

STATE OF WISCONSIN

CIRCUIT COURT
Branch____

DANE COUNTY

CLEAN WISCONSIN
634 W. Main Street, Ste 300
Madison, Wisconsin 53703

Petitioner,

Case No._____

Case Code: 30607

vs.

Administrative Agency Review

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES
101 South Webster Street
Madison, Wisconsin 53707

Respondent.

PETITION FOR JUDICIAL REVIEW

Clean Wisconsin brings this petition, pursuant to Wis. Stat. §§ 227.52, 227.53, and 285.62(9), seeking judicial review of the Wisconsin Department of Natural Resources' ("DNR") failure to act on a renewal operating permit application for the Weston Power Plant ("Weston") within the time required in Wis. Stat. §285.62(7).

The grounds for this petition are that DNR was required to act on a permit application for the Weston Power Plant within 18 months of the date that the application was complete, Wis. Stat. § 285.62(7), but failed to do so. Acting on a permit application under Wis. Stat. Ch. 285 is a non-discretionary duty of the agency. Failure to issue or deny a permit constitutes a final agency action for purposes of "judicial review under §§ 227.52 and 227.53 to require the department to act on the application without additional

delay.” Wis. Stat. §285.62(9)(a). DNR’s failure to issue or deny the operating permit substantially affects the interest of our members.

Petitioners further show to the Court as follows:

PARTIES

1. Clean Wisconsin is a not for profit corporation organized under the laws of Wisconsin and headquartered at 634 W. Main Street, Suite 300, Madison, Wisconsin. Clean Wisconsin’s members live, work, recreate, and breathe air in Wisconsin, including in the areas downwind from Weston.

2. Clean Wisconsin is a nonprofit corporation within the meaning of Wis. Stat. § 181.0103(17) and a “small nonprofit corporation” within the meaning of Wis. Stat. § 814.245(2)(c).

3. DNR is an independent agency of the State of Wisconsin, created under Wis. Stat. § 15.34, whose principal office is located at 101 South Webster Street, Madison, Dane County, Wisconsin, and which has the responsibility for the regulation of sources of air emissions, pursuant to Wis. Stat. ch. 285.

ADVERSE EFFECTS ON PETITIONER’S INTERESTS

4. The Weston power plant is located at 2501 Morrison Ave, Rothschild, WI and is owned and operated by the Wisconsin Public Service Corporation, a subsidiary of Integrys Energy Group.

5. Clean Wisconsin’s members are adversely affected by air pollution from Weston. During 2011, Weston emitted 16,351,229 pounds of sulfur dioxide, 5,777,421 pounds of nitrogen oxides, 1,426,929 pounds of particulates, 2,071,150 pounds of carbon monoxide, and 12,249,704,600 pounds of carbon dioxide. It also emitted significant amounts of

arsenic, mercury, barium, and other hazardous air pollutants. These emissions are harmful to Clean Wisconsin's members' health and welfare. Clean Wisconsin's members also reasonably believe that the renewal operating permit for Weston, once issued, must include more stringent pollution limits and more effective monitoring requirements than the currently expired permit issued in 2004 required. Clean Wisconsin seeks to protect our members' interests by evaluating, commenting on, and potentially seeking review and/or enforcement of the Weston air permit at issue in this case. DNR's failure to act thus adversely affects Clean Wisconsin and our members' interests.

FACTS

6. The Clean Air Act ("the Act") was passed to protect and enhance the quality of the nation's air so as to promote the public health and welfare and the productive capacity of the United States' population. 42 U.S.C. § 7401(b)(1). The United States Environmental Protection Agency is required to promulgate standards for ambient air quality for pollutants for which criteria have been issued pursuant to sections 108 and 109 of the Act (42 U.S.C. §§ 7408, 7409). States, including Wisconsin, then promulgate standards for air pollution emissions to ensure the ambient air quality standards are met. 42 U.S.C. § 7410.

7. To make the programs designed to protect air quality more effective, Congress amended the Act in 1990 to create an operating permit program that requires all major sources of air pollution to obtain and comply with an operating permit. *See* 42 U.S.C. § 7661a(a). Operating permits are intended to collect and consolidate air pollution limits contained in the Act, and to ensure continuous compliance with such limits. *Sierra Club v. Johnson*, 436 F.3d 1269, 1272 (11th Cir. 2006). Operating permits thus ensure that a

facility is operating in compliance with the Act. *See Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996); *see generally* S. Rep. No. 101-228 at 346-47, *reprinted in* 1990 U.S.C.C.A.N. 3385, 3729-30. In fact, the primary purpose of the operating permit program is to assure compliance with the Act, including sufficient monitoring to measure compliance. *Environmental Integrity Project v. EPA*, 425 F.3d 992, 993-94 (D.C. Cir. 2005).

8. Under the Clean Air Act, states are to have the primary role in issuing operating permits to sources of air pollution, pursuant to a federally-approved program.

9. Before a final permit is issued, DNR must issue a draft permit and follow proper notice, comment, and hearing procedures under §285.62(2) and (3) to provide the public with at least 30 days to weigh in on the terms of the permit and to request a hearing.

10. DNR must also notify the U.S. Environmental Protection Agency of the draft permit and give them 45 days to review and possibly object to the permit. 42 U.S.C.A. § 7661d.

11. In Wisconsin, DNR issues operating permits to air pollution sources, including Weston.

12. To ensure that permits are issued in a timely manner, the Act requires permits be issued or denied within 18 months of a completed application. 42 U.S.C. § 7661b(c).

13. The Act provides that “[t]o ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of [the state] permitting authority to act on a permit application or permit renewal application . . . shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person . . . to require that action be taken by the

permitting authority on such application without additional delay.” 42 U.S.C. § 7661a(b)(7).

14. As required by the Act, Wisconsin law also provides that DNR must issue or deny a permit within 18 months of a complete application. Wis. Stat. § 285.62(7)(a).

Wisconsin law provides that if DNR fails to issue or deny a permit within 18 months of a complete application “that failure is considered a final decision on the application solely for the purpose of obtaining judicial review under ss. 227.52 and 227.53 [Stats.] to require the department to act on the application without additional delay.” Wis. Stat. § 285.62(9)(a).

15. On April 10, 2009, Wisconsin Public Service Corporation filed an application to renew Weston’s operating permit (737009020-P10). *See Exhibit 1.*

16. The Weston Plant permit application (for Permit No. 737009020-P10) was deemed complete on September 18, 2009. *See Exhibit 1.*

17. On October 15, 2009, Weston’s operating permit (Permit number 737009010-P02) expired. *See Exhibit 1.*

18. Since October 15, 2009, Weston has been operating under expired permit number 737009020-P02.

19. The 18-month deadline for DNR to issue or deny a final permit expired on March 18, 2011.

20. Despite this deadline, DNR has not issued or denied the final permit. DNR released a draft permit for the minimum 30-day public comment period on September 14, 2011. Clean Wisconsin submitted timely comments on the draft permit. DNR has not

responded to Clean Wisconsin's comments, and has not yet issued a proposed permit to the U.S. Environmental Protection Agency for the minimum 45-day review period.

GROUND FOR REVIEW

21. DNR has a mandatory duty to act on the Weston permit application within 18 months of a complete application. DNR's failure to do so violates Wis. Stat. § 285.62(7), and DNR should be compelled by the Court to issue the permit pursuant to Wis. Stat. §§ 227.52, 227.53, 227.57(8) and (9), and 285.62(9)(a).

22. DNR is not substantially justified in failing to meet the clear statutory deadline for issuing the Weston permit within 18 months of a complete application.

RELATED CASES

23. Petitioner knows of no currently filed case that is related to the substantive issues in this action.

PRAYER FOR RELIEF

WHEREFORE, Petitioner requests judgment in his favor as follows:

1. Declaring DNR's failure to act on the Weston Title V permit application by March 18, 2011, to be a violation of law;
2. Ordering DNR to act on the Weston permit application (for Permit No. 737009020-P10), by issuing or denying the permit, without further delay;
3. Awarding costs and attorneys fees to Petitioner pursuant to Wis. Stat. § 814.245;
and
4. Granting such other relief as the Court may deem just and equitable.

Dated this 24th day of July, 2012

CLEAN WISCONSIN

Atty. Elizabeth A. Wheeler
State Bar No. 1056625

Atty. Kathryn A. Nekola
State Bar No. 1053203

634 W. Main Street, Suite 300
Madison, Wisconsin 53703
P: 608-251-7020