunier)

6. On April 26, 2004, the DNR granted the permit modification through issuance of Permit 03-POY-328. (Ex. 200)

7. CAM and the other Petitioners challenged the issuance of Permit 03-POY-328 resulting in this contested case review proceeding.

8. Permit 03-POY-328 is a modification of existing air permits previously issued by DNR. (Ex. 201) The permit modification only affects the emission limits for two furnaces described as "RCI-1" and "RCI-2." (Ex. 201) These furnaces emit through two 100-foot stacks described as S16 and S17. (Ex. 200) The emission limits for all other processes at Kipp's Atwood facility and Fair Oaks facility were established in other air permits issued by the DNR. (Klafka)

9. The Preliminary Determination issued by the DNR contains a chart of all 20 emission points from which Kipp is permitted to emit, including S16 and S17. (Ex. 201)

10. There will be no emission increase from any other Kipp stacks besides S16 and S17 as a result of Permit 03-POY-328. (Ex. 201)

11. The primary issue raised before the Division of Hearings and Appeals (the Division) in this contested case review proceeding is whether the DNR's determination to allow an increase in TSP emission rates for S16 and S17 to levels allowed by law was appropriate; specifically, whether the modification would cause or exacerbate violations of the secondary ambient air quality standard for TSP. (the TSP standard)

12. Several issues raised by the petitioners were dismissed by a Ruling of the Division dated April 7, 2005. At that time, the Division offered Petitioners the opportunity to amend their pleadings to allege any potential health impacts from Kipp emissions, but the Petitioners declined to do so.

13. Wisconsin Admin. Code § NR 404.04(3) establishes the TSP standard in Wisconsin. It provides:

PARTICULATE MATTER: SECONDARY STANDARD. The secondary Standard for particulate matter measured as total suspended particulates is 150 micrograms per cubic meter maximum 24-hour average concentration, not to be exceeded more than once per year.

14. The TSP standard itself is not specifically a health based standard, but instead is established as a “secondary standard” in Wis. Admin. Code § NR 404.04(3). TSP is not regulated at the federal level. (Klafka)

Choice of Air Model Issues

15. CAM requests that the Division order the use of an air model known as ISC Prime to evaluate the Kipp modification. (Klafka)

16. However, pursuant to the (then-Draft) WDNR Dispersion Modeling Guidelines the only approved model for evaluating operations such as Kipp is ISC3 (also called “ISCST3”). (Good, Roth; Ex. 19)

17. Klafka himself admitted that ISC3 was “the accepted model to be used for permitting” for at least the last 14 years. (Klafka) Thus, the use of ISC3 is a longstanding practice of DNR.

18. Use of ISC Prime would specifically not be appropriate. (Roth) Mr. Roth testified that “ISC Prime...is not ever going to be the allowed dispersion model that’s used.” (Roth) This is because the EPA has formally rejected ISC Prime as an approved model. (Ex. 275) Kipp expert witness Podrez confirmed that ISC Prime is not only not approved, but is also no longer being considered. (Podrez; TR pp. 640-642) Instead, the new model which DNR is currently considering for approval is AERMOD. (Ex. 120) AERMOD adapts an improved version of ISC Prime as one modeling variable.

19. Numerous states currently make use of AERMOD, including neighboring Minnesota. However, the WDNR has chosen to follow the USEPA rather than states that have taken the lead in utilizing this program that has been in development for numerous years.

20. The EPA has also suggested but not required a one-year transition period from other programs if and when AERMOD is approved. (Ex. 276; TR p. 642) The DNR concurs that such one-year transition is appropriate. (Ex. 120)

21. ISC-3 does not do a good job of the analyzing “downwash cavity impacts.” Screen and prime models try to address this issue but are not appropriate to do refined modeling. (TR pp. 651-652)

22. There appears to be little dispute that AERMOD, which incorporates a refined version of the ISC Prime model, will more accurately predict impacts related to changes in elevation as well as air pollutant dispersion in the “downwash cavity” in close proximity to sources. Kipp’s expert, Mr. Podrez testified “. . . this is exactly why EPA is developing AERMOD to make this a lot simpler, because AERMOD does properly treat terrain, both simple terrain and very complex terrain.” (TR p. 805)

23. The Division does not set policy for the DNR. The DNR has made a conscious decision not to use the AERMOD program until it is approved by the USEPA. The DNR has the legal authority to make this policy choice.

Fugitive Emissions

24. The DNR investigated the Kipp facilities and found no fugitive emissions. (Roth)

25. Klafka agreed that the alleged fugitive emissions addressed in his report did not come from S16 and S17, but argued that it was necessary to include them as part of the background and total emissions from the facility.

26. Thus, with regard to fugitive emissions, CAM challenges decisions which were made in prior permits. CAM raised these same concerns regarding fugitive emissions in 2001 (Ex. 265), and the DNR rejected such assertions.

27. CAM presented no evidence at the hearing that there were any actual fugitive emissions. (Klafka) Klafka speculated that there may be fugitive emissions based upon a 1999 report from the engineering firm of Mead & Hunt (Ex. 48) and a 1995 emission inventory report. (Ex. 46) However, Klafka was not aware that Kipp made substantial changes to its ventilation system in June, 2000. (Klafka, Meunier) These changes created a roof fan system which automatically activates to create a negative pressure in the Kipp buildings whenever the die casting machines are operated. (Meunier, Podrez) An experienced DNR engineer visited the Kipp facility to investigate and found no fugitive emissions after the change.

28. Mr. Podrez testified that he undertook a simple smoke bomb test to determine if there was a likelihood of fugitive emissions from windows and doorways. These tests indicated that the air flow now goes into rather than out of the building. The smoke bomb test is an EPA approved method as an indication of fugitive emissions. (Podrez, Ex. 51)

29. To ensure that the airflow continues to be into and not out of the buildings, the Division has amended the permit to include an annual compliance demonstration that all roof fans are used continuously and that they are maintained in good working order. (TR p. 799)

Flagpole Receptors

30. So-called “flagpole receptors” measure emissions at receptor heights above ground level. The DNR has determined not to use flagpole receptors in modeling any source using ISC-3. Mr. Klafka testified on behalf of CAM that this was an error by the DNR.

31. In a Memorandum dated November 16, 2000, the DNR rejected such arguments stating: “USEPA has only allowed use of flagpole receptors for purposes of model evaluation and not for regulatory (permit) applications.” (Ex. 359) Likewise, a DNR Memorandum dated April 24, 2004, shows that the use of flagpole receptors was again raised with Region V of EPA and rejected. (Ex. 26)

32. Klafka also admitted that he had received an e-mail from the EPA in calendar year 2000 which stated flagpole receptor data is not appropriate for a regulatory permit. (Klafka) Further, Klafka testified that except for his report in this case, he has never used flagpole receptor data in his professional career and has never provided such data to the DNR for his private clients. (Klafka)

33. Klafka testified that the maximum impacts from S16 and S17 will occur at Lowell School without any exceedances of the TSP standard. He also testified that a flagpole receptor at Lowell School is unnecessary in light of his own data. (Klafka)

34. A number of problems will occur if flagpole receptors are used. First, the regulatory defaults in the ICS-3 model take ground reflection into consideration whereas ground reflection is not considered when flagpole receptors are used. (Roth) Second, elevated external areas such as balconies are not areas where people will be present for 24 hours. (Roth, Podrez) Third, EPA guidance shows that Klafka is incorrect in his opinion that flagpole receptors should be used at open windows and doors. (Podrez) Fourth, even when Klafka used flagpole receptor data for balconies at condominium units on Maple Avenue, his analysis showed no exceedances. (Podrez) Finally, Klafka had been instructed by the EPA that before using flagpole receptors, he should consult with state regulators. Klafka did so and learned from the DNR that DNR would not use them. (Klafka)

35. The DNR appropriately determined that “flagpole receptors” were not an appropriate data point for modeling Kipp emissions.

Terrain Issues

36. Under the *WDNR Dispersion Modeling Guidelines* (the Guidance Document), dispersion modeling must take terrain into account if, within 1000 feet of the stack’s base, elevation rises to more than 25% of any stack’s height. (TR; Ex. 19 [Clean Air] and Ex. 105 [DNR]; TR p. 188, lines 12-20) For Kipp, any one of 15 stacks at the Atwood address and any one of the 10 stacks at the Fair Oaks address would trigger the terrain criteria. (Ex. 83)

37. Ms. Good of the DNR testified that the Guidance Document was not in final form or in full effect at the time of the Kipp air permit review. The Guidance became effective in May of 2004. However, Mr. Roth testified that the Guidance Document was posted to the DNR website prior to the review of the Kipp permit. Further, there were no significant changes to the draft Guidance Document. The Guidance Document reflected a comprehensive statement of DNR practice as it relates to air dispersion modeling.

Even the final Guidance does not have the legal force of a properly promulgated Administrative code and is not binding on the DNR or the Division.

38. Photographs juxtaposed with USGS elevation data demonstrate the differences in elevation in the area surrounding Kipp. (Exs. 27-32 and 83) The terrain change is apparent from a visit to the area and by virtue of a quantitative analysis using readily and publicly available tools, such as USGS Topographic maps or digital elevation files. (TR p. 187, line 4 and TR p. 188, line 20)

Mr. Klafka testified as follows:

“ . . . for the Atwood facility I used Stack 19F2, which is 46 feet in height. Twenty-five percent of that is eleven-and-a-half feet. And the stack elevation is 873 feet. The elevation at Lowell is 892 feet and so the difference going from the base of this stack to Lowell is 19 feet. And since that 19 feet exceeds eleven-and-a-half feet, then terrain should be considered. (TR p. 198, line 25 and TR p. 199, line 7)

Fourteen other stacks at the Atwood address would also trigger the terrain criteria. (Ex. 83)

39. The DNR determined that S16 and S17, the stacks at issue in this permit modification, are too high to raise terrain considerations. (Good, Roth, Podrez) The stacks at issue in this permit are 100 feet tall, which reflects the Good Engineering Practice (GEP) stack height and thus are unlikely to have any increased impact as a result of either terrain (TR p. 1251) or downwash cavity (TR p. 1213) effects.

40. CAM does not claim that S16 and S17 raise terrain issues. Likewise, Klafka's report (Ex. 222) does not address terrain with regard to S16 and S17. Instead, Klafka addresses stacks S19 and S30 which are the subject of previously issued permits and not modified by Permit 03-POY-328. (Ex. 222)

41. Roth also testified that the use of terrain is inappropriate because the slope of the land near Kipp is gradual enough that the atmosphere will adjust to existing topography in the area surrounding Kipp and, therefore, not require the use of terrain elevation in modeling. (Roth)

42. CAM's argument that DNR considered terrain in five other permits, but failed to do so for Kipp is without merit. Roth testified that the DNR modeling team completed approximately 450 dispersion modeling projects during the last two years; yet, there were only five cases that CAM identified where terrain was used. In two of these cases, the use of terrain was done by Mr. Klafka himself in applications prepared for his clients. Thus, the decision to include terrain was his and his alone. (Roth) As to the remaining three cases, each had significant terrain features which made them different from Kipp and, in the DNR's professional judgment, properly warranted using the terrain feature in the ISC-3 model. (Roth)

43. While consideration of terrain is not directly of concern with respect to stacks S16 and S17, it is necessary to consider emissions from the facility as a whole to determine if this permit will cause or exacerbate a violation of the TSP standard. The Division finds that placement of a continuous air monitor for TSP emissions at or near Lowell School will ensure that there are no such violations.

Downwash Cavity Impacts

44. As to S16 and S17, the only stacks at issue, Roth concluded that such stacks were at Good Engineering Practice (GEP) height and accordingly would not have any so-called "downwash effect" on nearby properties. (Roth) Klafka concurred that it is likely that S16 and S17 are tall enough to be considered GEP and that GEP height avoids downwash. (Klafka)

45. Therefore, DNR did consider downwash issues and concluded that they were irrelevant for S16 and S17. (Roth)

46. Again, CAM's downwash arguments are directed at other stacks and emissions authorized in earlier permit decisions, but also germane to the overall emissions of the facility and to whether it will cause or exacerbate a violation of the TSP standard. DNR considered downwash effects for the other stacks near the residences which abut the Atwood Avenue facility. Using the ISC-3 model, the DNR found the TSP levels next to the Kipp facility to be acceptable. (Roth)

47. Mr. Podrez testified that the ISC-3 model does not do a good job at predicting impacts from "downwash effects" and that the next "logical step" would be to monitor for these impacts. Klafka opined that the most likely downwash impacts would be expected just south of either facility.

Air Monitors

48. Given the uncertainty of the modeling results for the "downwash cavity" and the changes in elevation near the Kipp facility, it is appropriate to amend the permit to include continuous air monitoring at two locations near the Kipp plant.

49. Kipp's expert, Mr. Podrez, candidly testified as follows:

Q What is your position as to whether a monitor should be required as a permit condition in this case?

A Well, as we discussed, monitoring data can be used as a reality check of modeling. And we pointed out some areas where the accuracy of these modeling results are a bit questionable. From that standpoint, you might logically take that next step and say that it could be appropriate to supplement the already existing monitoring record and utilize another air monitor.

(TR p. 656)

50. However, Mr. Podrez then went on to say that it might be difficult to ascertain what TSP emissions were attributable to Kipp and what to other sources. (TR pp. 657-658) Mr. Klafka testified that previous TSP monitoring in the area was not placed at locations that measured the maximum impacts from the Kipp facility. (TR p. 1160) Given that the accuracy of the modeling results are "a bit questionable" the Division finds that air monitoring is necessary to assure that the Kipp facility does not cause or exacerbate a violation of the TSP standard.

51. The next issue is where continuous air monitors should be placed. In this regard Mr. Podrez testified that the ". . . whole discussion of the cavity zone and the uncertainty and the fact that there really aren't models available to—that are known to be accurate in predicting cavity, logically put one of these (monitors) in the cavity zone or near the cavity zone." Mr. Klafka opined the former bike path air monitor was not in a good location because it did not measure "maximum impacts from Kipp." Klafka testified that ". . . the maximums are occurring much closer to the facility, either the Atwood or the Fair Oaks." (TR p. 1160; see: also p. 1294)

Accordingly, the Division believes that the permit should be modified to include the placement of two TSP air monitors at the following locations: one monitor at the front entrance to the Kipp facility on Atwood Avenue and another at or near Lowell School. The first location is appropriate to measure potential "downwash cavity" impacts that are not modeled well by ICS-3. The Lowell School location is appropriate because this location is higher in elevation than the Kipp plants and because the highest predicted concentrations from the permit revisions were predicted at or near the school. (TR p. 302; Ex. 33A)

Miscellaneous Issues

52. CAM raises six new issues which were not raised by CAM before the DNR in connection with Permit 03-POY-328 and, therefore, are not properly a part of this proceeding under *Village of Thiensville v. DNR*, 130 Wis. 2d 276, 386 N.W.2d 519 (Ct. App. 1986). These issues are following:

- Alleged failure to use the correct building and stack orientation.
- Alleged failure to use the worst case emissions rates from the Fair Oaks facility for stacks S03 and S05.
- Alleged failure to use correct diameter for the Atwood facility roof vents including S19.
- Alleged failure to recognize the presence of rain hat obstructions on the Atwood facility roof vents.
- Alleged effect of off-site buildings.
- Alleged incorrect flow rate for S19.

DISCUSSION

CAM raised numerous alleged defects in the air permit as issued, all relating to whether or not there would be violations of the air quality standard for particulate emissions. There were numerous issues relating to whether the DNR properly modeled particulate emissions, and, more fundamentally, whether the DNR used the proper modeling program in reviewing the permit application. The Division finds that the DNR reviewed the permit utilizing the program preferred under its own Draft Modeling Guidelines. Further, the Division finds that the choice of air dispersion models is a policy determination best left to the discretion of the DNR. However, while many of the alleged defects in modeling were either not sufficient to have an impact on modeling results (flagpole receptors, etc.), two issues were significant. The ISC-3 model does not do a good job of predicting either downwash cavity impacts or those related to changes in terrain near the facility. Accordingly, two new continuous air monitors for total suspended particulate (TSP) emissions are required under the modified permit.

The most basic objection was that the DNR erred in its choice of air dispersion models by which they analyzed expected worst-case air emissions. However, the permit was analyzed using ISC-3, the only accepted program under the DNR's (then-Draft) Air Dispersion Modeling Guidelines. Kipp's expert Mr. Podrez, was unusually candid in readily agreeing that the ISC-3 program has certain limitations as it relates to the precise fact situation involved in this permit. Specifically, the ISC-3 program does not do a good job of analyzing either "downwash impacts" or the effects of a change in elevation near the pollutant source. The USEPA has been developing a new modeling program known as AERMOD, which is expected to more accurately model both downwash cavity and elevation impacts from emissions.

For reasons that are not entirely clear, nor relevant to this decision, the DNR has chosen to wait for the USEPA to approve the AERMOD model prior to switching to this

model which would likely more accurately predict emissions at this facility. Numerous other states have taken the initiative to begin using the much-delayed AERMOD program, including Minnesota. However, the DNR policy is similar to that of a majority of states, and is not unlawful. The Division does not set policy for the DNR, and does not believe it would be appropriate to order the DNR to alter its long-established policy of modeling air emissions using ISC-3.

As noted, the two most significant issues raised by the petitioners were: 1) impacts inside the “downwash cavity;” and 2) the potential impacts of charger in elevation near the plant. It is extremely important to remember that neither of these problems are likely to exist with respect to the two stacks, S16 and S17, which will have increased emissions as a result of this permit modification. Both of these stacks are designed to GEP standards, and at 100 feet tall, are unlikely to contribute to either downwash cavity or elevation effects. (TR p. 1213; TR p. 1251)

However, both of these issues are important when considering emissions from the facility as a whole and whether the facility as a whole will cause or exacerbate a violation of the air quality standard for TSP. Because the ISC-3 program does not do a good job in considering these impacts, placement of continuous TSP air quality monitors at two locations are supported by the record as a whole. While Kipp and the DNR argue that such monitoring is not necessary, it is significant that Kipp’s own very distinguished expert testified that air monitors might well be the “next logical step” given the problems with the ISC-3 model in accurately predicting these effects. There might well be difficulties in sorting out whether any TSP violations are attributable to Kipp or not, but these problems do not obviate the need for monitoring given the “questionable” modeling results.

Counsel for Kipp argued that Kipp was only asking to drive at the speed limit— i.e. to operate at the particulate emission limit set forth in Wis. Admin. Code NR 404.04(3). However, given the admitted limitations in the ISC-3 model with respect to predicting both nearby down-wash cavity impacts and effects from changes in elevation, the “logical next step” is to add a monitoring requirement that will take the guess work out of whether the particulate matter standard has been exceeded.

The permit has also been modified to require that there shall be no fugitive emissions, and requires that Kipp maintain a negative air pressure to drawn ambient air into the facility by the operation of roof fans whenever die casting machines are in use.

AMENDED DISCUSSION

The Motion for Clarification (and related pending Petition for Rehearing) filed by Kipp raises a total of six issues. These include: 1) revising the language of the permit relating to TSP monitoring to bring it in compliance with applicable DNR code provisions; 2) affirming that the permit as modified preserves DNR discretion and due process rights to all parties relating to possible exceedances; 3) limiting the operation of

roof fans to those associated with die-casting; 4) clarifying the meaning of continuous operation of TSP monitors; 5) adding a date-certain and clarifying how long air monitoring must continue; and 6) an attempt to delete the Order's requirement to place an air monitor at or near Lowell School. The first four requests for clarification are granted in full. Further, a date certain for the end of air monitoring is established, and a better explanation as to why the monitoring shall last three years is provided below. Finally, the request to strike the monitoring requirement at or near Lowell School is denied for the reasons set forth below.

The Division adopts in full the proposed revisions of the Order suggested by the DNR. These changes better reflect the purposes of the original Order, and provide enhanced clarity for all parties involved.

The three-year period of monitoring is reasonable and necessary because a clear preponderance of the credible evidence indicated that Kipp's production levels are subject to variability based upon an economic cycle lasting over a period of several years. The American auto industry in particular is currently experiencing a downturn that might well be subject to improvement over the next few years. Based upon the testimony of Mr. Meunier, Kipp will reach maximum rates of production infrequently. (TR p. 891) Mr. Meunier also noted a three-year long period of low-emission rates during a previous economic downturn during 1995 to 1997. Based upon the record as a whole, the Division finds that a three-year period of air monitoring will balance the expense of air monitoring with the need to experience a variety of production levels related to economic variability.

Placing a monitor at or near Lowell School is necessary given the fact that "currently, the maximum impact from the two aluminum furnaces and their 100 foot stacks is at Lowell School." (TR p. 302; Ex. 221) Further, Mr. Klafka noted that the terrain is higher at Lowell School, and that it is a multi-story building with access to the roof and fresh air intakes also on the roof. (TR p. 253) While the ISC-3 model does not predict exceedances at Lowell School, there are some doubts about the accuracy of the ISC-3 model as it relates to areas of elevated terrain such as at or near Lowell School. (See: Ex. 33A) In its "Motion for Clarification," Kipp cites 17 year old monitoring data that its own expert, Mr. Podrez, suggested might not be "appropriate" given changes in emission sources over that period of time. The permit provision requiring air monitoring at or near Lowell School is reasonable and necessary given the record as a whole.

Further, the language of the two new permit conditions is modified as suggested by the Department. With respect to the new A.1.b.3, the Department's proposed language makes it clear that the operation of roof fans is limited to those relating to exhaustion of die casting emissions. With respect to the new A.1.c.7, the Department's language clarifies the air monitoring protocol and language to be consistent with established DNR practice. The Amended language also corrects an error in the previous citation to the administrative code provision setting forth the TSP standard. The permit language as revised by the DNR also clarifies that any exceedances are subject to the usual rules for the measurement of ambient air quality. Finally, in the event of an exceedance, all of the usual due process rights remain available to parties. It should be

noted that the previous Order contemplated the DNR clarifying the latter condition and left the final permit language to the Department.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases relating to air pollution permits pursuant to Wis. Stat. §§ 227.43 and 285.81(a). “Following the hearing the department’s action may be affirmed, modified or withdrawn.” Wis. Stat. § 285.81(1)(b). The Division affirms the permit with several modifications.

2. In determining whether to issue a construction permit for an air pollution source such as Kipp, the DNR and Division must determine whether the criteria for permit approval contained in Wis. Stat. § 285.63 will be met. One of the applicable criteria is contained in Wis. Stat. § 285.63(1)(b) and provides as follows:

(1) The department may approve the application for a permit required or allowed under s. 285.60 if it finds: (b) The source will not cause or exacerbate a violation of any ambient air quality standard or ambient air increment under s. 285.21(1) or (2), Stat.

3. The standard at issue in this matter is a secondary standard designed to protect human welfare, from unknown or unanticipated adverse effects. Wis. Admin. Code NR 404.02(9).

4. Pursuant to Wis. Admin. Code NR 404.04(3) the secondary standard for particulate matter measured as total suspended particulates is 150 micrograms per cubic meter—maximum 24—hour average concentration, not to be exceeded more than once per year.

5. The permit as modified provides reasonable assurance that the increased emissions at the Kipp plant will not cause or exacerbate a violation of the secondary standard for particulate emissions. The placement, operation and maintenance of continuous air monitors at the locations specified above will ensure that the permit modification will not cause or exacerbate a violation of the secondary standard for TSP.

6. The DNR has complied with the procedural requirements of Wis. Stat. § 285.61.

7. The DNR has complied with the procedural requirements of Wis. Stat. § 1.11 and Wis. Admin. Code ch. NR 150, relating to assessing environmental impacts. The project is a Type III action under NR 150.

AMENDED ORDER

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

Permit No. 03-POY-328 shall be modified as follows:

PART I

APPLICABLE EMISSION LIMITATIONS AND REQUIREMENTS

Under A. 1. b. a new #3.

(3) The permittee shall demonstrate that there are no fugitive emissions resulting from open windows and doors by maintaining a negative pressure that brings air into the facility.

Under A. 1. c. a new #7.

(7) All roof fans exhausting die casting emissions (Stacks 19 and 22 at the Atwood facility and Stacks 01, 02, 03, 05 and 43 at the Fair Oaks Facility) shall be operated continuously whenever die casting machines are in use. The permittee shall demonstrate that the roof fans exhausting the die casting emissions are properly maintained and operated and that they are sufficient to keep a negative air pressure into the facility.

Under B. OTHER CONDITIONS APPLICABLE TO THE ENTIRE FACILITY

Madison-Kipp is required to place and operate two ambient air monitors for Total Suspended Particulates (TSP, as defined in Wis. Admin. Code § NR 404.02(11)), subject to the usual rules and procedures of the DNR. DNR shall approve the location of the monitors prior to their installation. The monitoring shall be conducted in accordance with Wis. Admin. Code § NR 404.06. The TSP monitors shall remain in place and in operation for 3 years, commencing on April 1, 2006. The TSP monitors shall operate for a continuous 24-hour period once every three days, using the federally approved monitoring method and Manual 24-hour Hi-Volume Monitors. One monitor shall be placed at or near Lowell Elementary School. One monitor shall be placed in front of the Kipp facility located at 2824 Atwood Avenue. If either of these monitors records a violation of the TSP standard in Wis. Admin. Code § NR 404.04(3), (by recording an exceedance of the TSP standard at the same monitor twice in a calendar year) and DNR determines that emissions from Madison-Kipp substantially contributed to the violation, DNR shall remodel the Madison-Kipp facility using the AERMOD model, if this model has been approved

for use in Wisconsin. If the AERMOD modeling shows that Madison-Kipp emissions are significantly contributing to a violation of the TSP standard, DNR shall require Madison-Kipp to reduce its emissions or take other measures as necessary to resolve any such modeled violation. DNR may take any other enforcement or permit revocation action it deems necessary if Madison-Kipp's emissions substantially contribute to a violation of the TSP standard in Wis. Admin. Code § NR 404.04(3).

Dated at Madison, Wisconsin on November 15, 2005.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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Madison, Wisconsin 53705
Telephone: (608) 266-7709
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By: _____
Jeffrey D. Boldt
Administrative Law Judge

NOTICE

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

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.