



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

RULING ON MOTION TO DISMISS ISSUES AND ORDER
GRANTING PARTIAL SUMMARY JUDGMENT

On September 15, 2004, Madison-Kipp Corporation (the permit-holder) filed a Motion to Dismiss. Pursuant to the Scheduling Order, the parties filed briefs and supporting evidentiary material. The last submittal was received on November 2, 2004.

The permit-holder's motion is the functional equivalent of a Motion to Dismiss certain claims from the proceeding as failing to state a claim upon which relief can be granted. Evidentiary material was submitted in connection with this motion. Motions to dismiss are appropriately treated as motions for summary judgment when "matters outside the pleadings" are considered. *See* Wis. Stat. § 802.06(3); *Envirologix Corp. v. City of Waukesha*, 192 Wis. 2d 277, 287, 531 N.W.2d 357, 362 (Ct. App. 1995).

In considering a motion for summary judgment, the tribunal must first examine pleadings to determine whether a claim for relief has been stated and a material issue of fact presented. If a claim for relief has been stated, inquiry then shifts to the moving party's affidavits or other proof to determine whether the moving party has made a *prima facie* case for summary judgment.

If the moving party has made a *prima facie* case for summary judgment, the court must examine affidavits and other proof of the opposing party to determine whether there exists disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn sufficient to entitle the opposing party to trial.

Voss v. City of Middleton, 162 Wis.2d 737, 470 N.W.2d 625, 629 (1991); accord, *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2002 WI App 46, ¶ 19, 251 Wis. 2d 212, 641 N.W.2d 504.

The Petitioners Issues and the DNR Grant of a Hearing

The Petitioners initially filed a petition for a contested case on May 25, 2004. On June 8, 2004, DNR Secretary Hasset requested more specificity relating to the issues set forth in the first

petition. On June 18, 2004, the Petitioners amended their initial filing in conformance with the Secretary's request.

The following issues were set forth:

Regarding Issue (1) "Whether Madison-Kipp Corporation meets all of the applicable criteria in s. 285.61," Petitioners believe there are disputes of material fact and law regarding the following:

- a. Whether the Department sufficiently complied with Wis. Stat. § 285.61(3), requiring an analysis regarding "the effect of the proposed construction, reconstruction, replacement or modification on ambient air quality and a preliminary determination on the approvability of the construction permit application." Specifically, the "preliminary determination" document prepared by the Department:
 - i. fails to investigate or analyze ambient air concentrations of PM_{2.5} in the ambient air; and
 - ii. fails to investigate or analyze the effects of Madison-Kipp emissions at locations required by law.
- b. Whether the Department properly considered comments submitted by petitioners and other members of the public prior to issuing the permit, as required by Wis. Stat. §§ 285.61(6)-(8).

Regarding Issue (2), "whether Madison-Kipp Corporation meets all of the applicable criteria in s. 285.63, thus allowing the department to issue air pollution control permits," Petitioners believe that there are disputes of material fact and law regarding the following issues:

- a. Whether Madison-Kipp will meet all applicable limitations, including emission standards for hazardous air contaminants, including but not limited to whether Madison-Kipp will comply with Wis. Admin. Code § NR 445.03;
- b. Whether Madison-Kipp will meet particulate matter emission limits required by Wis. Admin. Code § NR 415.03;
- c. Whether Madison-Kipp, as permitted, will violate the NAAQS for PM_{2.5} and TSP;
- d. Whether the air dispersion modeling used to determine Permit conditions is flawed as a matter of fact and/or as a matter of law; and
- e. Whether Madison-Kipp as permitted will cause "air pollution" in violation of State law, because its emissions are injurious to human health.

The initial motion and brief of the permit holder sought to dismiss “claims related to PM_{2.5}.” A subsequent Amended Motion also sought to “Dismiss Petitioners’ Claims Related to Wis. Admin. Code §§ NR 415 and NR 445.” Both Motions were fully briefed by all parties.

Finally, in its brief, the permit-holder sought to dismiss the Petition in full. The permit-holder now seeks to Dismiss the Petition for Review as not meeting the requirements of Wis. Stat. § 285.81(1).

In *Metro. Greyhound Mgt. Corp. v. Racing Bd.*, 157 Wis.2d 678, 692, (Wis. Ct. App. 1990) the court pointed out that holding a full-blown contested case hearing to determine whether there is a right to a contested case hearing made little sense. Rather, a reviewing court should examine the record before the agency to determine whether a *prima facie* entitlement to a contested case hearing has been made. *Id.*

A review of the record in this case indicates that the petitioner has made such a showing. The Petitioners’ Amended petition met the requirements of the statute and complied with the specific request of the DNR Secretary to provide more specificity on issues for hearing. The Secretary properly granted a contested case as to the following issues:

“(1)(a) Whether the department complied with s. 285.61(3), Stats., requiring an analysis of the effects of the proposed construction...or modification on ambient air quality and a preliminary determination on the approvability of the permit application. You specifically allege that the preliminary determination prepared by the Department:

- i.) Fails to investigate or analyze air concentrations of PM 2.5; and
- ii) Fails to investigate or analyze the effects of Madison-Kipp emissions at location required by law.

(b) Whether the Department properly considered comments submitted by petitioners and other members of the public prior to issuing the permit, as required by s. 285.61(6) to (8), Stats.

(2)(a) Whether Madison-Kipp will meet all applicable emission limitations including emission standards for hazardous air contaminants, specifically ss. NR 415.03 and 445.03, Wis. Adm. Code.

(b) Whether Madison-Kipp will cause or exacerbate a violation of an ambient air quality standards, specifically PM 2.5 and Total Suspension Particulate Matter.

Regarding the relief desired, s. 285.81(1)(b) allows an ALJ to affirm, modify or withdraw DNR’s action. Your June 16 letter says you want the permit vacated. I

will take this to mean you are seeking withdrawal of the air construction permit issued to Madison-Kipp.”

Further, the secretary noted that issues 2(d) and 2(e) were incorporated by reference into the above issues:

“Your June 16 Issue (2)(D) was not specifically raised in your initial May 24, 2004 Petition, but we will likely litigate this issue as part of Issue (1)(a)(i) or (2)(b). Regarding your June 16 Issue (2)(e), I believe this issue is the same as Issue (2)(b), that is, whether Madison-Kipp is required to or can meet the emission limit in s. NR 415.03, Wis. Adm. Code.”

The Petition for Review was granted by the DNR Secretary and carefully allowed and denied issues set forth in the Petition. The permit holder’s request to dismiss the entire Petition is denied.

Further, it should be noted that once a contested case has been granted, Wis. Admin. Code NR 2.14(2) allows for liberal amendment of pleadings in contested cases, at least with respect to evidence submitted at the time of hearing:

(2) 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. The hearing examiner may, in his discretion, grant such continuances as may be necessary to give other parties adequate time to prepare evidence to rebut that involved in any such variances.* (Emphasis added)

Accordingly, the amendment of the Petition for hearing was properly granted and further amendment may also be appropriate so long as the other parties are given sufficient time to prepare for consideration of such issues as allowed by the Division.¹

Motion to Dismiss Individual Issues

The following issues have been disputed at length in connection with these motions:

1. The issue of PM_{2.5} claims; and
2. The issues relating to NR 415.03 and NR 445.03 claims.
3. The issue of the Department’s Response to Public Comments.

¹ There are limits to such amendments, including limitations placed by a Scheduling Order and limitation to matters considered by the Department for the specific contested case before the Division. *See: Thiensville v. DNR*, 130 Wis. 2d 276, 286 N.W.2d 519 (Wis. Ct. App. 1986) (cite discussed at p. 7)

PM_{2.5} Issues

The Petitioners in this matter assert that the DNR failed to investigate or analyze ambient air concentrations of PM_{2.5}, failed to determine whether emissions will cause or exacerbate a violation of the PM_{2.5} NAAQS, and failed to properly consider comments submitted by Petitioners concerning PM_{2.5} emissions before issuing the air permit.

The permit-holder and the Department argue that the same issues were already addressed in a similar motion before the Division. On August 3, 2004, Division of Hearings and Appeals Administrative Law Judge (ALJ) William S. Coleman, Jr., issued an Order in the contested case proceeding concerning the air permit issued to the Wisconsin Electric Power Company Elm Road Generating Station (ERGS).

ALJ Coleman dismissed similar issues based upon these claims, holding that regulations have not yet been promulgated to implement the PM_{2.5} NAAQS. The ALJ further ruled that, until such regulations are developed, the DNR need not separately evaluate PM_{2.5} emissions in its air permitting decisions. (08/03/04, IH-04-03 Order, p. 4)

ALJ Coleman ruled as follows in the ERGS Order:

In reviewing the application for the construction permit here, there is no issue of fact that DNR employed existing federal standards and guidance respecting the NAAQS for PM_{2.5}, which have implemented the presidential directive that there be “no new controls related to the PM_{2.5} standards” until certain conditions are met. To date, there continue to be no federal or state controls on PM_{2.5} emissions. The NAAQS for PM_{2.5}, in and of itself, is not directly enforceable against a source. *Cate v. Transcontinental Gas Pipeline Corp.*, 904 F.Supp. 526 (W.D. Va. 1995).

The appropriate scope of the contested case hearing with respect to the regulation of PM_{2.5} emissions will be limited to sufficiency of the DNR’s execution of the federally approved “surrogate approach” to PM_{2.5}. Accordingly, Petitioners’ issues 1 and 2 quoted above are stricken as outside the permitted scope of the contested case hearing. (08/03/04, IH-04-03 Order, p. 5)

As the petitioners argue, the Division is not bound by the doctrine of *stare decisis* and the Division is not bound by its earlier Ruling. *Nelson Bros. Furniture v. WDOR*, 152 Wis. 2d 746, 756, 449 N.W.2d 328 (Wis. App. 1989) However, the ALJ adopts the reasoning of ALJ Coleman in the ERGS Order.

Specifically, ALJ Coleman correctly ruled that the DNR does not need to separately evaluate PM_{2.5} emissions in its permitting decision. ALJ Coleman properly held that the appropriate scope of the contested case hearing with respect to regulation of PM_{2.5} emissions should be limited to the sufficiency of DNR’s execution of the federally approved “surrogate approach” to PM_{2.5}. Nothing in the affidavits submitted by the petitioners raise any disputed material issue of fact that the conclusion was in error.

While the DNR has required some PM_{2.5} modeling, this has never been done as part of the air permitting process. (Roth 10/20/04 Affidavit) Rather, such limited modeling has been undertaken as part of the Environmental Assessment and/or EIS process. The Petitioners' effort to distinguish the ERGS and the Madison-Kipp permits also fails. As the DNR notes in its brief, the ERGS facility was for a major source, while Madison-Kipp permit relates to a minor source of air pollution. As a major source, the ERGS facility must meet additional criteria, and both the ERGS and Madison-Kipp are subject to the standards set forth in Wis. Stat. § 285.63(1)(b).

Further, as ALJ Coleman ruled, the PM₁₀ "surrogate approach" for PM_{2.5} modeling is appropriate under the still-binding 1997 EPA memo. As ALJ Coleman specifically stated: "This recommended 'surrogate approach' for reducing PM 2.5 emissions and protecting air quality remains EPA's prescribed standard today." (08/03/04, IH-04-03 Order, p. 4) As noted by John Roth in his Affidavit, the DNR advises permit applicants and DNR staff to follow the October 21, 1997, EPA Guidance for PM_{2.5}.

Nothing in the Klafka or Bender affidavits raises any disputed issue of material fact that it was an error for the DNR not to do so in conjunction with the permitting process. Accordingly, Issue 1, subsection 1(A) is dismissed. Issue 2, subsection 3 is dismissed to the extent that it seeks to dispute the DNR's use of the PM₁₀ "surrogate approach" in its modeling for this permit.

NR 415.03 and 445.03 Issues

Another issue addressed in the ERGS Order that is also raised by the Petitioner relates to the interplay between NR 415.03 and NR 445.03 and the modeling procedure relating to PM_{2.5}.

ALJ Coleman held that:

"To the extent that the Petitioners would seek to demonstrate that emissions from ERGS of PM 2.5 or any other pollutant for which NAAQS have been established would result in "air pollution" as that term is employed in Wis. Stats. s. 285.01(3) and Wis. Admin. Code ss. NR 400.02(16) & NR 405.09, those contentions are outside the scope of the regulatory framework and may not be litigated in the contested case hearing . . ." (08/03/04, IH-04-03 Order, p. 6)

The same logic applies to the Madison-Kipp Petitioners' claims under NR 415.03 and 445.03 claims. NR 415.03 sets forth "general limitations" on particulate matter and regulates such emissions to the extent to which it "substantially contributes to exceeding of an air standard or creates air pollution."

NR 445.03 sets forth "general limitations" relating to control at hazardous pollutants and restricts emissions of hazardous substances "in a quantity or concentration or for a duration that is injurious to human health, plant or animal life unless the purpose of that emission is for the control of plan or animal life."

The general language of these sections does not supercede the more specific requirements of specific emission requirements such as those relating to particulates.

As the DNR notes in its brief:

“Petitioners argue that the specific particulate matter emission limits which apply to Madison-Kipp (in s. NR 415.05, Wis. Adm. Code) should not preclude application of NR 415.03, because the rules do not conflict. DNR disagrees. While DNR and Madison-Kipp can determine the company’s compliance with the emission limits in s. NR 415.05, it would be extremely difficult for either entity to determine compliance with s. NR 415.03, regarding the creation of “air pollution”. Clearly, by issuing air pollution control permits, DNR is allowing facilities to emit air contaminants into the ambient air. However, DNR includes specific emission limits, recordkeeping, reporting and compliance demonstration requirements in such permits to limit the air pollution that may be emitted. These rules conflict because it would be impossible to determine what constitutes compliance with the prohibition on causing “air pollution” in s. NR 415.03. The only practical way to limit air pollution and determine compliance is to apply specific emission limits such as those in s. NR 415.05.

The same analysis and argument hold true for application of s. NR 445.03 as well. DNR and Madison-Kipp agree that the facility is subject to some hazardous air Pollutant emission limits in ch. NR 445, Wis. Adm. Code, and Madison-Kipp’s permit reflects those requirements.”

The Division agrees with this reasoning. NR 415 and 445 requirements are already reflected in the modified permit. If the objectors sole argument relates to alleged violations of either NR 415 or NR 445 because of PM_{2.5} emissions that meet other permit requirements, their claims under these sections fail. To the extent that the petitioners are making such claims, these issues are dismissed.

Given the current record before the Division, particularly the extensive Public Comments that bear generally and specifically on public health, it is not entirely clear whether this is the sole issue asserted by the petitioners under NR 415 and NR 445. Because any such claims relate to concerns about public health, the petitioners will be allowed a brief opportunity to further amend their petition subject to both the lawful objections of the other parties and to a modification of the Scheduling Order, if necessary. (NR 2.14(2))

The permit-holder and the DNR cite a WPDES case *Thiensville Village v. DNR*, 130 Wis. 2d 276, 286 N.W.2d 519 (Wis. Ct. App. 1986) for the proposition that the issues for the contested case hearing should be limited to those raised in public comments. The facts of *Thiensville* related to the specific issue of whether the hearing examiner erred by refusing to “consider terms of the original (WPDES) permit which were not changed by the modified permit” that was the subject of the contested case hearing. *Id.* p. 279 In general terms, however, *Thiensville* does support limiting the contested case issues to those raised in public

comments before the DNR. However, numerous issues raised in public comments were not addressed anywhere in the affidavits that constitute the record currently before the Division.

The most extensive information relating to claims asserts by the petitioners is found in the February 6, 2004, letter to Paul Yeung that was submitted by the petitioners as well as in the materials attached to the Palmer affidavit. Based upon this submittal, it is unclear if the petitioners are asserting other claims under NR 415 and NR 445 that were not related to PM_{2.5} issues, and thus not the subject of the motion to dismiss.

The permit-holder has not made out a *prima facie* case on any such issues that do not relate to PM_{2.5} standards and modeling. However, the permit-holder is entitled to summary judgment on these issues to the extent that they relate to the PM_{2.5} issues discussed above.

Response to Public Comments

A third issue relates to whether the Department properly considered Public Comments in connection with the public hearing. The petitioners assert in their brief that the DNR did not properly respond to all Public Comments made at the public hearings held in conjunction with review of the construction permit. (Brief of Petitioners, pp. 25-26) However, materials filed with the Palmer affidavit reveal an extensive response to each and every comment made by hearing participants. For example, numerous changes were made in response to comments made by the Sierra Club. This constitutes a *prima facie* case for summary judgment of this issue. The affidavits of the objectors do not rebut this *prima facie* case. The only specific issue raised by the petitioners in connection with its brief again relates to consideration of the size of particulate emissions and the impact of smaller particles on human health. It appears that this is simply a recycling of the PM_{2.5} argument that was rejected above and by ALJ Coleman. Accordingly, Issue (1)(b) Relating to the Failure to Consider Public Comments is also dismissed.

Summary of Remaining Issues

The following issues remain after the grant of partial summary judgment:

1(a)(ii) Relating to whether the DNR P.D. failed “to investigate the effects of Madison-Kipp emissions at locations required by law.”

It should be noted that this issue includes what was issue 2(d) relating to alleged deficiencies in air dispersion modeling in connection with preparation of the P.D. (*see*: June 16, 2004, letter of Sec. Hassett, p. 2) While Secretary Hassett identified this as part of issue 1(a)(i) or 2(b), it seems to directly relate to issue 1(a)(ii) as well, particularly to the contention that the WDNR used a “flat, rural” rather than a “rolling, urban” dispersion assumption in connection with such modeling. (Palmer affidavit, Ex. F, 02/06/04)

Further, issue (2)(b) relating to whether Madison-Kipp will cause or exacerbate a violation of an ambient air quality standard for Total Suspended Particulate Matter remains, but claims relating to PM_{2.5} are dismissed.

Finally, to the extent that the Petitioners are asserting violations of NR 415.03 and NR 445.03, other than the alleged violations relating to PM_{2.5}, the Petitioners shall describe in detail such violations within four days of this Order. Such issues must relate to concerns raised as part of the Public Comments to the construction permit.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that partial summary judgment be granted to the permit-holder with respect to the following issues:

Issue 1, subsection (a)(i);

Issue 2, subsection (a), (b) and (c), to the extent that these issues relate to alleged defects in PM_{2.5} modeling or to claims that emissions of PM_{2.5} create "air pollution" as defined in Wisconsin statutes.

IT IS FURTHER ORDERED that any further clarification or amendment of any issues described in the Petition for Review and raised during Public Comments must be filed with the Division of Hearings and Appeals by December 10, 2004.

Dated at Madison, Wisconsin on December 6, 2004.

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