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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 non-profit 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 Dept. of the Executive Branch of the State of Michigan; and DAN WYANT, Director of the Michigan Dept. of Environmental Quality,
Appellees

v

SEVERSTAL DEARBORN, LLC
Intervening Appellee.

Case N°. 14-008887-AA

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BRIEF IN SUPPORT OF APPELLANTS' MOTION FOR PEREMPTORY REVERSAL

October 9, 2014

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INTRODUCTION

This appeal concerns a type of air pollution permit known as a "permit to install." In this case, DEQ issued a permit to install that raises the limits on how much pollution Severstal is allowed to emit into the air that Appellants' members and their families breathe. This appeal covers several complex issues, but may be disposed of on one narrow issue: when DEQ issued this permit, it applied the air pollution regulations that were in effect in 2007, rather than current regulations. This decision relieved Severstal of having to comply with modern standards that – in all likelihood – would have required it to install additional pollution control equipment.

No Michigan statute or administrative rule allows the use of anything other than current law when reviewing a permit to install application. Moreover, the U.S. Ninth Circuit Court of Appeals recently held that the Clean Air Act does not allow ad hoc grandfathering of permits. The Ninth Circuit made clear what should always have been obvious: if an agency is not going to apply current law, that approach must be authorized by a statute or rule. Because no statute or rule authorized DEQ to apply old law in this case, the agency's decision is manifestly reversible.

COURT RULES AUTHORIZING THIS MOTION

This appeal is generally governed by MCR 7.119 or MCR 7.123. Both rules state in sub-section (A): "Unless this rule provides otherwise, MCR 7.101 through 7.115 apply." MCR 7.110 is in that range, and so applies to Circuit Court appeals. It states:

> Motion practice in a circuit court appeal is governed by MCR 2.119. Motions may include special motions identified in MCR 7.211(C). Absent good cause, the court shall decide motions within 28 days after the hearing date.

One of the special motions identified in MCR 7.211(C) is a motion for peremptory reversal. MCR 7.211(C)(4) allows an appellant to file such a motion when the "error is so manifest that an immediate reversal should be granted."

STATEMENT OF FACTS

Severstal owned a steel mill in Dearborn, which it recently sold to AK Steel. The steel mill is a major source of air pollution. DEQ regulates the steel mill under Part 55 of the Natural Resources and Environmental Protection Act (NREPA)[1] and the Part 55 air pollution control rules.[2] Under Part 55, DEQ is authorized to issue two types of permits: permits to install and operating permits.[3]

DEQ has also been authorized by the U.S. Environmental Protection Agency (EPA) to administer the Clean Air Act.[4] To do so, DEQ's rules must be at least as stringent as the Clean Air Act and federal rules.[5] Under the Clean Air Act, EPA establishes "national ambient air quality standards" (NAAQS). NAAQS define the maximum permissible amounts of certain pollutants in the ambient air, in order to protect public health and welfare.[6] Areas where the air is within these limits are designated "attainment." Areas where air pollution exceeds these standards are designated "nonattainment." Permit requirements for nonattainment areas are much stricter than for attainment areas – a fact that is important in this case and discussed further below.

The part of Wayne County in which Severstal and Appellants are located is designated nonattainment for sulfur dioxide, or "SO_2."[7] Sulfur dioxide is an acid gas that exacerbates respiratory illness, and forms fine particles that cause emphysema and heart disease.[8] Severstal is a major source of SO_2 – emitting hundreds and perhaps thousands of tons per year.[9] Severstal also emits hundreds of tons of particulates, thousands of tons of carbon monoxide, and toxic metals such as lead, mercury, and manganese.[10]

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[1] MCL 324.5501 *et seq.*
[2] Mich Admin Code R 336.1101 *et seq.*
[3] MCL 324.5503(b); Mich Admin Code R 336.1201 *et seq.*
[4] 42 USC 7401 *et seq.*
[5] 42 USC 7410(k)(1)(A); see also 40 CFR § 51.166 (state implementation plans for PSD must be "more stringent, or at least as stringent," as federal PSD regulations).
[6] 42 USC 7409(b)(1).
[7] 78 Fed Reg 47191 (Aug 5, 2013).
[8] *Id.*
[9] Permit to Install No.182-05C, found in the Administrative Record, Permit File, Document No. 432. (References to the Administrative Record will henceforth be abbreviated "AR [File Name] No. [Document Number]").
[10] AR Public Comments No. 56, Table 1, pages 12-13; AR Permit No. 433 (Application Summary, Tables 2-1 and 2-2).

People in neighborhoods near Severstal breathe the most polluted air in Michigan.[11] To no one's surprise, they suffer disproportionately from diseases associated with air pollution.[12] The Michigan Department of Community Health stated that local asthma rates warrant "immediate attention."[13] Severstal is a chronic violator of its permits, and, in the words of DEQ, "by far the most egregious facility in the state."[14]

The history of this permit begins in 2006, when DEQ issued a prior permit to install to Severstal for plant upgrades. That permit was amended once in 2006, and again in 2007, to modify equipment or processes. In 2008 and 2009, Severstal performed "stack tests" required by the permit, to measure the pollution it was emitting. The results showed that some of Severstal's emissions exceeded the limits in its permit.[15] DEQ issued a violation notice to Severstal on the basis of these stack tests.[16]

Michigan Air Pollution Control Rule 201 provides that DEQ may revoke a permit to install, and require a new application to be submitted, if "evidence indicates that the process or process equipment is not performing in accordance with the terms and conditions of the permit to install."[17] This is exactly what the stack tests showed was happening. Yet DEQ chose not to take the action outlined in its rules. Instead, Severstal proposed to "comply" by increasing the emission limits, rather than installing equipment to better control the pollution.[18] DEQ agreed to that plan – even though it was not outlined anywhere in Part 55 or the rules. What ensued was a tangled process of clandestine negotiations; more stack testing; more violations; DEQ asserting that it must deny the application; intervention by the Michigan Economic Development Corporation (MEDC); and DEQ reversing its position on key issues.[19]

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[11] AR Public Comments No. 46, pages 3-5; AR Supplemental 210REV.
[12] AR Public Comments No. 54 (ACCESS Health Journal, Fall 2013).
[13] AR Public Comments No. 46, pages 4-5.
[14] AR Permit No. 260, page 2.
[15] AR Permit No. 433, page 4.
[16] This violation notice is a subject of the administrative record order.
[17] Mich Admin Code R 336.1201(8) **(Ex 1)**.
[18] AR Permit Nos. 007 and 012.
[19] See the chronology included at pages 1-15 of AR Public Comments No. 56 and the related exhibits.

One of the key issues discussed during the negotiations was which set of regulations would apply to the permit. Severstal wanted to apply the regulations in effect during 2006 and 2007, rather than current regulations. In 2012, Severstal outlined the benefits of this approach in a "Grandfathering Analysis," which MEDC asked Severstal's counsel to prepare.[20] The main benefits of grandfathering were:

- Grandfathering would allow Severstal to ignore rules for several pollutants that have been revised since 2007. These include new requirements for greenhouse gases, nitrogen oxides, and fine particulate matter.[21]
- Grandfathering would help Severstal to avoid new requirements for sulfur dioxide. At that time, the area was expected to be designated nonattainment for sulfur dioxide, which occurred in 2013. As a result, facilities that emit SO_2 are required to install state-of-the-art pollution control equipment to meet a standard called the "lowest achievable emission rate" (LAER), and to seek "offsets" to its emissions from other polluters.[22] Even before the nonattainment designation, Severstal recognized it could not obtain a permit to emit sulfur dioxide without meeting LAER, because the SO_2 concentration in the air was already too high.[23]
- Grandfathering would turn the increase in allowed emissions into a "decrease." This was because in reviewing the application, DEQ would not compare the emissions allowed by the existing permit to those allowed by the new permit. Instead, DEQ would compare the plant's emissions prior to the 2007 permit – before pollution control equipment was installed – to the emissions allowed by the new permit.[24]

[20] **Ex 2**, Severstal's Grandfathering Analysis, pages 5-6. This document appears several places in the Administrative Record. It is not confidential.
[21] **Ex 2**, Severstal's Grandfathering Analysis, pages 5-6.
[22] **Ex 2**, Severstal's Grandfathering Analysis, page 6.
[23] At the time of the Grandfathering Analysis, Wayne County was in nonattainment for fine particulates ($PM_{2.5}$). Because SO_2 is a "precursor" to $PM_{2.5}$, DEQ was required to apply stringent nonattainment standards to SO_2 emissions in $PM_{2.5}$ areas, even though the area was not yet in nonattainment for SO_2. 73 Fed Reg 28321 (May 15, 2008).
[24] See AR Permit No. 408, Fact Sheet, Table 5.

> Turning an increase into a decrease avoided several rules that could have required Severstal to install new pollution control equipment.[25]

DEQ and Severstal did not disagree about whether to apply grandfathering, but they disagreed about how to apply it. Discussions at meetings organized by MEDC reflect that the parties' primary concern was about "litigation risk" and "a 3rd party lawsuit due to not following" certain rules governing permits to install.[26] After years of negotiation, DEQ informed the public about the proposed emissions increases for the first time in February 2014. DEQ stated in the public information documents that it would apply regulatory grandfathering to the permit:

> [A]ny revisions that occurred to preconstruction NSR permitting regulations ... that occurred after the date the unit commenced construction ... are not applicable to this permitting action.[27]

DEQ also 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.[28]

Appellants objected to grandfathering in their written comments.[29] EPA also objected to grandfathering in its comments on the new permit. EPA wrote that DEQ must "take[] into account current technology and requirements," and that "underlying applicable requirements" for sulfur dioxide nonattainment areas should be followed.[30]

In its response to comments, DEQ said it would not apply current law to the new permit – even though it increased emissions – because Severstal was not installing new equipment.[31] DEQ's Air Quality Division Chief told EPA, in essence, to take a hike:

> 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 repermitting the source that we were going back to the attainment status of the original permit and the [Record of Decision] would reflect this ...

[25] AR Public Comments No. 056, pages 19-20.
[26] AR Miscellaneous No. 021, (09-14-12 meeting notes).
[27] AR Permit No. 408, Fact Sheet, page 2. "NSR" means "new source review."
[28] AR Permit No. 432, page 131 (DEQ Response to Comments, page 28).
[29] AR Public Comments No. 056, pages 17-43.
[30] **Ex 8**, AR Public Comments No. 042, page 2.
[31] **Ex 3**, excerpt from AR Permit No. 432, Response to Comments, page 26 (PDF page 129).

> 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.[32]

DEQ issued the permit on May 12, 2014.[33] Severstal and DEQ will undoubtedly repeat to this Court one of their main talking points: that the limits in the new permit are not really increases, but instead reflect the facility's actual pollution as measured by the stack tests.[34] That is false. While the process was triggered by the stack tests, the new permit raises emissions limits far beyond the emissions documented by the testing.[35] This is because Severstal did the stack testing at low steel production levels, due to the economic recession in 2008 and 2009. The new permit is based on higher assumed production levels, allowing more pollution than was ever measured in the stack tests.

STANDARD OF REVIEW

The standard of review for this appeal is "whether the action of the agency was authorized by law."[36] DEQ's decision "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."[37] The Court reviews these questions *de novo*.[38]

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[32] **Ex 4**, AR Misc. No. 76 (05-07-14 Hellwig email).
[33] AR Supplemental No. 432REV (Permit to Install No. 182-05C).
[34] AR Supplemental No. 60a (DEQ Talking Points).
[35] AR Permit No. 433 (Application Summary, Tables 2-1, 2-2); AR Permit No. 408 (Public Participation Documents, Tables 1, 2, 3).
[36] *Natural Res Defense Council v Dep't of Envt'l Quality* ("*NRDC*"), 300 Mich App 79, 87; 832 NW2d 288 (2013); see also MCL 600.631; Const. 1963 art. 6, § 28.
[37] *NRDC*, 300 Mich App at 87-88.
[38] *Id.* at 88.

ARGUMENT

I. NO STATUTE OR REGULATION AUTHORIZED DEQ TO ISSUE A PERMIT TO INSTALL THAT DID NOT MEET CURRENT AIR POLLUTION REQUIREMENTS.

A. Part 55 and the Michigan air pollution control rules require DEQ to apply current law.

An agency's authority is limited to the powers granted by statute.[39] An agency possesses only the authority it is granted by "clear and unmistakable language, since a doubtful power does not exist."[40] Moreover, "powers specifically conferred on an agency cannot be extended by inference."[41] Therefore, "[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."[42] Equally important, when an agency issues administrative rules, it is bound by those rules.[43]

Both Part 55 and the Michigan rules state that a permit to install must meet all applicable requirements of the law. The statute says:

> The department may do 1 or more of the following:
>
> ...
>
> (b) Issue permits for the construction and operation of sources, processes, and process equipment, subject to enforceable emission limitations and standards and other conditions reasonably necessary to assure compliance with all applicable requirements of this part, rules promulgated under this part, and the clean air act.[44]

In stating that permits must assure compliance with all applicable state and federal requirements, the statute has a few specific exceptions that are instructive. There is a discrete "grandfathering" provision from certain setback requirements for municipal solid waste incinerators

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[39] *In re Detroit Edison Co*, 296 Mich App 101, 109-10; 817 NW2d 630 (2012).
[40] *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 582, quoting *Mason County Research Council v Mason County*, 343 Mich 313, 326-27; 72 NW 2d 292 (1955).
[41] *Id.* at 582-83.
[42] *Mich Educ Ass'n v Sec'y of State*, 489 Mich 194, 225-26; 801 NW2d 35 (2011).
[43] *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).
[44] MCL 324.5503 (emphasis added).

that existed before 1993.[45] Car ferries and historic trains are exempt altogether.[46] And there is a formal variance process for hardship cases.[47]

These provisions show that "if the Michigan Legislature had wanted to" authorize grandfathering or similar waivers of requirements, "it could and would have made its intention clear."[48] But Part 55 authorizes no other exceptions to relieve an air polluter from having to meet all applicable requirements when it seeks a permit – by grandfathering or otherwise. There is no exception for a pollution source that wishes to update a permit to install it received in the past, or a source that applied for a new permit because its emissions violate an existing permit. The statute simply says that permits must assure compliance with all applicable requirements.

The same is true of the rules. Permits to install are governed by DEQ Rules 201 through 207.[49] Rule 201 states that "A permit to install may be approved subject to any condition, specified in writing, that is reasonably necessary to assure compliance with all applicable requirements."[50] Again, there is no exception to the obligation to comply with all applicable requirements, and no provision that authorizes grandfathering.

That is not all. Another of the permit to install rules, Rule 207, states:

> (1) The department shall deny an application for a permit to install if, in the judgment of the department, any of the following conditions exist:
>
> ...
>
> (c) The equipment for which the permit is sought will violate the applicable requirements of the clean air act, as amended, 42 U.S.C. §7401 et seq., including any of the following:
>
> ...
>
> (iii) The requirements of prevention of significant deterioration of air quality ...
>
> (iv) The requirements of nonattainment new source review...[51]

"Prevention of significant deterioration" and "nonattainment new source review" are the same requirements DEQ referred to in the public information document discussed in the Statement of

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[45] MCL 324.5502(2).
[46] MCL 324.5513.
[47] MCL 324.5535-5538.
[48] *In re Detroit Edison Co*, 296 Mich App 101, 110; 817 NW2d 630 (2012).
[49] Mich Admin Code R 336.1201-1207, attached as **Ex 1**.
[50] Mich Admin Code R 336.1201(3) (emphasis added).
[51] Mich Admin Code R 336.1207(1)(c) (emphasis added).

Facts, where the agency stated it would not apply regulatory changes that have occurred since 2007.[52]

Rule 207 also states that DEQ shall deny an application for a permit to install if "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."[53] Severstal asserted in its Grandfathering Analysis that it could not meet this requirement for sulfur dioxide without installing new pollution control equipment. Severstal asserted that "A demonstration of compliance with the new 1-hour SO_2 NAAQS would be required," and that it could not meet the standard without making investments to meet the stringent LAER control standard:

> ... since ambient air monitoring data in Southeast Michigan for SO_2 currently exceeds the SO_2 NAAQS, a cumulative air quality impact analysis to demonstrate that the source's emissions, when combined with the background SO_2 concentration, do not exceed the NAAQS does not appear to be possible. As a result, since the project related emissions changes associated with this new permitting action could not be modeled below significant impact levels, (i.e., those levels below which by definition the project does not cause or contribute to a violation), without the installation of LAER type controls, then an application that included a compliant air quality impacts analysis would not be possible.[54]

The United States Supreme Court has held that unless a statute or rule clearly states otherwise, an agency must apply the law in effect at the time of its permitting decision.[55] In the absence of a statute or rule stating otherwise, the language in Part 55 and the permit-to-install rules referring to "all applicable requirements" refers to the requirements in effect at the time DEQ issued the permit. Likewise, in the absence of a specific exception, the language in Rule 207 referring to "attainment or maintenance of the air quality standard for any air contaminant" refers to the air quality standards in effect today, not the standards that were in effect in 2007.

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[52] AR Permit No. 408, Fact Sheet, page 2 (PDF page 8).
[53] Mich Admin Code R 336.1207(1)(b).
[54] **Ex 2**, Severstal's Grandfathering Analysis, page 6 (emphasis added).
[55] *Ziffrin v United States*, 18 US 73, 78 (1943) (agency required to apply law existing at time of permit decision); *American Trucking Ass'ns v United States*, 364 US 1, 13 n9 (1960).

B. The Clean Air Act requires DEQ to apply current law.

Two months ago, the U.S. Ninth Circuit Court of Appeals held that a permit applicant cannot be exempted from meeting new Clean Air Act regulations unless an administrative rule specifically allows it.[56] In the *Avenal* case, a power plant applied for a permit under Title I of the Clean Air Act, which is the federal equivalent of a permit to install.[57] While the permit was in process, EPA tightened several regulations.[58] The agency decided to apply the requirements that were in effect when Avenal applied for the permit, rather than the ones in effect when EPA issued the permit.[59]

The Ninth Circuit held that the Clean Air Act "clearly requires EPA to apply the regulations in effect at the time of the permitting decision."[60] The court distinguished situations in which "grandfathering of pending permit applications [is] explicitly built into the new regulations" from ones in which grandfathering is done in an ad hoc manner. Although grandfathering may be authorized by a promulgated rule, it may not be done on a case-by-case basis.[61] 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." By doing so, EPA exceeded its authority by exercising "unbounded discretion."[62]

As discussed earlier in this brief, Part 55 and the Michigan rules require that DEQ permits to install must comply with the Clean Air Act.[63] In interpreting the Clean Air Act, Michigan courts are "bound by the holdings of federal courts on federal questions."[64] In addition, the holdings of federal circuit courts on the Clean Air Act must be adhered to by EPA all other circuits.[65] And as discussed earlier, Michigan's statute and rules are required to be at least as stringent as the Clean

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[56] *Sierra Club v EPA*, 762 F3d 971, 983 (9th Cir 2014) (This case is referred to as "*Avenal*" for the name of the power plant that was at issue.)
[57] *Id.* at 973.
[58] *Id.* at 974-75.
[59] *Id.* at 975.
[60] *Id.* at 979 (emphasis added).
[61] *Id.* at 983.
[62] *Id.*
[63] See MCL 324.5503.
[64] *NRDC*, 300 Mich App at 90.
[65] See *Nat'l Envt'l Dev Assn's Clean Air Project v EPA*, 752 F3d 999 (DC Cir 2014).

Air Act.[66] As such, DEQ's permit decision is also unlawful under Clean Air Act, based upon *Avenal*.

C. Neither DEQ nor Severstal identified a provision of Part 55, the Permit to Install rules, or the Clean Air Act that authorized a permit that did not meet current requirements.

1. DEQ's position

DEQ has never identified the authority it relied on for its position that current requirements should not be applied to this permit. The record reflects that the agency relied at least in part on the internal EPA decision that the Ninth Circuit overturned in *Avenal*.[67] Obviously, any such reliance was misplaced.

Beyond that, the only basis DEQ gave for its position is a short statement in the permit fact sheet and response to public comments. There, DEQ states that since the application "does not propose to make any physical changes or changes to the method of operation to the existing emission units at the facility," the permit will not be subject to current requirements.[68] DEQ also states that "the purpose of this application was to demonstrate that the previous … analyses are still valid, using updated emission factors."[69] DEQ's Air Quality Division Chief also wrote that the agency "viewed the application as a 'fix-up' to a prior permit."[70]

Neither Part 55 nor the Michigan rules allow a permit to install to be granted using old requirements just because the application "does not propose to make any physical changes or changes to the method of operation." Nor do the rules permit the issuing of a new permit to install that increases emission limits simply upon a demonstration that the data underlying an old application was invalid. Nor do the rules provide for a "fix-up" to a prior permit that increases allowed emissions by hundreds of tons per year. The permit-to-install rules do contain at least one procedure that may be followed when pollution control equipment turns out to be incapable of

[66] 42 USC 7410(k)(1)(A); see also 40 CFR § 51.166.
[67] **Ex 5**, Sept. 12, 2012, MEDC Table ("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.")
[68] See **Ex 3**, AR Permit No. 432, Response to Comments, page 26 (PDF page 129).
[69] AR Permit No. 432, Response to Comments, page 28 (PDF page 130).
[70] AR Permit No. 244.

meeting emission limits. This is the "revoke and resubmit" process that was discussed in the Statement of Facts.[71] However, that process was not used here.

DEQ's statement about no "physical changes or changes to the method of operation" had its genesis in a March 2009 letter from Severstal.[72] Severstal's letter argued that DEQ should increase the plant's emission limits without applying the permit-to-install rules, because the requirement to obtain a permit to install did not apply as a matter of law. This was the best of both worlds. Severstal could obtain a new permit to install that increased its emission limits without going through the revoke and resubmit process. Yet because the permit to install rules did not apply, the new permit would not have to follow all of the requirements that such a permit is required to follow.

All this really means, though, is that Severstal's application was not eligible for a permit to install. The rules define "permit to install" as "a permit issued by the department authorizing the construction, installation, relocation, or alteration of any process, fuel-burning, refuse-burning, or control equipment . . . ."[73] Furthermore, the rules list the reasons for which DEQ may issue a permit to install. These reasons are to authorize the construction or modification of equipment, or to deal with three other narrow situations that no one claims apply here.[74] In other words, if there was no construction or modification, there was no legal authority for DEQ to issue a permit to install.

It does not follow that if the application was ineligible for a permit to install, such a permit could nonetheless be granted without needing to apply current regulations. DEQ statements in the record suggest that the agency's view is that it can issue a permit to install without applying current regulations as long as it is simply "revising" an old permit by re-doing a prior analysis with new data. But DEQ has no rules that allow such a process. The agency's rules state that a permit to install may not be issued, and that it shall be denied, if it does not meet all applicable requirements.

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[71] Mich Admin Code R 336.1207(8).
[72] **Ex 6**, AR Permit No. 012.
[73] Mich Admin Code R 336.1116(f).
[74] Mich Admin Code R 336.1201(2). Under Rule 201(2), permit to install may also be issued for three other limited purposes not applicable here. Those reasons are to limit "potential to emit," which has to do with limiting a source's production so that it does not become a major source; to consolidate terms from more than one permit to install into an operating permit; or a combination of the first two reasons.

The rules also state that a permit to install shall be denied if the source will interfere with attainment of an air quality standard, such as, in this case, the NAAQS for sulfur dioxide.[75]

There is no exception waiving these requirements for a "revision" or "a fix-up." It is true that Part 55 authorizes DEQ to "modify" permits, but only if the modifications are done "in accordance with" promulgated rules.[76] DEQ has promulgated rules for modifying a different kind of permit, called an operating permit.[77] But DEQ has not promulgated rules for modifying a permit to install. And it has certainly not promulgated rules for revising a permit to install by redoing a prior analysis using new data and old requirements, in order to increase emission limits in an area that is too polluted already. As EPA stated in its written comments on this permit, "The Michigan State Implementation Plan [the Michigan Air Pollution Control Rules] does not address the issue of revising Prevention of Significant Deterioration (PSD) permits."[78]

2. Severstal's position

Severstal's position only reinforces the fact that nothing in Part 55 or the Michigan rules authorized what was done here. Severstal's position is that two non-binding EPA documents authorized this grandfathered permit revision. Severstal is wrong because such EPA documents cannot authorize a state agency to do something the agency's rules do not authorize. And even if they could, one of the EPA documents Severstal relies on states that current requirements do apply to this type of permit. EPA reiterated this point in its written comments on Severstal's permit in this case.

Severstal's Grandfathering Analysis says that "U.S. EPA guidance provides clear support for the permit correction process that Severstal and DEQ have been following."[79] The primary support Severstal cited was called the "Ogden Martin memo," a 1987 internal memo regarding a permit that EPA issued.[80] This memo says for permits that EPA issues itself, it may revise an emission limit in certain circumstances.

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[75] Mich Admin Code R 336.1207(1)(b).
[76] MCL 324.5503(c).
[77] Mich Admin Code R 336.1216
[78] **Ex 8**, EPA comments.
[79] **Ex 2**, Grandfathering Analysis, p 5.
[80] U.S. EPA, Request for Determination, Ogden Martin Municipal Waste Incinerator, available at: http://www.epa.gov/region7/air/nsr/nsrmemos/ogden.pdf.

The Ogden Martin memo is, at most, a non-binding "guidance document." It is not an administrative rule and it does not have the force of law.[81] If DEQ does not have authority to revise a permit to install under Part 55 or its own rules, a non-binding EPA memo cannot give DEQ that authority. This fact is confirmed by many EPA guidance documents, which begin with a statement that they are not binding.[82]

Even if it did apply, the Ogden Martin memo provides no support for grandfathering. In fact, it says the opposite: when revising a permit, "current ... technology and requirements must be considered."[83] If there was any remaining doubt, EPA referred to the Ogden Martin memo in its comments on Severstal's permit, and stated that DEQ must apply "current technology and requirements."[84]

The other document Severstal cited in its Grandfathering Analysis was a "revised draft" of an EPA internal policy from 1985.[85] Severstal claimed that this draft policy allows for permit revisions to be grandfathered if they started construction before new regulations were adopted.[86] This draft memo not only lacks the force of law but it has no weight at all. EPA recently went on record that the draft policy was "never issued in final form" and did not establish a controlling interpretation of the rules it analyzed.[87] And if that is not enough, *Avenal* settled the matter when it held that the Clean Air Act does not allow ad hoc grandfathering in the absence of a promulgated administrative rule.

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[81] *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).
[82] See, e.g., **Ex 7**, U.S. EPA, *Guidance on Extension of Prevention of Significant Deterioration (PSD) Permits* ("Page Memo") (January 21, 2014) page 1, footnote 1.
[83] Ogden Martin memo at page 2 (emphasis added).
[84] AR Public Comments, No. 042, page 2.
[85] EPA Memo, *Revised Draft Policy on Permit Modifications and Extensions*, available at: http://www.epa.gov/region7/air/nsr/nsrmemos/permmod.pdf.
[86] **Ex 2**, Grandfathering Analysis, p 5.
[87] **Ex 7**, Page Memo at pages 2-3.

CONCLUSION

No statute or regulation authorized DEQ to issue a permit to Severstal that did not meet current laws and rules governing air pollution. DEQ's decision to grandfather Severstal was reversible error so manifest that an immediate reversal should be granted. The Court should vacate the permit, and remand the matter to DEQ for a new decision applying current laws and regulations.

OLSON, BZDOK & HOWARD, P.C.
Attorneys for Appellant SDEIA

Date: October 9, 2014

By: */s/ Christopher M. Bzdok*
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LAW OFFICE OF TRACY JANE ANDREWS, PLLC
Co-Counsel for Appellant SDEIA

Date: October 9, 2014

By: */s/ Tracy Jane Andrews*
Tracy Jane Andrews (P67467)

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Attorneys for Appellants DWEJ, OUCSD, and Sierra Club

Date: October 9, 2014

By: */s/Stephanie Karisny*
Nicholas Schroeck (P70888)
Stephanie Karisny (P76529)

South Dearborn Env'tal Improvement Assoc, et al. v MDEQ, et al., v Severstal Dearborn LLC
Case N[o.] 14-008887-AA

Brief in Support of Appellants' Motion for Peremptory Reversal

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EX	DESCRIPTION
1	Michigan Air Pollution Permit to Install Rules
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7	U.S. EPA, *Guidance on Extension of Prevention of Significant Deterioration (PSD) Permits* ("Page Memo") (January 21, 2014)
8	Blathras public comments to DEQ re: PTI No. 182-05C; U.S. EPA letter to DEQ

14-008887-AA
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CATHY M. GARRETT

Exhibit 1

DEPARTMENT OF ENVIRONMENTAL QUALITY

AIR QUALITY DIVISION

PART 2. AIR USE APPROVAL

(By authority conferred on the director of environmental quality by Part 55, Air Pollution Control, of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.101 to 324.90106)

PART 2. AIR USE APPROVAL

R 336.1201 Permits to install.

Rule 201. (1) Except as allowed in R 336.1202, R 336.1277 to R 336.1290, or R 336.2823(15) a person shall not install, construct, reconstruct, relocate, or modify any process or process equipment, including control equipment pertaining thereto, which may emit any of the following, unless a permit to install which authorizes such action is issued by the department:

(a) Any air pollutant regulated by title I of the clean air act and its associated rules, including
40 C.F.R. §51.165 and §51.166, adopted by reference in R 336.1299.

(b) Any air contaminant.

A person who plans to install, construct, reconstruct, relocate, or modify 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.

(2) The department may issue a permit to install for any of the following reasons:

(a) To authorize a person to install, construct, reconstruct, relocate, or modify a process or process equipment pursuant to subrule (1)(a) of this rule.

(b) To establish limits on potential to emit. The limits shall comply with the provisions of R 336.1205(1)(a).

(c) To consolidate terms and conditions from existing permits to install within a renewable operating permit pursuant to R 336.1214a.

(d) To authorize a person to install, construct, reconstruct, relocate, or modify process or process equipment solely pursuant to subrule (1)(b) of this rule or to consolidate state-only enforceable conditions within a renewable operating permit when the renewable operating permit is issued pursuant to R 336.1214. This permit may establish terms and conditions that are legally enforceable solely pursuant to R 336.1224 to R 336.1232, R 336.1901, or other regulations that are not federally enforceable. Each condition in a permit issued pursuant to this subrule shall be identified as state-only enforceable.

(3) A permit to install may be approved subject to any condition, specified in writing, that is reasonably necessary to assure compliance with all applicable requirements.

(4) If a person decides not to install, construct, reconstruct, relocate, or modify the process or process equipment as authorized by a permit to install, then the person, or the

authorized agent pursuant to R 336.1204, shall notify the department, in writing, and upon receipt of the notification by the department, the permit to install shall become void. 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 either of the following occurs:

(a) Otherwise authorized by the department as a condition of the permit to install.

(b) The installation permit is the subject of a formal appeal by a party other than the owner or operator of the process or process equipment that is the subject of the installation permit, in which case the date of termination of the permit is not later than 18 months after the effective date of the permit plus the number of days between the date on which the permit was appealed and the date on which all appeals concerning the permit have been resolved.

(5) Upon issuance of a permit to install, the emissions from the process or process equipment allowed by the permit to install shall be included in the potential to emit of the stationary source. 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.

(6) Except as provided in subrule (8) of this rule and R 336.1216, operation of the process or process equipment is allowed by the permit to install. The department may void a permit to install upon any of the following actions:

(a) A new permit to install authorizing the action is approved by the department in accordance with subrule (2)(a), (b), or (d) of this rule, and the new permit to install renders all portions of the old permit obsolete.

(b) All terms and conditions of the permit to install are incorporated into a renewable operating permit, in accordance with the provisions of R 336.1212(5) and R 336.1213, and a source-wide permit to install is issued pursuant to R 336.1214a.

(c) All of the emission units, processes, or process equipment covered by the permit to install are physically removed from the stationary source or the department makes a determination that the emission units, processes, or process equipment covered by the permit to install have been permanently shut down.

(7) The department may require 1 or both of the following notification requirements as a condition of a permit to install:

(a) Not more than 30 days after completion of the installation, construction, reconstruction, relocation, or modification authorized by the permit to install, unless a different period is specified in the permit to install, the person to whom the permit to install was issued, or the authorized agent pursuant to R 336.1204, shall notify the department, in writing, of the completion of the activity. Completion of the installation, construction, reconstruction, relocation, or modification is considered to occur not later than commencement of trial operation of the process or process equipment.

(b) Within 12 months after completion of the installation, construction, reconstruction, relocation, or modification authorized by the permit to install, or 18 months after the effective date of this rule, whichever is later, unless a different period is specified in the permit to install, the person to whom the permit to install was issued, or the authorized agent pursuant to R 336.1204, shall notify the department, in writing, of the status of

compliance of the process or process equipment with the terms and conditions of the permit to install. The notification shall include all of the following:

(i) The results of all testing, monitoring, and recordkeeping performed by the stationary source to determine the actual emissions from the process or process equipment and to demonstrate compliance with the terms and conditions of the permit to install.

(ii) A schedule of compliance for the process or process equipment.

(iii) A statement, signed by the person owning or operating the process or process equipment, that, based on information and belief formed after reasonable inquiry, the statements and information in the notification are true, accurate, and complete.

(8) 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 consistent with section 5510 of the act. Upon revocation of the permit to install, operation of the process or process equipment shall be terminated. Revocation of a permit to install is without prejudice and a person may file a new application for a permit to install that addresses the reasons for the revocation.

History: 1980 AACS; 1992 AACS; 1995 AACS; 1996 AACS; 2003 AACS; 2008 AACS; 2013 AACS.

R 336.1201a General permits to install.

Rule 201a. (1) The department may, after notice and opportunity for public participation pursuant to section 5511(3) of the act, issue a general permit to install covering numerous similar stationary sources or emission units. A general permit to install shall include terms and conditions which are necessary to assure that the stationary source or emission unit will comply with all applicable requirements and shall be consistent with the permit content requirements of R 336.1205(1)(a). The general permit to install shall also identify criteria by which a stationary source or emission unit may qualify for the general permit to install. The department shall grant the terms and conditions of the general permit to install to stationary sources or emission units that qualify within 30 days of receipt by the department of a complete application. An applicant shall be subject to enforcement action if the department later determines that the stationary source or emission unit does not qualify for the general permit to install.

(2) A person who owns or operates a stationary source or emission unit that would qualify for a general permit to install issued by the department pursuant to subrule (1) of this rule shall apply to the department for coverage under the terms of the general permit to install or may apply for a permit to install consistent with R 336.1201. The department may require the use of application forms designed for use with a specific general permit to install issued by the department. The application forms shall include all information necessary to determine qualification for, and to assure compliance with, the general permit to

install. Without repeating the public participation process pursuant to subrule (1) of this rule, the department may grant a request by a person for authorization to install and operate a stationary source or emission unit pursuant to a general permit to install.

(3) The department shall maintain, and make available to the public upon request, a list of the persons that have been authorized to install and operate a stationary source or emission unit pursuant to each general permit to install issued by the department.

History: 1996 AACS; 2003 AACS.

R 336.1202 Waivers of approval.

Rule 202. (1) If the requirement for approval of a permit to install before construction will create an undue hardship to the applicant, the applicant may request a waiver to proceed with construction from the department. The application for a waiver shall be in writing, shall explain the circumstances that will cause the undue hardship, and shall be signed by the owner or his or her authorized agent. The application shall be acted upon by the department within 30 days. If a waiver is granted, the applicant shall submit pertinent plans and specifications for approval as soon as is reasonably practical. The applicant, after a waiver is granted, shall proceed with the construction at his or her own risk; however, operation of the equipment shall not be authorized until the application for a permit to install has been approved by the department. After construction, modification, relocation, or installation has begun or been completed, if the plans, specifications, and completed installations do not meet department approval, then the application for a permit to install shall be denied, unless the alterations required to effect approval are made within a reasonable time as specified by the department.

(2) The provisions of subrule (1) of this rule shall not apply to any of the following:

(a) Any activity that is subject to R 336.2802, prevention of significant deterioration regulations, or R 336.2902, nonattainment new source review regulations.

(b) Construction or reconstruction of a major source of hazardous air pollutants as defined in and subject to, national emission standards for hazardous air pollutants for source categories.

(c) Construction or modification as defined in and subject to 40 C.F.R.part 61, national emission standards for hazardous air pollutants, adopted by reference in R 336.1299. For the purpose of this subrule, "activity" means the concurrent and related installation, construction, reconstruction, relocation, or modification of any process or process equipment.

History: 1980 AACS; 2003 AACS; 2008 AACS.

R 336.1203 Information required.

Rule 203. (1) An application for a permit to install shall include information required by the department on the application form or by written notice. This information may include, as necessary, any of the following:

(a) A complete description, in appropriate detail, of each emission unit or process covered by the application. The description shall include the size and type along with the make and model, if known, of the proposed process equipment, including any air pollution control equipment. The description shall also specify the proposed operating schedule of the equipment, provide details of the type and feed rate of material used in the process, and provide the capture and removal efficiency of any air pollution control devices. Applications for complex or multiple processes shall also include a block diagram showing the flow of materials and intermediate and final products.

(b) A description of any federal, state, or local air pollution control regulations which the applicant believes are applicable to the proposed process equipment, including a proposed method of complying with the regulations.

(c) A description in appropriate detail of the nature, concentration, particle size, pressure, temperature, and the uncontrolled and controlled quantity of all air contaminants that are reasonably anticipated due to the operation of the proposed process equipment.

(d) A description of how the air contaminant emissions from the proposed process equipment will be controlled or otherwise minimized.

(e) A description of each stack or vent related to the proposed process equipment, including the minimum anticipated height above ground, maximum anticipated internal dimensions, discharge orientation, exhaust volume flow rate, exhaust gas temperature, and rain protection device, if any.

(f) Scale drawings showing a plan view of the owner's property to the property lines and the location of the proposed equipment. The drawings shall include the height and outline of all structures within 150 feet of the proposed equipment and show any fence lines. All stacks or other emission points related to the proposed equipment shall also be shown on the drawings.

(g) Information, in a form prescribed by the department, that is necessary for the preparation of an environmental impact statement if, in the judgment of the department, the equipment for which a permit is sought may have a significant effect on the environment.

(h) Data demonstrating that the emissions from the process will not have an unacceptable air quality impact in relation to all federal, state, and local air quality standards.

(2) The department may require additional information necessary to evaluate or take action on the application. The applicant shall furnish all additional information, within 30 days of a written request by the department, except as provided by the following provisions:

(a) The applicant may request a longer period of time, in writing, specifying the reason why 30 days was not reasonable for submitting the information.

(b) The department may provide written notice to the applicant of an alternate time period for the submittal, either as part of the original request or upon the granting of an extension requested by the applicant.

(3) An applicant may reference a permit application previously submitted to the department for the purpose of supplying a portion of the information required by this rule. Any reference to a previously submitted permit application shall clearly

identify the permit application number assigned to the previous application by the department. If acceptable to the department, an applicant may also reference other previously submitted information for the purpose of supplying a portion of the information required by this rule.

History: 1980 AACS; 2003 AACS.

R 336.1204 Authority of agents.

Rule 204. When a person files an application for a permit to install as the agent of an applicant, the applicant shall furnish the department with written authorization for the filing of the application. The authorization shall indicate if the applicant intends that the department contact the agent directly with questions regarding the application and also indicate if the agent is authorized to negotiate the terms and conditions of the permit to install.

History: 1980 AACS; 2003 AACS.

R 336.1205 Permit to install; approval.

Rule 205. (1) The department shall not approve a permit to install for a stationary source, process, or process equipment that meets the definition of a major stationary source or major modification under any part of these rules unless the requirements specified in subdivisions (a) and (b) of this subrule have been met. In addition, except as provided in subrule (3) of this rule, the department shall not approve a permit to install that includes limitations which restrict the potential to emit from a stationary source, process, or process equipment to a quantity below that which would constitute a major source or major modification under any part of these rules unless both of the following requirements have been met:

(a) The permit to install contains emission limits that are enforceable as a practical matter. An emission limit restricts the amount of an air contaminant that may be emitted over some time period. The time period shall be set in accordance with the applicable requirements and, unless a different time period is provided by the applicable requirement, should generally not be more than 1 month, unless a longer time period is approved by the department. A longer time period may be used if it is a rolling time period, but shall not be more than an annual time period rolled on a monthly basis. If the emission limit does not reflect the maximum emissions of the process or process equipment operating at full design capacity without air pollution control equipment, then the permit shall contain 1 of the following:

(i) A production limit which restricts the amount of final product that may be produced over the same time period used in the emission limit and which comports with the true design and intended operation of the process or process equipment.

(ii) An operational limit which restricts the way the process or process equipment is operated and which comports with the true design and intended operation of the process or process equipment. An operational limit may include conditions specifying any of the following:

(A) The installation, operation, and maintenance of air pollution control equipment.

(B) The hours of operation of the stationary source, process, or process equipment, if the hours are less than continuous.

(C) The amount or type of raw materials used by the stationary source, process, or process equipment.

(D) The amount or type of fuel combusted by the stationary source, process, or process equipment.

(E) The installation, operation, and maintenance of a continuous gas flow meter and a continuous emission monitor for the air contaminant for which an enforceable emission limit is required.

(iii) For volatile organic compound surface coating operations where an add-on control is not employed, an emission or usage limit coupled with a requirement to calculate or demonstrate daily compliance.

(b) A draft permit has been subjected to the public participation process specified in section 5511(3) of the act. The department shall provide a copy of the draft permit to the United States environmental protection agency for review and comment at or before the start of the public comment period.The department shall also provide a copy of each final permit to install issued pursuant to this rule to the United States environmental protection agency.

(2) The department shall not approve a permit to install to construct a major source or reconstruct a major source under any applicable requirement of section 112 of the clean air act unless the requirements of subrule (1)(a) and (b) of this rule have been met. In addition, except as provided in subrule (3) of this rule, the department shall not approve a permit to install that includes limitations which restrict the potential to emit of a stationary source, process, or process equipment to a quantity below that which would constitute a major source or modification under any applicable requirement of section 112 of the clean air act unless the requirements of subrule (1)(a) and (b) of this rule have been met.

(3) The department may approve a permit to install that includes limitations which restrict the potential to emit of a stationary source, process, or process equipment to a quantity below that which would constitute a major source or major modification under any part of these rules without meeting the requirement of subrule (1)(b) of this rule if the emission limitations restrict the potential to emit of the stationary source, process, or process equipment to less than 90% of the quantity referenced in the applicable requirement.

History: 1995 AACS; 1996 AACS; 1998 AACS; 2003 AACS; 2008 AACS.

R 336.1206 Processing of applications for permits to install.

Rule 206. (1) The department shall review an application for a permit to install for administrative completeness pursuant to R 336.1203(1) within 10 days of its receipt by the department. The department shall notify the applicant in writing regarding the receipt and completeness of the application.

(2) The department shall take final action to approve or deny a permit within 180 days of receipt of an application for a permit to install. The department shall take final action

to approve or deny a permit to install subject to a public comment period pursuant to R 336.1205(1)(b) or section 5511(3) of the act within 240 days of receipt. If requested by the permit applicant, the department may extend the processing period beyond the applicable 180 or 240 day time limit. A processing period extension is effective after a formal agreement is signed by both the applicant and the department. However, a processing period shall not be extended under this subrule to a date later than 1 year after all information required pursuant to R 336.1203(1) and (2) has been received. Permit processing period extensions shall be reported as a separate category under section 5522(9)(b) of the act. The failure of the department to act on an application that includes all the information required pursuant to R 336.1203(1) and (2) within the time frames specified in this subrule may be considered a final permit action solely for the purpose of obtaining judicial review in a court of competent jurisdiction to require that action be taken by the department without additional delay.

History: 1980 AACS; 2003 AACS; 2013 AACS.

R 336.1207 Denial of permits to install.

Rule 207. (1) The department shall deny an application for a permit to install if, in the judgment of the department, any of the following conditions exist:

(a) The equipment for which the permit is sought will not operate in compliance with the rules of the department or state law.

(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, as amended, 42 U.S.C. §7401 et seq., including any of the following:

(i) The standards of performance for stationary sources, 40 C.F.R. part 60, adopted by reference in R 336.1299.

(ii) The national emission standards for hazardous air pollutants, 40 C.F.R. part 61, adopted by reference in R 336.1299.

(iii) The requirements of prevention of significant deterioration of air quality, R 336.2801 to R 336.2819 and R 336.2823.

(iv) The requirements of nonattainment new source review, R 336.2901 to R 336.2903, R 336.2907, and R 336.2908.

(v) The requirements for control technology determinations for major sources in accordance with 40 C.F.R. §63.40 to §63.44 and §63.50 to §63.56, adopted by reference in R 336.1299.

(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.

(2) When an application is denied, the applicant shall be notified in writing of the reasons therefor. A denial shall be without prejudice to the applicant's right to a hearing pursuant to section 5505(8) of the act or for filing a further application after revisions are made to meet objections specified as reasons for the denial.

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CATHY M. GARRETT

Exhibit 2

Severstal
International

SETTLEMENT CONFIDENTIAL
NOT ADMISSIBLE AS EVIDENCE

September 12, 2012

Via Email

Jim J. Sygo, Deputy Director
G. Vinson Hellwig, Chief, Air Quality Division
Michigan Department of Environmental Quality
Constitution Hall
525 West Allegan Street
PO Box 30473
Lansing, MI 48909

Subject: Severstal Dearborn, LLC, Permit Application 182-05C

Dear Mr. Sygo and Mr. Hellwig:

As committed during our August 22 meeting, and in advance of our meeting this Friday, we write to provide a summary of the reasons why Severstal Dearborn, LLC believes that DEQ's recent efforts to seek withdrawal or denial of the pending permit update/revision application (designated as 182-05C) will have detrimental impact on Severstal and the State of Michigan, and are unnecessary and inconsistent with the established permit correction process. Withdrawal or denial of the permit application would position Severstal such that future operation of the Dearborn facility may no longer be viable. Achieving the same permit updates and revisions via a new application, as DEQ has suggested, is not feasible for the reasons discussed in this letter. Instead of denial of the pending application, there are available paths forward, including use of an ROP compliance plan or a consent decree, that can appropriately and fully address DEQ's concerns, preserve Severstal's ability to operate now and in the future, and help further a cooperative approach to a broader range of air issues. Further, Severstal is willing to offer several voluntary projects to help DEQ achieve improvements in ambient air quality if DEQ will work with Severstal to see the 182-05C through to completion and issuance with all appropriate and necessary permit corrections.

This letter addresses the following points:

* Severstal recognizes the obligation to achieve and maintain compliance;
* The requested permit corrections are necessary and justified;
* Withdrawal or denial of the application poses potentially severe consequences to Severstal and the future operation of the plant;
* MDEQ is not compelled to deny or otherwise act on the permit application now;
* Severstal is actively and aggressively addressing current compliance issues;

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* Severstal will voluntarily commit to perform projects that will help MDEQ address broader air quality concerns; and
* There are available and appropriate paths forward that can provide for compliance and avoid permit denial.

In order to first put these issues in perspective, we believe it is important to recall the purpose and context of the 182-05 series of permits. In 2004, Severstal acquired and began operation of the bankrupt Rouge Steel Company's assets, which avoided a permanent shutdown of the Dearborn facility and the resulting loss of employment, and facilitated Severstal's subsequent $1.4 billion investment in Dearborn. In 2005, Severstal engaged in discussions with the DEQ regarding a commitment to install new, state of the art, air pollution control baghouses on both blast furnaces and the basic oxygen furnace ("BOF"). The baghouse installation resulted in significant reductions in particulate matter and metals emissions. The current permit correction/revision process is the final step of this continuing project.

At the onset of the permitting process, there were no pre-existing site-specific data from the Severstal/Rouge facility that could be used to quantify many of the facility's emissions. By collecting emissions that were previously fugitive in nature or that passed through the roof monitors, the baghouses significantly reduced net emissions but created new emissions points (i.e. new stacks) that had not previously existed. The project also resulted in emissions limits for pollutants that had not previously been subject to limits, at both existing and new emissions points, including many not modified by the C Furnace/baghouse project. As a result, the permit development process followed the typical approach for development of emission limits, and unavoidably involved making a number of assumptions and the use of correlations to provide an estimate of actual and future emissions. This included the use of established emissions factors, data from other similar but not identical facilities, and correlation of available information, such as baghouse dust concentrations, to estimate emissions.

Subsequent emissions testing revealed that in a number of instances the shared assumptions made during the permit development had underestimated the actual amount of pre-existing emissions generated by Severstal's operations. In other words, the testing identified emissions that had essentially always been there, but which had never before been measurable or quantified.[1]

As a result, it became necessary and appropriate to utilize the new data to correct the assumptions and correlations used in permit development. With this goal in mind, Severstal approached DEQ in February 2009 to address this issue, and embarked on a mutually agreed multi-step process to 1) identify which new permit limits were not currently being met, 2) evaluate whether there was any way Severstal could meet the existing limits, and 3) for any limits that could not be met, utilize the new information to correct the baseline and potential to emit calculations in support of more

[1] Recognition and accounting for corrected emissions levels does not negatively impact any ambient air issues, since the emissions in question are already present and within the set of emissions already being measured at relevant ambient air monitors.

appropriate permit limits – i.e. the limits that would have been imposed in the first place had more accurate information been available. As of this June, the ongoing and continual effort by DEQ and Severstal had resulted in general agreement on draft permit conditions that were effectively ready for public notice and comment.

Severstal's obligation to be in compliance

Severstal recognizes the obligation to achieve and maintain full compliance with all applicable requirements. Where there is non-compliance, Severstal understands the need to return to compliance and to be subject to enforceable requirements to ensure such a return to compliance. Since initial discussions in 2009, Severstal has always been willing to submit to enforceable compliance plan requirements. Severstal remains willing to do so.

The permit corrections are critical to continued operation by Severstal

The permit corrections sought by the pending application are necessary for continued operation by Severstal. Until this May, DEQ was in agreement that the permit updates/revisions were necessary and appropriate, and has acknowledged that it was within a few weeks of issuing a corrected permit for public notice. Nothing has happened to alter the need for, or appropriateness of, the permit updates/revisions, and the recent problems at the BOF ESP do not undermine the record supporting issuance of a corrected permit based on the cooperative path that began in February 2009.

The modification of C Furnace and the baghouse installations authorized under the original permits have already been completed. The pending application is dissimilar from an application for the construction of a new facility or a new modification to an existing facility, where withdrawal or denial of the application would merely delay commencing construction. Instead, the pending application updates and revises inaccurate mutual assumptions and correlations used in the development of the current permit limits. These corrections are necessary for continued operations.

A prime example is the sulfur dioxide (SO_2) emission limits at the blast furnace stoves and casthouse. The current permit imposed, for the first time, SO_2 emission limits on these emission points. Prior to the construction of the baghouse, casthouse SO_2 emissions were emitted via the roof monitor, and as a result could not be tested, and historically had not been quantified. The permit also authorized the use of pulverized coal in the blast furnace, which introduced a new element of uncertainty into projecting future emissions, and was expected to influence sulfur levels in the blast furnace gas. It was anticipated that the bulk of SO_2 emissions would be emitted from the blast furnace stoves, rather than the casthouse, since that is where the blast furnace gas is burned. However, site-specific stack testing data now demonstrates that the bulk of the SO_2 is emitted from the casthouse, and not the stoves.

The pending application supports reallocation of the SO_2 emissions between these two emissions points at the blast furnace emission unit. Without this reallocation, the casthouse cannot operate in compliance with its stack specific SO_2 limit. This is true even though overall SO_2 emissions from

blast furnace operations (casthouse and stoves) are no greater than authorized by the current permit. The pending permit application includes an equivalency demonstration that the impact on ambient air from correcting this error and reallocating the allowable SO_2 emissions will not result in any greater impact to the ambient air. The U.S. EPA has already indicated that it does not object to the use of this equivalency demonstration. Correction of the existing permit to adjust these limits is thus justified and appropriate, and without such a correction, the blast furnace cannot operate in compliance with the currently applicable permit limit.

Further examples are the lead and manganese limits at the desulfurization baghouse. The pre-existing desulfurization baghouse was not modified by the C Furnace/baghouse project, but new limits for lead and manganese were included in order to support Rule 225 compliance. With the inclusion of these limits, there was no intent to reduce emissions at the desulfurization baghouse. Unfortunately, when these metals limits were derived, it was assumed that there would not be a material condensable portion of the particulate matter emissions. *See* DEQ Response to Comments for PTI 182-05, dated January 31, 2006. This assumption turned out to be incorrect. For example, in the case of manganese, approximately 90% of the manganese emissions in the baghouse exhaust are condensable. These emissions are pre-existing and have always been there. Correcting the permit limits to properly account for them will not result in an increase in emissions. Without updating/revising the assumptions used to develop these metals limits via the pending application, the desulfurization baghouse will not be able to operate in compliance with the current limits. Similar examples pertain to the other permit limit updates requested in the pending application.

It is important to remember that steelmaking is a batch process, subject to short bursts of emissions, rather than steady-state emissions. Severstal's operations do not allow the option of running a production line slowly to meet lb/hr emission limits. Because of the nature of Severstal's emissions, an inappropriate emissions limit threatens to shut down iron and steelmaking operations entirely.

What are the consequences of permit denial or withdrawal?

Withdrawal or denial of the pending application risks changing the permit update/revision process from a difficult task to a nearly impossible one. 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.[2] 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

[2] The new regulations in question include the 1-hour SO_2 and 1-hour NO_2 ambient air standards, the SO_2 precursor requirements for PM2.5, expiration of the PM10 surrogate policy, and greenhouse gas requirements.

emissions increase calculations, dramatically alter the netting demonstration, and expand the BACT/LAER applicability associated with the original project.

U.S. EPA guidance provides clear support for the permit correction process that Severstal and DEQ have been following, which consists of the following steps: 1) determine whether there is compliance with the limits, 2) evaluate whether emissions can be reduced to the permitted level, and 3) if the permitted emissions levels cannot be achieved, then there can be reevaluation of the permit limits, which must include a reevaluation of BACT (Best Available Control Technology) for any sources that triggered BACT review. *See* U.S. EPA Memorandum, Request for Determination on Best Available Control Technology (BACT) Issues – Ogden Martin Tulsa Municipal Waste Incinerator Facility, November 19, 1987. This is the path that has been followed since Severstal and DEQ first addressed these issues in 2009, and should continue to be followed.

U.S. EPA guidance also recognizes that there is a difference between permit updates/revisions and new permit applications. Permit revisions can be exempted from any new PSD (Prevention of Significant Deterioration) requirements that were added between the time of the original permit issuance and the submission of the proposed change if the source had commenced construction prior to the adoption of the new PSD requirement. *See* U.S. EPA Memorandum, *Revised Draft Policy on Permit Modifications and Extensions*, July 5, 1985, at p. 15[3], and June 11, 1991 update. For Severstal, construction commenced in the Spring of 2006, well before promulgation of the new standards in question.

A new permit application would result in the following, given the new regulations and the passage of time since the original permitting:

* 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, which is likely to result in the application of new BACT and LAER (Lowest Achievable Emission Rate) requirements as well as the need to obtain offsets for non-attainment pollutants. A lack of available offsets would have the potential to render this an impossible task, and the cost of LAER would likely make such a project infeasible, even if that caused shutdown of the affected units.[4]

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[3] *See* U.S. EPA Region IX letter, November 6, 1991 re: North County Resource Recovery Associates; at Attachment 2, confirming that U.S. EPA Regional Offices are expected to follow the July 5, 1985 Revised Draft Policy; *see also* Bay Area Air Quality Management District, *Permit Evaluation and Statement of Basis for Minor Revisions to the Major Facility Review Permit for Los Medanos Energy Center, LLC*, March 2012 and Kansas Department of Health and Environment, *Permit Summary Sheet, Sunflower Electric Power Corp – Holcomb Unit 2*, December 2010 (both relying on the 1985 Revised Draft Policy).

[4] Further, even if offsets are obtained, the result could be that this project, originally for the installation of baghouses, which provided a real reduction in actual particulate matter emissions, could actually result in a process that requires removal of the baghouse and installation of more complicated controls. This would be unfair to Severstal, and serve as warning to all facilities to resist installing pollution controls if such a result is a potential outcome.

* A demonstration of compliance with the new 1-hour SO_2 NAAQS (National Ambient Air Quality Standard) would be required, which poses a Catch-22. Because Severstal is located in an area that is currently classified as attainment, the project would be subject to PSD review for SO_2 and an air quality impact analysis would be required for SO_2. However, since ambient monitoring data in Southeast Michigan for SO2 currently exceeds the SO2 NAAQS, a cumulative air quality impact analysis to demonstrate that the source's emissions, when combined with the background SO_2 concentration, do not exceed the NAAQS does not appear to be possible. As a result, since the project related emissions change associated with this new permitting action could not be modeled below the significant impact levels (SILs) (i.e, those levels below which by definition the project does not cause or contribute to a violation), without the installation of LAER type controls, then an application that included a compliant air quality impacts analysis would not be possible.

* SO_2 is also classified as a precursor for $PM_{2.5}$ and Wayne County is currently classified as non-attainment for $PM_{2.5}$. As a result, SO_2 offsets would need to obtained, SO_2 LAER controls would be required on applicable emissions units, and a compliance certification would be required. There is no established market for SO_2 offsets, and they may be simply unobtainable. Further, imposition of LAER would likely be cost-prohibitive to future operations.

* The new 1-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. Furthermore, due to ambient air concentrations, it may not be possible for Severstal to make the necessary modeling demonstration under any circumstance.

* $PM_{2.5}$ requirements would be triggered, due to the expiration of the surrogate policy. Further, the forthcoming revision to the $PM_{2.5}$ annual standard, expected this December from U.S. EPA, has the potential to introduce additional complications. Since the installation of the baghouses has already significantly reduced actual $PM_{2.5}$ emissions, this reduction would then be used to lower the baseline and require further controls and offsets, which presents a potentially unachievable set of requirements.

* A Carbon Dioxide equivalent/Greenhouse Gas (CO_2e/GHG) BACT review would be required. While this goal is theoretically achievable, CO_2e/GHG emissions are a hot-button issue, and working through a CO_2e/GHG BACT analysis would require significant effort by DEQ staff, response to EPA oversight and review, and potentially draw significant interest from the outside. This would likely result in significant additional delay to the permitting process.

These new permitting challenges did not exist when the original permit application was submitted and when the project commenced construction. 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. A new permit application would arguably lose this key basis supporting grandfathering. As a result, there is a high probability that the necessary

permit limit correction would not be achievable if sought via a new permit application. As such, any withdrawal or denial of the pending application would place Severstal and DEQ in a potentially impossible situation.

Is MDEQ required to act on the permit application on an immediate basis?

DEQ has full discretion to hold the application pending appropriate resolution of the current compliance concerns. On August 22, DEQ stated that the timing requirements of Rule 206 (R 336.1206) dictate that Severstal should immediately withdraw its permit application, or it will be denied by DEQ. However, Rule 206, which requires DEQ to act on a permit application within 120 days of the application being complete, and affords a right of relief to permit applicants when action is not taken, does not expressly compel MDEQ to deny or otherwise act on Severstal's permit application.[5] Further, it is appropriate to consider the 120 day period as currently tolled, pending the further information that is being provided by Severstal to DEQ pursuant to DEQ's requests; such tolling is expressly provided for by Rule 206.

Although DEQ has identified April 6, 2012 as the date of technical completeness[6] of the pending application, DEQ is not compelled to consider the 120 day period to have begun on April 6th. April 6th was the third time that DEQ provided draft conditions, with prior draft conditions having been provided on August 18, 2011 and December 28, 2011. Another draft was then received from DEQ on May 25, 2012. Since that time, the DEQ and Severstal have engaged in continuing discussions on permit conditions. These included meetings between the DEQ permit writer and Severstal and Severstal's permitting consultant, on April 27, May 8, and May 16, followed by a revised draft permit provided by DEQ on May 25th, and the subsequent submittal of further comments by Severstal on June 6th. The further exchanges and continuing provision of information by Severstal since June evidences that this process is still continuing and can appropriately be deemed to have stayed the running of any 120 day period.

Severstal's Compliance Status

As DEQ has acknowledged, it was within several weeks of issuing the permit correction for public notice when concerns arose at the BOF ESP with respect to opacity, manganese (as a result of the testing done for U.S. EPA), and then with lead. However, Severstal has committed to and embarked on an aggressive program to correct opacity, and a program to evaluate and identify

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[5] Action on a permit application within a 120 day time period is not federally mandated. *See* Clean Air Act Section 165, 42. U.S.C. § 7475, and *Hancock County v. U.S. EPA*, 1984 U.S. App. LEXIS 14024, at *12-*13 (6th Cir. 1984).

[6] We note that Michigan's regulatory revision process has recognized that the concept of "technical completeness" is not defined or addressed in any DEQ regulations. The proposed revisions to Rule 206 from the Office of Regulatory Reinvention states that "[t]he current wording within the rule is too vague and Rule 206 should be revised for permit action by specific deadlines, for both minor and major source PTI based upon date of receipt of the permit application. This would provide more regulatory certainty, and speed the issuance of permits. Historically, the term "technical completeness" has been somewhat arbitrarily determined as supported by lack of documentation within existing PTI application files." *See Recommendations of the Michigan Office of Regulatory Reinvention Regarding Environmental Regulations*, dated December 23, 2011, at pp. 7 and A-10.

potential solutions for BOF ESP manganese and lead emissions and LRF particulate emissions. These activities have been detailed in our submittals of June 19, June 22, July 3, July 20, August 31, and September 7, and are being addressed on a continuing basis.

Severstal's offer of voluntary projects

Severstal recognizes its obligations and is committed to working cooperatively with DEQ and with local citizens in addressing air quality concerns. Severstal is willing to propose and implement several voluntary measures to help further reduce emissions and help DEQ meet its goals with respect to ambient air quality. Severstal is willing to move forward with these measures if DEQ will commit to continue the current 182-05C permit update/revision process through to issuance of a corrected permit. Accordingly, Severstal proposes the following projects:

1. Manganese control – Severstal proposes to eliminate hand scarfing of steel slabs, and construct an automatic scarfing machine that would be controlled with a baghouse. As illustrated in our submittal of July 20, 2012, modeled impacts of machine scarfing outside of Severstal's property are considerably less than the modeled impacts of hand scarfing.

2. SO_2 control – Severstal proposes to install a lime injection system at the C Furnace casthouse to control SO_2 emissions from the casthouse baghouse. This would be a technology-forcing project, as this is not a demonstrated technology for blast furnaces and Severstal is not aware of any blast furnace casthouses using lime injection for control of SO_2. Severstal anticipates lime (or potentially Trona, another SO_2 absorbing material) would allow for a material reduction in SO_2 emissions from the casthouse. This project would help DEQ meet its obligations with respect to the 1-hour SO_2 ambient air quality standard.

Upon installation of an SO_2 lime injection system, Severstal also proposes to test whether lime injection affords any reduction in manganese emissions. Lime injection was identified as a control solution in DEQ's March 2012 study regarding ambient air concentrations of manganese. Severstal is not aware of lime injection having been implemented for manganese control, but developing new data would provide valuable information to DEQ, Severstal and the public.

3. Fallout mitigation, particulate control and manganese control – Severstal will commit to installing a desulfurization slag pot watering station, which has previously been discussed with DEQ and proposed, without resolution, as a possible measure to reduce the potential for fallout from Severstal's operations. Severstal also believes that a slag pot watering station will control fugitive emissions, and thereby reduce both fugitive particulate matter and manganese emissions. Severstal recognizes that the alleged fallout violations are currently subject to enforcement by U.S. EPA. However, no detailed discussions on fallout mitigation have occurred with U.S. EPA, and it is uncertain whether the slag pot watering station will be an element of any resolution of claims with U.S. EPA. Severstal now proposes a commitment to DEQ to install slag pot watering station, regardless of the outcome of any discussions with U.S. EPA. Severstal will not seek consideration of this project as a Supplemental Environmental Project with either DEQ or U.S. EPA.

4. BOF ESP enhancement – As a result of the current focus on operation of the BOF ESP, Severstal has identified a significant project that would allow for enhanced operation of the ESP. This project is not necessary for the ESP to operate in compliance with opacity limits, but would provide enhanced control of particulate matter, and as a result is anticipated to also provide a margin of benefit for manganese. Severstal intends to address this project at our September 14 meeting.

Lack of Benefit to DEQ from Permit Denial

It is also worth noting that withdrawal or denial of the permit does not appear to provide any material benefit to DEQ. DEQ was within several weeks of issuing a draft permit for public notice and comment before the compliance issues at the BOF ESP sidetracked the draft permit. In contrast, the serious detrimental consequences to Severstal from a denial of the pending permit application would force Severstal to contest that denial. Regrettably, Severstal would simply have no choice. Denial of the permit threatens the existence of the facility, and the thousands of direct and indirect jobs that rely on it, including customers and suppliers across the state, with broad impacts in the immediate Dearborn and Southeast Michigan area, to the iron mine that supplies Severstal in the Upper Peninsula.

Charting a Path Forward without Permit Denial

Well established regulatory mechanisms exist for DEQ and Severstal to address the current permitting and compliance issues without denial or withdrawal of the current permit application. This can be accomplished through either a consent decree or through the use of a compliance plan in Severstal's Renewable Operating Permit (ROP). Use of an ROP compliance plan is a federally supportable approach, one that is not at odds with any U.S. EPA enforcement action, and the majority of the work on Severstal's ROP renewal has already been accomplished.

A compliance plan can be imposed without the need to first allow any U.S. EPA enforcement to be resolved, and is appropriate even if there are unresolved current compliance issues.[7] Indeed, the very purpose of a compliance plan is to allow permit issuance when there is a current compliance issue.[8] Specifically, DEQ can expand the compliance plan in Severstal's currently pending ROP renewal that would provide enforceable measures and milestones for bringing all units of concern

[7] U.S. EPA would be able to comment on any revised ROP compliance plan, as per the ROP issuance process. Further, any current or future enforcement measures imposed by U.S. EPA can be incorporated into the ROP compliance plan.

[8] *See, e.g.*, 40CFR §70.6(c)(3), 70.5(c)(8)(iii)(C); Rule 336.1213(4). *See also, e.g., In Re: Tesoro Refining and Marketing Company. Petition IX-2004-6.* Further, EPA evaluations of whether a given NOV or allegation of non-compliance necessitates a compliance plan in an Title V permit (i.e. ROP) all make clear that a compliance plan is an available tool to address known current non-compliance issues. *See In the matter of Georgia Power Company, Bowen Steam-Electric Generating Plant*, Final Order at 5-9 (January 8, 2007; *In the matter of East Kentucky Power Cooperative Inc., Hugh L. Spurlock Generating Station*, Petition IV-2006-4, Final Order at 13-18 (August 30, 2007); and *In the matter of CEMEX, Inc.*, Petition VIII-2008-01, Final Order at 6 (April 20, 2009).

**SETTLEMENT CONFIDENTIAL
NOT ADMISSIBLE AS EVIDENCE**

into compliance, while at the same time imposing a process for accomplishing the necessary revisions.

Conclusion

For the foregoing reasons, Severstal is unable to withdraw its pending application, and seeks the cooperation of DEQ to hold the permit application, address compliance concerns via an enforceable compliance plan, and work together toward issuance of a corrected permit and implementation of other projects beneficial to air quality.

We look forward to discussing these issues with you further at our meeting scheduled for September 14. In the interim, if there are questions regarding the above information, please contact us.

Very truly yours,

Martin Szymanski
Vice President and General Counsel

James E. Earl, Manager
Environmental Engineering

cc (via email):
Amy Banninga
Bruce Black
Dave Morris
Scott Dismukes, Esq.
David Rockman, Esq.

14-008887-AA
FILED IN MY OFFICE
WAYNE COUNTY CLERK
10/9/2014 1:05:12 PM
CATHY M. GARRETT

Exhibit 3

Comment

The Draft Permit improperly fails to analyze the proposed emissions limits under current law and regulations governing air pollution, including PSD and Non-attainment New Source Review (NNSR) analyses.

AQD Response

Since PTI application No. 182-05C does not propose to make any physical changes or changes to the method of operation to the existing emission units at the facility new source review (NSR) under PSD was not triggered. Additionally, if NSR under PSD was not triggered, the NNSR was not triggered as well.

Comment

I read that there will be filtration systems for particulate matter with aerodynamics less than 10 microns (PM10) and particulate matter with aerodynamics less than 2.5 microns (PM2.5), which are actual particles. That's good. But how about the gases that are going to be released, like lead and CO which are detrimental to our health? And all the kids that live in that area, they literally breathe in this air every day, and it's disgusting.

AQD Response

Severstal has existing particulate control devices in operation at the facility which includes an ESP and a number of baghouses, there are no new control devices being installed through this permitting action. These devices control the emissions of particulate (PM, PM10, and PM2.5) as well as metals in particulate form. Lead, like other metals and particulate, can be emitted in filterable form and a condensable form at high temperatures. Since some of the lead emissions from the process are in filterable form the emissions will be controlled by the particulate control devices. Additionally, the emissions of lead were evaluated using air dispersion modeling and were shown to meet the lead NAAQS, which is protective of human health.

In the permit application Severstal updated its CO Best Available Control Technology (BACT) analysis to determine if the previous BACT analysis from PTI No. 182-05 was still valid. This analysis revealed that no additional control would be feasible for this project. Under the PSD regulations, the AQD does not have the regulatory authority to require additional air pollution control devices without the demonstration the control is required for BACT. Additionally, the emissions of CO were evaluated using air dispersion modeling and were shown to meet the CO NAAQS standards, which are protective of human health.

Comment

Based on the application and associated documentation, the USEPA believes that Severstal meets the criteria necessary for PSD permit revision. Therefore, the MDEQ should reevaluate the BACT determination for any emissions factors or BACT limits that must be revised, taking into account current technology and requirements, as well as retrofit and other cost associated with the fact that Severstal is an already-existing facility. Additionally, other commenters also stated that Severstal should be required to go through BACT "today" and meet all current requirements.

AQD Response

This permit application did not trigger NSR permitting under PSD, and therefore is not subject to a BACT analysis evaluating current technology and requirements. NSR was not triggered because this permit did not propose to make any physical change or change in method of operation of any equipment at the facility. The purpose of this application was to demonstrate that the previous netting and BACT analyses were still valid, using up to date emission factors.

Comment

Require Severstal to meet the current permit limits and install additional control to achieve those levels. Why are there no technologies available to meet the current limits?

AQD Response

Severstal has shown through this permit application that even with the revised emission rates, the proposed project would have still netted out of PSD for PM, PM-10, NOx, VOC, and lead. Since these pollutants netted out they are not subject to BACT review and therefore the AQD does not have regulatory authority to require Severstal to install additional control for them. SO_2 and CO remained above the significant level in the updated netting analysis and Severstal showed through a re-BACT analysis the additional control remained uneconomical. Therefore, the AQD does not have the regulatory authority to require Severstal to install additional control for them.

Comment

The MDEQ further asserts that no additional NSR is required where PTI No. 182-05C only changes the amount that Severstal is allowed to emit, and does not change the amount of pollution Severstal is actually emitting. These assertions that no new NSR should occur are logically incongruous in light of the fact that according to the MDEQ, the determinations of emissions limits in Severstal's previous PTIs were based on "limited" and "incomplete" emissions testing data. Moreover, when emissions limits were created for Severstal, Wayne County was in attainment for SO_2. Non-attainment NSR, including installation of lowest achievable emission rate (LAER), must be triggered, even in the absence of a current physical change or change in the method of operation at Severstal, where previous NSR (at the time of change/installation) was based on faulty data, and where the attainment designation for a criteria pollutant (SO_2) has since changed.

AQD Response

During the time of original permitting, Wayne County was designated as attainment for SO_2. Since this permit is updating the emission information and is not considered a physical modification under either the PSD rules or the major NNSR rules, the emissions should be evaluated as if the area were still in attainment. Severstal provided a re-BACT analysis for SO_2 that was evaluated as part of this application and showed that no additional control was still BACT.

Exhibit 4

Fiedler, Lynn (DEQ)

From: Fiedler, Lynn (DEQ)
Sent: Wednesday, May 07, 2014 6:11 PM
To: Wurfel, Brad (DEQ); Seidel, Teresa (DEQ)
Cc: Dolehanty, Mary Ann (DEQ)
Subject: FW: Contact from EPA on Severstal Permit

From: Hellwig, Vince (DEQ)
Sent: Wednesday, May 07, 2014 5:37 PM
To: Sygo, Jim (DEQ); Fiedler, Lynn (DEQ); Dolehanty, Mary Ann (DEQ)
Subject: Contact from EPA on Severstal Permit

I had a call from George Czerniak today concerning the pending decision on the Severstal permit. Specifically the issue is how we will treat SO2 in the permit and the EPA comment. I told George that since we were repermitting the source that we were going back to the attainment status of the original permit and the RCD would reflect this. George commented that they had been requested by Rep. Talib and another Rep. to take over the permitting for Severstal. Of course they have no authority to do so.

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.

Sent from my iPad

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CATHY M. GARRETT

Exhibit 5

Severstal

9/12/2012 Letter on Reasons Not to Deny Permit Application

Letter Subject is the permit, not settlement
Subject is "Permit Application" but also labeled "Settlement Confidential Not Admissible Evidence." This correspondence is related to the permit application. DEQ is not in settlement discussions with Severstal. DEQ's role in settlement ended January 2012, now EPA is lead on enforcement. Page 3 states that "permit corrections are critical..."

Letter Analysis

Item	Analysis	Page
Unknown, but pre-existing emissions	Can be used as basis to revise permit, but cannot continue to change information after application for permit correction is submitted.	2, 4
Data and limits in current application	Subsequent testing is in conflict with data included in the application. This invalidates the application and removes the basis for making a decision. If the permit were issued using the application data, Severstal would be non-compliant and would be subject to enforcement action...the same place they are now. DEQ does not believe defensible or durable	
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. - New regulations may be brought into an EPA enforcement/consent agreement. Until the issues with EPA are settled, a valid and durable permit is not possible	4
EPA Guidance on Permit Process	Was Ogden Martin Tulsa (1987) superseded by Avenal decision (2011)? - Were there changes to data after application was submitted? - Was EPA in enforcement action with the company? The information that you have submitted indicates that on December 23, 1982, a PSD permit was issued ... Prior to construction... permit modifications were issued to the source resulting in a final permit ... The units were constructed in conformity with the modified permit and subjected to compliance testing .. Measured ... emissions exceed the permit limit by a "significant" amount as defined in 40 CFR 52.21(b)(23)(i). The source has requested that the permit be revised to reflect the actual measured emissions of these pollutants. You have requested a determination on whether the exceedance of permitted emissions by "significant" amounts, or the determination of a new "significant" pollutant by performance testing triggers the reopening of the BACT review process for the Ogden Martin facility. If BACT review is reopened, which pollutant(s) would be subject, to what degree should the limitations and economics of the existing facility come into play, and would the June 25, 1987, "Operational Guidance on Control Technology for New and Modified Waste Combustors" apply to this facility? Based on the information presented, this response assumes that errors, faulty data, or incorrect assumptions contained in the original or modified permit applications have resulted in what may be inappropriate BACT emission levels and unpermitted significant emissions, and there is no indication that the applicant intentionally acted to	5

Item	Analysis	Page
	misrepresent or conceal data in their original and modified permit applications and BACT analysis. This guidance does not apply to any other type of noncompliance scenario. ... the source has an initial obligation to comply with the permit. At a minimum the source should be required to investigate and report to the permitting agency all available options to reduce emissions to a lower (if not the permitted) level. If compliance with the permit can be reasonably achieved, the source should be required to take steps to reduce emissions. If sufficient emission reductions down to the permitted level cannot be reasonably achieved, then a reevaluation of the permit may be warranted. For H2SO4, if potential emissions cannot be reduced below the significance level, a PSD review is required and the results must be incorporated in the source's PSD permit. As with NOx and mercury emissions, the BACT analysis considers current technology and requirements while weighing the additional retrofit costs and other costs associated with an already existing facility. If a revision to the permit is determined to be appropriate, the revision must also address all other PSD requirements which may be affected by an allowable increase in permitted or newly regulated emissions (eg., protection of the standards and increments, additional impacts, monitoring) The control of emissions of toxic air *pollutants is an important aspect of PSD review. This memorandum* does not address potential air toxics issues.	
EPA Enforcement	Has primacy. Ignores state permit actions.	
Why deny?	- DEQ's position is that rules require action on a permit within 120 days after receipt of all the information required—administratively complete. DEQ has no legal mechanism to put a hold on the application until EPA has acted—they have to act if the application is not withdrawn - They have responsibility to act on resident complaints	
DEQ Must act within 120 Days	Rule or performance target?	7
Administratively complete?	Do subsequent revisions point to the application not being truly complete?	7
ORR Recommendation (rule has not been changed)	ORR Recommendation: R 336.1206 must be more specific and must include a definition for "administratively complete". The rule should be amended to: ... Require AQD to act (issue or deny) on all minor source Permit to Install (PTI) applications within 180 days of receipt. This should include "opt-out" PTIs... Allow for the extension of these deadlines with the mutual consent of both the applicant and the DEQ.	7
Voluntary Projects	What are priorities? What is timeline? Severstal should focus on those projects that are most likely to: - Meet EPAs requirements under a consent agreement - Have the greatest impact on emissions	8
Reason to Extend	Enforceable compliance plan under current permit?	9

Exhibit 6

From: "Earl, Jim" <jearl@severstalna.com>
To: FEIGHNERB@michigan.gov
Date: 3/9/2009 6:05:18 PM
Subject: Severstal North America - PTI No. 182-05B Corrections

Bryce,

Per our discussion on March 5, attached is our letter stating why any correction to the existing permit limits in 182-05B would not be a permit modification. Please contact me or Ted Bishop with any questions. Thanks.

Jim Earl

Manager, Environmental Engineering

Severstal North America, Inc.

(313) 845-3217

CC: SEIDELT@michigan.gov; TELESZR@michigan.gov; SIAB@michigan.gov; rkalinowsky@nthconsultants.com; SDismukes@eckertseamans.com; dmorris@severstalna.com; . . .

SeverStal
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March 9, 2009

Mr. Bryce Feighner
Michigan Department of Environmental Quality
Air Quality Division
Constitution Hall, 3rd Floor
525 W. Allegan
Lansing, MI 48909

RE: Severstal North America - PTI No. 182-05B Corrections Do Not Constitute a Modification

Dear Mr. Feighner:

Thank you for the time which you and Randal Telesz took to meet with Severstal North America ("Severstal") on Thursday, March 5, 2009 to discuss the permit corrections that need to be made to Permit to Install (PTI) No. 182-05B. As discussed during the meeting, Severstal is submitting the following information affirming that we are not making any physical or operational changes outside of those covered under PTI No. 182-05B and therefore, the facility is not being modified.

BACKGROUND

Severstal was issued PTI No. 182-05B on April 19, 2007, which authorized modifications to the C Blast Furnace ("C-FCE"), installation of the BOF secondary emission control baghouse and the installation of a baghouse on B Blast Furnace ("B-FCE"). Various contemporaneous increases and decreases resulted in the facility netting out of PSD for nitrogen oxides (NO_x) and particulate matter less than 10 microns in diameter (PM_{10}). The modifications resulted in significant net increases of sulfur dioxide (SO_2) and carbon monoxide (CO) and therefore PTI No. 182-05B is a PSD permit for those pollutants. To date, the facility has not yet completed the construction of the B Blast Furnace baghouse and other modifications allowed by PTI No. 182-05B.

Emission rates detailed in Severstal's permit application were based on a combination of emission factors from EPA's AP-42 database and the FIRE Data System, as well as past stack testing from various steel mills, including stack tests at the Severstal facility – all of which were the best available data at the time the application was prepared, submitted and reviewed, up through the issuance of the final permit. As required by PTI No. 182-05B, Severstal has performed a myriad of compliance stack testing at the Dearborn, Michigan facility, and has found that some of the emission factors and resulting emission estimates do not accurately portray the facility's operations.

Severstal and the MDEQ have both recognized that in the case of PM_{10} and metal emissions, the emission factors used to develop Permit No. 185-05B do not include emissions of the condensable particulate fraction. Current compliance testing, however, has included measurement of condensable particulate emissions when determining compliance with the permit emission limits. The results of the recent source specific testing have demonstrated that, contrary to previous engineering judgment, the difference between the emission factors (without condensable PM) and the site specific test results are significant due to the unexpected contribution of condensable particulates. Given this new site specific data (which is the first data of its kind for condensable particulate from integrated steel manufacturing), Severstal and MDEQ are recognizing the need to account for condensable emissions

and to update the application based on site specific data and emission factors. As a result, Severstal needs to make corrections to certain emission limits contained in PTI No. 182-05B, and will need to make appropriate updates to the emission calculations used in the application.

Based on the information collected during site specific testing to date, Severstal proposes to revise at least the following emissions at the following sources: PM_{10} at its C and B furnace baghouses and BOF baghouse, CO at its BOF ESP, mercury at its C Furnace stoves, lead, manganese and SO_2 at the baghouses for B and C Furnaces. All emission limit revisions would be intended only as corrections to inaccuracies in the emissions factors used to derive the current permit limits.

Severstal is not proposing to make any physical modifications or changes in the method of operation to the facility, and is not requesting any additional production capacity beyond what is allowed in PTI No. 182-05B. Severstal will only operate the facility as set forth in the permit, still based upon the underlying permit application; and for sources not included specifically in the permit, operations will continue in the same manner as they have been both prior to and subsequent to the issuance of the 182-05 series of permits. Accordingly, Severstal does not plan any installation, construction, reconstruction, relocation, or modification at its facility which is not already permitted under PTI No. 182-05B and correction of the permit limits will not result in any such activity, as explained further in this correspondence.

RULE 201 PERMIT APPLICABILITY

The State of Michigan's Air Pollution control Rule 201(1) states that:

> *A person shall not install, construct, reconstruct, relocate, or modify any process or process equipment, including control equipment pertaining thereto, which may emit [an air contaminant], unless a Permit to Install which authorizes such action is issued by the Department.*

Severstal will demonstrate that the necessary corrections to PTI No. 182-05B would not be considered an installation, construction, reconstruction, relocation, or modification as discussed below.

Installation/Construction

Installation and construction are often used interchangeably and refer to installing a new emission unit. "Installation" means installing new emission units into an existing building or an existing site. "Construction" refers to constructing a new building along with installing new emission units within the building or new emission units at a new site.

Since Severstal is merely requesting adjustments or corrections to emission limits contained in PTI No. 182-05B, it is not pursuing the installation of any new equipment and therefore there is no installation or construction taking place.

Reconstruction
Reconstruction is defined in Rule 118(b) as:

> *The replacement of components of an existing facility so that the fixed capital cost of the new components is more than 50% of the fixed capital cost that would be required to construct a comparable entirely new emission unit and so that it is technologically and economically feasible to meet the applicable requirement.*
>
> *"Fixed capital cost," as used in this subdivision, means the capital needed to provide all of the depreciable components.*

This definition is consistent with the federal definition at 40 CFR 60.15.

Severstal is not contemplating any replacement of components or capital expenditure.

Relocation
The term relocation refers to moving an existing emission unit. Relocation may occur within the same facility or from one facility to another.

Severstal is not proposing to relocate any equipment.

Modification
Rule 113 (e) defines modification as:

> *...making a physical change in, or change in the method of operation of, existing process or process equipment which increases the amount of any air contaminant emitted into the outer air which is not already allowed to be emitted under the conditions of a permit or order or which results in the emission of any toxic air contaminant into the outer air not previously emitted. An increase in the hours of operation or an increase in the production rate up to the maximum capacity of the process or process equipment shall not be considered to be a change in the method of operation unless the process or process equipment is subject to enforceable permit conditions or enforceable orders which limit the production rate or the hours of operation, or both, to a level below the proposed increase.*

A modification has occurred if the physical or operational change results in any of the following:

1. an increase in emissions;
2. emissions of new pollutants not previously permitted; or
3. changes to other existing permit conditions

Severstal has not made any physical changes or changes in the method of operation except those authorized under PTI No. 182-05B, nor is Severstal proposing to make any additional physical changes or changes in the methods of operation than those already allowed (unless otherwise authorized by separate permit). Emissions will be entirely consistent with normal operation of pre-existing sources and operation of all sources as permitted by PTI No. 182-05B.

Severstal understands that it will be necessary to revise PTI No. 182-05B, and also ensure that existing PSD netting and ambient impact analyses are intact. However, correcting emission factors and emission limits in the existing PTI No. 182-05B would not be considered installation, construction, reconstruction, or relocation or alone be considered a modification subject to additional permitting requirements.

If you have any questions, please feel free to call me at 313-845-3217 or Ted Bishop at 313-323-1261.

Very truly yours,

James E. Earl, Manager
Environmental Engineering

cc: E. M. Bishop
D. W. Morris
S. R. Dismukes, ESCM
R. P. Kalinowsky, NTH
B. Sia, MDEQ
R. Telesz, MDEQ

Exhibit 7

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

JAN 3 1 2014

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Guidance on Extension of Prevention of Significant Deterioration (PSD) Permits under 40 CFR 52.21(r)(2)

FROM: Stephen D. Page, Director Michael Kuehlmeyer
Office of Air Quality Planning and Standards

TO: Regional Air Division Directors, Regions 1-10

The purpose of this memorandum is to clarify the U.S. Environmental Protection Agency's views on what constitutes adequate justification for an extension of the 18-month timeframe for commencing construction of a source that has been granted a preconstruction permit under the prevention of significant deterioration (PSD) provisions of part C of title I of the Clean Air Act (CAA). Such extensions are authorized by 40 CFR 52.21(r)(2).[1,2]

This guidance primarily applies to the EPA and delegated permitting authorities. In preparing the guidance, we sought input from regional offices and also informed state and local air agency staff about its main concepts.

For questions on this guidance, please contact Raj Rao at (919) 541-5344, *rao.raj@epa.gov* or Jessica Montañez at (919)541-3407, *montanez.jessica@epa.gov*.

BACKGROUND

The permit extension provision at 40 CFR 52.21(r)(2)[3] establishes that "approval to construct [a new major stationary source or major modification] shall become invalid if construction is not commenced

[1] This document explains the requirements of the EPA regulations, describes the EPA policies, and recommends procedures for permitting authorities to use to ensure that permitting decisions are consistent with applicable regulations. This document is not a rule or regulation, and the guidance it contains may not apply to a particular situation based upon the individual facts and circumstances. This guidance does not change or substitute for any law, regulation or any other legally binding requirement and is not legally enforceable. The use of non-mandatory language such as "guidance," "recommend," "may," "should" and "can," is intended to describe the EPA policies and recommendations. Mandatory terminology such as "must" and "required" are intended to describe controlling requirements under the terms of the CAA and the EPA regulations, but this document does not establish legally binding requirements in and of itself.

[2] In 1992, the EPA finalized permit extension provisions in 40 CFR 55.6(b)(4) for sources seeking permits in the Outer Continental Shelf (OCS). The permit extension provisions in 40 CFR 55.6(b)(4) only apply to OCS sources and as such they are not addressed by the clarifications in this memorandum.

[3] The CAA does not expressly include the 18-month deadline or any provision for extending that deadline. Thus, the EPA's analysis focuses on the regulatory text.

within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time."[4] In addition, this provision states that "the [EPA] Administrator may extend the 18-month period upon a satisfactory showing that an extension is justified."[5] This provision gives the EPA discretion to extend the 18-month commencement of construction deadline for PSD permits issued under federal authority where the EPA determines that a "satisfactory showing that an extension is justified" has been made. The PSD regulations indicate that the EPA should exercise this discretion on a case-by-case basis, evaluating whether the showing offered for a particular extension is satisfactory and, accordingly, whether an extension is justified for a particular permit. The text of 40 CFR 52.21(r)(2) does not provide any specific criteria or required process that must be satisfied before the EPA can exercise its discretion to determine that a permit extension is justified.

The EPA has previously considered how it would exercise its discretion in determining whether granting a permit extension was justified under the provision in 40 CFR 52.21(r)(2). In 1988, Wayne Blackard, then Chief of the EPA's Region 9 New Source Section, issued a policy memorandum[6] describing how Region 9 intended to exercise its discretion at that time in determining whether granting an extension of the 18-month commencement of construction deadline was justified per 40 CFR 52.21(r)(2). However, the approach described in the 1988 Region 9 policy memorandum is not, and never has been, the exclusive means by which an applicant can show that an extension of the 18-month expiration period is justified. The 1988 Region 9 policy memorandum did not purport to interpret the terms of 40 CFR 52.21(r)(2) and did not state that the provision requires the approach outlined in the memorandum to show that an extension of the 18-month timeframe for commencing construction is justified. Accordingly, the 1988 Region 9 policy memorandum should not be viewed as a controlling EPA interpretation of 40 CFR 52.21(r)(2), but rather should be regarded as a prior Region 9 policy statement for PSD permit extensions. This 1988 Region 9 policy memorandum asked the permittee to submit a complete re-analysis of PSD permit requirements and stated that the Region would conduct another comprehensive PSD review. This comprehensive PSD review was to include a re-analysis of the best available control technology (BACT), a re-analysis of air quality impacts and PSD increment consumption, and an analysis of any new PSD requirements. The 1988 Region 9 policy memorandum also called for a public participation process under 40 CFR 124 in order to determine that a PSD permit extension was justified under 40 CFR 52.21(r)(2).

In addition to the 1988 Region 9 policy memorandum described above, in 1985 an EPA headquarters office developed a draft policy addressing PSD permit extension requests that was distributed for review among the EPA staff.[7] This EPA headquarters office also developed a similar (but not identical) draft policy dated June 11, 1991.[8] However, these documents were never issued in final form. Because these

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[4] This guidance is specifically intended to clarify our current views on processing requests to extend the 18-month timeframe for commencing construction under 40 CFR 52.21(r)(2). It does not address the two other aspects of 40 CFR 52.21(r)(2), i.e., the provisions pertaining to discontinuing construction and completion of construction within a reasonable time. Requests pertaining to these provisions occur less frequently, and may present different considerations, than requests for extension of the deadline for commencing construction. The EPA will exercise its discretion to address these requests on a case-by-case basis.

[5] For phased construction projects, the provision also states that "each phase must commence construction within 18 months of the projected and approved commencement date."

[6] Memorandum from Wayne Blackard, Chief, New Source Section, EPA Region 9 Policy on PSD Permit Extensions (September 8, 1988). *See http://www.epa.gov/ttn/naaqs/aqmguide/collection/nsr/extnsion.pdf.*

[7] Memorandum from Darryl D. Tyler, Director, Control Program Development Division, Revised Draft Policy on Permit Modifications and Extensions (July 5, 1985). *See http://www.epa.gov/ttn/naaqs/aqmguide/collection/nsr/permmod.pdf.*

[8] *See http://www.regulations.gov/#!documentDetail;D=EPA-R09-OAR-2013-0190-0010.*

documents were drafts that were never finalized, they did not establish a controlling interpretation of the text in 40 CFR 52.21(r)(2). These draft EPA headquarters policies called for public notice and comment for PSD permit extensions and a substantive re-analysis of BACT and in some instances other PSD requirements. The draft policies discussed the role of the permit expiration requirement in ensuring that PSD analyses, in particular BACT, be current for PSD-permitted projects. These draft policies were based on the idea of allowing extensions readily but requiring substantive review to ensure that the BACT limits and other conditions in the original permit remained current. The EPA developed these draft approaches as alternatives to other approaches, such as requiring a showing of the inability of the source to construct due to various reasons including but not limited to economic or legal constraints. In the 1985 and 1991 draft policy memoranda, the EPA explained that the latter approaches presented varying degrees of subjectivity and certain difficulties in the factual analysis, which these draft policies sought to avoid.

THE EPA'S POLICY ON PSD PERMIT EXTENSIONS

After further consideration of the practical impact of these earlier policies, the EPA has determined that it is more appropriate and consistent with the terms of 40 CFR 52.21(r)(2) to evaluate on a case-by-case basis whether an applicant has shown that an extension of the deadline for commencing construction of a PSD permit is justified. This analysis would include a case-by-case consideration of the appropriate factors and process to be employed in determining whether to grant such request. As 40 CFR 52.21(r)(2) does not specify that any particular criteria must be satisfied or process followed, this case-by-case approach is consistent with the provision and the discretion that it provides to the EPA.

Requiring substantive review of a prior PSD permitting decision and conducting an additional public participation process in the context of PSD extension requests has resulted in little or no practical distinction between the extension of an existing PSD permit and an applicant having to apply for a new permit. The 1985 and 1991 draft policies did not consider how this approach could obscure the distinction between extension of an existing permit and requiring the applicant to apply for a new permit. The intensive substantive review and associated public participation process called for in the 1988 Region 9 policy memorandum further illustrates this tension between a permit extension and a new permit. The EPA believes it is important to give meaning to the extension provision in the PSD regulations.

The 1985 and 1991 draft policy memoranda did not recognize other potential downsides of the approach they described, such as the potential for substantial further delay or the significant resource burden that may result from substantive re-analysis of the permit in the context of even a relatively brief extension request. The EPA's recent experience is that improvements in pollution control technology for criteria pollutants have not been occurring as rapidly as was anticipated at the time of the earlier draft EPA policies on permit extensions. Thus, the time and resource burdens involved in reviewing an earlier permitting decision after the initial 18 months do not produce as much value in this context. The earlier draft documents also did not demonstrate that re-evaluation of permit conditions was necessary when other factors may otherwise provide a reasonable justification for an extension, such as litigation over the PSD permit or a lack of other approvals that precludes a source from commencing construction. In recent years, the EPA has noticed an increase in the number of PSD permits subject to judicial review and the time required to complete this process, particularly in the U.S. Courts of Appeals. The earlier draft policies expressed concern with subjectivity and difficulties in verifying facts showing the inability of the source to construct due to various reasons such as economic or legal constraints. However, the EPA has not encountered such difficulties in its more recent reviews of permit extension requests or

received information indicating that other PSD permitting authorities are frequently experiencing such difficulties.

With regard to soliciting public comment on an extension request, the earlier Region 9 and draft headquarters policies deemed this process advisable in the context of other elements of the policies that called for substantive review of PSD requirements such as BACT before granting the extension. When this kind of substantive review is not conducted, the EPA does not see the same basis for providing an opportunity for public comment on an extension of the deadline for commencing construction. A later section of this memorandum discusses the issue of the appropriate process for granting a permit extension in more detail.

As a policy matter, the EPA generally intends to exercise its discretion, in accordance with 40 CFR 52.21(r)(2), to make a case-by-case evaluation of whether a source's showing is satisfactory and, therefore, whether an extension is justified for a particular permit.[9] The text of 40 CFR 52.21(r)(2) does not provide any specific criteria or required process that must be satisfied before the EPA can exercise its discretion to determine that a permit extension is justified. Therefore, the elements outlined below represent various aspects of permit extension situations that the EPA Regions, and state, tribal or local programs that issue permits on behalf of the EPA in accordance with 40 CFR 52.21(u) ("delegated permitting authorities"), should generally consider in determining whether a particular permit extension is justified. However, these aspects do not represent the only factors that may be relevant when considering whether a particular permit extension is justified. Consistent with 40 CFR 52.21(r)(2), the EPA may in a particular case exercise its discretion to determine that another type of showing is sufficient or necessary to justify a permit extension. If a delegated permitting authority is considering issuing a permit extension, the delegated permitting authority should coordinate with the EPA to ensure that the approach being considered is consistent with 40 CFR 52.21(r)(2).

WHEN AN EXTENSION REQUEST SHOULD BE MADE

While 40 CFR 52.21(r)(2) does not specify a deadline for requesting a PSD permit extension, sources are strongly encouraged to request a permit extension in advance of the end of the 18-month period for commencing construction. The EPA and delegated permitting authorities should strive to make PSD permit extension decisions as expeditiously as possible.

LENGTH OF EXTENSION

The EPA's regulations do not state the time period for a permit extension granted under 40 CFR 52.21(r)(2). However, we believe that PSD permit extensions generally should be available for an additional 18-month period following the initial 18-month timeframe for commencing construction set forth in 40 CFR 52.21(r)(2), and should be based on adequate justification for the length of the permit extension. Permit extensions for shorter or longer time periods may be granted depending on the particular demonstration that an extension of the commencement of construction deadline is justified.

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[9] We note that the EPA Region 9 has previously applied the reasoning reflected in this guidance in making a case-specific determination, in the context of a particular request to extend the deadline for commencement of construction in a PSD permit. Information concerning this determination can be found at 78 FR 40968 (2013). *See* http://www.gpo.gov/fdsys/pkg/FR-2013-07-09/pdf/2013-16334.pdf

PSD PROGRAMS UNDER APPROVED STATE IMPLEMENTATION PLANS (SIPs)

We note that while the 18-month timeframe for commencing construction appears in the EPA's rules in 40 CFR 52.21, neither the CAA nor the EPA's rules in 40 CFR 51.166, which govern SIP-approved PSD programs, contain this 18-month deadline. Accordingly, SIP-approved programs are not required to include the 18-month construction deadline, and nothing in this guidance should be read to indicate that SIP-approved PSD programs need to be revised consistent with this guidance. Nonetheless, we encourage permitting authorities with SIP-approved PSD programs that incorporate the 40 CFR 52.21(r)(2) provision by reference or that implement a provision similar to 40 CFR 52.21(r)(2) to apply this policy or a policy that is similar to that included in this memorandum. Owners or operators of facilities seeking extensions of PSD permits issued by state, tribal or local authorities with SIP-approved programs should contact their PSD permitting authority for information on the applicable requirements.

EXTENSION OF MINOR SOURCE PERMITS

This permit extension guidance does not address minor New Source Review (NSR) permit extension requests (other than requests for certain sources in Indian country[10]) because the provision in 40 CFR 52.21(r)(2) does not apply to minor NSR sources. Owners or operators of facilities with questions on minor source permit extensions should contact their minor NSR permitting authority.

FIRST PERMIT EXTENSION REQUEST

In accordance with 40 CFR 52.21(r)(2), a permittee's first PSD permit extension request should include a detailed justification of why the source cannot commence construction within the initial 18-month deadline. For example, relevant factors for this justification could include ongoing litigation over the PSD permit, natural disasters that directly affect the facility, significant or unusual economic impediments (including inability to secure financial resources necessary to commence construction) and/or delays in obtaining other required permits.

Furthermore, the EPA believes that in order to give meaning to the extension provision in 40 CFR 52.21(r)(2), review or redo of substantive permit analyses such as BACT, air quality impacts analysis (AQIA) or PSD increment consumption analyses should generally not be necessary for a first permit extension request.

SECOND PERMIT EXTENSION REQUEST

The EPA believes that in most cases a request for a second extension of the commencement of construction deadline should include a substantive re-analysis and update of PSD requirements. Only in rare circumstances would a detailed justification of why a source cannot commence construction by the current deadline (as is recommended above for the purpose of requesting the first extension) be sufficient to support a second extension. Generally, the benefits of conducting an updated substantive review of the PSD requirements after 36 months from the initial issuance of the PSD permit would

[10] Since PSD sources in Indian country are currently permitted under 40 CFR 52.21 and the permit extension provisions for minor sources in Indian country (40 CFR 49.155(b)) are identical to those in 40 CFR 52.21(r)(2), this guidance also extends to the EPA's consideration of sources seeking extensions of the deadline for commencing construction in PSD and minor NSR permits in Indian country until such time as a tribe develops and the EPA approves a tribe's PSD or minor NSR Tribal Implementation Plan (TIP).

outweigh the considerations discussed above that favor an initial extension without such analysis. While the EPA's experience is that pollution control technology for criteria pollutants has not been advancing at the same rate that it once was, the EPA believes that it is more likely that technology and air quality considerations will become outdated when construction does not begin until 36 months or longer after the EPA has taken final action to issue a PSD permit. Therefore, when a second extension of the deadline for commencing construction is requested, the EPA will evaluate on a case by-case basis whether a second permit extension is justified. In some cases, the EPA may ask the permittee to apply for a new PSD permit rather than conduct its review through a permit extension proceeding.

PSD PERMIT EXTENSIONS INVOLVING GRANDFATHERED REQUIREMENTS OR REQUIREMENTS THAT TAKE EFFECT DURING THE INITIAL 18-MONTH PERMIT TERM

In certain circumstances, the EPA has not imposed PSD requirements resulting from a newly regulated pollutant or a new or revised national ambient air quality standard (NAAQS) or PSD increment on permit applicants that have already submitted complete PSD permit applications or on projects for which draft PSD permits have already been issued at the time when a new requirement would otherwise go into effect. These sources and modifications have been "grandfathered" from having to demonstrate compliance with the new or revised PSD regulatory requirements. Thus, the EPA has used grandfathering as a means of transition to new PSD requirements.

Current PSD regulations do not speak specifically to whether an extension of the initial 18-month commencement of construction deadline may be justified where a project has been grandfathered in the initial PSD permit decision from PSD requirements that would otherwise have applied. Therefore, the EPA believes it is appropriate and consistent with the terms of 40 CFR 52.21(r)(2) and the discretion provided by those terms to evaluate on a case-by-case basis whether and under what circumstances a PSD permit extension is justified in the context of such a source. Therefore, a source that was grandfathered from PSD requirements that seeks a permit extension is encouraged to address in its permit extension request and justification the significance of the grandfathering and whether the EPA's basis for grandfathering the permit still applies to the source.

Similarly, the PSD regulations do not specifically address situations where a new pollutant is regulated or a NAAQS is promulgated or revised after a permit is issued but before the expiration of the 18-month deadline for commencing construction. In its 1988 policy memorandum, Region 9 called for a PSD permit extension application to address the new PSD permitting requirements that became applicable in this 18-month period. However, considering the extension language of 40 CFR 52.21(r)(2) and the value of giving an extension meaning independent of a new permit application, the EPA believes that a permitting authority has the discretion to evaluate on a case-by-case basis whether and under what circumstances it would be justified to issue a PSD permit extension without requiring the source to meet a new requirement that took effect during the term of the initial permit.[11] Thus, applications for permit extensions should address this issue, if applicable.

[11] The EPA has explained elsewhere that a PSD permit issued before a new requirement takes effect does not need to be reopened. 75 FR 31514, 31593 (June 3, 2010).

PSD PERMIT EXTENSIONS FOR AREAS THAT HAVE BEEN REDESIGNATED FROM ATTAINMENT TO NONATTAINMENT

Part D of the CAA contains the general and pollutant-specific requirements applicable to all areas that are designated nonattainment of the NAAQS. However, neither the CAA nor the regulatory text at 40 CFR 52.21(r)(2) provides any specific criteria or required process for PSD permit extensions in areas that have been redesignated from attainment to nonattainment for a particular pollutant following PSD permit issuance.

On March 11, 1991, John S. Seitz, then Director of the Office of Air Quality Planning and Standards, issued a policy memorandum concerning certain transitional issues related to changes to the NSR requirements of the PSD and nonattainment area programs resulting from the CAA Amendments of 1990. Among other things, this memorandum stated, without detailed discussion, that it would be inappropriate to extend the PSD permit expiration deadline for permits issued to sources in areas that have been designated as nonattainment following permit issuance.

As with the other older policy memoranda discussed in this document, this 1991 Seitz memorandum does not purport to interpret the terms of 40 CFR 52.21(r)(2) and does not state that the regulation requires the approach outlined therein in all circumstances to determine whether an extension of a PSD permit's commencement of construction deadline is justified in areas that have been redesignated as nonattainment following PSD permit issuance. In addition, the memorandum does not discuss how PSD continues to apply to pollutants for which the area remains designated attainment while nonattainment NSR becomes applicable only to the pollutants for which the area is designated as nonattainment. Considering this distinction, the EPA believes that it is appropriate and consistent with the terms in 40 CFR 52.21(r)(2) to evaluate on a case-by-case basis whether an extension of the PSD permit is justified in situations where one or more pollutants have been redesignated nonattainment following PSD permit issuance and the PSD permit contains other pollutants for which the area remains in attainment. However, for the pollutant(s) for which the area changed to nonattainment, these pollutant(s) should be evaluated by the appropriate permitting authority under the applicable nonattainment NSR permit requirements prior to commencing construction if construction will be delayed beyond the 18-month deadline.[12] We do not believe it is consistent with the purposes of the nonattainment NSR program to use an extension of the deadline for commencing construction in a PSD permit for the pollutants that remain in attainment as a shield against the requirements to obtain a major nonattainment NSR permit, if applicable, for the pollutant(s) for which the area has become nonattainment.

PUBLIC NOTICE AND COMMENT ON PSD PERMIT EXTENSION ACTIONS

Public notice and comment is not necessary for permit extension actions that would simply extend the deadline for commencing construction without reconsideration or amendment of the substantive conditions of the permit.

The EPA has considered the question of whether PSD permit extension actions pursuant to 40 CFR 52.21(r)(2) are subject to the procedures in the EPA's permitting regulations at 40 CFR Part 124. The provisions in 40 CFR Part 124 do not reference extensions of PSD permits. The EPA notes that section

[12] 40 CFR 51.165 and 40 CFR 49.166 include the regulatory text for state/local and tribal nonattainment permitting programs, respectively. 40 CFR Appendix S contains the nonattainment NSR requirements for areas newly designated nonattainment for which a revised SIP or TIP is not in place yet.

124.15 does state that a "final permit decision" includes a decision to "modify" a permit, but the EPA has not yet promulgated more specific provisions regarding modifications of PSD permits. *See* 40 CFR 124.5(g). Thus, the precise scope and meaning of the term "modify" as applied to a PSD permit is not clear from the Part 124 regulations.

In the absence of controlling regulations, the EPA views the modification of a PSD permit to include material changes to substantive terms and conditions that govern the construction and operation of the source. We do not interpret the term "modify" in this context to include the decision to issue an administrative amendment to extend the deadline for commencing construction under the PSD permit without reconsideration or amendment of the substantive conditions of the permit. Therefore, the EPA has determined that permit extension actions that would simply extend the deadline for commencing construction without reconsideration or amendment of the substantive conditions of the permit are not subject to the procedures in Part 124. We also believe that a public notice-and-comment period for a permit extension request would generally be unnecessary where no re-analysis of substantive PSD permit conditions and terms (such as BACT, air quality impact analysis, or PSD increment analysis) would be conducted, as would likely be the case for a first permit extension request. However, the EPA (or the delegated permitting authority) retains the discretion to provide for public notice and comment on a case-by-case basis if it determines that doing so would be appropriate.

As stated above, the EPA views the modification of a PSD permit, as that term is used in the Part 124 regulations, to include material changes to substantive terms and conditions that govern the construction and operation of the source. Therefore, when these types of changes to a permit are being analyzed, it would be appropriate to follow the public notice and comment procedures in 40 CFR Part 124.

Once an EPA regional office or delegated permitting authority has issued a permit extension pursuant to 40 CFR 52.21, we encourage the permitting authority to notify the public of the final permit extension decision, particularly when the public expressed significant interest in the underlying PSD permit proceeding that preceded the extension request. The means of notification could include but are not limited to: (1) posting the decision on the permitting authority's website; (2) sending notification letters about the decision to the permit extension applicant and interested parties (e.g., parties who commented on the underlying PSD permit, or litigants if the underlying PSD permit remains under litigation); or (3) publishing a notice of the final decision on the permit extension request in the *Federal Register*.[13]

[13] Footnote 9 above cites an example of a *Federal Register* notice for a permit extension. In the case of an extension issued by a delegated permitting authority, the corresponding EPA regional office would initiate a *Federal Register* notice.

Exhibit 8

From:	Blathras, Constantine
To:	DEQ-AQD-PTIPublicComments
Cc:	Dolehanty, Mary Ann (DEQ); Damico, Genevieve; Smith, Cindy (DEQ); Mitchell, Mark (DEQ); Valenziano, Beth
Subject:	Severstal Dearborn, Inc. (PTI No. 182-05C)
Date:	Monday, March 31, 2014 2:18:36 PM
Attachments:	20140331131139745.pdf

REQUIRED INFO

Your Title (e.g. Mr., Ms., Dr.): Mr.
Your Full Name: Constantine Blathras
Your Company Name (if applicable): United States Environmental Protection Agency
Your Full Mailing Address (include ZIP Code): 77 West Jackson Blvd, Chicago, Illinois 60604

Your Comment: as attached

Note on Submitting Comments: If attaching files, please adhere to the following restrictions or your e-mail will be automatically blocked by the State of Michigan's web security. 1) File attachments are limited to 15 MB maximum. 2) The following file types are not allowed as attachments: EXE and MDB.

OPTIONAL INFO

Your Daytime Phone No. (include area code and extension): 312 886-0671
Your E-Mail Address (provide if you wish to be notified of future updates regarding this application): Blathras.constantine@epa.gov

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAR 3 1 2016

REPLY TO THE ATTENTION OF

Ms. Mary Ann Dolehanty
Permit Section Supervisor
Michigan Department of Environmental Quality
Air Quality Division
P.O. Box 30260
Lansing, Michigan 48909-7760

Dear Ms. Dolehanty:

Thank you for the opportunity for the United States Environmental Protection Agency to provide the Michigan Department of Environmental Quality (MDEQ) our comments on the draft construction permit number 182-05C for Severstal Dearborn LLC (Severstal). Below are our comments:

1) On January 31, 2006, MDEQ issued Permit To Install (PTI) 182-05, which authorized modifications to Severstal's process and process equipment. MDEQ issued this PTI based on calculations that the changes resulted in net emission decreases of Particulate Matter (PM) and oxides of nitrogen. Subsequent stack testing conducted at the Severstal facility has shown that Severstal has violated the PM emission limits from the 2006 permit, and suggests that the emissions factors and Best Available Control Technology (BACT) limits in the initial 2006 permit were not appropriate. The current draft permit, 182-05C, proposes to update the emission factors for PM less than 10 microns and other emission factors used to establish the 2006 permit limits.

   The Michigan State Implementation Plan does not address the issue of revising Prevention of Significant Deterioration (PSD) permits; however, EPA discussed revision of federal PSD permits in a November 19, 1987 memorandum on the Ogden Martin Tulsa Municipal Waste Incinerator (Ogden memo). In that memo, EPA found that it is possible to make revisions to BACT requirements only if the original BACT determination is inappropriate as a result of errors, faulty data, or incorrect assumption in the original permit application; the source was constructed in conformity with the permit; and the source has investigated and is taking all available options to reduce emissions but cannot comply with the permit limits. *See also* March 3, 2014 letter from Kate Kelly, EPA, Region 10, to Stuart Clark of the Washington State Department of Ecology. The Ogden memo further states that "[a]ny time a permit limit founded in BACT is being considered for revision, a corresponding reevaluation (or reopening) of the original BACT determination is necessary.... [W]here the source is already operating, certain retrofit costs and other costs associated with an already existing facility may be considered." Ogden memo at 2. However, "the BACT analysis considers current

technology and requirements while weighing the additional retrofit costs and other costs associated with an already existing facility." *Id.* at 3.

Based upon the application and associated documentation, EPA believes that Severstal meets the criteria necessary for PSD permit revision. Therefore, MDEQ should reevaluate the BACT determination for any emissions factors or BACT limits that must be revised, taking into account current technology and requirements, as well as retrofit and other cost associated with the fact that Severstal is an already-existing facility.

2) On October 4, 2013, Wayne County, within which the Severstal facility is located, was designated as a nonattainment area for the National Ambient Air Quality Standards for Sulfur Dioxide (SO_2). EPA recommends that this draft permit be issued following the underlying applicable requirements currently in place for Wayne County if the permitting action is a major modification for SO_2 under nonattainment New Source Review.

3) The draft permit requires that if the permittee does not install a bag leak detection system, then it is required to install a continuous opacity monitoring system (See pages 19, 29, 57, 62, and 74). EPA recommends the use of a continuous opacity monitoring system in conjunction with a bag leak detection system due to the historic violations occurring at this facility and being addressed by the MDEQ consent decree order 6-2006, (see below). The continuous opacity monitor assures that the particulate matter emission limits are being met, whereas, the bag leak detection system assures the integrity of the control device.

4) The draft permit references certain permit terms and conditions that are a result of a MDEQ consent order 6-2006. EPA recommends that MDEQ include the consent order as part of the fact sheet public record since this document is the basis of those applicable draft permit conditions. Additionally, if the consent order's condition terms expire, please include the expiration dates of these conditions in the draft permit.

5) On pages 13 and 70 of the draft permit, condition II. Material limits 1. Iron processing has a testing/monitoring method that is not relevant to the calculating iron processing and production levels. Please correct the draft permit for the relevant citations for testing/monitoring methods appropriate to the permit condition.

We would like to thank you again for working with us in making sure that these issues were resolved in a timely manner. If you have any further questions, please feel free to contact Constantine Blathras, of my staff, at (312) 886-0671.

Sincerely,

Genevieve Damico

Genevieve Damico
Chief
Air Permits Section