STATE OF MICHIGAN
WAYNE COUNTY CIRCUIT COURT

SOUTH DEARBORN ENVIRONMENTAL IMPROVEMENT ASSOCIATION, INC., a Michigan non-profit corporation; DETROITERS WORKING FOR ENVIRONMENTAL JUSTICE, a Michigan nonprofit corporation; ORIGINAL UNITED CITIZENS OF SOUTHWEST DETROIT, a Michigan non-profit corporation; and SIERRA CLUB, a California corporation,

Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, a Department of the Executive Branch of the State of Michigan; and DAN WYANT, Director of the Michigan Department of Environmental Quality,

Appellees,

and

AK STEEL CORPORATION,

Intervening Appellant.

Case No. 14-008887-AA

Hon. Daniel A. Hathaway

BRIEF OF APPELLANTS SOUTH DEARBORN ENVIRONMENTAL IMPROVEMENT ASSOCIATION; DETROITERS WORKING FOR ENVIRONMENTAL JUSTICE: ORIGINAL UNITED CITIZENS OF SOUTHWEST DETROIT; AND SIERRA CLUB.

ORAL ARGUMENT REQUESTED

THIS APPEAL INVOLVES A RULING THAT A STATE GOVERNMENTAL ACTION IS INVALID.

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STATEMENT OF QUESTIONS PRESENTED

1. Was the Department of Environmental Quality's (DEQ's) decision to grant an air pollution permit to Severstal (now AK Steel), without requiring the steel mill to meet current air pollution rules, in excess of the agency's statutory authority, contrary to law, arbitrary and capricious, and an exercise of unlawful procedure?

   Appellants answer: yes.

2. Where Severstal's plant was emitting more air pollution than permitted by its existing permit, was DEQ's use of an *ad hoc* process to substantially raise the emission limits in the permit, rather than applying an existing rule specifically written for that situation, contrary to law, arbitrary and capricious, and an exercise of unlawful procedure?

   Appellants answer: yes.

3. Was DEQ's decision to enter into an *ultra vires* agreement with Severstal to extend a permit decision deadline, for the purpose of "going around" an air pollution rule requiring that the steel mill be in compliance before a new permit could be issued, in excess of the agency's statutory authority, contrary to law, arbitrary and capricious, and an exercise of unlawful procedure?

   Appellants answer: yes.

4. Was DEQ's decision to evaluate the emissions changes in the new permit as if a major piece of pollution control equipment had been installed on one of the blast furnaces at the steel mill, when in fact that furnace was destroyed years before and no control equipment was ever installed on it, in excess of the agency's statutory authority, contrary to law, arbitrary and capricious, and an exercise of unlawful procedure?

   Appellants answer: yes.

STATEMENT OF JURISDICTION

Part 55 of the Natural Resources and Environmental Protection Act (NREPA) governs air pollution permits in Michigan.[1] Where the Michigan Department of Environmental Quality (DEQ) issues a permit to install, Part 55 authorizes any person to appeal that action under Section 631 of the Revised Judicature Act.[2] This Court therefore has jurisdiction to hear this case, and to grant the relief Appellants seek, under MCL 324.5505(8), MCL 324.5506(14), MCL 600.631, and MCR 7.103(A)(4). This Court is an appropriate venue for Appellants' appeal under MCL 600.631 because Appellants reside in Wayne County. DEQ issued the subject permit on May 12, 2014. Appellants filed this Claim of Appeal on July 10, 2014. On July 17, 2018 the Michigan Supreme Court affirmed this Court's February 12, 2014 ruling that the claim was timely filed.[3]

INTRODUCTION

This case involves the 2014 decision by the Michigan Department of Environmental Quality (DEQ) to grant an air pollution permit to Severstal, for the former Ford Rouge steel mill in Dearborn, Michigan. The new permit drastically increased the amount of air pollution the plant is permitted to emit. The Appellant community groups challenged the permit on behalf of their members, who breathe the pollution emitted by the steel mill. These residents and citizens suffer the most polluted air in Michigan. Shortly after DEQ issued the permit, AK Steel bought the plant from Severstal.[4]

[1] See generally MCL 324.5501 *et seq.*

[2] MCL 324.5505(8); 324.5506(14).

[3] See *South Dearborn Improvement Assoc Inc v DEQ*, ___ Mich ___ (July 17, 2018).

[4] AK Steel Corporation purchased the entire membership interest in Severstal Dearborn, LLC and changed the name of the company to AK Steel Dearborn, LLC. Because the company and facility were referred to

The permit issued by DEQ should be overturned for four reasons:

First, DEQ unlawfully declined to apply current air pollution rules to the steel mill's permit. Severstal urged DEQ to "grandfather" the permit – a position that had no legal basis when Severstal raised it and which was subsequently rejected by the 9th Circuit U.S. Court of Appeals.

Second, DEQ engaged in unlawful action and improper procedure when it used an ad hoc process not governed by any rule to "revise" the permit and increase its emission limits. DEQ's action was particularly arbitrary and capricious given that the agency does have a rule on the books specifically written for the situation the steel mill was in – and yet declined to implement that rule. DEQ compounded this error by declining to apply a rule prohibiting the issuance of a permit to install if the equipment governed by the permit will interfere with the attainment of an air quality standard – in this case, a standard for sulfur dioxide.

Third, DEQ entered into an *ultra vires* agreement with Severstal to extend the permit decision deadline. DEQ did this at Severstal's urging because the steel mill was unable to come into compliance with its old permit fast enough to meet the decision deadline for the new permit – which was required for the new permit to issue. Both DEQ and Severstal acknowledged during the process that the agreement was not authorized by law, and was a way of getting around the requirements that Severstal was unable to meet.

Fourth, the permit treats one of the steel mill's blast furnaces as if it were still operating, and as if Severstal had installed a baghouse on it to control emissions. To the contrary: the blast furnace at issue was destroyed in an explosion in 2008. It was never rebuilt; and no baghouse was installed. But by engaging in the fiction that a baghouse was installed on the furnace (as well as

throughout the record as Severstal, we generally maintain that convention in this brief, in order to minimize confusion.

other fictions), the parties were able to manipulate the calculations of net emissions changes between the old and new permit to avoid the application of several key air pollution rules. The rules prohibit DEQ from treating the defunct furnace as if it were still operational and using its fictitious emissions reductions to offset increases permitted for the plant's other blast furnace.

Each of these errors, standing alone, requires this permit to be vacated and remanded for review under proper procedures and rules. Considered together, these errors comprise the most harmful and unlawful agency permit decision these authors have ever witnessed. Many of the principal actors in these decisions have since moved on. But Appellants' members and their families are left to suffer the consequences, through the air they breathe every day and the illnesses they will experience for years.

LEGAL FRAMEWORK

This case is governed by Part 55 of NREPA and the DEQ rules implementing Part 55. Michigan, through DEQ, is also authorized by EPA to administer the federal Clean Air Act through a "State Implementation Plan" (SIP). Michigan's SIP is comprised of the Part 55 rules, which are approved by EPA. The SIP must be at least as stringent as the Clean Air Act and corresponding federal rules.

DEQ is authorized to issue two types of air permits: permits to install, or PTIs, and operating permits.[5] This case involves a permit to install. Permits to install are required for the construction of new sources of air pollution as well as major modifications of existing plants or processes. Permits to install are governed by Section 5505 of Part 55 and the DEQ rules

[5] See MCL 324.5503(b); Mich Admin Code R 336.1201 *et seq*.

implementing Title I of the Clean Air Act.[6] A permit to install contains an emission limit for each pollutant emitted from each *emission unit* (individual source of emissions) at a facility.[7]

Under the Clean Air Act, EPA establishes *national ambient air quality standards* (NAAQS) for certain pollutants. These pollutants are called *criteria pollutants*, and they include lead, sulfur dioxide, and particulate matter. NAAQS define the maximum concentrations of the criteria pollutants in the ambient air, in order to protect public health with an adequate margin of safety.[8] EPA designates areas where the ambient air complies with a NAAQS as *attainment*, and areas where the ambient air does not comply with a NAAQS as *nonattainment*.

From 2005 until 2013, Wayne County was designated non-attainment for fine particulates ($PM_{2.5}$).[9] In 2013, EPA designated the part of Wayne County where the steel mill and Appellants' neighborhoods are located as *nonattainment* for sulfur dioxide.[10] Sulfur dioxide is a toxic gas that exacerbates respiratory illness and forms fine particles that cause emphysema and heart disease.[11] The steel mill is a major source of sulfur dioxide – it is permitted to emit over 1,100 tons of that pollutant every year.[12] The steel mill also emits hundreds of tons of particulates and thousands of tons of carbon monoxide; and is the most significant regional source of toxic metals, including

[6] MCL 324.5505; Mich Admin Code R 336.1201-1207.

[7] Mich Admin Code R 336.1203, 1205

[8] 42 USC 7409(b)(1).

[9] 70 Fed Reg 944 (Jan. 5, 2005) (designated attainment for PM2.5); 78 Fed Reg 53272 (Aug. 29, 2013) (re-designated attainment for PM2.5).

[10] 78 Fed Reg 47191 (Aug 5, 2013). The area remains nonattainment for sulfur dioxide.

[11] *Id.*

[12] PTI 182-05C, p 23, line 15; found at AR Supp Rev 432REV and attached as **Exhibit 2**. The Administrative Record in this case is comprised of folders with names designated by DEQ, and numbered documents within each folder. Cites to the Administrative Record will use the form "AR [Folder name] No. [Document number]." For the convenience of the reader, certain important documents have also been extracted from the administrative record and filed with this brief as exhibits.

manganese.[13] As a result, the people living near the steel mill breathe the most polluted air in Michigan, and suffer disproportionately from diseases associated with air pollution.[14]

These attainment designations are important because they dictate the level of scrutiny that is applied to permit to install applications. In *attainment* areas, DEQ reviews PTI applications under *prevention of significant deterioration* (PSD) rules. Under these rules, an applicant must show emissions "before" and anticipated emissions "after" the plant modification, and the *net* of those emissions dictates what controls may be required.[15] To comply with PSD rules, permit applicants must install *best available control technology* (BACT) if their project will result in a significant increase in emissions of a criteria pollutant.[16]

In *nonattainment* areas, however, DEQ reviews PTI applications under *nonattainment new source review rules* (NNSR). These rules are much more stringent, because DEQ is under an obligation to reduce the level of pollution in the ambient air in order to bring the area back into attainment. Applicants in nonattainment areas must comply with the more stringent *lowest achievable emission rate* (LAER). Further, DEQ cannot issue a permit to a source in a nonattainment area that is not compliance with all air pollution laws and rules; and applicants must obtain pollution offsets from other sources to result in a net decrease of pollutants.[17]

[13] *Id.*; AR Supplemental & Revised Docs 210REV, Fig. 6, p. 26.

[14] *Id.*; AR Public Hearing and Comments File No. 46, pp. 3-5; *Id.* No. 56, pp. 10-11.

[15] *Id.*

[16] Mich Admin R 336.2802, 2810.

[17] Mich Admin Code, R 336.2902, 2908.

STATEMENT OF FACTS

The AK/Severstal steel mill is an integrated steel manufacturing plant. The core of the plant is the "C" Blast Furnace, which turns iron ore into molten iron; and the Basic Oxygen Furnace, which turns the molten iron into steel.[18] There used to be a "B" Blast Furnace at the plant as well. The B Blast Furnace was destroyed in 2008 and never rebuilt, but still figures prominently in the permit at issue, as explained further below. Severstal is a "major stationary source" of air pollution that is subject to Michigan's PSD and NNSR rules.[19]

This section outlines the events leading to DEQ's decision to approve the permit at issue. But first, for context, this section describes the air pollution in the neighborhoods downwind of the steel mill.

A. The steel mill is in an Environmental Justice Community[20].

The steel mill is located next to the South End neighborhood in Dearborn, where Eighty percent of the residents are Arab-American, and 43% live below the poverty level.[21] Also downwind from the steel mill are the neighborhoods of Southwest Detroit, including the 48217 ZIP code, [22] EPA designated this neighborhood as an Environmental Justice area due to its minority and low-income populations. Researchers describe it as the most polluted zip code in Michigan.[23]

[18] AR Permit File No. 408 (Public Participation Documents, Fact Sheet, at Page 1). **[Ex. 3]**

[19] *Id.* (Fact Sheet, at Page 9).

[20] Environmental justice attempts to mitigate disparate adverse impacts to protected groups, including minority and poverty populations. AR Permit File No. 432 (Response to Public Comments, p. 44).

[21] *Id.*; AR Public Comments No. 47 (Ex's 2, 3 and 4).

[22] *Id;* AR Public Comments No. 46 (Comments from Great Lakes Environmental Law Center and Sierra Club, Pages 3-5).

[23] AR Public Comments No. 46 (Comments from Great Lakes Environmental Law Center and Sierra Club, at Pages 3-5).

The people who live in these communities suffer disproportionately from air pollution. Wayne County was designated nonattainment for fine particulates ($PM_{2.5}$)[24] from January 2005 to August 2013.[25] The air pollution monitor at the South End's elementary school records the highest levels of $PM_{2.5}$ in Michigan.[26] The health impacts of fine particulates include premature mortality, increased hospital admissions and emergency room visits, and chronic respiratory disease.[27]

Part of Wayne County (including the South End and Southwest Detroit) was designed nonattainment for sulfur dioxide in August 2013.[28] Sulfur dioxide health impacts include bronchoconstriction and increased asthma symptoms, particularly while exercising or playing; and increased emergency room visits and hospital admissions for respiratory illnesses, particularly in at-risk populations (children and elderly people).[29] DEQ acknowledged the high asthma rates in Detroit, and that elevated sulfur dioxide may contribute to those high rates, but dismissed the concern.[30]

In addition, a DEQ report found that manganese levels in Delray and Dearborn "remain consistently above the health protective benchmark level, higher than other Michigan sites, and some of the highest values measured within [EPA] Region 5 and across the U.S."[31] Manganese is

[24] $PM_{2.5}$ is particulate matter less than 2.5 microns in diameter, also called fine particulate matter.

[25] 70 Fed Reg 944 (Jan. 5, 2005) (designated attainment for PM2.5); 78 Fed Reg 53272 (Aug. 29, 2013) (re-designated attainment for PM2.5).

[26] AR Public Comments No. 47 (Ex 10 – 2013-10-01 DEQ AQD $PM_{2.5}$ Summary).

[27] AR Public Comments No. 47 (Ex 5 – EPA Tech Support Document $PM_{2.5}$ threshold).

[28] 78 Fed Reg 47191 (Aug. 5, 2013).

[29] *Id.*

[30] AR Permit File No. 432 (Response to Public Comments, p. 23 of 67). **[Ex. 4]**

[31] AR Public Comments No. 56 (SDEIA Comments, Ex 19).

a neurotoxin that can cause deficits in motor skills.[32] The Report found, that "[t]he primary source contributor at the Dearborn site was Severstal."[33]

Residents of the South End and Southwest Detroit suffer in disproportionately high numbers from a number of diseases and ailments associated with environmental pollution, including but not limited to asthma and other respiratory diseases.[34] The Michigan Department of Community Health coined Detroit, "the epicenter of asthma burden in Michigan," stating that the severity of the asthma burden in Detroit warrants "immediate attention," that rates of asthma hospitalizations in Detroit were three times higher than Michigan as a whole, asthma prevalence among adults in Detroit was 50% higher than the statewide average, and rates of asthma death in Detroit are over two times higher than overall state numbers.[35]

It is against this backdrop that DEQ approved a permit to increase the limits permitted for steel mill's emissions of air pollutants –without applying current air pollution rules.

B. Between 2006 and 2007, DEQ approved three permits based on errors and bad assumptions.

In 2006, DEQ issued an original permit to install to Severstal to increase steel production at the plant. The permit required that the Severstal install a pollution control device called a "baghouse" at the C Blast Furnace, and another baghouse at the Basic Oxygen Furnace to control secondary emissions (those escaping the building from sources other than the smokestack).[36] That permit was amended once in 2006, and again in 2007, to modify equipment or processes. The

[32] *Id.* at Page 6.

[33] *Id*. at Page 26, Figure 6.

[34] AR Public Comments No. 54 (ACCESS Health Journal, Fall 2013). *See, esp.*, the reports at pages 17-20; 21-27 and 153).

[35] AR Public Comments No. 46 (pages 4-5).

[36]AR Permit No 408 (DEQ Fact Sheet, Feb. 12, 2014, at page 1). **[Ex. 3]**

original trio of permits were called PTI Nos. 182-05, 182-05A and 182-05B. Together, the increased steel production and new emissions control devices resulted in a net decrease in particulate emissions, compared to 2001-2002 emissions, but a significant increase in sulfur dioxide and carbon monoxide emissions.[37] Severstal began construction in the spring of 2006 and began operation of the equipment in October 2007.[38]

After the equipment was installed, in 2008 and 2009, Severstal did "stack tests" to measure the pollution it was emitting.[39] The tests showed pollution that exceeded the permit limits units in PTI 182-05B for some emissions.[40]

Later investigations explored the deviations between Severstal's actual emissions measured by stack testing and the emissions limits in PTI-182-05B.[41] Though Severstal was required to support its permit applications with accurate, reliable data, [42] Severstal did not do so:

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[37] AR Permit No. 53 (Permit to Install Application, Dec. 9, 2010, at Page 6); AR Permit No. 433 (Table B-1 Process Inputs, Baseline Actual Emission Period: Jan. 1, 2001 to Dec. 31, 2002).

[38] *Id.* at Page 2.

[39] AR Permit No. 433 ((Permit to Install Application Summary for 182-05C, at Page 4). **[Ex. 5]**

[40] AR Permit No 408 (Public Participation Document, at Table 1); AR Permit No. 433 (Permit to Install Application Summary for 182-05C, at Table 2-1).

[41] AR Permit File No. 408 (Fact Sheet, page 2 and Table 1 Justification for Proposed Limit).

[42] Mich Admin Code, R 336.2801(b)(ii)(E) (baseline emissions cannot be based on a period where there is "inadequate information for determining annual emissions"); EPA, *Technical Support Document (TSD) for the Prevention of Significant Deterioration and Nonattainment Area New Source Review Regulations* (Nov. 2002), at page I-2-22 (hereinafter, TSD for PSD and NNSR Regulations), available at: https://www.epa.gov/sites/production/files/2015-12/documents/nsr-tsd_11-22-02.pdf (last viewed Sept. 25, 2018)

("In conjunction with this policy we do not believe that sources should be allowed to use information derived from the records of other facilities. There are generally sufficient differences between the way individual facilities operate, even when they are similar source types with similar operating characteristics. *The baseline emissions are an important component of the calculation of a modified unit's emissions increase and should, therefore, be based on accurate information reflecting the source's operation and emissions* during the representative period selected by the owner or operator of the source. This applies to the calculation of emissions changes associated with the netting calculations. Consequently, the new rules

- Severstal assumed its manganese emissions from the C Blast Furnace baghouse would mirror those from another facility's Electric Arc Furnace, which uses entirely different raw materials.[43]
- Severstal used the sulfur dioxide emissions from another facility, which has a different system to capture slag emissions than Severstal.[44]
- Severstal used the carbon monoxide (CO) emissions data from a single test run, which apparently did not capture "the oxygen blow portion of the steelmaking heat, which is where all the CO is generated".[45]
- The mercury emissions limit traces to Severstal's 2004 testing error that over-calculated captured mercury, and also failed to consider condensable particulates.[46]

Of particular concern, the particulate matter, manganese, and lead violations trace largely to Severstal's refusal to acknowledge – until the stack tests – the extent of condensable particulates emitted by its processes.[47] Both DEQ and Appellants warned Severstal of high condensable

follow the proposal in requiring that full use of the new 10-year look back period be conditioned on the *accuracy and completeness* of source records of emissions and capacity utilization for any emissions unit that undergoes a physical or operational change.").

[43] AR Permit File No. 433 (Permit to Install Application Summary for 182-05C, at Page 19).

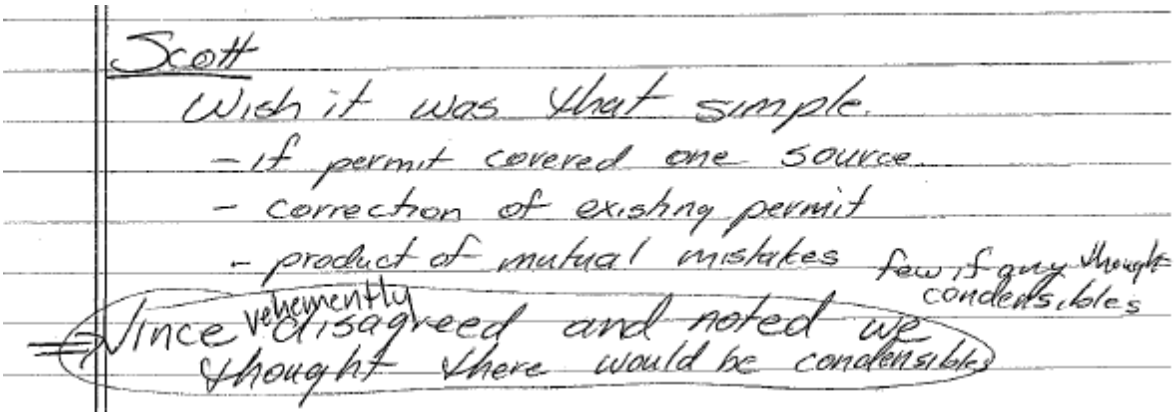
[44] AR Permit File No. 015 (May 19, 2009, Technology Review, Page 14); AR Permit No. 13 (Mar. 27, 2009, letter from J. Earl (Severstal) to B. Sia (MDEQ), at Page 5).

[45] AR Permit No. 408 (Public Participation Document, at Table 1); AR Permit No. 13 (Mar. 27, 2009, letter from J. Earl (Severstal) to B. Sia (MDEQ), at Pages 3-4); AR Permit No. 32 (Revised Technical Evaluation, Jan. 13, 2010, at Page 10).

[46] AR Permit No. 433 (Permit to Install Application Summary for 182-05C, at Page 20).

[47] AR Permit No. 007 (Nov. 17, 2008, letter from J. Earl (Severstal) to K.Kajiya-Mills (MDEQ)); AR Permit No. 433 (Permit to Install Application Summary for 182-05C, at Pages 14, 19); AR Permit No. 408 (Public Participation Documents, Table 1) (providing justification for emissions limits increases).

emissions in the PTI 182-05B permitting process.[48] At an August 2012 meeting, after Severstal's legal counsel (Scott Dismukes) asserted that the "condensibles" error was a "mutual mistake," MDEQ's Air Division Chief Vincent Hellwig disagreed:[49]



C. The steel mill has a long history of violations.

In response to the stack testing, DEQ issued a violation notice to Severstal in February 2009.[50] Between February 2009 and May 2014, when DEQ issued the permit under appeal here, DEQ and the EPA issued another 31 violation notices to Severstal, which collectively recite hundreds of rule and permit violations, including chronic opacity and multiple instances of fallout.[51] Opacity is the degree to which air pollution reduces the amount of background light seen

[48] AR Miscellaneous No. 11 (Notes by Dolehanty 8-12-12) ("condensibles – we told them our position is that those were always intended to be included, contrary to what co. says")**[Ex. 23]**; AR Permit No. 433 (Permit to Install Application Summary for 182-05C, at Page 14) (MDEQ put Severstal on notice of the need to control condensable particulates) **[Ex 5]**; Permit No. 39 (April 13, 2010, email from M. Dolehanty (MDEQ) to J. Earl (Severstal)) ("In addition, we do not agree with your characterization that the condensable fraction of PM10 was not included in the original permit emission rates. PM10 is defined as both filterable and condensable and any permit issued by the [MDEQ] that includes a PM10 is intended to include both fractions.") **[Ex. 6]**; AR Public Comment No. 48 (Ex 13, Pages 2-3)

[49] AR Miscellaneous No 13 (Aug. 22, 2012, handwritten meeting notes, at Page 4). **[Ex. 7]**

[50] AR Supplement to the AR Mar 3 2015 File No. 2.

[51] AR Supplement to the AR Mar 3 20015 File, Nos. 2 to 33. DEQ sent violation notices to Severstal on Feb. 24, 2009; July 17, 2009; Aug. 12, 2009; Oct. 28, 2009; May 18, 2010; Aug. 18, 2010; Sept. 27, 2010; Nov. 22, 2010; Dec. 10, 2010; Jan. 5, 2011; Mar. 15, 2011; April 28, 2011; Aug. 16, 2011; Sept. 20, 2011;

through observation and is used as a proxy for particulate matter emissions.[52] Fallout refers to particulates physically landing and collecting on property.[53] In August of 2012, DEQ noted: [54]

Since July 23, 2010, there have been:

- 117 citizen complaints alleging fallout and opacity from various processes at the facility
- 76 on-site visits in addition to the routine surveillance conducted in the area, and
- Over 20 Violation Notices sent to the company.

While considering Severstal's application for this permit, DEQ field staff repeatedly expressed frustration about Severstal's ongoing failure to comply with the law,[55] Staff described the plant as "by far the most egregious facility in the state."[56]

D. Severstal asks to raise the emissions limits in its permit.

In response to the February 2009 notice of violation, Severstal informed DEQ that it would seek to achieve compliance by increasing the emission limits in its current permit, rather than reducing production or installing additional pollution control equipment.[57]

Oct. 24, 2011; Dec. 8, 2011; Mar. 29, 2012; May 1, 2012; May 10, 2012; May 15, 2012; May 16, 2012; June 29, 2012; July 19, 2012; July 31, 2012; Aug. 8, 2012; Aug. 14, 2012; Sept. 13, 2012; Sept. 27, 2012; Nov. 14, 2012; Jan. 30, 2013; Mar. 8, 2013; May 13, 2013; and April 15, 2014; and EPA sent violation notices to Severstal, on Feb. 9, 2009; June 15, 2012; and Mar. 5, 2013.

[52] See Mich Admin Code, R 336.1301.

[53] Mich Admin Code, R 336.1901.

[54] AR Permit No. 260 (Aug. 16, 2012, email from L. Fiedler, at Page 1). **[Ex. 8]**

[55] AR Permit No. 212 (June 1, 2012, email from J. Lamb); AR Permit No. 258 (Aug. 9, 2012, email with table of "highlights of compliance issues with Severstal" created by K. Koster and J. Lamb); AR Public Comment No. 49 (Ex 26 – Nov. 21, 2012, email from K. Koster to J. Earl *et al*); AR Miscellaneous No. 28 (Nov. 21, 2012, email from K. Koster to Director Wyant *et al*); AR, Permit No. 260 (Aug. 16, 2012, email from L. Fiedler, at Page 2).

[56] AR Permit No. 260 (Aug. 16, 2012, email from L. Fiedler, at Page 2).

[57] AR Permit No. 007 (Nov. 17, 2008, letter from J. Earl (Severstal) to K. Kajiya-Mills (DEQ), at Page 2); R Permit No. 12 (Mar. 9, 2009, letter from J. Earl (Severstal) to B. Feighner (DEQ), at Page 2) ("Severstal needs to make corrections to certain emission limits contained in PTI No. 182-05B").

In December 2010, Severstal applied for a permit "correction" in order to "bring[] into alignment the allowed emissions with the facility's actual operation."[58] Severstal provided DEQ with additional information, and negotiated with DEQ proposed conditions for a "corrected" permit.[59] On April 6, 2012, DEQ found it had received all required information and deemed Severstal's application complete.[60]

E. In 2012, Severstal's proposal hits a roadblock and MEDC intervenes.

In the spring of 2012, DEQ analyzed the causes of high manganese levels in the Detroit air.[61] Shortly after, Severstal provided DEQ with additional stack test results showing that the pollution control device on its Basic Oxygen Furnace – which was called an Electrostatic Precipitator ("ESP") – emitted three times as much manganese as allowed under the existing permit.[62] In addition, the ESP was having substantial operational problems. DEQ issued multiple violation notices for manganese and opacity violations at the ESP.[63] On June 13, 2013, Severstal

[58] AR Supplement No. 60a (Severstal Background) (DEQ press release issued May 12, 2014); AR Permit No. 53 (Permit to Install Application for PTI 182-05C, Dec. 15, 2010).

[59] *See* AR Permit Nos. 55 to 171 (documents from Dec. 15, 2010, to Sept. 27, 2011, related to information requests); AR Permit Nos. 172 to 208 (draft permit conditions from Sept. 27, 2011, to May 25, 2012).

[60] Mich Admin Code, R 336.1203. AR Permit File No. 199 (April 6, 2012, email from R. Telesz (DEQ) to J. Earl (Severstal); AR Permit File No. 260 (Aug. 16, 2012, email from L. Fiedler (DEQ) to R. Telesz (DEQ)) (stating DEQ deemed Severstal's application complete on April 6, 2012).

[61] AR Supplement 210REV (Ambient Air Levels of Manganese in Southeast Michigan, Mar. 27, 2012, at Page 1).

[62] AR Permit File No. 220 (June 19, 2012, email from R. Telesz (DEQ); AR Permit File No. 234 (July 3, 2012, letter from V. Hellwig (DEQ) to J. Earl (Severstal)).

[63] AR Permit File No. 212 (June 1, 2012, email from J. Lamb (DEQ) to M. Mitchell (DEQ) *et al*); AR Permit File No. 216 (June 5, 2012, meeting notes) ("[DEQ] will not issue this permit wt [*sic*] a Mn limitation being violated."); AR Permit File No. 218 (June 11, 2012, meeting notes); AR Permit No. 227 (copies of March 29, May 1, 10, 16 Violation Notices);.

submitted an "action plan" regarding these issues.[64] DEQ rejected Severstal's proposed plan and instead concluded that it was required to deny Severstal's application for a permit modification. DEQ told Severstal, "simply increasing your allowed emission rates is not an acceptable solution to your recent exceedance."[65] DEQ cited Rule 207, which requires application denial if the equipment will not comply with air standards.[66] DEQ requested Severstal withdraw its application else DEQ would deny it, after a public hearing that could generate significant attention.

In response, Severstal's CEO asked the Michigan Economic Development Corporation (MEDC) to lobby DEQ. Those activities are described in more detail in Section I.C.4 of this brief. Among other things, Severstal, DEQ, and MEDC discussed grandfathering the permit against current air pollution rules, whether Severstal should withdraw its application, the litigation risk of going around a key air pollution rule, and a proposed agreement to extend the permit review deadline so Severstal could come into compliance with the old permit – which was necessary for the new permit to be issued. Under pressure from MEDC, DEQ acquiesced to most of Severstal's requests. The parties signed an "extension agreement" on February 1, 2013 that is discussed further in Section I.C.4.

F. Severstal and DEQ negotiate an unprecedented revised permit.

Following the extension agreement, DEQ and Severstal reached agreement on a permit that increases the plant's emission limits substantially. The details of these increases are shown in the table in Exhibit 1. Compared to the prior permit, the revised permit increases emissions limits for particulates, course particulates (PM_{10}), carbon monoxide, nitrogen oxide, volatile organize

[64] AR Permit File No. 220 (June 19, 2012, letter from J.Earl (Severstal) to M. Dolehanty (DEQ)).

[65] AR Permit No. 234 (July 3, 2012, letter from V. Hellwig (DEQ) to J. Earl (Severstal)). **[Ex. 9]**

[66] *Id.*

compounds (VOCs), lead and manganese.[67] The increases range from a few percentage points to hundreds and even thousands of percentage-point increases.[68] The magnitude and scope of the increases are enormous.

In addition to increasing the emissions limits for multiple pollutants, DEQ and Severstal "reallocated" emissions between different equipment, to avoid an "overall" increase in some emissions.[69] Other manipulations were achieved by combining and capping total production on the B and C blast furnaces –even though the B furnace was long since destroyed. This was a fictitious way to "offset" (mask) the increases at the C furnace.[70] DEQ also let Severstal change its assumption for how effective pollution control equipment would be: at three sources, control equipment that captured 95% of emissions in 2007 was re-set (on paper) to capture 98% of emissions in 2014.[71]

Also notable is what DEQ did *not* do in the revised permit. It did not apply any air pollution rules that had been enacted since 2006. These rules included requirements concerning the non-attainment status of Wayne County for sulfur dioxide in 2013, and the July 2008 mandate to treat sulfur dioxide as a "surrogate" for fine particulates in non-attainment areas, which included

[67] Ex 1 (Table of Emissions Increases); see also AR Permit 408 (Fact Sheet, Table 1).

[68] *Id.*

[69] AR Permit File No. 408 (Fact Sheet, pp. 7-8) (mercury emissions "redistributed" between BOF and Blast Furnace process; sulfur dioxide emissions "reallocated" between

[70] AR Permit File No. 408 (Fact Sheet, p. 19, Table 6) (justifications for proposed changes).

[71] AR Permit File No.433 (Application Summary, pp. 32-34). The sources are the Hot Metal Transfer, Hot Metal Desulfurization, and the Basic Oxygen Furnace (BOF) roof monitor. For the BOF only, Severstal provided support that the equipment would perform at the higher level.

Wayne County.[72] The explanation for this decision was that the area "was in attainment at the time of PTI 182-05B, [so] this permitting action was completed as if SO2 was still in attainment."[73] DEQ also did not apply federal greenhouse gas regulations for the same reason."[74] DEQ also did not consider the destruction of the B Blast Furnace.[75] So even though the emissions limits were "updated" to reflect new stack test data, the "updating" only went in one direction – to support the emissions limit increases.[76]

DEQ provided public notice of the permit changes on February 12, 2014.[77] Appellants and others raised multiple concerns about the legality of the proposed permit,[78] but the agency rebuffed these concerns and issued the new permit on May 12, 2014.[79] AK Steel bought the plant from Severstal shortly thereafter.

A final note: AK Steel and DEQ will argue that the permitted emissions increases simply reflect the facility's actual pollution.[80] That is unequivocally false. While the new permit process

[72] 78 Fed Reg 47191 (Aug. 5, 2013) (designated non-attainment for SO2); 70 Fed Reg 944 (Jan. 5, 2005) (designated nonattainment for PM2.5); 78 Fed Reg 53272 (Aug. 29, 2013) (re-designated attainment for PM2.5).

[73] AR Permit File No. 433 (Application Summary, pdf p. 11 of 215); AR Permit File No. 408 (Fact Sheet, pp. 2, 11).

[74] AR Permit File No. 433 (Application Summary, pdf p. 11 of 215).

[75] AR Permit File No. 432 (Response to Public Comments, p. 31 of 67). As noted above, DEQ allowed Severstal to change capture efficiencies in the netting analysis and make other paper changes to "validate" the results. **[Ex. 4]**

[76] AR Permit File No. 408 (Fact Sheet, Table 1) (justifying revisions as "updating" to reflect subsequently obtained data).

[77] AR Permit File No. 408 (Public Participation Documents).

[78] AR Public Comments Nos. 46 to 56 (public comment submittals); AR Permit No. 432 (Response to Comments Document, May 12, 2014).

[79] AR Supplemental No. 432REV (May 12, 2014, Permit to Install No. 182-05C). **[Ex. 2]**

[80] AR SUPP 60a (DEQ Talking Points).

was triggered by high pollution levels shown in the stack testing, the new permit raises the emissions limits well above the levels that stack testing demonstrated were achievable.[81] The new permit also increases emissions limits at sources that stack testing demonstrated to have met the limits in the prior permit.[82]

STANDARD OF REVIEW

Judicial review of a permit to install issued under Part 55 of NREPA focuses on "whether the action of the agency was authorized by law."[83] DEQ's issuance of a permit to install "was not authorized by law if it violated a statute or constitution, exceeded the agency's statutory authority or jurisdiction, materially prejudiced a party as the result of unlawful procedures, or was arbitrary and capricious."[84] On appeal, a Circuit Court reviews these questions *de novo*.[85]

[81] *Id.*; AR Permit No. 433 (Permit to Install Application Summary for PTI 182-05C, Feb. 24, 2014, at Tables 2-1, 2-2).

[82] AR Permit No. 408 (Public Participation Documents, Feb. 12, 2014, at Tables 1, 2, 3).

[83] *Natural Res Defense Council v Dep't of Envt'l Quality*, 300 Mich App 79, 87; 832 NW2d 288 (2013); see also MCL 600.631; Const. 1963 art. 6, § 28.

[84] *Id.* at 87-88.

[85] *Id.* at 88.

ARGUMENT

I. DEQ UNLAWFULLY DECLINED TO REQUIRE THE STEEL MILL'S PERMIT TO COMPLY WITH CURRENT AIR POLLUTION RULES.

DEQ did not apply current rules to AK/Severstal's application. Instead, DEQ applied rules from 2006, when it issued the prior permit. DEQ had no authority to apply rules other than those in effect at the time it issued the permit.

A. Severstal Requested that DEQ Grandfather the Permit from Complying with Current Air Pollution Rules, and DEQ Assented.

As noted in the statement of facts, stack tests conducted starting in 2008 showed that the steel mill was emitting air pollution in excess of the limits established in its permit. Rather than revoke the permit and require the company to submit a new application, as the air pollution rules provide,[86] Severstal proposed that DEQ change the permit to increase the emission limits.[87] One of the key issues in the negotiations between Severstal, DEQ and MEDC was which vintage of air pollution rules would apply to the new permit – the rules in effect in at the time the new permit would be issued, or the rules in effect in 2006 when the old permit was issued.

Severstal was concerned that if it withdrew its pending permit application and submitted a new one, as DEQ requested, the plant would become subject to current air pollution rules.[88] At the request of MEDC, Severstal prepared a detailed "Grandfathering Analysis" which outlined these concerns.[89] The Grandfathering Analysis stated in pertinent part:

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[86] Mich Admin Code, R 336.1201(8). This process is discussed further at pages 30-31, below. **[Ex. 10]**

[87] AR Permit Nos. 007 and 012.

[88] DEQ wanted Severstal to fix a broken electrostatic precipitator and then re-apply for the permit. The reasons why, and the workaround the parties came up with, are discussed further at pages 33-39, below.

[89] Grandfathering Analysis, AR Supplement 270REV. DEQ, MEDC, and Severstal called this letter the "Grandfathering Analysis" throughout the fall of 2012. See, e.g. AR Misc. 018. **[Ex. 11]**

> Since 2006, when construction began on the project, and since 2009 when Severstal first contacted DEQ to address this issue, numerous changes to Clean Air Act requirements have occurred. The pending permit application, which updates and revises the original application, has until now been grandfathered from these regulatory changes that occurred after Severstal began actual construction on the project and after the original permit issuance. In contrast, a new permit application would reset the clock on the application's timing and interrupts the sequence of work that began in 2009 when the new site-specific test data was first discussed by DEQ and Severstal. It would eliminate the existing grandfathering and reset the baseline of post-baghouse controls, change the baseline actual to projected-actual/potential-to-emit emissions increase calculations, dramatically alter the netting demonstration, and expand the BACT/LAER applicability associated with the original project.[90]

The bottom line for Severstal was that without grandfathering, it would be much harder to obtain a new permit with higher emission limits. Concerns cited in Severstal's attorney's grandfathering analysis included:

- "The baseline actual emissions for the new permit application/project would change, and would, in part, be based on the limits contained in the current permit. This would result in nonattainment New Source Review and PSD being triggered for multiple pollutants, at multiple modified emissions units, where it was not triggered for the original project. The result would be a far more complicated permitting process…"
- "A demonstration of compliance with the new l-hour SO_2 National Ambient Air Quality Standard would be required…"
- "The new l-hour NO_2 standard could require NO_2 emissions reductions from emissions units not affected by the project in order to achieve an air quality impact analysis in compliance with this new standard."

[90] *Id* at pp 4-5.

- "$PM_{2.5}$ requirements would be triggered, due to the expiration of the surrogate policy."[91]

Severstal's Grandfathering Analysis relies mainly on an EPA guidance document from 1987 known as the "Ogden Martin memo."[92] The Ogden Martin memo says that for permits EPA issues itself, it may revise an emission limit in certain circumstances.[93] However, the Ogden Martin memo is not a rule and therefore does not have the force of law.[94] Even if it was binding, the Ogden Martin memo specifically rejects grandfathering. It says that when revising a permit, "current BACT [Best Available Control Technology] requirements must be considered."[95]

Throughout the negotiations with Severstal, DEQ also characterized the process as "grandfathering." However, DEQ believed that Severstal would be grandfathered regardless of whether the company continued with its current application, or withdrew and resubmitted it.[96] A table summarizing the parties' positions in the negotiation stated:[97]

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[91] *Id* at pp 5-6.

[92] Grandfathering Analysis, p 5, citing U.S. EPA, Request for Determination, Ogden Martin Municipal Waste Incinerator, **Ex.11**. Available at: https://www.epa.gov/sites/production/files/2015-07/documents/ogden.pdf.

[93] The other document Severstal relied on was a "revised draft" of an EPA internal policy from 1985, which Severstal claimed to allow permit revisions to be grandfathered if they started construction before new rules were adopted. *EPA revised Draft Policy on Permit Modifications and Extensions*, available at: https://www.epa.gov/sites/production/files/2015-07/documents/permmod.pdf (last checked September 27, 2018). However, this draft memo was never adopted and therefore has no weight at all, according to EPA. **[Ex. 12, Page Memo at pages 2-3]**.

[94] *TMW v Dep't of Treasury*, 285 Mich App 167, 178; 775 NW2d 342 (2009); *Christensen v Harris County*, 529 US 576; 120 SCt 1655, 1662-63 (2000).

[95] Ogden Martin memo at page 2 (emphasis added). EPA even cited the Ogden Martin memo when it wrote that DEQ must apply "current technology and requirements" to Severstal's permit. AR Public Comments, No. 042, page 2.

[96] AR Miscellaneous No 13 at p 4 **[Ex. 7]**; AR Permit No. 244 **[Ex.13]**.

[97] AR Supp 034, p 1 **[Ex. 14]**; AR Miscellaneous No. 11 (Notes by Dolehanty 8-12-12) **[Ex.23]**

Grand fathering of Regulatory Changes	-	DEQ does not believe that Severstal loses grandfathering benefits if the application is withdrawn. New regulations since construction began will not apply. See Avenal decision.	4

The same table asked: "Was Ogden Martin Tulsa (1987) superseded by Avenal decision (2011)?"[98] (The *Avenal* decision is of great importance to this appeal and is discussed in the next section.)

When DEQ issued the permit, it did not apply current rules. For example, DEQ stated that Severstal's sulfur dioxide emissions should "be evaluated as if the area were still in attainment," instead of under its actual, nonattainment status.[99] EPA protested that DEQ must "take into account current technology and requirements," and that "underlying applicable requirements" for sulfur dioxide nonattainment areas must be followed.[100] DEQ rejected EPA's position:

> I got a call from George Czerniak [of EPA] today concerning the pending decision on the Severstal permit. Specifically, the issue is how we will treat SO_2 in the permit and the EPA comment. I told George that since we were re-permitting the source that we were going back to the attainment status of the original permit and the [decision] would reflect this …
>
> George said he wanted to give me a heads up that we may be at odds on this issue. This may be something we have to deal with in the near future.[101]

B. Severstal's Request for Grandfathering Was Unlawful.

Under the plain language of the state air pollution rules and the federal Clean Air Act, DEQ cannot issue a permit to install unless it determines that the applicant will comply with all existing

[98] *Id.*

[99] AR Permit No. 432, page 131 (DEQ Response to Comments, page 28).

[100] AR Public Comments No. 042, page 2 **[Ex. 15]**.

[101] AR Misc. No. 76 (05-07-14 Hellwig email). **[Ex. 16]**

air pollution rules.[102] Rule 207 states that DEQ "shall deny an application for a permit to install if…[t]he equipment for which the permit is sought will violate the applicable requirements of the clean air act…"[103] DEQ must also deny an application for a permit to install if "[o]peration of the equipment for which the permit is sought will interfere with the attainment or maintenance of the air quality standard for any air contaminant."[104] An agency must apply the law in effect at the time of its permitting decision.[105] Therefore, the requirements and standards referred to in Rule 207 are those existing at the time DEQ issues a permit.

The 2011 *Avenal* decision relied on by DEQ in the 2012 negotiations discussed above was an EPA permit approval for a power plant. In the 2011 decision, EPA grandfathered the plant against new Clean Air Act rules that took effect while the application was pending and before a permit decision was made. However, after the Severstal permit was issued in this case, the Ninth Circuit U.S. Court of Appeals reversed EPA's approval of the permit in *Avenal*.[106] The court held that the Clean Air Act "clearly requires EPA to apply the regulations in effect at the time of the permitting decision."[107] The court distinguished the situation in which "grandfathering of pending permit applications was explicitly built into the new regulations" from an "ad hoc" approach in which applications were grandfathered on a case-by-case basis.[108] The court characterized case-

[102] Mich Admin Code, R 336.1207(1); 42 USC §§ 7475(a), 42 USC §§ 7410(j); 40 CFR § 52.21(k).

[103] Mich Admin Code, R 336.1207(1)(c).

[104] Mich Admin Code, R 336.1207(1)(b).

[105] *Ziffrin v United States*, 318 US 73, 78 (1943) (agency required to apply law existing at time of permit decision rather than law existing at time of permit application); *Nat'l Wildlife Fed v Dep't of Envtl Quality*, 306 Mich App 369; 856 NW2d 394 (2014).

[106] *Sierra Club v EPA* ("*Avenal*"), 762 F3d 971 (2014).

[107] 762 F3d at 979.

[108] *Id* at 982.

by-case grandfathering as an exercise of "unbounded discretion" that "exceeds the agency's authority."[109] The court held that "the statute does not permit EPA to waive current NAAQS and BACT requirements whenever it finds it convenient to do so."[110] More recently, the *Avenal* court's holding that the Clean Air Act requires agencies to give effect to existing laws and regulations in force at the time of the final agency decision has been supported by the U.S. Court of Appeals for the D.C. Circuit.[111]

Given the Ninth Circuit's decision, DEQ and AK Steel will undoubtedly try to distinguish *Avenal* or minimize its significance to this case. However, the record shows that *Avenal* is important in two respects.

First, Severstal argued for case-by-case grandfathering of its permit: "Because of the continuum of ongoing activities between the DEQ and Severstal, the pending application has a legitimate and justifiable basis for being grandfathered from these new requirements."[112] What Severstal sought – and ultimately received – was precisely the kind of ad hoc grandfathering that the Ninth Circuit in *Avenal* ruled was impermissible.

Second, DEQ relied on the EPA permit decision in *Avenal* for its interpretation of how grandfathering applied to Severstal's permit in this case. DEQ relied on the EPA's *Avenal* permit decision as the basis for its belief that the Severstal would not lose "grandfathering benefits" if the company withdrew its application, because new rules that had taken effect since construction

[109] *Id* at 983.

[110] *Id.*

[111] *Stand Up for Cal! v United States DOI*, 879 F3d 1177, 1191 (2018).

[112] Grandfathering Analysis, p 6.

began would not apply.[113] Once the Ninth Circuit vacated the EPA's permit decision, the stated basis for DEQ's position was also wiped out.[114]

C. DEQ's Argument That Current Rules Were Not Applicable Because AK/Severstal Did Not Construct Any New Equipment is Unavailing.

When DEQ issued the permit, it changed its tack. Rather than use the term "grandfather," DEQ emphasized that current air pollution rules were not "applicable" to the permit because Severstal had already constructed the equipment authorized by the original permit.[115] In its response to public comments, DEQ even denied that it was grandfathering the permit.[116] According to DEQ, the permit did not involve physical changes at the steel mill (*e.g.*, equipment modification, production increases), so it did not trigger the rules that apply to physical changes.[117] Instead, according to DEQ, this permit is just an "update" or "revision" to the old permit (PTI 182-05B) to ensure it reflects data that only became available after the modifications that the old permit approved – increased steel production and installation of equipment – were completed.[118]

[113] AR Supp 034, p 1.

[114] Further, Michigan courts are "bound by the holdings of federal courts on federal questions." *Natural Res Defense Council v MDEQ* , 300 Mich App 79. at 90. And Michigan's SIP must be "more stringent, or at least as stringent," as federal PSD regulations. 40 CFR § 51.166.

[115] See **Ex 3 to Appellants' Motion for Peremptory Reversal filed October 9, 2014**, AR Permit No. 432, Response to Comments, page 26 (PDF page 129).

[116] AR Permit No. 432, p 59.

[117] See, e.g., AR Permit File No. 408 (Fact Sheet, pages 2, 10, 11, 19); AR Permit File No. 433 (Application Summary, page 18); AR Permit File No. 432 (Response to Public Comments, pages 26, 29, 32).

[118] See, e.g., AR Permit File No. 433 (Application Summary, Flags for PTI No 182-05C, page 1 of 1, "The application is a "look-back" to updated emissions limits and calculations from PTI 182-05B"); AR Permit File No. 408 (Fact Sheet, pp. 1, 2, 10, 11).

Although that perspective permeates the record of DEQ's decision-making, it is not true. The new permit completely replaced the old permit.[119] If otherwise lawful, the new permit constitutes a retroactive re-approval of the production increases and equipment changes that were approved in the old permit and that Severstal implemented.[120] Thus, contrary to DEQ's position, the new permit does authorize physical modifications and production increases at the Severstal facility – it just happens that in this (unusual) case, those changes and increases were already completed. Stated otherwise, the new permit does not only approve the changes in emission limits; it becomes the necessary approval for everything the old permit authorized, including equipment changes and production increases. As a result, the permit should not just reflect emissions data acquired after 2007, but by law, it must also reflect air pollution rules imposed after 2007, as explained in the prior section. This appears to be how Severstal viewed the matter in its Grandfathering Analysis, hence the company's request for grandfathering. And it appears to be how DEQ viewed the matter during the negotiations, which is why the agency also referred to grandfathering throughout the process.

Besides being incorrect and an arbitrary departure from the position DEQ maintained throughout the process with Severstal, there are several additional problems with DEQ's new position:

- First, no rules exist to govern a process in which the emission limits in a permit are significantly increased and no new pollution control equipment is required. Instead, DEQ exercised the kind of "unbounded discretion" that the *Avenal* court criticized.

[119] See AR Permit File No. 408 (Fact Sheet, page 2); AR Permit File No. 432 (Response to Public Comments, p. 62) (noting that, upon issuance of new permit, prior permit is "voided").

[120] AR Permit File No. 433 (Application Summary, pages 2 to 4).

- Second, rules do exist for the situation here – where equipment is not complying with permitted emission limits. Yet DEQ chose not to apply those rules to AK/Severstal.
- Third, Rule 207(1)(b) requires DEQ to deny a permit to install where operation of the equipment for which the permit is sought will interfere with the attainment of an air quality standard. That rule is not triggered only by new construction – it applies to any permit to install.
- Fourth, DEQ's ad hoc permitting process here was only made possible as a result of entering into an *ultra vires* agreement to go around two other rules – Rules 206 and 207. Rule 206 requires permit applications to be decided within 120 days, while Rule 207 required Severstal to be in compliance with its old permit before the new permit could be issued. The agreement essentially waived Rule 206 until Severstal could comply with Rule 207 – an action both DEQ and Severstal acknowledged was legally risky.

Each of these issues is discussed in the sections that follow.

1. No rules governed the process DEQ used to approve this permit.

DEQ has enacted a rule listing the situations in which a permit to install may be issued. None of those situations applied here. Further, no rule provides for modifying a permit to install by raising its emission limits without requiring any new pollution control equipment to mitigate the impact of the increases.

State administrative agencies have no inherent authority. Their powers are limited to those expressly granted by statute.[121] An agency possesses only those powers that are granted by "clear and unmistakable language, since a doubtful power does not exist."[122] "Powers specifically conferred on an agency cannot be extended by inference."[123] As such, "[t]he extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority."[124] Where the legislature authorizes an agency to implement its statutory authority through administrative rules, the agency is bound by the rules it so promulgates.[125]

DEQ Rule 201 lists three permissible reasons for which the agency may issue a permit to install: (a) where a person seeks to "install, construct, reconstruct, relocate, or modify a process or process equipment;" (b) in order to "establish limits on potential to emit;" or (c) to "consolidate terms and conditions from existing permits to install within a renewable operating permit."[126]

[121] *Oshtemo v Kalamazoo County Road Comm'n*, 302 Mich App 574, 584; 841 NW2d 135 (2013); *In re Detroit Edison Co*, 296 Mich App 101, 109-10; 817 NW2d 630 (2012); *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 574; 810 NW2d 110 (2011).

[122] *Herrick*, 293 Mich App at 582, quoting *Mason County Research Council v Mason County*, 343 Mich 313, 326-27; 72 NW 2d 292 (1955).

[123] *Id.* at 582-83; *see also Maxwell v. Dept of Enviro Quality*, 264 Mich App 567, 570; *** NW2d ** ((2004) (citation omitted).

[124] *Sittler v Mich Coll of Mining & Tech Bd of Control*, 333 Mich 681, 687; 53 NW2d 681 (1952) (quoted in *Mich Educ Ass'n v Sec'y of State*, 489 Mich 194, 225-26; 801 NW2d 35 (2011)).

[125] See *Kassab v Acho*, 150 Mich App 104, 112; 388 NW2d 263 (1986); *Micu v City of Warren*, 147 Mich App 573, 584; 382 NW2d 823 (1985); *Boyce v Grand Rapids Asphalt Paving Co*, 117 Mich App 546, 552; 324 NW2d 28 (1982).

[126] Mich Admin Code, R 336.2101(2).

The permit in this case was not issued for any of these reasons. It was not issued under subsection (a) because no installation or construction occurred.[127] Nor was it issued under subsection (b), to impose limits on the steel mill's potential to emit. This subsection addresses the situation where a facility is capable of operating at a particular level (*i.e.*, it has the "potential to emit" a particular level of emissions), but in fact operates at a lesser level (*e.g.*, limited production, fewer hours of operation).[128] Subsection (b) authorizes DEQ to issue a permit to install to ensure such operational limitations are legally enforceable.[129] None of that occurred here. Nor was the permit here issued under subsection (c), which authorizes DEQ to issue a permit to install that consolidates terms and conditions from existing permits to install into a renewable operating permit.[130] PTI 182-05C is not a source-wide permit to install. Other pollution sources at the steel mill have their own permits.

DEQ claims that it has statutory authority to modify a permit. That may be, but authorization states that DEQ may, "in accordance with this part and rules promulgated under this part, deny, terminate, modify, or revoke and reissue permits for cause."[131] DEQ argues that "in accordance with" rules just means not in conflict with them. However, *Black's Law Dictionary* states that "accordance" means "agreement; harmony; concord; conformity."[132] These words

[127] AR Permit No. 341 (Severstal "is not pursuing the installation of any new equipment and therefore there is no installation or construction taking place").

[128] See DEQ, *Potential to Emit Workbook*, at Page 2-10 (available at: http://www.michigan.gov/documents/deq/deq-ess-caap-pte-workbook-part2_314117_7.pdf, last viewed Sept. 26, 2018).

[129] See Mich Admin Code, R 336.1205(1)(a); see also R 336.2801(hh).

[130] See Mich Admin Code, R 336.1214a.

[131] MCL 324.5503(c) (emphasis added).

[132] Black's Law Dictionary (6th ed. 1990), p 17.

denote more than just a lack of direct conflict. It is wholly unclear how DEQ could have modified this permit in agreement, harmony, or conformity with rules that do not exist.

By contrast, DEQ has promulgated rules for modifying a different kind of permit, called an operating permit.[133] Those rules are quite detailed – they classify modifications into one of several categories, and then provide specific procedures for each category. By contrast, there are no rules to guide the process for modifying a permit to install. EPA recognized this fact: "The Michigan State Implementation Plan does not address the issue of revising Prevention of Significant Deterioration (PSD) permits."[134]

Certainly, DEQ has no rules for modifying a permit to install in order to increase emission limits – without requiring any new pollution control equipment or applying current air pollution standards. DEQ's argument that none of the current rules were "applicable" because no new equipment was constructed or installed is just circular. If the current rules had been applied, DEQ would have evaluated the actual impact of the 2006 production increases and new control equipment based on all intervening laws and factual circumstances. Such an evaluation would undoubtedly have required the steel mill to install more pollution control equipment. Severstal appears to have recognized this fact in its Grandfathering Analysis.

In light of the complete absence of rules to govern the permit modification DEQ undertook in this case, it is important to note that two other DEQ rules do in fact govern this exact situation. Yet, inexplicably, DEQ opted not to apply those rules.

[133] Mich Admin Code R 336.1216

[134] **Ex. 15**, EPA comments.

2. DEQ Declined to Apply a Rule that Specifically Governs this Situation.

Rule 201(7) allows DEQ to require testing after installation of the equipment authorized by a permit to install.[135] If the testing shows violations of the permit limits, Rule 201(7) states that the source facility "shall" provide DEQ with "a schedule for compliance for the process or process equipment."[136] Then Rule 201(8) states: "If evidence indicates that the process or process equipment is not performing in accordance with the terms and conditions of the permit to install, the department, after notice and opportunity for a hearing, may revoke the permit to install…"[137] If that happens, the source facility "may file a new application for a permit to install that addresses the reasons for the revocation."[138]

The situation addressed by Rules 201(7) and (8) is the precise factual scenario that occurred in this case. Stack tests revealed that the steel mill's process and/or pollution control equipment were violating the limits in permit 182-05.[139] Yet DEQ did not commence the process in Rule 201(8) to hold a hearing and determine whether cause existed to revoke the permit.

It is true that Rule 201(8) uses the word "may," which admits a certain degree of discretion. However, the fact that DEQ has discretion whether to invoke Rule 201(8) does not mean DEQ also has discretion to create a new process on an ad hoc basis that has the opposite result – raising permitted emission limits as a response to violations instead of starting over. Further, DEQ's

[135] Mich Admin Code, R 336.1201(7).

[136] *Id.*

[137] R 336.1201(8).

[138] *Id.*

[139] AR Permit File No. 002 (Feb. 24, 2009, Violation Notice).

decision to invent a new process instead of using the one codified in existing rules for this exact situation is arbitrary, capricious, and an abuse of discretion.

3. DEQ had no basis to conclude that the plant would not interfere with attainment of the 1-hour SO2 standard, requiring denial of the permit under Rule 207(1)(b).

Rule 207(1)(b) states that DEQ "shall deny an application for a permit to install if, in the judgment of the department, any of the following conditions exist: … (b) Operation of the equipment for which the permit is sought will interfere with the attainment or maintenance of the air quality standard for any air contaminant."[140] On its face, this rule applies irrespective of whether any new construction, equipment installation, or process changes are occurring in connection with the permit.

The 1-hour SO_2 NAAQS is an air quality standard under the Part 55 rules.[141] As noted in the statement of facts, the area in which the steel mill is located has been designated as non-attainment for the 1-hour SO_2 NAAQS – meaning the short-term concentrations of sulfur dioxide in the community already exceed the standard EPA has determined to be requisite to protect public health with an adequate margin of safety.[142] Therefore, DEQ was required by its own rules to deny the permit if the equipment governed by the permit would interfere with attainment of the 1-hour SO_2 NAAQS.

To reach attainment, it is necessary to substantially *reduce* the amount of SO_2 already in the air around Dearborn and Southwest Detroit. Instead, the new permit allows the steel mill to

[140] R 336.1207(1)(b).

[141] R 336.1101(j).

[142] 42 USC §7409(b)(1).

emit up to 1,199 *tons* of SO_2 per year.[143] The EPA's "Significant Emissions Rate" for SO_2 is 40 tons per year.[144] The new permit also authorizes a "reallocation" of SO_2 between sources at the B blast furnace (which has been demolished for years now) and the C blast furnace (which still operates). The "reallocation" is discussed further at pages 40-48 of this brief.

DEQ stated that the steel mill's sulfur dioxide emissions should "be evaluated as if the area were still in attainment," instead of nonattainment – using the same justification that the permit did not involve new construction, installation of equipment, or changes in process so as to trigger PSD or nonattainment NSR.[14] However, as discussed above, Rule 207(1)(b) does not require new construction, installation of equipment, or changes in process. DEQ never addressed how it could make a finding that the emissions from the steel mill would not interfere with attainment of the 1-hour SO_2 NAAQS when it specifically chose to evaluate the permit as if the area was already in attainment with that standard. This is the essence of arbitrary and capricious decision-making.

DEQ did perform some air dispersion modeling of sulfur dioxide.[145] However, none of this modeling addressed the issue of the steel mill's equipment interfering with the attainment of the 1-hour SO_2 NAAQS. DEQ modeled the sulfur dioxide emissions from the original 2006 permit a couple different ways to see if they met the requirements from 2006 for an attainment area.[146]

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[143] PTI 182-05C, p 23, line 15. This is the same total amount as the prior permit.

[144] 40 CFR §52.21(b)(23); 40 CFR §51.166(b)(23); Mich Admin Code, R 336.2901(gg)(i)(C); EPA "Guidance Concerning the Implementation of the 1-hour SO_2 NAAQS for the Prevention of Significant Deterioration Program" (August 23, 2010), available at:

https://www.epa.gov/sites/production/files/2015-07/documents/appwso2.pdf.

[14] AR Permit No. 432, page 131 (DEQ Response to Comments, page 28).

[145] AR Modeling No. 013, p 1. **[Ex. 17]**

[146] *Id.*

However, this modeling did not address the 1-hour SO_2 standard and was not for the purpose of determining impact in a non-attainment area.

DEQ also required Severstal's consultant to perform an "equivalency analysis" to show that the "reallocated" SO_2 emissions would have less impact than the SO_2 emissions as allocated in the prior permit.[147] However, this modeling evaluated a fictitious condition: the reallocation of SO_2 emissions between a blast furnace that no longer exists and one that still does exist. And "the 1-hour NAAQS was not modeled per agreement with the AQD [DEQ Air Quality Division]."[148]

In sum, DEQ refused to apply rules related to the 1-hour SO_2 NAAQS to this permit. By doing so, there was no way for the agency to make a non-arbitrary decision that operation of the equipment governed by the permit will not interfere with the attainment of the 1-hour SO_2 NAAQS. Without such a determination, DEQ was required to deny the permit under Rule 207(1)(b) – irrespective of whether DEQ's theory about no new construction or installation is correct or not.

4. DEQ's approval of the permit was only made possible by an "extension agreement" that both DEQ and AK/Severstal recognized was *ultra vires*.

During the time leading up to the approval of this permit, Rule 206 required DEQ to act on a permit to install application within 120 days of determining it to be administratively complete.[149] At the same time, Rule 207 prohibited DEQ from issuing a permit to Severstal if the company was not in compliance with the requirements of Part 55 and the Clean Air Act – which both DEQ and Severstal agreed it was not. To get around this dilemma, DEQ and Severstal entered into an

[147] *Id* at p 2.

[148] AR Permit File No. 433, Evaluation Memo, p 54. **[Ex. 5]**

[149] **Exhibit 18**, prior version of Mich Admin Code, R 336.1206.

agreement to extend the deadline in Rule 206 so that Severstal to get into compliance and allow the permit to be issued without violating Rule 207. The parties referred to this strategy as "going around" Rule 207 and acknowledged it was likely to invite this very litigation. Because the permit was only made possible by the extension agreement, and the agreement was ultra vires, this represents another reason why the permit is unauthorized and contrary to law.

a. Chronology of events leading to extension agreement.

DEQ determined that Severstal's permit application was complete on April 6, 2012.[150] Shortly thereafter, DEQ issued a series of violation notices to Severstal regarding the pollution control equipment on plant's basic oxygen furnace.[151] This equipment was called an electrostatic precipitator, or ESP. Because of these violations, DEQ concluded that Rule 207 prohibited the agency from granting a new permit to Severstal. Rule 207 requires DEQ, in pertinent part, to deny an application for a permit to install if:

> (b) Operation of the equipment for which the permit is sought will interfere with the attainment or maintenance of the air quality standard for any air contaminant.
>
> (c) The equipment for which the permit is sought will violate the applicable requirements of the clean air act…
>
> (d) Sufficient information has not been submitted by the applicant to enable the department to make reasonable judgments as required by subdivisions (a) to (c) of this subrule.[152]

[150] AR Permit No. 199; AR Permit No. 260.

[151] AR Permit No. 227 (copies of March 29, May 1, 10, 16 Violation Notices);

[152] Mich Admin Code, R 336.1207.

DEQ notified Severstal that the company should withdraw its permit application, bring the ESP into compliance, and then submit a new application.[153] DEQ recognized that bringing the ESP into compliance "will require considerable time" (*i.e.*, longer than 120 days).[154] DEQ stated that if Severstal did not withdraw the application, the agency would deny it.[155]

As discussed earlier, Severstal was concerned that withdrawal or denial of its application would render the company ineligible for the grandfathering that it sought.[156] Instead, Severstal proposed an "extension agreement" with DEQ to add at least another year for DEQ to make a final decision on the permit.[157]

At first, DEQ refused to enter into such an agreement. The agency explained: "As a result of the application being technically complete, the DEQ is obligated to act upon this permit…DEQ is mandated by Rule 207 to deny the application."[158] DEQ's Air Division Chief told the Deputy Director: "Failure to act on this permit violates our own rules. We have but one action available and that is to deny this permit if it is not withdrawn."[159]

At roughly the same time, however, MEDC intervened. Severstal CEO Sergei Kuznetsov approached Governor Snyder and MEDC Director Michael Finney seeking their help:[160]

[153] AR Permit No. 234 (July 3, 2012, letter from V. Hellwig (DEQ) to J. Earl (Severstal). **[Ex. 9]**

[154] AR Permit No. 013, meeting notes from August 22, 2012. **[Ex. 7]**

[155] *Id.*

[156] Grandfathering Analysis, p 4.

[157] See, e.g., AR Miscellaneous No. 021, Handwritten meeting notes 09-14-12. **[Ex. 19]**

[158] AR Permit No. 260 (Aug. 16, 2012, email from L. Fiedler (DEQ) to R. Telesz (DEQ). **[Ex. 8]**

[159] AR Permit No. 260 (Aug. 16, 2012, email from V. Hellwig (DEQ) to J. Sygo (DEQ)). **[Ex. 8]**

[160] AR Public Comments No.49 (Ex 21 – 2012-06-22 MEDC email). **[Ex. 20]**

From: Amy Banninga
Sent: Thursday, June 21, 2012 4:50 PM
To: Susan Holben
Subject: Severstal Dearborn

Susan—

Mike Finney and Governor Snyder attended a grand opening event at Severstal today, While he was there, Mike spoke with Sergei (I think local plant manager) who expressed some concerns on the air permitting process. We may not have all this exactly right, but this is what I took down:

- Severstal thinks DEQ may get EPA involved, and doesn't think that should be. They think they should be grandfathered (sounds similar to Guardian).

- This involvement will add cost and time

- Can DEQ do anything to help them make this more efficient?

Can you kick the tires over at DEQ to see where this stands? We need to know what the issue is, and have a reasonable response for the company. If there is something the DEQ can do to help the company comply, etc. we can help connect the players. We can get contact details from Mike if it gets to that point. At this point, we just need a better understanding of where things stand so we can communicate with the company.

Let me know if you have any qs and thanks for your help!

Amy Banninga
State Business Ombudsman
Michigan Economic Development Corporation

MEDC organized a series of meetings involving MEDC, DEQ and Severstal; and DEQ softened it position: [161]

> We appreciate DEQ's commitment not to further seek withdrawal of the permit application at this time or to yet begin any process to deny the application, pending your discussions with DEQ's air permitting staff. We look forward to hearing the results of those discussions, and continue to hope that those discussions will concur with holding the permit application (i.e. taking it "off-line" as you described) pending Severstal's ongoing work to address DEQ's compliance concerns.

After months of pressure, DEQ agreed to the concept of an extension agreement at a meeting with Severstal and MEDC.[162] At that meeting, Severstal's counsel, Scott Dismukes, admitted that the "compliance picture [is] frankly bad" and that there was "no excuse" for the failure to correct the company's violations.[163] However, he insisted that Severstal needed a tolling agreement due to the "high litigation risk" involved in submitting a new permit application that also sought grandfathering.[164] Deputy Director Sygo stated that he was "willing to entertain tolling

[161] AR Permit No. 243 (July 13, 2012, letter from J. Earl (Severstal) to J. Sygo and V. Hellwig (DEQ)).

[162] AR Miscellaneous No. 021, Handwritten meeting notes 09-14-12.

[163] *Id*, p 4.

[164] *Id*, p 3.

agreement," but was "concerned about a 3rd party lawsuit due to not following [Rule] 207."[165] Notes from this meeting reiterate Sygo's concern that an extension agreement "Leaves us open to 3rd party challenge – 207."[166]

DEQ and Severstal signed the extension agreement" on February 1, 2013.[167] The agreement provided that DEQ would make a final decision on the permit 150 days after it determined Severstal's application to be complete (for a second time), or 120 days after Severstal provided supplemental information if DEQ requested it.[168] The extension agreement was extended again on April 18, 2014, to require a final decision by May 9, 2014.[169] The permit was finally approved on May 12, 2014 – 766 days after DEQ had originally determined the application to be complete.

b. <u>The extension agreement was contrary to law and the result of unlawful procedures.</u>

DEQ exceeded its authority, and violated its own rules, by entering into the extension agreement with Severstal. At the time the agreement was signed, Rule 206 unambiguously required the agency to "take final action to approve or deny a permit to install subject to a public comment period…within 120 days of receipt of all information required."[170] DEQ recognized this fact in July and August of 2012, in the statements about being "obligated to act" and that "failure to act violates our own rules" discussed above.

[165] *Id*, p 6.

[166] *Id*.

[167] AR Permit No. 275 (Feb. 1, 2013, Extension Agreement). **[Ex. 21]**

[168] *Id*, p 6.

[169] AR, Permit No. 426.

[170] **Exhibit 18**, prior version of Mich Admin R 336.1206.

Further establishing the *ultra vires* nature of the extension agreement, DEQ amended Rule 206 to provide for such agreements in October of 2013. The new version of Rule 206 states, in part, that "if requested by the permit applicant, the department may extend the processing period… after a formal agreement is signed by both the applicant and the department.[171] The new version of Rule 206 became effective on October 28, 2013, eight months after DEQ signed the extension agreement with Severstal.[172] Because no rule allowed DEQ to extend the time limit Rule 206 when it agreed to an extension agreement with Severstal, the agency followed unlawful procedures exceeded its authority by doing so. And because the operation of Rules 206 and 207 together required DEQ to deny a permit to install application if the facility was not in compliance with Part 55 and the Clean Air Act, DEQ's action was also in excess of its authority, contrary to law, and the result of unlawful procedures.

c. DEQ and AK/Severstal ultimately violated Rule 207 despite the extension agreement.

Even though DEQ entered into the extension agreement, the agency still violated Rule 207 when it issued the permit because it did not consider multiple violations at the ESP identified just weeks before the permit was issued. As noted above, one of the purposes of the extension agreement was to give Severstal time to repair the ESP. Those repairs were completed in March of 2013.[173] On April 15, 2014, DEQ issued yet another notice of violation to Severstal, citing

[171] Mich Admin Code, Rule 336.1206(2). The new version also extends the 120 days to 240 days.

[172] Annual administrative code supplement for 2013, available at: http://cdm16110.contentdm.oclc.org/cdm/ref/collection/p16110coll2/id/116583.

[173] AR Permit No. 280, TRK Engineering Report on ESP.

Severstal for 16 categories of violations at five pieces of equipment. [174] Five of the categories of violations occurred at the ESP, including 221 individual opacity violations.[175]

As quoted above, Rule 207 requires DEQ to deny an application when, in its judgment, the equipment will not operate in compliance with applicable air quality rules.[176] DEQ's judgment is not unbounded. The ESP – the same equipment that led DEQ to conclude it must deny the application in 2012 – was cited for numerous violations at almost the same time that the new permit was issued. By its own admission, DEQ never considered the April 2014 violations before it issued the permit in May.[177] Thus, there is no non-arbitrary basis upon which DEQ could ignore the April 2014 violation notice under Rule 207. Any "judgment of the department" that did not consider such highly relevant information was necessarily arbitrary and capricious.

D. Conclusion to Section.

In sum, DEQ unlawfully processed AK/Severstal's permit in a way that allowed the company to evade a number of current air pollution rules. The result was a permit that significantly increased the allowed emissions of pollutants virtually across the board. Because Severstal's proposed grandfathering was unlawful, and because DEQ's alternative process was untethered to any rule and contrary to several others, approval of the permit was arbitrary and capricious, contrary to law, in excess of the agency's authorization, based upon improper procedure, and must be vacated.

[174] AR Supp 030, Severstal VN 4-15-14.

[175] *Id*, p 3.

[176] Mich Admin Code, R 336.1207.

[177] **Exhibit 22**, Transcript of September 10, 2014 motion hearing, pp 38-41.

II. PTI 182-05C DOES NOT ACCURATELY REFLECT THE 2008 DESTRUCTION OF THE B-BLAST FURNACE.

Severstal's B Blast Furnace was destroyed in 2008 and never rebuilt. But the way Severstal and DEQ treated and permitted the B Blast Furnace in PTI 182-05C – as if it had never been destroyed and also as if a baghouse had been installed in a hypothetical re-build – was unorthodox and unlawful. The Court should overturn the decision to issue the permit and require that any future permit reflect the actual state of the B Blast Furnace and treat its emissions as required by law.

In 2007, Severstal applied for a permit amendment to increase steel production, and DEQ granted the permit on condition that – if the B Blast Furnace were still operational after June 30, 2008, then Severstal must put a baghouse on it.[178] But after DEQ issued PTI 182-05B and before Severstal had a chance to install a baghouse on the B Blast Furnace, the furnace was destroyed in an explosion on January 5. 2008.[179] Severstal received $430M in insurance proceeds to compensate and estimated replacement to cost up to $533M.[180]

After the explosion, Severstal showed DEQ its plans to repair the B Blast Furnace, presenting evidence of redesign, emissions projections, repair costs (over $236 million), and schedule (starting construction in August 2008, with a target start-up of April 2010).[181] Based on that evidence, in September 2008, DEQ found the repair was covered by the then-current permit, PTI 182-05B.[182]

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[178] PTI 182-05B (issued April 19, 2007); AR Permit No. 408 (Fact Sheet, page 1).

[179] AR Permit No. 2 (July 25, 2008, letter from Severstal to DEQ, Page 1).

[180] AR Permit File No. 418 (Attachment B to Siemens proposal, pdf p. 31 et seq)**;** AR Permit Comments No. 56 (SDEIA Comments, page 45).

[181] AR Permit Nos. 2 (July 25, 2008, letter from E. Bishop (Severstal) to T. Seidel (DEQ) *et al*), 3 (Aug. 15, 2008, letter from J. Earl (Severstal) to T. Seidel (DEQ)).

[182] AR Permit File No. 003 (Aug. 15, 2008, letter from J. Earl (Severstal) to T. Seidel (DEQ)); AR Permit File No. 004 (Sept. 5, 2008,, letter from T. Seidel (DEQ) to J. Earl (Severstal)); AR Permit File No. 418

For the next six years the record on this issue is silent. The one fact that is known is that Severstal did not rebuild the furnace, citing "some long lead-time items," "market demand for steel," and "uncertainty" regarding the new permit process.[183] There have been no reported emissions from the B Blast Furnace, starting in 2008.[184]

But when DEQ and Severstal renegotiated the emissions limits for the new permit, DEQ did two important things related to the B Blast Furnace. First, DEQ renewed an installation permit for Severstal to rebuild and restart the furnace in the future.[185] The B Blast Furnace could never be permitted for reconstruction in the future without complying with current air pollution rules.

Second, DEQ treated emissions from the B Blast Furnace as if it had never stopped operating –and as if Severstal had installed a baghouse on it in 2008.[186] This action camouflages the actual emissions increases resulting from the C Blast Furnace. DEQ also "redistributed" emissions and also combined-and-capped total emissions between the B and C furnaces.[187] There is no legal authority to use a non-existent source of air pollution to offset emissions increases from an operating source of air pollution in this way. Moreover, this approach let Severstal avoid considering any remedial action (*e.g.*, reduced production, control equipment) to offset the real emissions increases in the new permit.

1. <u>DEQ could not permit the future reconstruction of the B Blast Furnace through a permit</u>

(emails regarding B-BF Rebuild); AR Permit No. 432 (Response to Comments Document, May 12, 2014, Page 57).

[183] AR Permit File No. 432 (April 15, 2014, email from J. Earl (Severstal) to K. Koster (DEQ));

[184] AR Public Comment 52 (Severstal MAERS 2008-2012) (showing no reported emissions from B-Blast Furnace since 2008).

[185] AR Permit No. 432 (May 12, 2014, PTI No. 182-05C; Response to Public Comments, page 57 of 67); AR Permit No. 423 (April 15, 2014, email from J. Earl (Severstal) to K. Koster (DEQ)).

[186] AR Permit File No. 408 (Fact Sheet, pp. 7-8, Tables 3, 4, 6).

[187] *Id.*

designed to "correct" emissions errors in PTI 182-05B.

DEQ rules would not permit Severstal to rebuild the B Blast Furnace without a new complete installation permit based on a contemporary review of the potential emissions, control technology, and local air quality.[188] The restart of a long-dormant facility triggers review under the permit to install legal requirements.[189] State and federal air laws prohibit indefinite construction delays in recognition that there will be interim regulatory and technology changes:

> Time limits prevent companies from sitting on PSD permits for an unreasonably long period of time. Presumably these requirements help ensure that major emitting facilities ***comply with up-to-date emissions regulations and do not construct today's facilities with yesterday's technology***.[190]

As EPA explained why a plant dormant for 11 years was subject to new permitting standards:

> For the last eleven years the Monroe plant has been inoperative. To

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[188] Mich Admin Code, R 336.1201(1) ("a person shall not … ***reconstruct*** … any process or process equipment, including control equipment pertaining thereto, which may emit any of the following, unless a permit to install that authorizes such action is issued by the department. . . . A person who plans to … ***reconstruct*** … any such process or process equipment shall apply to the department for a permit to install on an application form approved by the department and shall provide the information required in R 336.1203."); Mich Admin Code, R 336.1201(5) ("Upon the physical removal of the process or process equipment, or upon a determination by the department that the process or process equipment has been permanently shut down, the permit to install ***shall become void*** ….").

[189] *In the matter of Monroe Electric Generating Plant Entergy Louisiana, Inc., Proposed Operating Permit, Petition No. 6-99-2, "Order Partially Granting and Partially Denying Petition for Objection to Permit,"* (June 11, 1999) ("*Monroe")*, available at: https://www.epa.gov/sites/production/files/2015-08/documents/ccaw_ord.pdf (emphasis added); *Communities for a Better Environment v. Cenco Refining, Inc*., 179 F Supp 2d 1128, 1144 (CD Cal 2001); *Supplemental PSD Applicability Determination, Cyprus Casa Grande Corporation Copper Mining and Processing Facilities* (Nov 6, 1987) ("*Cyprus Casa Grande*"), available at: https://www.epa.gov/sites/production/files/2015-07/documents/cyprusca.pdf; *Letter from L. Starfield* (*EPA Region 6) to M. Vickery (TCEQ), re: ASARCO El Paso Cooper Plant Restart* (Feb. 3, 2009) ("ASARCO letter"), available at http://shapleigh.org/system/reporting_document/file/291/Ltr_to_Vickery_from_Starfield_02-03-2009.pdf (all documents last viewed Sept. 26, 2018).

[190] *Sierra Club v. Franklin County Power of Illinois,* LLC, 546 F 3d 918, 934 (7th Cir. 2008); see also *United States v Pacific Gas & Electric,* 776 F Supp 2d 1007, 1013 (ND Cal 2011).

> operate the plant now after such a long period constitutes a change in the method of operation with the meaning of the PSD regulations. The mere fact that the plant is changing from a lengthy "non-operational" and "unmanned" condition, to one in which the plant is fully operation, fits the common sense meaning of a "change in the method of operation."[191]

Similarly, in determining that reactivation of the *Cyprus Casa Grande* processing facility qualified as a major modification (following 10 years of inoperability and months of repairs costing over $900,000), EPA concluded that the combination of physical and operation changes "constitute[d] a fundamental alteration in the character of the plant, one that is neither everyday nor routine."[192] EPA's reactivation policy states that "[a] shutdown lasting for two years or more, or resulting in removal of the source from the emissions inventory of the State, should be presumed permanent."[193] Similarly under DEQ Rules, a new permit would be required for the B Blast Furnace due to the destruction of the furnace.[194] DEQ Rules also state that a permit to install is

[191] *Monroe* at page 20.

[192] *Cypress Casa Grande*, at page 7. See also *Cenco*, 179 F. Supp. 2d at 1144; *see also ASARCO letter, supra*.

[193] EPA's Reactivation Policy provides "A shutdown lasting for two years or more, or resulting in removal of the source from the emissions inventory of the State, ***should be presumed permanent***. The owner or operator proposing to reopen the source would have the burden of showing that the shutdown was not permanent, and of overcoming any presumption that it was." *Reactivation of Noranda Lakeshore Mines' RLA Plant and PSD Review* (May 27, 1987), available at https://www.epa.gov/sites/production/files/2015-07/documents/reactivn.pdf (last viewed Sept. 25, 2018); see also *Cenco*, 179 F Supp 2d at 1144 (finding the EPA Reactivation Policy "is a permissible and reasonable standard to apply in interpreting the Clean Air Act").

[194] Mich Admin Code, R 336.1201(5) ("Upon the physical removal of the process or process equipment, or upon a determination by the department that the process or process equipment has been permanently shut down, the permit to install shall become void and the emissions allowed by the permit to install shall no longer be included in the potential to emit of the stationary source.").

void following 18 months without commencing construction.[195]

DEQ initially determined, in September 2008, that Severstal's planned rebuild would be "covered" by PTI 182-05B**.**[196] Even if that decision was reasonable at the time,[197] DEQ's subsequent 2014 decision to permit reconstruction or replacement of the B blast furnace through PTI 182-05C was not. Severstal provided no updates or supporting data between 2008 and 2014 about the reconstruction of the B Blast Furnace. After the issue was raised in public comment on the draft permit, DEQ asked Severstal for a repair status update, which indicated without dates or support that only foundations had been poured and "made ready for repair of the furnace itself".[198] The six-year shutdown of the B Blast Furnace, and the fact that its emissions have been removed from the Michigan air emissions inventory, mean that in 2014, the B Furnace shut-down was presumptively permanent, and Severstal has not demonstrated otherwise.[199]

As a result, if and when Severstal decides to rebuild the B Blast Furnace, that decision must be the subject of a new permit application under DEQ rules. DEQ's decision to re-permit the future reconstruction B Blast through PTI 182-05C was unsupported, unreasonably, and contrary to DEQ rules.

2. Including B Blast Furnace Historic and Future Emissions Masks the Emissions

[195] Mich Admin Code, R 336.1201(4) ("If the installation, reconstruction, or relocation of the equipment, for which a permit has been issued, has not commenced within, or has been interrupted for, 18 months, then the permit to install shall become void, unless [there are circumstances inapplicable here]").

[196] AR Permit File No. 004 (Sept. 5, 2008, letter from T. Seidel (DEQ) to J. Earl (Severstal)).

[197] Appellants do not concede that DEQ's decision in this regard was reasonable, in light of the scant evidence supporting the conclusion, as well as the extent of the destruction and proposed scope of potential replacement.

[198] AR Permit File No. 423 (April 15, 2014, email from K. Koster (DEQ) to J. Earl (Severstal)).

[199] AR Public Comment No. 52 (Ex 39 – Severstal MAERS 2008-2012); see also Mich Admin Code, R 336.1201(5). *See also Cyprus* (state recognized the lack of emissions in its air emissions inventory from a non-operating plant in determining its environmental impact, which supported its conclusion that facility should be treated as non-operable for PSD baseline emissions purposes).

Increases Permitted by PTI 182-05C.

Throughout the 2014 permit process, DEQ and Severstal treated the B Blast Furnace as if it was still operating.[200] And not just that the B Blast Furnace was still operating, but also as if Severstal had installed a baghouse on it to control its emissions.[201] By including high *historic* emissions from the B Blast Furnace in the "before" side of the netting analysis, and also including hypothetically-lowered future emissions from the B Blast Furnace for the "after" side of the netting analysis, PTI 182-05C masked the extent of the emissions increases identified in the stack tests. Had DEQ followed the rules for this issue, the B Blast Furnace would be assigned zero emissions on both sides of the netting analysis. The result would be a more accurate analysis of the net impact of the permit "corrections" in PTI 182-05C. It would also show that the net increases in permitted emissions between PTI 182-05B and 183-05C are substantial and should be subject to full review under current law and standards.

Under DEQ rules, Severstal's baseline ("before") emissions should have included zero emissions from the B Blast Furnace due to it being destroyed.[202] The same treatment of the B Blast Furnace emissions is mandated by federal law.[203] This is so when the plant is permanently

[200] See, e.g., AR Permit File No. 408 (Fact Sheet, pages 7-8); AR Permit File No. 433 (Application Summary, pages 49-60).

[201] AR Permit File No. 433 (Application Summary, page 32 of 60) ("Prior to future startup of the B Blast Furnace, Severstal will complete the installation of this baghouse system.").

[202] Mich Admin Code, R 336.1201(5) ("Upon the physical removal of the process or process equipment, or upon a determination by the department that the process or process equipment has been permanently shut down, … the emissions allowed by the permit to install ***shall no longer be included in the potential to emit of the stationary source***.").

[203] *See Communities for a Better Environment v. Cenco Refining, Inc*., 179 F. Supp.2d 1128, 1143-44 (C. Cal. 2001) (concluding that a unit that was modified after "six years of non-operation" should be compared to a "zero baseline" and explaining that "for a long-dormant facility (at least those shutdown for two years or more), the emissions baseline for determining whether it has undergone an emissions increase subject to NSR will be zero*"); Supplemental PSD Applicability Determination Cyprus Casa Grande Corporation*

shutdown, which is presumed (but rebuttable) after two years of inoperability.[204] It is also the case when the source is temporarily shut down, if startup would involve substantial changes.[205]

In addition, DEQ relied on hypothetical future emissions as if the B Blast Furnace had been reconstructed with a new baghouse for the "after" side of the netting equation. The furnace was destroyed in January 2008, before a baghouse was required to be installed (June 2008), so there is no evidence the future baghouse would achieve the proposed emissions reductions. To the extent DEQ was authorized to retroactively relax emissions limits in PTI 182-05B, is could not consider the emissions reductions from the destruction of the B Blast Furnace, which occurred *after* PTI 182-05B issued.[206]

Had DEQ and Severstal treated the B Blast Furnace for netting purposes to reflect reality

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Copper Mining and Processing Facilities (Nov. 6, 1987)[203] ("*Cyprus*") (emissions from a facility that had been shut for 13 years "should be zero."); *In re Monroe Elec. Generating Plant*, Petition No. 6-99-2 (June 11, 1999) (Doc. 435-36)[203] ("*Monroe*") at 16 ("EPA has made clear that in calculating the net emissions increase for reactivation of long-dormant sources potentially subject to PSD, the source is considered to have zero emissions as its baseline.").

[204] *See Monroe*, at p. 8 ("Shutdowns of more than two years, or that have resulted in the removal of the source from the State's emissions inventory, are presumed to be permanent.").

[205] *Id; Cyprus* (considering the rehabilitation work necessary to make a non-operating plant operable again would be considered a "physical change," and increasing hours of operation from zero for ten years to full operation would be considered a "change in method of operation"); *Cenco*, 179 F.Supp.2nd at 1144 (proposed startup would trigger NSR because "1) there is not a mere variation in the hours of operation but a fundamental change in the facility's operational status, from six years of non-operation to full operations and 2) the restart will be accompanied by independent physical modifications to the Refinery triggering a comparison of new emissions to the zero baseline.").

[206] 40 CFR § 52.21(r)(4); *see letter from Stephen Rothblatt (EPA) to Felicia Robinson George (Indiana Dept. of Environmental Management) regarding Cooper Tire and Rubber Company* (Sept. 29, 1992) (in processing an amendment to relax emissions standards under (r)(4), retroactive PSD netting analysis cannot include reductions achieved in the interim period between the original permit action and the amended permit action).

–i.e., that it was not an emissions source[207] -- the results would have shown the real impact of the emissions increases permitted by PTI 182-05C. Without the B Blast Furnace emissions, the proposed new emissions levels would create "significant" increases in fine and course particulates and nitrogen oxide, as well as sulfur dioxide and carbon monoxide.[208]

Pollutant	**PTI-C Table 5 (tpy)**	**Significant Increase Threshold (tpy)**	**Scenario A with B-BF at zero emissions (tpy)**	**Scenario B with B-BF at zero emissions (tpy)**
PM10	-61.08	15	-16.2	38.92
PM2.5	-10.09	10	14.53	67.86
SO_2	666.69	40	238	501.46
NOx	33.23	40	84.40	185.88
VOC	36.33	40	20.84	32.40
CO	20,777.23	100	19,691	21,728
Hg	Not provided	n/a	1.63E-02	1.97E-02

Had the analysis properly treated the shutdown of the B Blast Furnace, it would show that the underlying project (increased production at the C Blast Furnace) caused a significant increase of fine particulates. This increase would have triggered non-attainment new source review (since Wayne County was non-attainment in 2007).[209]

[207] Mich Admin Code, R 336.2801(r) ("Emissions unit" means any part of a stationary source that emits or would have the potential to emit any regulated new source review pollutant").

[208] AR Public Comment No. 56 (SDEIA Comments, pp. 49 to 50, Table 2). The calculations in Scenario B reflect maximum production out of the C Blast Furnace. AR Permit File No. 433 (Application Summary, p. 35).

[209] Wayne County was non-attainment for fine particulates from 2005 to 2013. 70 Fed Reg 944 (Jan. 5, 2005) (designated nonattainment for PM2.5); 78 Fed Reg 53272 (Aug. 29, 2013) (re-designated attainment for PM2.5).

PTI 182-05C took further unorthodox (and unlawful) measures when it "redistributed" and "combined-then-capped" emissions among and between various sources. For example, increased mercury emissions from the C Blast Furnace were offset by reduced mercury emissions achieved years after the C Blast Furnace rebuild at the *ESP* (a different emission source).[210] DEQ Rules do not authorize DEQ to permit after-the-fact offsets.[211] PTI 182-05C also redistributed and then capped sulfur dioxide emissions "within" the blast furnace stoves and baghouses to avoid a net increase in sulfur dioxide emissions from PTI 182-05**B** to 182-05**C**.[212] A similar approach was taken for particulates, lead, manganese and volatile organize compounds.[213] PTI-182-05C thus uses emissions reductions from the 2008 B Blast Furnace shut-down to credit the significant emissions increases that resulted from the 2006 changes to the C Blast Furnace. This is not permitted by DEQ Rules[214] and is another way that DEQ avoided application of its air quality rules in order to permit, through an "update" to PTI 182-05B, what it could not otherwise legally permit.

[210] AR Permit File No. 408 (Fact Sheet, p. 7 and Table 2).

[211] Mich Admin Code, R 336.2801(ee)(ii)(A) (offset to net out of an emission increase must occur within at least "five years *before construction on the particular change commences*").

[212] AR Permit File No. 408 (Fact Sheet, p. 7).

[213] AR Permit File No. 408 (Fact Sheet, Tables 1 and 6, and pages 7-8).

[214] Mich Admin Code, R 336.2801(ee).

CONCLUSION

For the reasons discussed above, this Court should reverse the DEQ's decision, vacate Permit to Install No. 182-05C, and remand the matter to the agency for further proceedings consistent with the Court's decision.

Respectfully submitted,

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Date: September 27, 2018

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Date: September 27, 2018

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