
OLSON, BZDOK & HOWARD



September 27, 2016

VIA FEDEX OVERNIGHT

Administrator Gina McCarthy
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

ATTORNEYS

PARTNERS:

James M. Olson
Christopher M. Bzdok
Scott W. Howard
Jeffrey L. Jocks
Ross A. Hammersley
Kate Redman

OF COUNSEL:

William Rastetter
Michael H. Dettmer
Lawrence I. McKay III
Joan S. McKay

RE: Petition to Object to Proposed Amendment of a State Title V
Operating Permit
Permit Number: V: 2016- _____
Our File No. 5355.05

Dear Administrator McCarthy:

Enclosed please find our Petition to Object to Proposed Amendment of a
State Title V Operating Permit for permit number V:2016- _____ and a disc
containing all exhibits.

We are submitting this Petition on behalf of South Dearborn
Environmental Improvement Association, Inc, Great Lakes Environmental Law
Center, and the Sierra Club.

Thank you for your careful consideration of this Petition.

Sincerely,

Christopher M. Bzdok
chris@envlaw.com

Tracy Jane Andrews
tjandrews@ymail.com

TRAVERSE CITY:
420 E. Front Street
Traverse City
Michigan 49686
231.946.0044
envlaw.com

FRANKFORT:
427 Main Street
PO Box 1782
Frankfort
Michigan 49635
231.352.4412

TJA/knf
Enclosures (Petition and disc)
xc:
Lynn Fiedler, MDEQ
Nicholas Kohlhas, AK Steel Dearborn Works
cc via email only:
Neil Gordon (gordonn1@michigan.gov)
Adam Hall (ahall@fbtlaw.com)
William C. Schaefer (wschaefer@driggerschultz.com)
Barbara Urlaub (burlaub@driggerschultz.com)
Kasey Barton (barton.kasey@epa.gov)

Certificate of Service


I, Tracy Jane Andrews, hereby certify that on September 27, 2016 the foregoing **Petition to Object to Proposed Amendment of a State Title V Operating Permit along with Exhibits 1-37 (on disc)**, was served via FedEx Overnight service upon the following:

Administrator Gina McCarthy
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Lynn Fiedler, Chief Air Quality Div.
Michigan Dept. of Environmental Quality
Constitution Hall, 2nd Floor South Tower
525 W. Allegan Street
Lansing, MI 48933

Nicholas Kohlhas, General Manager
AK Steel Dearborn Works
4001 Miller Road
Dearborn, MI 48120

I declare that the above statement is true to the best of my information, knowledge and belief.



Tracy Jane Andrews

SUBSCRIBED and SWORN to me on September 27, 2016.

KIMBERLY FLYNN
Notary Public, State of Michigan
County of Grand Traverse
My Commission Expires Jan. 11, 2019
Acting in the County of Gr. Traverse



Kimberly Flynn
Notary Public, Grand Traverse County
My Commission Expires: January 11, 2019

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

IN THE MATTER OF)	
AK Steel Dearborn Works)	
)	
Permit No. MI-ROP-A8640.2016a)	PETITION TO OBJECT TO PROPOSED
)	AMENDMENT OF A STATE TITLE V
)	OPERATING PERMIT
Proposed for Issuances by the)	
Michigan Department of)	
Environmental Quality,)	Petition Number: V: 2016-_____
Air Quality Division)	
_____)	

Pursuant to Section 505(b)(2) of the Clean Air Act, 40 CFR § 70.8(d), and Michigan Department of Environmental Quality (DEQ) Rule 336.1214(8), South Dearborn Environmental Improvement Association (SDEIA), Great Lakes Environmental Law Center (GLELC), and Sierra Club (collectively, "Citizens Groups"), hereby petition the Administrator of the U.S. Environmental Protection Agency (EPA) to object to the Michigan Department of Environmental Quality's (MDEQ) proposed amendment of the Title V operating permit (known in Michigan as a Renewable Operating Permit or ROP) for the AK Steel Dearborn Works facility located in Wayne County, Michigan. See **Exhibit 1**, MDEQ Proposed Permit No. MI-ROP-A8640-2016a together with MDEQ Staff Report.

The Administrator must object to the amendment of the operating permit because the proposed amendment does not comply with the Clean Air Act (Act) in three distinct ways: (1) the permit amendment has not be reviewed under, and does not apply, current standards and regulations of the Act, but instead was "grandfathered" under 2007 standards; (2) the permit amendment authorizes the future operation of a blast furnace that does not currently exist; and (3) no agency has undertaken the required Environmental Justice analysis to consider the impact of the permit's emissions increases on protected communities.

I. INTRODUCTION

AK Steel Dearborn Works¹ is an integrated steel manufacturing plant located in Dearborn, Wayne County, Michigan. The mill consists of buildings, processes, operations, and equipment spread across 350 acres. The core of its operations, and particularly relevant to this Petition, are the B and C Blast Furnaces, which turn iron ore into molten iron, and a Basic Oxygen Furnace, which turns the molten iron into steel. The steel mill is a major stationary

¹ During much of the timeframe relevant to this Petition, the facility that is the subject of this Petition was owned by Severstal Dearborn, LLC, and the facility was referred to as the Severstal facility. On September 16, 2014, AK Steel Corporation purchased the entire membership interest in a company called Severstal Dearborn, LLC, and changed the name of the company to AK Steel Dearborn, LLC. Because the company and facility were referred to throughout the record as Severstal, we maintain that convention in this Petition, in order to minimize confusion.

source within the meaning of 40 CFR § 52.21(b)(1)(i)(a) and a major emitting facility within the meaning of Section 169(1) of the Act, 42 U.S.C § 7479(1).

The Citizens Groups request EPA object to the proposed amendment of the company's Title V permit because the proposed amendment would authorize significant increases in emissions from the facility and is contrary to the Act's New Source Review (NSR) and Prevention of Significant Deterioration (PSD) programs. The increased emissions result in part from MDEQ's decision to "grandfather" the company's application and apply outdated air quality standards that are insufficient to protect public health, instead of current standards and regulations. In addition, the amendment proposes to allow the future operation of the B-Blast Furnace, which has been inoperable following an explosion in January 2008, without requiring a new preconstruction permit prior to its reconstruction. Finally, both MDEQ and EPA have failed to consider the required Environmental Justice considerations – *i.e.*, the disparate impact on nearby protected populations – prior to increasing the permitted emissions from the facility.

II. PETITIONERS

SDEIA is a Michigan non-profit corporation incorporated by residents of the South End neighborhood of Dearborn in order to assist in representing the residents of that community in their ongoing efforts to improve its environment and public health.

The GLELC is a Michigan nonprofit organization founded to protect the world's greatest freshwater resource and the communities that depend on it. Based in Detroit, the GLELC has a board and staff of dedicated and innovative environmental attorneys to address our most pressing environmental challenges. The GLELC was also founded on the idea that law students can and must play a significant role in shaping the future of environmental law.

The Sierra Club is a national nonprofit organization with 67 chapters and over 635,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Michigan Chapter of the Sierra Club has approximately 18,500 members.

III. PROCEDURAL BACKGROUND

This Petition involves MDEQ's proposal to amend AK Steel's Title V operating permit to significantly increase permitted emissions limits. Specifically, MDEQ proposes to incorporate into the operating permit the terms of a 2014 pre-construction permit known as MDEQ Permit To Install (PTI) 182-05C.

MDEQ initially issued a preconstruction permit (PTI 182-05) to Severstal in January 2006, which allowed Severstal to increase its steel production at the facility. That permit also required the installation of a baghouse for emissions control at the C Blast Furnace and another baghouse as secondary emissions control at the Basic Oxygen Furnace. The original preconstruction permit (PTI 182-05) contained a specific emissions limitation for each pollutant emitted from each modified emissions unit at the facility, as well as each upstream and downstream emissions units affected by the increased production.

The original preconstruction permit was amended once in 2006, and again in 2007, to modify equipment or processes. Together, the increased steel production and new emissions control devices permitted by the PTI 182-05 trilogy resulted in a net decrease in particulate emissions, compared to Severstal's documented 2001-2002 emissions, but a significant increase in sulfur dioxide and carbon monoxide emissions.

Severstal commenced the construction permitted by the PTI 182-05 trilogy in the spring of 2006, and it began operation of the modified equipment in October 2007. In 2008 and 2009, Severstal performed stack tests required by the preconstruction permit, and the results showed some emissions exceeding the permit limits. On February 24, 2009, MDEQ issued a violation notice to Severstal on the basis of these stack tests. In response, Severstal proposed to come into compliance by increasing the emissions limits of its permit.² MDEQ initially resisted Severstal's proposal, but eventually agreed after extensive intervention by the Michigan Economic Development Corporation (MEDC).

After years of negotiation between Severstal, MDEQ, and MEDC, in February 2014, MDEQ informed the public that it proposed to amend the company's preconstruction permit (the PTI 185-05 trilogy) to increase the emissions limits.³ MDEQ stated in the February 2014 public information documents that it would apply grandfathering to the permit, and that the sulfur dioxide emissions should be evaluated "as if the area were still in attainment," instead of under its actual, nonattainment status.⁴

The Citizen Groups objected to these decisions, and so did EPA. Specifically, on March 31, 2014, the Citizen Groups, along with many other organizations and individuals, submitted details comments regarding MDEQ's proposal to amend the Severstal plant permit.⁵ The objections raised in this petition were raised with reasonable specificity in the comment letters. In its comments, EPA stated, among other things, that the permit revision be issued "following the underlying applicable requirements currently in place for Wayne County if the permitting action is a major modification for SO₂ under nonattainment New Source Review."⁶

MDEQ issued the permit, PTI 182-05(C), on May 12, 2014, without amending the permit to address these concerns. The Citizen Groups appealed that decision, and that appeal remains pending.⁷

On June 14, 2016, MDEQ submitted to EPA a proposed amendment to the company's operating permit, which would incorporate the terms of PTI 182-05(C).⁸ EPA apparently did not

² March 27, 2009, letter from J. Earle (Severstal) to B. Sia (MDEQ), p. 6 (Ex 2).

³ MDEQ Public Participation Documents, Feb. 12, 2014 (Ex 3).

⁴ *Id.* pp. 2, 9, 11; *see also* MDEQ Response to Public Comments, p. 27 (Ex 4)

⁵ SDEIA Comments (Ex 5 & Ex 36); Comments from Great Lakes Environmental Law Center and Sierra Club (Ex 6).

⁶ EPA Comments (Ex 9).

⁷ The Citizens Groups filed the administrative appeal of the amended permit to install, PTI 182-05C, in Wayne County Circuit Court on July 10, 2014. AK Steel appealed an interlocutory decision of the Circuit Court to the Michigan Court of Appeals, which affirmed the Circuit Court decision. *SDEIA et al v. DEQ and AK Steel*, __ Mich. App. __, __N.W.2d __, 2016 Mich. App. LEXIS 1331 (July 12, 2016). AK Steel and DEQ sought reconsideration of that decision, which was denied August 24, 2016. AK Steel has indicated that it or MDEQ may seek leave to appeal that decision from the Michigan Supreme Court. The deadline within which to seek leave has not yet passed.

object to the proposed amendment. To date, MDEQ has not taken final action on its proposal to amend the company's operating permit.⁹ This Petition to Object is timely filed within 60 days of the conclusion of EPA's review period and apparent decision not to raise objections.

IV. LEGAL STANDARDS

The Clean Air Act is a comprehensive regulatory scheme developed by Congress to prevent and control air pollution. See 42 U.S.C. § 7401. Under the Act, EPA establishes national air quality standards for various pollutants and works with the states to achieve those standards. See, e.g., *id.* §§ 7409-7410. In 1990, Congress added Title V to the Act and created a national permitting program. See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 501-507, 104 Stat. 2399, 2635-48 (codified at 42 U.S.C. §§ 7661-7661f (2000)).

Federal regulations adopted pursuant to Title V of the CAA require that facilities subject to Title V permitting requirements must obtain a permit that "assures compliance by the source with all applicable requirements." 40 C.F.R. § 70.1 (b); see also Mich. Admin. Code R. 336.1213(2) ("Each renewable operating permit shall contain emission limits and standards, including operational requirements and limits that ensure compliance with all applicable requirements at the time of permit issuance."). Applicable requirements include, among others, the requirement to obtain a preconstruction permit that complies with applicable preconstruction review requirements under the CAA, EPA regulations, and state implementation plans ("SIPs"). 40 C.F.R. § 70.2. Title V permit applications must disclose all applicable requirements and any violations at the facility. 42 U.S.C. § 7661b(b); 40 C.F.R. §§ 70.5(c)(4)(i), (5), (8); Mich. Admin. Code R. 336.1212. If a facility is in violation of an applicable requirement at the time that it receives an operating permit, the permit must include a compliance schedule. 42 U.S.C. §§ 7661b(b)(1), 7661(3). The MDEQ is authorized to issue an administrative amendment to a Title V permit that incorporates the requirements from "preconstruction review permits authorized under an EPA-approved program". 40 C.F.R. 70.7(d)(1)(v); Mich. Admin. Code R. 336.1216(1)(a)(v).

Where a state or local permitting authority issues a Title V operating permit, EPA will object if the permit is not in compliance with any applicable requirements under C.F.R. Part 70. 40 C.F.R. § 70.8(c). If the EPA does not object, "any person may petition the Administrator within 60 days after the expiration of the Administrator's 45-day review period to make such objection." 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). The Administrator "shall issue an objection ... if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the CAA]." 42 U.S.C. § 7661d(b)(2); see also 40 C.F.R. § 70.8(c)(1); *N.Y. Public Interest Group (NYPIRG) v. Whitman*, 321 F.3d 316, 333 n. 11 (2nd Cir. 2003). The Administrator must grant or deny a petition to object within 60 days of its filing. 42 U.S.C. § 7661(b)(2). While the burden is on the petitioner to demonstrate to EPA that a Title V Permit is deficient, *Sierra Club v. Johnson*, 541 F.3d 1257, 1266-67 (11th Cir. 2008), once such

⁸ MDEQ Staff Report (Ex 1).

⁹ MDEQ Title V Renewable Operating Permit (ROP) Public Notice Documents, available at: http://www.deq.state.mi.us/aps/downloads/rop/pub_ntce/ROP_Public_Notice.pdf. Last checked Sept. 27, 2016.

a burden has been met, EPA is required to object to the permit. *NYPIRG v. Whitman*, 321 F.3d at 332-34.

V. OBJECTIONS

A. The proposed amendment permits emissions increases without applying the Act's current standards and regulations.

The proposal to amend the company's Title V permit to incorporate the terms of PTI 182-05C is unlawful because PTI 182-05C authorized emissions increases without applying current standards and regulations. Instead, PTI 182-05C applied the regulations as they were in 2007, and permitted the facility to increase its emissions limits based on the then-current standards. There is no authority under the Act to waive the legal requirements in effect at the time an agency issues a permit. Therefore, there is no authority for the Title V permit to incorporate the invalid terms of PTI 182-05C.

1. MDEQ did not subject the underlying permit to current legal requirements.

One of the key issues discussed during the negotiations preceding the issuance of PTI 182-05C 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."¹⁰ The main benefits of grandfathering identified 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.¹¹
- Grandfathering would help Severstal to avoid new requirements for sulfur dioxide. At the time of the Analysis, the area was expected to be designated nonattainment for sulfur dioxide, which in fact occurred in 2013. As a result, facilities that emit sulfur dioxide are required to install state-of-the-art pollution control equipment to meet the "lowest achievable emission rate" (LAER) standard, and to seek "offsets" to its emissions from other polluters.¹² Even before the nonattainment designation, Severstal recognized it could not obtain a permit to emit sulfur dioxide without meeting LAER, because the sulfur dioxide concentration in the air was already too high.¹³

¹⁰ Sept. 12, 2012, letter from M. Szymanski (Severstal) and J. Earl (Severstal) to J. Sygo (MDEQ) and V. Hellwig (MDEQ), at pp. 4-7 (Ex 7, "Grandfathering Analysis"). This document is not confidential, although it is so marked.

¹¹ *Id.*

¹² *Id.* p. 6.

¹³ At the time of the Grandfathering Analysis, Wayne County was in nonattainment for fine particulates (PM_{2.5}). Because SO₂ is a "precursor" to PM_{2.5}, DEQ was required to apply stringent nonattainment standards to SO₂ emissions in PM_{2.5} areas, even though the area was not yet in nonattainment for SO₂. 73 Fed Reg 28321 (May 15, 2008).

- Grandfathering would turn the increase in allowed emissions into a "decrease." This was because MDEQ would not compare the emissions allowed by the existing permit to those allowed by the new permit. Instead, MDEQ would compare the plant's pre-2007 permit emissions – before pollution control equipment was installed – to the emissions allowed by the new permit.¹⁴ Turning an increase into a decrease avoided several rules that may have required Severstal to install new pollution control equipment.¹⁵

MDEQ and Severstal did not disagree about *whether* to apply grandfathering, but they disagreed about *how* to apply it. Discussions at meetings facilitated by the Michigan Economic Development Corporation ("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.¹⁶ After years of negotiation, when DEQ finally informed the public about the proposed permit application, it stated 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.¹⁷

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.¹⁸

The Citizens Groups objected to grandfathering in their written comments.¹⁹ 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.²⁰

In its response to comments, DEQ said it would not apply current law to the new permit – even though it permitted increased emissions – because Severstal was not installing new equipment.²¹ DEQ's Air Quality Division Chief described his conversation with EPA staff:

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 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 [Record of Decision] would reflect this. George commented that they have been requested by Rep. Talib and another Rep. to take over the permitting for Severstal. Of course they have no authority to do so.

¹⁴ See MDEQ Fact Sheet, Table 5 (Ex 3)

¹⁵ SDEIA Comments, pp. 19-20 (Ex 5).

¹⁶ 09-14-12 meeting notes, p. 7 (Ex 8)

¹⁷ MDEQ Fact Sheet, p. 2 (Ex 3).

¹⁸ MDEQ Response to Comments, p. 27 (Ex 4).

¹⁹ SDEIA Comments, pp. 17-43 (Ex 5).

²⁰ EPA Comment Letter (Ex 9).

²¹ MDEQ Response to Comments, pp. 26-27 (Ex 4).

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.²²

MDEQ issued the permit on May 12, 2014, without applying the air quality standards and regulations in effect at the time of its permitting decision. The parties repeatedly referred to “grandfathering” during the permitting process, and what the agency did here falls squarely within any reasonable definition of the term “grandfather” in this context.²³ MDEQ did not, for example, consider greenhouse gas emissions, despite the fact that greenhouse gases became subject to PSD regulations and BACT requirements in 2011.²⁴ Most importantly, although the facility is located in an area designated as “nonattainment” for the sulfur dioxide NAAQS, as of October 4, 2013,²⁵ MDEQ did not apply the stringent standards applicable to nonattainment areas before issuing PTI 182-05C.²⁶ Further, the area was designated “nonattainment” for PM_{2.5} from July 2005 until August 2013,²⁷ and regulations effective since July 2008 treat SO₂ (and also NO_x) as precursors for PM_{2.5}, so that significant increases in either contaminant also triggered the nonattainment new source review, which MDEQ did not apply.²⁸

In short, MDEQ issued PTI 182-05C and permitted significant emissions increases at the facility without applying current Clean Air Act standards and requirements.

2. A preconstruction permit must apply all legal requirements in effect at the time of a permitting decision.

Under the plain language of MDEQ’s rules and the Clean Air Act, a preconstruction permit must comply with all current air quality standards.²⁹ Mich. Admin. Rule 207 states that MDEQ “shall deny an application for a permit to install if . . . [t]he equipment for which the permit is sought will violate the applicable requirements of the clean air act . . .”³⁰ MDEQ must also deny an application for a permit to install if “[o]peration of the equipment for which the permit is sought will interfere with the attainment or maintenance of the air quality standard for any air

²² May 7, 2014, Hellwig email (Ex 10).

²³ See Grandfathering Analysis at p. 4 (Ex 7); Sept. 11, 2012, email from A. Banninga (MEDC) to multiple recipients (Ex 11); Sept. 12, 2012, Table (Ex 12) (“DEQ does not believe that Severstal loses grandfathering benefits if the application is withdrawn.”).

²⁴ MDEQ Fact Sheet, p. 15 (Ex 3); MDEQ Response to Comments, pp. 29-30 (Ex 4); 75 Fed.Reg. 31514, 31593 (June 3, 2010) (EPA rule subjecting sources of greenhouse gases, if not operating under a permit issued before January 2, 2011, to new regulation under the Clean Air Act); see also U.S. EPA, *Clean Air Act Permitting for Greenhouse Gas Emissions – Final Rules: FACT SHEET*.

²⁵ 78 Fed Reg 47191 (Aug 5, 2013).

²⁶ MDEQ Response to Comments, pp. 32, 49 (Ex 4).

²⁷ 70 Fed Reg 944 (Jan. 5, 2005) (designated attainment for PM_{2.5}); 78 Fed Reg 53272 (Aug 29, 2013) (re-designated attainment for PM_{2.5}).

²⁸ 73 Fed Reg 28321 (May 16, 2008).

²⁹ Mich. Admin. Code R 336.1207(1); 42 U.S.C. §§ 7475(a), 7410(j); 40 C.F.R. § 52.21(k); see also *Sierra Club v US Env’tl Prot Agency*, 762 F.3d 971, 983 (9th Cir. 2014) (“*Avena*”) (preconstruction permits issued under Title I of Clean Air Act must ensure compliance with all air quality regulations in effect at time of permitting decision).

³⁰ Mich. Admin. Code R. 336.1207(1)(c) (emphasis added).

contaminant.³¹ Typically, an agency must apply the law in effect at the time of its permitting decision.³² Therefore, in the absence of any clear statutory or regulatory language to the contrary, “the applicable requirements of the clean air act” and “the air quality standard[s]” are the requirements and standards existing at the time of issuance of the permit.

(a) The Avenal decision prohibits grandfathering.

The United States Court of Appeals for the Ninth Circuit, in *Sierra Club v Environmental Protection Agency* (“*Avenal*”), relied on exactly this rationale in vacating an EPA-issued pre-construction permit under the Clean Air Act.³³ That case involved an application for a permit to construct a new power plant and, contrary to the statute requiring EPA to act on the application within one year, EPA took over three years to issue the permit. During those three years, EPA tightened multiple air quality regulations affecting the standards and technology requirements applicable to construction permits. In light of the length of time it took to issue the permit, EPA concluded that it could apply the standards and regulations in place when the applicant submitted its application, rather than those in place at the time it issued the permit.

The Ninth Circuit disagreed. Primarily relying on the applicable statutory text and federal implementing regulations, the court in *Avenal* concluded that the Clean Air Act “clearly requires EPA to apply the regulations in effect” at the time of the permitting decision.³⁴ The court distinguished the situation in which “grandfathering of pending permit applications was explicitly built into the new regulations” – which was permissible – from an “ad hoc” approach in which applications were grandfathered on a case by case basis – which was not.³⁵ 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. The foregoing conclusion ends the inquiry.”³⁶

By grandfathering the permit application in *Avenal* – that is, by waiving various Clean Air Act standards that had been finalized after the permit application was submitted but before the permit was issued – EPA exceeded its authority in an exercise of “unbounded discretion.”³⁷ Indeed, the *Avenal* court specifically rejected EPA’s argument that its grandfathering was warranted by a protracted, years-long permitting process during which significant new regulations were finalized:

[T]he parties’ protracted negotiation of the Clean Air Act’s requirements – frustrating and burdensome though it may have been . . . – does not endow the EPA with authority simply to waive the newly effective regulations on an ad hoc basis by ‘rewriting unambiguous statutory terms’ in order to serve its own ‘bureaucratic policy goals.’³⁸

³¹ *Id.* 336.1207(1)(b) (emphasis added).

³² See *Ziffrin v. United States*, 318 U.S. 73, 78 (1943) (agency required to apply law existing at time of permit decision rather than law existing at time of permit application).

³³ See *Avenal*, *supra*.

³⁴ 762 F. 3d at 979.

³⁵ *Id.* at 983.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 982.

As the *Avenal* court noted, EPA itself has generally interpreted the Clean Air Act as foreclosing the waiver of existing laws and regulations in force at the time of permitting decisions.³⁹

Both the company and MDEQ have attempted to differentiate the *Avenal* case on the basis it dealt with a facility seeking a *new* permit, not a facility seeking to *update* an issued permit at a facility where the work is already complete. But *Avenal* does not support this distinction: it says the agency is to apply the law in effect at the time of permit decision. The time of the permit decision is independent of the time of the facility modification. This distinction is thus without merit.

Moreover, their argument that this was a permit revision or amendment, as opposed to a new permit, raises significant other problems with PTI 182-05C. MDEQ lacks authority under state or federal law to revise, amend, or otherwise open and redo a permit to install. To the extent the *Avenal* court was concerned about EPA exercising “unbounded discretion” by waiving certain legal requirements, MDEQ was even further untethered when it effectively re-wrote PTI 182-05 retroactively. In cases presenting the exact scenario presented by the Severstal matter – *i.e.*, post-permit evidence indicated process or process equipment is not performing in accordance with the emissions limits in PTI 182-05B, then Michigan law allows for revocation and resubmission of a permit:

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.⁴⁰

The existence of a clearly-applicable rule raises the further question why MDEQ chose to not apply this rule and instead make up a new procedure to retroactively amend an existing permit. Moreover, had MDEQ applied this otherwise clearly applicable rule, there can be no question that current standards would apply to the permit application. By creating an alternative path – *i.e.*, revising the prior permit – MDEQ and the company intentionally attempted to avoid that situation. But *Avenal* confirms that – even if their process were appropriate (which the Citizens Groups contest) – their attempted end-run around application of current standards is not permissible, either.

³⁹ *Id.* at 979. See also *In re Shell Gulf of Mexico, Inc, Shell Offshore, Inc (Frontier Discovery Drilling Unit)*, OCS Appeal Nos 10-01 through 10-04, at pp. 109, 148-161 (EAB, Dec. 30, 2010) (NAAQS finalized after permit application must be considered on remand); see also Memorandum from Stephen D. Page, EPA Office of Air Quality Planning and Standards, *Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards* (April 1, 2010) (“Page Memo”), available at http://cdn.ca9.uscourts.gov/datastore/library/2014/09/10/Sierra_Ambient.pdf (stating that “EPA generally interprets the [Clean Air Act] and EPA’s . . . permitting program regulations to require that each final . . . permit decision reflect consideration of any NAAQS that is in effect at the time the permitting authority issues a final permit.”).

⁴⁰ Mich. Admin. Code R 336.1201(8).

(b) Other cited authority does not support grandfathering.

Leading up to the decision to issue PTI 182-05C, in support of its decision to grandfather the permit, MDEQ relied on the *Avenal* EPA appeals board decision, which Ninth Circuit's vacated in *Avenal*.⁴¹ Therefore, the appeals board decision does not save MDEQ's decision to grandfather the facility from post-2007 developments; but rather confirms its invalidity.

The only other material that MDEQ may have referenced in grandfathering the permit consists of two EPA documents: a memorandum addressing a site-specific query, and a draft EPA guidance policy.⁴² Severstal cited these in its Grandfathering Analysis.⁴³ These two documents are essentially internal memos; they are not administrative rules and do not have the force of law.⁴⁴ Moreover, *Avenal* effectively vacated these guidance documents when it held that the Clean Air Act does not allow *ad hoc* grandfathering in the absence of a formal administrative rule. Moreover, in this matter, they are otherwise unavailing on their merits.

(i) *Ogden Martin Memo*:

The Ogden Martin Memo is a 1987 EPA memorandum regarding BACT issues at a municipal waste incinerator facility. Severstal erroneously argued this 3-page memo "provides clear support" for merely "correcting" an existing permit to install and thereby ignoring intervening changes in the law and regulation governing air pollution.⁴⁵

First, the Ogden Martin Memo begins with a statement of its limited scope. Indeed, it first observes that "no final [EPA] policy exists as yet on the more general issue of PSD permit modifications regardless of the status of the source (operating, under construction, etc.) or of the type or magnitude of the change requested."⁴⁶ The memo goes on to say that it "addresses only BACT changes for this source and operating sources in similar situations."⁴⁷ No matter the weight to be assigned to this guidance document, therefore, it can only be read as applying to BACT changes for sources that fall into a narrow category. The Ogden Martin Memo says nothing about intervening changes in NAAQS standards, newly regulated pollutants, or nonattainment designations – all of which are involved in the permit action here.

Second, the Ogden Martin Memo states that a permit revision is only warranted if reducing emissions down to the currently-permitted level cannot reasonably be achieved.⁴⁸ And even if it cannot lower emissions to the permitted level, a source must, "at a minimum,"

⁴¹ Sept. 12, 2012, Table (Ex 12) ("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."). The 9th Circuit *Avenal* decision had not been issued at the time of the September 12, 2012, Letter and the Table analyzing it (Ex 12).

⁴² See Grandfathering Analysis, p. 4 (Ex 7) (citing the EPA "Ogden Martin Memo" (November 19, 1987), and EPA Memorandum, *Revised Draft Policy on Permit Modifications and Extensions* (July 5, 1985)).

⁴³ *Id.*

⁴⁴ *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).

⁴⁵ Grandfathering Analysis, p. 5 (Ex 7) (citing Ogden Martin Memo).

⁴⁶ Ogden Martin Memo at p 1.

⁴⁷ *Id.*

⁴⁸ *Id.* at p 2.

“investigate and report to the permitting agency all available options to reduce emissions to a lower (if not the permitted) level.”⁴⁹

This prerequisite for a permit revision under the Ogden Martin Memo was not satisfied here. When it first notified MDEQ of the failure to meet emission limits in PTI 182-05B in 2008, the company proposed changing its permits emissions limits.⁵⁰ A few months later, in response to MDEQ's violation notice, the company committed to reviewing “economically feasible” and “appropriate” technology, but suggested throughout that permit revisions may be needed.⁵¹ As late as August 2012, MDEQ staff observed that Severstal had not seriously undertaken a review of potential additional emission control options, such as a lime injection system at the facility's ESP.⁵² In addition, Severstal had admitted “a total disregard for the maintenance of the ESP and for the air quality requirements,” and MDEQ staff noted that “with proper operation and maintenance, the refurbishing of the ESP now underway would never have been needed.”⁵³ Given the company's compliance history (discussed further below), it does not appear serious efforts were made by the company “to reduce emissions to a lower (if not the permitted) level.”⁵⁴ There is nothing in the record in this matter indicating that changes in production levels, in order to meet permitted emissions limits, were ever discussed. Stack testing was conducted at less-than-full production, and the destruction of the B Blast Furnace (discussed below) limited production levels, but there is no evidence of attempting to meet permit limits in PTI 182-05B through different production levels or permanent retirement of the B-Blast Furnace. And although the company identified several possible technologies, it quickly dismissed all of them. MDEQ did not condition the permit on the company's use of any technologies or production limits to meet the emissions limits in its permit.⁵⁵

Third, any increase in permitted emissions potentially allowable under the Ogden Martin Memo would have to be capped at the facility's actual tested emissions. Indeed, the source in that case “requested that the permit be revised to reflect the actual measured emissions” of two relevant pollutants. In this case, for many pollutants, the permit substantially increased Severstal's permitted emissions at many emission units beyond the stack testing limits:⁵⁶

Pollutant	Source	Current Emissions Limit		Stack Test Result	Proposed New Emissions Limit		Increase (tpy, except * lb/yr)
		lb/hr	tpy	lb/hr	lb/hr	tpy	
Particulate Matter (PM)	B Blast Furnace Stoves						

⁴⁹ *Id.*

⁵⁰ Nov. 17, 2008, letter from J. Earle (Severstal) to K. Kajiya-Mills (MDEQ), p. 3 (Ex 13).

⁵¹ March 27, 2009, letter from J. Earle (Severstal) to B. Sia (MDEQ) (Ex 2).

⁵² Fiedler email in Q&A w MEDC (Ex 36 – SDEIA Comments, Ex. 23).

⁵³ *Id.*

⁵⁴ Ogden Martin Memo at p 2.

⁵⁵ May 19, 2009, Technology Evaluation (Ex 14); Aug. 4, 2009, Revised Technology Evaluation (Ex 15); Jan. 8, 2010, DEQ Letter (Ex 16); Jan. 13, 2010, Technology Evaluation Addendum (Ex 17).

⁵⁶ All data is from MDEQ Fact Sheet, Tables 1, 3, 6 (Ex 3).

	B Blast Furnace Casthouse Baghouse	5.59	24.48		6.1	26.72	2.23
	C Blast Furnace Stoves	14.6	63.95		6.98	30.57	-33.38
	C Blast Furnace Casthouse Baghouse	11.17	48.92		13.87	60.75	11.83
	Desulfurization Baghouse	2.09	9.15		7.7	33.73	24.57
	BOF ESP	50.94	223.12		62.6	274.19	51.07
	BOF Roof Monitor		15.88			61.90	46.02
	BOF Baghouse	7.75	33.95		15.6	68.33	34.38
	Combined B/C Roof Monitors		19.93			87.41	67.48
	TOTAL INCREASED PM:						
PM10	B BF Casthouse Baghouse	2.85	12.48		7.6	33.29	20.81
	C BF Stoves	14.16	62.02	9.78	19.72	86.37	24.35
	C BP Casthouse Baghouse	5.7	24.97	8.13	18.24	79.89	54.93
	Relating Roof Monitor		3.22			3.60	0.38
	Desulfurization baghouse	1.55	6.79	1.48	3.6	15.77	8.98
	Desulfurization roof monitor		6.88		24.38	106.78	99.90
	BOF ESP	37.7	165.13	18.19	47.5	208.05	42.92
	BOF Roof (fugitives)		7.25			28.30	21.05
	BOF Baghouse	3.35	14.67	6.56	17.71	77.57	62.90
	Combined B/C BF casthouse fugitives (roof monitors)		10.16			15.04	4.88
	Combined B/C stoves	14.16	62.02		27.84	121.94	59.92
TOTAL INCREASED PM10:							401.02

Carbon monoxide (CO)	BOF ESP	3,057.40	13391.41	3237.00	7048.00	30870.24	17478.83
Sulfur dioxide (SO₂)	B-BF Casthouse Baghouse	6.91	30.27		71.9	314.92	284.66
	B-BF Stove	70.9	310.54		38.75	169.73	-140.82
	C-BF stove	275.1	1204.94		193.6	847.97	-356.97
	C-BF casthouse baghouse	23.03	100.87	128.28	179.65	786.87	686.00
	TOTAL INCREASED SO₂:						
NOx	C-BF casthouse baghouse	2.45	10.73		5.46	23.91	13.18
Volatile Organic Compounds (VOC)	C-BF casthouse baghouse	6.77	29.65	4.22	9.92	43.45	13.80
	Combined B/C BF baghouses		27.00			49.42	22.42
	TOTAL INCREASED VOC:						
Lead (Pb)	C-BF casthouse baghouse	0.00015		0.001	0.0077		0.00755*
	Desulfurization baghouse	0.000278		0.000539	0.0016		0.001322*
	Combined B/C BF Casthouse baghouses	0.000223			0.00753		0.007307*
	Combined B/C Roof monitors	0.000087			0.0064		0.006313*
	TOTAL INCREASED Pb (lb/hr):						
Manganese (Mn)	C-BF casthouse baghouse	0.00256		0.01897	0.042		0.03944*
	Desulfurization baghouse	0.00064		0.00395	0.013		0.01236*
	Combined B/C Furnace Roof Monitors	0.006			0.0448		0.0388*
	Combined B/C Furnace baghouses	0.00385			0.0597		0.05585*
	TOTAL INCREASED Mn (lb/hr):						

Mercury (Hg)	C-BF stoves	0.000414		0.000929	0.003		0.002586
	BOF baghouse & ESP	0.0125			0.0086		-0.0039
	TOTAL INCREASED Hg (lb/hr):						

Even assuming the permitted emissions increases are due to stack tests being performed while the emission unit was running at less than full production capacity, a new problem thereby arises: namely, it is patently unreasonable to assume the pollution control equipment will be capable of increasing its efficiency in lockstep with production rates. If stack tests were performed at less than full production capacity, in other words, the basic raw data underlying the proposed emission limit increases may once again be flawed, and may once again make it impossible for Severstal to meet even the new limitations when operating at full capacity. Whatever authority may be contemplated by the Ogden Martin Memo, it cannot be used to raise emission limits to a higher-than-necessary level to accommodate the requested production level as a result of improving economic conditions. That is especially true where, as here, more than a decade elapsed since many of the emissions limits were established.

Fourth, the Ogden Martin Memo states that it "is applicable only if EPA finds that the BACT determination in the original permit is inappropriate." Severstal's request to change the emission limits in its permit was that "the emission factors used in the development of [the existing permit's] emission limits did not accurately reflect the emissions associated with Severstal's operations."⁵⁷ Apparently, the emissions factors used to create the limits of the prior permit "were based on the best available data at the time."⁵⁸ Whether or not that data ultimately turned out not to be "representative of Severstal's operations as anticipated," the mere fact that emissions factor data may have evolved and/or improved since issuance of the existing permit does not justify a retroactive, grandfathered permit correction. Indeed, emissions factor data for any number of sources and/or pollutants are likely to improve over time, and if such data improvement were to allow retroactive increases in the emission limits of existing permits, the goals and purpose of the Clean Air Act and Part 55 would be substantially frustrated.

Fifth, a key precondition of the permit "revision" in the Ogden Martin case was that alleged flaws in the original permit resulted from "errors, faulty data, or incorrect assumption[s]."⁵⁹ Along the same principle, in establishing the baseline emissions for permit analysis, Mich. Admin. Rule 1801 prohibits an applicant from relying on "inadequate information for determining annual emissions, in tons per year."⁶⁰ This requires that applicants maintain records on their emissions and operations, to determine actual emissions during the baseline period.⁶¹ Furthermore, under a virtually identical federal provision, EPA prohibits applicants

⁵⁷ MDEQ Fact Sheet, at p 2 (Ex 3).

⁵⁸ *Id.*

⁵⁹ Ogden Martin Memo at 2.

⁶⁰ Mich. Admin. R 336.2801(b)(ii)(E).

⁶¹ EPA, *Technical Support Document (TSD) for the Prevention of Significant Deterioration and Nonattainment Area New Source Review Regulations* (Nov. 2002), at p. 1-2-22 (hereinafter, TSD for PSD and NNSR Regulations).

from using "information derived from the records of other facilities. There are generally sufficient differences between the way individual facilities operate, even when they are similar source types with similar operating characteristics."⁶²

Contrary to these requirements, Severstal did not generate emissions data from many key pollution stacks until after it completed the 2007 upgrades. Instead of relying on actual emissions data, Severstal did exactly what EPA prohibits: it relied on other facility's data. Severstal assumed its manganese emissions from the C Blast Furnace baghouse would mirror those from another facility's Electric Arc Furnace, which uses entirely different raw materials.⁶³ Severstal also used the sulfur dioxide emission limit from another facility, which has a different system to capture slag emissions than Severstal.⁶⁴ Severstal also based its emissions factors on faulty assumptions about its own processes. For example, Severstal used the carbon monoxide (CO) emissions data from a single test run, which apparently failed to capture "the oxygen blow portion of the steelmaking heat, which is where all the CO is generated".⁶⁵ The mercury emissions limit traces to Severstal's 2004 testing error that over-calculated captured mercury, and also failed to consider condensable particulates.⁶⁶

In addition, and of particular concern here, the particulate matter, manganese, and lead exceedances trace largely to Severstal's refusal to acknowledge – until the stack tests – the extent of condensable particulates emitted by its processes.⁶⁷ Both MDEQ and some Petitioners notified Severstal of the likelihood of high condensable emissions during the PTI 182-05B permitting process.⁶⁸ At an August 2012 meeting, after Severstal's legal counsel, Scott Dismukes, argued the "condensibles" error was a "mutual mistake – few if any thought condensibles", MDEQ's Chief of the Air Quality Division, Vincent "Vince" Hellwig "vehemently disagreed and noted we thought there would be condensibles".⁶⁹

⁶² *Id.*

⁶³ Permit to Install Application Summary for 182-05C, at p. 19 of 60 (Ex 18).

⁶⁴ May 19, 2009, Technology Review, p. 14 (Ex 14); Mar. 27, 2009, letter from J. Earl (Severstal) to B. Sia (MDEQ), at p. 5) (Ex 2) (explaining Severstal's errors in developing the SO₂ emissions limit for the C-Blast Furnace baghouse).

⁶⁵ MDEQ Fact Sheet, Table 1 (Ex 3) ("Initial limits based on emission factor that did not fully capture the oxygen blow portion of the steelmaking heats, which is where all the CO is generated"); Mar. 27, 2009, letter from J. Earl (Severstal) to B. Sia (MDEQ), at pp. 3-4 (Ex 2) (explaining Severstal's errors in developing the CO emission limit for the ESP); Revised Technical Evaluation, Jan. 13, 2010, at p.10 (Ex 17).

⁶⁶ Permit to Install Application Summary for 182-05C, at p. 20 of 60 (Ex 18).

⁶⁷ Nov. 17, 2008, letter from J. Earl (Severstal) to K. Kajiya-Mills (MDEQ)) (Ex 19); Permit to Install Application Summary for 182-05C, at Pages 14, 19 (Ex 18); MDEQ Fact Sheet, Table 1 (Ex 3) (providing justification for emissions limits increases).

⁶⁸ See Aug. 12, 2012, Notes by MDEQ Dolehanty (Ex 20) ("condensibles – we told them our position is that those were always intended to be included, contrary to what co. says"); Permit to Install Application Summary for 182-05C, at p. 14 of 60 (Ex 18) (MDEQ put Severstal on notice, during the permitting process for PTI 182-05B, of the requirement to control condensable particulates); April 13, 2010, email from M. Dolehanty (MDEQ) to J. Earl (Severstal)) (Ex 21) ("In addition, we do not agree with your characterization that the condensable fraction of PM₁₀ was not included in the original permit emission rates. PM₁₀ is defined as both filterable and condensable and any permit issued by the [MDEQ] that includes a PM₁₀ is intended to include both fractions."); SDEIA Comments, Attachment Ex 13 (Ex 36) (2004-12-05 Sagady Comments on Draft PTI for Modification of SNA Steel Mill Facility, Dearborn, at pp. 2-3).

⁶⁹ Aug. 22, 2012, handwritten meeting notes, at p. 4 (Ex 22).

Thus, any errors or flaws in PTI 182-05B were the result of the company's unreasonable assumptions and willful errors. The Ogden Martin Memo does not authorize an after-the-fact opportunity to correct a self-imposed situation, as was done in this case.

Sixth, even if a permit "correction" were appropriate under the authority of the Ogden Martin Memo, nothing in that guidance document suggests that legal and regulatory grandfathering is appropriate when analyzing the correction. Although the Memo does say that reevaluating an existing permit to install "may be warranted" in limited circumstances⁷⁰ – indeed, even Severstal acknowledged the memo simply says there "can be" such a reevaluation⁷¹ – the memo says nothing about legal or regulatory "grandfathering" during such a reevaluation. To the contrary, the Memo says that "[i]n the process of reevaluating BACT, current BACT technology and requirements must be considered."⁷² Moreover, "[i]f 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"⁷³ As Severstal has recognized, its operations involve the emission of several pollutants – including PM_{2.5} and greenhouse gases – that are "newly regulated" since the issuance of the company's permit. Rather than exempting Severstal from current legal and regulatory developments under the Clean Air Act and Part 55, the Ogden Martin Memo actually requires those developments to be considered in any revision to the permit. Because the revised preconstruction permit increased a number of permitted emissions limits, it was required to address all PSD requirements that may be affected, and no legal or regulatory grandfathering is allowed.

For all these reasons, the Ogden Martin Memo does not support or authorize the increased emissions authorized by PTI 182-05C.

(ii) *EPA's 1985 Revised Draft Policy on Permit Modifications and Extensions:*

The second guidance document cited by Severstal in the permit revision proceeding, a 1985 EPA memorandum entitled *Revised Draft Guidance on Permit Modifications and Extensions*, provides no more support for a grandfathered permit correction than the Ogden Martin Memo.

First, the director of EPA's Office of Air Quality Planning and Standards explained in a January 2014 guidance document that the 1985 *Revised Draft Policy* (and a subsequent update in 1991) "were never issued in final form" and did not establish a controlling interpretation of the federal regulations they analyzed.⁷⁴ According to this more recent guidance, which specifically

⁷⁰ Ogden Martin Memo, at p. 2. The Ogden Memo also clearly states that enforcement actions, rather than permit revisions, "have and will serve as the primary mechanism in ensuring compliance."

⁷¹ Grandfathering Analysis, p 5 (Ex 7).

⁷² Ogden Martin Memo, at p. 2.

⁷³ *Id.* at p. 3.

⁷⁴ Page Memo at pp. 2-3. Even if the 1985 *Draft Policy* were still considered "controlling" guidance in EPA's parlance, it is well established that EPA guidance documents are not legally binding on state permitting authorities. See, e.g., Page Memo at p. 1 n.1. Thus MDEQ certainly

addresses construction commencement extensions, EPA apparently believes that, for requests to extend commencement deadlines, its 1985 *Revised Draft Policy* should be replaced with a case-by-case approach. This guidance shows that EPA disfavors grandfathering where a source would be exempt from intervening nonattainment designations, as in this case.⁷⁵ By extension, the 1985 *Revised Draft Policy* could not shield Severstal from obtaining a major NNSR permit for sulfur dioxide or otherwise from current law and regulations governing the permitting process.

Second – even assuming that the 1985 *Revised Draft Policy* had ever been finalized by EPA and was controlling – the policy is limited, on its face, to preconstruction permits originally issued by EPA. As for permits issued by state agencies like MDEQ, under an approved SIP, the *Revised Draft Policy* states that it is intended to “be used as a model for States developing their own permit revision processes”⁷⁶ In the absence of promulgating its own policy, therefore, MDEQ could not act under the authority of this thirty-year-old draft guidance that has since been disclaimed by the federal agency that drafted it.

Third, the company incorrectly cited the document. In its Grandfathering Analysis, Severstal pointed to page 15 of the document for the proposition that “[p]ermit 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.”⁷⁷ But page 15 of the *Revised Draft Policy* clearly applies to proposed permit changes that “qualify[] as a revision.” Page 12 of the *Revised Draft Policy*, meanwhile, specifically defines the term “revision” as, “in the case of operating sources” like Severstal, “most changes involving construction or changes in the method of operation of a source, including control equipment, that do not produce a net significant emissions increase.”⁷⁸ The *Revised Draft Policy* repeatedly makes clear, in fact, that permit changes or revisions that would result in a significant emissions increase are considered “major modifications” and treated as such for purposes of regulatory and legal review.⁷⁹ And even more broadly, PTI 182-05C did not seem to involve any of the triggering conditions referenced by the 1985 *Revised Draft Policy* for proceeding with a “permit revision” as opposed to simply applying for a new permit.⁸⁰

In discussing EPA’s 1985 *Revised Draft Policy*, Severstal cited a “Permit Summary Sheet” issued by the Kansas Department of Health and Environment in 2010.⁸¹ Although it is true that the Kansas agency issued a 2010 permit to install for a power plant expansion, and relied in part on the *Revised Draft Policy*, the circumstances of that case were quite different from those at issue here. The Kansas agency relied on the *Revised Draft Policy* as authority for prospectively contemplating potential changes to emission limits when issuing the original

cannot derive authority, to the extent it is not provided by clear statutory language elsewhere, from a non-binding federal guidance document.

⁷⁵ See Page Memo at p 7.

⁷⁶ 1985 *Revised Draft Policy* at pp 6-7, p 2.

⁷⁷ Grandfathering Analysis, p. 5 (Ex 7).

⁷⁸ 1985 *Revised Draft Policy*, p 12 (emphasis in original).

⁷⁹ See *id.* at pp. 1-2, 5-6, 12, 17.

⁸⁰ See *id.* at p 1.

⁸¹ Grandfathering Analysis, p. 5, n.3 (Ex 7).

permit.⁸² In other words, there is no indication that the Kansas agency ever made an actual determination that a retroactive permit revision was necessary or even allowed under the *Revised Draft Policy*. In fact, the Kansas Supreme Court vacated this permit in *Sierra Club v Moser*, holding that the Kansas agency had improperly approved the permit without first considering the most current Clean Air Act regulations pertaining to SO₂ emissions.⁸³

Severstal also cited a permit evaluation for a project in California, but that citation was similarly misplaced. The California permit in question did not involve an increase in permitted emissions of any PSD pollutant, and the *Revised Draft Policy* was cited simply for its discussion of “administrative changes.”⁸⁴ Nothing in the California permit involved or discussed the propriety of allowing a permit “correction” – much less regulatory grandfathering – where a facility seeks to increase permitted emissions of multiple PSD pollutants at multiple emission units by significant amounts.

In sum, there is no authority authorizing the issuance of a revised permit to increase emissions limits without applying current regulations and standards in the Clean Air Act.

(c) Current preconstruction permit regulations are “applicable requirements.”

MDEQ and AK Steel have argued that *current* permit to install rules would not be “applicable requirements” to the underlying permit to install because *current* permit to install rules are only triggered by a *current* facility modification. Because Severstal’s facility modifications were completed in 2007, their logic goes, the 2007 rules and regulations continue to apply. There are several problems with this argument.

First, there is no authority for the theory that a different set of regulations applies when MDEQ issues a retroactive permit to install *after* the facility has already been modified, versus when MDEQ issues a permit to install *before* the facility has been modified. In other words, there is no authority that distinguishes between amending (or revising or modifying) a preconstruction permit versus issuing an original preconstruction permit. Michigan and federal law recognize a single set of rules for “permits to install” (preconstruction) permits.

Second, if the current preconstruction permit rules are only triggered by an application that proposes a “facility modification,” then the permit to install application for PTI 182-05C – which did not propose a “facility modification” – would not trigger any permit to install rules at all. Under their logic, it wouldn’t matter which era of rules (2007 or 2014) were it issue because the permit application did not include the triggering “facility modification” for either vintage.

Moreover, there are no provisions, requirements, or standards in Michigan or federal law applicable to “permit modifications” (or amendments, or revisions), independent of (or after) “facility modifications.” As such, this premise would wholly untether MDEQ from *any* rules or requirements when issuing “permit modifications.” Without any promulgated rules or requirements, the result would be (and was here) arbitrary decision-making for “permit

⁸² Sunflower Permit Summary Sheet, p. 5, (Ex 23).

⁸³ *Sierra Club v Moser*, 298 Kan 22; 310 P.3d 360 (2013).

⁸⁴ Los Medanos Permit Evaluation, p. 26. (Ex 24).

modifications.”⁸⁵ For example, MDEQ could (and did) decide to apply *some* post-2007 regulations (e.g., the 2010 Sulfur Dioxide NAAQS), but not others (e.g., non-attainment technology standards for sulfur dioxide).

In short, neither state nor federal law authorized MDEQ to ignore interim air quality and scientific improvements while “updating” a permit to reflect interim emissions data. The plain language and intent of the Clean Air Act requires compliance with regulations in place when the permit is issued. MDEQ issued PTI 182-05C in 2014, so it must apply 2014 regulations and standards to the application. As the Supreme Court explained in *Ziffrin v. United States*, allowing agencies to apply any law other than the law in effect at the time of their permitting decisions would lead to absurd and unlawful results; any other approach is directly “contrary to [] existing legislation.”⁸⁶ By applying 2007 standards, MDEQ followed a legal fiction that allowed Severstal to circumvent seven years of substantial developments in air pollution regulation. Because PTI 182-05C did not comply with legal standards in effect at the time it was issued, it is contrary to the requirements in the Clean Air Act, and EPA must object to the amendment of the ROP to incorporate its terms.

3. As a result of exempting the permit from then-current (2014) requirements, the permit is not protective of public health.

MDEQ’s fiction has significant adverse impacts on air quality in the already overburdened communities surrounding Severstal’s facility. EPA determined that a part of Wayne County is non-attainment for the 1-hour sulfur dioxide NAAQS. In its response to comments on PTI 182-05C, MDEQ acknowledged that this nonattainment designation “poses a public health concern because SO₂ contributes to asthma and other lung diseases.”⁸⁷ In the same response, however, MDEQ stated that it is addressing this health concern by “acting on a proposed permit that meets all applicable rules and regulations, including those that are designed to provide public health protection”⁸⁸ But MDEQ did not review Severstal’s permit application in light of all “applicable” rules and regulations for sulfur dioxide because it exempted Severstal from compliance with many of them through grandfathering. MDEQ also did not subjected the permit to rules and regulations “designed to provide public health.” After all, the basis for the revised 1-hour sulfur dioxide NAAQS was a determination by EPA that the old standard did not protect public health sufficiently.⁸⁹ By failing to review Severstal’s permit according to the new sulfur dioxide NAAQS, MDEQ not only issued a permit that is “contrary to existing legislation,” but it issued a permit that does not adequately protect public health.

MDEQ unlawfully decided that Severstal’s sulfur dioxide should “be evaluated as if the area were still in attainment.”⁹⁰ EPA has explained that the “area designation in effect on the

⁸⁵ See *Avenal, supra*, **Error! Main Document Only**. 762 F3d at 983 (where not authorized by formal administrative rules, EPA decision to grandfather an air pollution permit was unlawful exercise of “unbounded discretion.”).

⁸⁶ 318 U.S. at 78.

⁸⁷ MDEQ Response to Comments, p. 23 (Ex 4).

⁸⁸ *Id.*

⁸⁹ See Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed Reg 35520, 35521 (June 22, 2010) (“EPA is making revisions to the primary SO₂ NAAQS so the standards are requisite to protect public health with an adequate margin of safety.” (emphasis added)).

⁹⁰ MDEQ Response to Comments, p. 28 (Ex 4).

date of permit issuance by the reviewing agency determines which regulations [PSD or NNSR] apply to that permit," and that "a PSD permit for a pollutant cannot be issued in an area that is designated nonattainment for that pollutant."⁹¹ EPA also explained that, where a PSD permit is issued prior to a nonattainment designation, "no extension [of that permit] would be appropriate where the area has been designated nonattainment following permit issuance."⁹² Thus, the designation of parts of Wayne County as nonattainment for sulfur dioxide prevented permit action unless the permit is subjected to the analyses, regulations, and standards applicable to nonattainment areas. Consistent with this requirement, EPA specifically recommended that PTI 182-05C "be issued following the underlying applicable [nonattainment] requirements currently in place for Wayne County."⁹³ MDEQ nevertheless exempted Severstal's permit from those standards.

The agency's failure to apply proper NNSR regulations is important for three reasons. First, a source seeking to increase its emissions of a pollutant for which an area has been designated nonattainment must obtain offsets from other sources of that pollutant such that there is a net decrease in emissions of the pollutant within the nonattainment area. MDEQ did not require Severstal to obtain any such offset.

Second, sources seeking to significantly increase emissions of a pollutant in nonattainment areas must demonstrate compliance with the "lowest achievable emissions rate," (LAER),⁹⁴ which is more stringent than the "best available control technology" (BACT) applicable in attainment areas.⁹⁵ Severstal asserted in its Grandfathering Analysis (discussed above) that it could not meet current sulfur dioxide requirements without installing new pollution control equipment. Severstal asserted that "A demonstration of compliance with the new 1-hour SO₂ 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 SO₂ currently exceeds the SO₂ NAAQS, a cumulative air quality impact analysis to demonstrate that the source's emissions, when combined with the background SO₂ 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.⁹⁶

⁹¹ U.S. EPA Memorandum, *New Source Review (NSR) Program Transitional Guidance* (March 11, 1991), 7 (emphasis in original), available at: <http://www.epa.gov/NSR/ttnnsr01/gen/nstrans.pdf>; see also Page Memo at 2 (Clean Air Act permits required to reflect any NAAQS in effect at time of permit issuance); EPA, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed Reg 31514, 31593 (June 3, 2010) (same).

⁹² *Id.* at 8.

⁹³ EPA 2012 Comment Letter (Ex 9).

⁹⁴ See generally Mich. Admin. Code R 336.2901.

⁹⁵ See generally *id.* 336.2801.

⁹⁶ Severstal's Grandfathering Analysis, p. 6 (emphasis added) (Ex 7).

Ultimately, MDEQ determined that "SO2 [emissions] remained above the significant level in the updated netting analysis," but it required Severstal only to update its BACT analysis.⁹⁷ The BACT analysis concluded that "additional control remained uneconomical," and therefore MDEQ did not require any additional sulfur dioxide controls. If MDEQ had applied LAER, as it was obligated to do, Severstal could not consider the costs of additional controls.

Third, the NNSR regulations prohibit the issuance of a permit in a nonattainment area to an operator who is not in already compliance with its existing permits. The Clean Air Act and MDEQ Rule 1908 both explicitly provide that an NNSR permit may only be issued if where the facility is "in compliance" with all applicable local, state, and federal air quality standards.⁹⁸

At the time MDEQ issued the amended permit to install, Severstal had multiple unresolved violation notices, and thousands of violations.⁹⁹

Date	Allegation	Period of violation
8/12/2008	Fall-out in Melvindale	2 days
10/6/2008	C-Blast Furnace roof monitor – opacity violation	1 instance cited
2/24/2009	BOF ESP Stack – stack test failure, carbon monoxide emissions	Continuous, through at least May 12, 2014 ¹⁰⁰
	BOF Baghouse Stack - stack test failure, PM10 emissions	
	C-Blast Furnace Baghouse Stack - stack test failure, sulfur dioxide emissions	
	C-Blast Furnace Baghouse Stack - stack test failure, PM10 emissions	
	C-Blast Furnace Stove Stack - stack test failure, mercury emissions	
4/23/2009	C-Blast Furnace roof monitor – opacity violation	1 instance cited
7/17/2009	Fall-out at the Ford Plant parking lot	1 day
10/7/2009	Blast Furnace Slag Pit – visible smoke	1 day
	Blast Furnace casthouse – opacity violation	1 instance cited
10/28/2009	Fallout in Melvindale	1 day
1/6/2010	C-Blast Furnace bleeder stack – opacity violation	1 instance cited
2/11/2010	C-Blast Furnace roof monitor – opacity violation	1 instance cited
5/18/2010	Fallout	4 days
8/18/2010	Fallout	1 day
10/28/2010	Blast Furnace Slag Pits – opacity violation	1 instance cited

⁹⁷ MDEQ Response to Comments, p. 27 (Ex 4).

⁹⁸ 42 USC §7503(a)(3); see also Mich. Admin. Code R 336.2908.

⁹⁹ A copy of each of the Violation Notices is attached as Ex 25. All these violation notices were issued by MDEQ, except for the two noted – June 15, 2012, and March 5, 2013 – which were issued by EPA.

¹⁰⁰ These stack tests identified that equipment, including the two baghouses installed in 2006, did not meet permit limits.

	BOF ESP - opacity violation	1 instance cited
	BOF roof monitors – excessive deviations, no root cause identified	1 instance cited
11/22/2010	Fallout from blast furnace slag pits	6 days
12/10/2010	Fallout	5 days
	Slag Pit opacity violation	1 instance cited
1/5/2011	C-Blast Furnace Cast House baghouse stack – stack test failure, manganese & lead emissions	Continuous from at least August 2010 until at least May 2014. ¹⁰¹
	Desulfurization baghouse stack - stack test failure, manganese and lead emissions	Continuous from at least August 2010 until April 8, 2013. ¹⁰²
3/15/2011	BOF Opacity Monitor - failure to continuously monitor	Opacity monitor down 38.6% of the operating time for the fourth quarter of 2010
4/28/2011	BOF ESP Stack - opacity violations	Multiple exceedances
	BOF B Vessel - opacity violations	Multiple exceedances
	BOF Roof Monitors - opacity violations	Multiple exceedances
	Steel manufacturing facility & process - excessive deviations	Multiple exceedances
8/16/2011	C-BF bleeder stack - opacity violations	1 instance cited
	C-BF Stove stack - opacity violations	1 instance cited
9/20/2011	Fallout on Luther, Oakwood, Colonial, Ormond Streets	1 day, 8 complaints received in multiple locations
10/24/2011	Fallout in Oakwood Heights - inadequate response to prior Violation Notice	1 instances cited
12/8/2011	Desulfurization baghouse inspections - failure to conduct monthly inspections since June 2010	Multiple
	Desulfurization baghouse - failure to present records of bag leak detection alarms and corrective action	Multiple
	BOF - failure to provide consecutive monthly inspections of secondary emissions baghouse; some weekly records not provided	Multiple
	BOF- failure to present bag leak detection alarms and corrective action	Multiple

¹⁰¹ *Id.*

¹⁰² Stack testing in April 2013 demonstrated potential compliance at the C-Blast Furnace baghouse and Basic Oxygen Furnace Desulfurization baghouse for manganese and lead. Whether that stack testing is reliable and demonstrative of operations is discussed further below.

	BOF- failure to properly maintain records of fragmented scrap usage	Multiple
	BOF- failed to reduce oxygen blow rate as required	Multiple
3/29/2012	BOF B-Vessel - opacity violations	1 instance cited
	BOF ESP Stack - opacity violations	1 instance cited
	BOF ESP Stack - failure to properly install, maintain, and operate the ESP	Continuous
5/1/2012	BOF ESP Stack - opacity violations	2 instances cited
	BOF ESP Stack - failure to properly install, maintain, and operate the ESP	Continuous
5/10/2012	BOF ESP Stack - opacity violations	2 instances cited
	BOF ESP Stack - failure to properly install, maintain, and operate the ESP	Continuous
5/16/2012	BOF Roof Monitors - opacity violations	1 instance cited
	BOF ESP Stack - opacity violations	1 instance cited
	BOF ESP Stack - failure to properly install, maintain, and operate the ESP	Continuous
6/15/2012 (EPA)	BOF ESP Stack - opacity violations	6 instances cited
	C-BF bleeder stack - opacity violations	2 instances cited
	C-BF East Taphole roof monitor - opacity violations	2 instances cited
	C-BF Stove stack - opacity violations	1 instance cited
	BOF B Vessel - opacity violations	2 instances cited
	BOF Roof Monitor - opacity violation	1 instance cited
	Fallout events	13 instances cited
	Slag pit opacity violation	1 instance cited
6/29/2012	BOF Roof Monitor - opacity violation	1 instance cited
	BOF ESP Stack - opacity violations	4 instances cited
	BOF ESP Stack - failure to properly install, maintain, and operate the ESP	Continuous
7/19/2012	BOF Roof Monitor - opacity violation	1 instance cited
7/31/2012	BOF Roof Monitor - opacity violation	1 instance cited
	BOF ESP Stack - opacity violation	1 instance cited
	BOF ESP Stack - failure to properly install, maintain, and operate the ESP	Continuous
8/14/2012	BOF Roof Monitor - opacity violation	1 instance cited
9/13/2012	Desulfurization slag handling – opacity violation	2 instances cited
9/13/2012	BOF ESP Stack - opacity violation	1 instance cited
	BOF ESP Stack - Failure to properly install, maintain, and operate the ESP	Continuous
9/27/2012	New Pickle Line - Failure to record pickle line scrubber data once per shift	Daily, Aug 2011 to Sept 5 2012

	New Pickle Line - Failure to inspect pickle line scrubbers no less than every 3 months since August 2011	Multiple
	New Pickle Line - Failure to complete inspection of pickle line scrubber, including visual inspection of scrubber	Multiple
	New Pickle Line - Failure to calibrate monitoring devices at least yearly	Multiple
	New Pickle Line Tank Farm - Failure to keep daily record of liquid flow to pickle line tank farm scrubber	Daily, August 2011 to September 5, 2012
	New Pickle Line Tank Farm- Failure to inspect tank farm & scrubber semi-annually	Multiple
	New Pickle Line Tank Farm – Failure to perform complete inspection of tank farm, including loading operations & closed vent system	1 instance cited
	New Pickle Line Tank Farm - Failure to implement an OMP for pickle line & tank farm	Continuous
	Scale Breaker Baghouse - Failure to conduct quarterly inspections, failure to maintain baghouse due to lack of inspections	Multiple
11/14/2012	Ladle Refining Facility - Failure to conduct monthly baghouse inspections at each baghouse	Multiple
	Ladle Refining Facility - Failure to properly install, operating & maintain bag leak detection system	Continuous
	Ladle Refining Facility - failure to report violations in the semi-annual deviation reports	Multiple
	Ladle Refining Facility - Stack test failure for particulate matter	Continuous from July 14, 2012, until September 25, 2012 ¹⁰³
	Ladle Refining Facility - Failure to maintain, install, operate baghouses - failed stack testing	Continuous
	BOF Shop - Stack test failure for Manganese and Lead from ESP and BOF baghouse	Continuous, from July 2012 until December 11, 2012 ¹⁰⁴
	BOF Shop - failure to install, maintain and operate the ESP and baghouse	Continuous
	BOF Roof Monitor - opacity violation	3 instances cited
11/29/2012	Fallout on Luther and Heidt Streets	2 days
1/24/2013	Second Notice – follow-up on November 14, 2012, Violation Notice – insufficient response received	No new violations cited

¹⁰³ Stack testing on September 25 to 27, 2012, demonstrated compliance at this source.

¹⁰⁴ Stack testing on December 11, 2012, demonstrated compliance at this source, though as discussed below, the ESP stack testing may be unreliable.

1/30/2013	BOF ESP Stack - Failure to maintain records of continuous compliance due to lack of monthly inspections	Multiple, between January 2010 and August 2012
	BOF ESP Stack - Failure to perform preventative maintenance	Multiple, between January 2010 and August 2012
	BOF ESP Stack - failure to maintain records to demonstrate continuous compliance with rules due to lack of monthly inspection records	Multiple
	BOF ESP Stack - Failure to maintain & operate ESP & capture system	Multiple
	BOF ESP - opacity violations; failure to operate and maintain the ESP; failure to report deviations at the ESP	1,528 hourly exceedances from January to September 2012
	Facility-wide - Failure to report missed inspection from Jan 2010 to Aug 2012	Multiple
	Facility-wide - Failure to submit semi-annual report	1 instance cited
	Facility-wide - Failure to include deviations from 10% opacity at stack test in April 2012 in semi-annual report	2 instances cited
	Facility-wide - Failure to establish operating limit parameters that represent performance of the capture system for the secondary baghouse.	1 instance cited
	BOF Roof Monitor - Failure to report opacity violation	1 instance cited
3/5/2013 (EPA)	BOF ESP Stack -opacity violations	1,660 occasions from June 14 to September 12, 2012
3/8/2013	Hot dip galvanizing line - Stack test failure - Ammonia	Continuous, December 2012, through March 12, 2013. ¹⁰⁵
	Hot dip galvanizing line - failure to timely complete NOx emissions testing	1 instance cited
3/27/2013	BOF ESP – opacity violation	1 instance cited
	BOF ESP – Failure to maintain and operate ESP	Multiple
5/13/2013	C-BF Casthouse - Failure to inspect	Multiple, January to December 2012
	C-BF Casthouse -Failure to maintain records	Multiple, January to December 2012
	C-BF Casthouse -Failure to continuously monitor & record damper position and fan amps	Continuous, January to December 2012
	C-BF Casthouse - Failure to operate property - no inspections	Continuous, January to December 2012
4/15/2014	No. 1 Ladle Refining - Failure to maintain when baghouse pressure drops	Multiple

¹⁰⁵ Stack testing on March 12, 2013, demonstrated potential compliance at this source.

	No. 2 Ladle Refining - Failure to maintain when baghouse pressure drops	Multiple
	C-BF Casthouse - Failure to inspect & preventative maintenance, and to maintain records of compliance	Multiple, January to December 2013
	C-BF Casthouse - Failure to maintain baghouse system	Multiple, January to December 2013
	C-BF Casthouse - Failure to meting operating limits for dampers and fan amps as specified in the O&M Plan	Multiple, January to December 2013
	BOF ESP - Failure to perform all inspections, and to maintain records to demonstrate compliance	Multiple, July to December 2013
	BOF ESP - Failure to maintain and operate ESP	Multiple, January to December 2013
	BOF ESP - opacity violations	221 exceedances from January to December 2013
	BOF BOF secondary baghouse - Failure to perform all inspections	Multiple, January to December 2013
	BOF ESP - Failure to conduct COMS quarterly maintenance	1 instance cited
	BOF secondary baghouse - Failure to property maintain and operate the baghouse	Multiple, January to December 2013
	BOF secondary baghouse - failure to meet operating limits for dampers and fan speeds as required in the O&M plan	Multiple, January to December 2013
	Facility-wide - fugitive dust violations of opacity limits	Multiple, January to December 2013
9/2/2014	Fallout resulting from beaching of molten iron	1 instance cited
10/27/2014	BOF ESP – opacity violations	28 instances cited between January and June, 2014
	BOF ESP – Failure to inspect & preventative maintenance, and to property maintain & operate	Multiple, January to June 2014
	BOF Secondary Baghouse – Failure to maintain records of inspections, and to maintain records of inspections	Multiple, January to June 2014
	BOF Secondary Baghouse – Failure to conduct new performance test prior to changing capture system	Multiple, January to June 2014

MDEQ cited Severstal for a series of violations less than a month before it issued the amended permit.¹⁰⁶ The vast majority of the violations were referred to EPA for enforcement, and an enforcement case was open at the time the permit was issued.¹⁰⁷ The violation notices were not “resolved” until a Consent Decree was entered by the United States District Court for

¹⁰⁶ Notice of Violation dated April 15, 2014.

¹⁰⁷ MDEQ Response to Comments, pp. 45-48 (Ex 4) (describing ongoing enforcement proceedings, and lack of civil penalties since 2006).

the Eastern District of Michigan on August 21, 2015.¹⁰⁸ Thus, Severstal was not in compliance, nor under an "order of the department specifying a plan and timetable for compliance" at the time the permit was amended.

Because PTI 182-05C was exempted from current standards and regulations, it does not comply with the Clean Air Act and EPA must object to the issuance of the Title V permit incorporating it terms.

B. The Proposed Amendment does not comply with the Act because it authorizes the operation of the long-defunct B Blast Furnace.

On January 5, 2008, the B Blast Furnace suffered a major explosion that caused extensive damage.¹⁰⁹ Severstal received \$430 million in insurance proceeds to compensate for the damages resulting from the explosion.¹¹⁰ Severstal then estimated that it will cost between \$235 million and \$533 million to replace or rebuild the B Blast Furnace.¹¹¹ Severstal planned for its immediate rebuild, presenting MDEQ with evidence of the redesign, emissions projections, repair costs (over \$236 million), and schedule (commencement of construction in August 2008, with a target start-up date of July 14, 2009, later amended to April 2010).¹¹² Based on that information, in September 2008, MDEQ determined Severstal's planned rebuild would not require a new preconstruction permit.¹¹³

But the rebuild never happened. Severstal had been contemplating taking the B Blast Furnace offline before the explosion,¹¹⁴ so the decision to not rebuild the B Blast Furnace (or the lack of a decision yet to rebuild it) may be attributable to the expense of rebuilding, independent market conditions, or production efficiencies available as a result of the C Blast Furnace rebuild

¹⁰⁸ *United States of America and Michigan Dept. of Environmental Quality v. AK Steel Corp.*, Consent Decree (Civil Action No. 15-CV-11804) (Ex 26). The Citizen Groups objected to the proposed Consent Decree (Ex 27), but the Consent Decree was entered over the objections.

¹⁰⁹ July 25, 2008, letter from Severstal to MDEQ, p. 1 (Ex 28 AR Permit 2).

¹¹⁰ Severstal, *Annual Financial Report* (2009) ("In January 2008, an explosion occurred on one of Severstal Dearborn's furnaces, blast furnace 'B'. Following the accident, Severstal Dearborn ceased blast furnace 'B' operation. Severstal Dearborn is insured against property damage and business interruption with a combined gross coverage of US\$500.0 million, subject to customary deductibles. The business interruption insurance covers fixed costs and loss of profits. The entire amount of the insurance coverage of US\$430.0 million was received in 2008."). See SDEIA Comments, n. 146 (Ex 5).

¹¹¹ See July 25, 2008, email and attachments from Ted Bishop (Severstal) to Teresa Seidel and Bernardo Sia (DEQ) (Attachment B to Siemens proposal) (Ex 29).

¹¹² *Id.*; Aug. 15, 2008, letter from J. Earl (Severstal) to T. Seidel (MDEQ)) (Ex 30).

¹¹³ Sept. 4, 2008, letter from T. Seidel (MDEQ) to J. Earl (Severstal)) (Ex 31) (determination that proposed rebuild of B-Blast Furnace is not subject to new permitting requirements).

¹¹⁴ *Severstal Permit to Install Application for Enhancement of C Blast Furnace* (July 12, 2005) (original application for PTI 182-05) (Severstal contemplating not operating the B Blast Furnace beyond December 2007); MDEQ 2006 Consent Order, ¶ 10(B)(i) (copy at SDEIA Comments, Attachment 38, Ex 36) (Severstal considering complete shut-down of the B Blast Furnace by June 30, 2008).

in 2007.¹¹⁵ Regardless of the reason, however, the B Blast Furnace has not operated or emitted pollutants since 2008.¹¹⁶ The company has not taken steps to rebuild and restart that furnace.¹¹⁷ After now nine years of dormancy, AK Steel cannot rebuild the B Blast Furnace without a new preconstruction permit. PTI 182-05C, and amending the operating permit to incorporate that permit, is invalid to the extent they authorize the furnace's future operation, and accordingly EPA must object to such terms into the amended ROP.¹¹⁸

1. Prior to construction, the B-Blast Furnace requires a new preconstruction permit, issued under current standards.

The restart of a long dormant facility triggers new preconstruction permit requirements when the restart constitutes a major modification, whether by virtue of (a) "a physical change resulting in a significant net emissions increase," or (b) "a change in the method of operation resulting in a significant net increase in emissions."¹¹⁹ As EPA explained in considering whether a plant that had been dormant for 11 years was subject to new permitting standards:

For the last eleven years the Monroe plant has been inoperative. To operate the plant now after such a long period constitutes a change in the method of operation with the meaning of the PSD regulations. The mere fact that the plant is changing from a lengthy "non-operational" and

¹¹⁵ SDEIA Comments, n. 150 (Ex 5) (citing Press Release, *Severstal to Invest Over \$180 Million in Blast Furnace Upgrades; Begins Its 4-Year Modernization Program* (July 14, 2005) ("As a part of the permit application, Severstal reported that it is evaluating the future of operating its smaller 'B' Blast Furnace following the reline of its larger blast furnace. 'With the added production capability of the enhanced 'C' Blast Furnace, the question is simply whether or not the market will support the incremental tonnage produced by our smaller furnace in 2007 and beyond,' said [Ronald J.] Nock, [president and CEO of Severstal].") and Severstal Dearborn Website, *Other Key Information* ("The 'C' Blast Furnace, rebuilt in 2007, utilizes state-of-the-art technologies making it among the most efficient, productive and environmentally friendly blast furnaces in the world"))).

¹¹⁶ According to the Michigan Air Emissions Reporting System (MAERS), there have been no operations or emissions at the B Blast Furnace since 2008, and the 2008 emissions were relatively minor compared to prior years (the furnace ceased operations in January). (Ex 32). See also MDEQ Response to Comments Document, May 12, 2014, p. 57 (Ex 4) (describing demolition and activities to make the site ready for future repair, but noting "[t]he decision-making process on the timing for completion of the repairs to the B Blast Furnace has been influenced by market demand for steel").

¹¹⁷ Severstal MAERS 2008-2012 (Ex 32) (showing no reported emissions from B-Blast Furnace since 2008).

¹¹⁸ May 12, 2014, PTI No. 182-05C; April 15, 2014, email from J. Earl (Severstal) to K. Koster (MDEQ) (Ex 37).

¹¹⁹ *In the matter of Monroe Electric Generating Plant Entergy Louisiana, Inc., Proposed Operating Permit, Petition No. 6-99-2, "Order Partially Granting and Partially Denying Petition for Objection to Permit,"* (June 11, 1999) ("Monroe"); *Communities for a Better Environment v. Cenco Refining, Inc.*, 179 F Supp 2d 1128, 1144 (CD Cal 2001) ("Cenco"); *Supplemental PSD Applicability Determination, Cyprus Casa Grande Corporation Copper Mining and Processing Facilities* (Nov 6, 1987) ("Cyprus Casa Grande"); *Letter from L. Starfield (EPA Region 6) to M. Vickery (TCEQ), re: ASARCO El Paso Cooper Plant Restart* (Feb. 3, 2009) ("ASARCO letter").

“unmanned” condition, to one in which the plant is fully operation, fits the common sense meaning of a “change in the method of operation.”¹²⁰

Similarly, in determining that reactivation of the *Cyprus Casa Grande* processing facility qualified as a major modification (following 10 years of inoperability and months of repairs costing over \$900,000), EPA concluded that the combination of physical and operation changes “constitute[d] a fundamental alteration in the character of the plant, one that is neither everyday nor routine.”¹²¹

Under this authority, a restart of the B Blast Furnace would be subject to new permitting requirements. This is consistent with EPA’s Reactivation Policy, which provides:

A shutdown lasting for two years or more, or resulting in removal of the source from the emissions inventory of the State, should be presumed permanent. The owner or operator proposing to reopen the source would have the burden of showing that the shutdown was not permanent, and of overcoming any presumption that it was.¹²²

Likewise, under Mich. Admin. Rule 201, a new permit would be required for the B Blast Furnace due to the physical destruction of the furnace, and the company’s failure for now over eight years to rebuild it:

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.”), (4) (“If the installation, reconstruction, or relocation of the equipment, for which a permit has been issued, has not commenced within, or has been interrupted for, 18 months, then the permit to install shall become void, unless [there are circumstances inapplicable here].¹²³

Particularly relevant in this case, where there has been a change in attainment status in Wayne County, indefinite construction delays raise concerns about interim regulatory and technology changes:

Time limits prevent companies from sitting on PSD permits for an unreasonably long period of time. Presumably these requirements help ensure that major emitting facilities comply with up-to-date emissions regulations and do not construct today’s facilities with yesterday’s technology.¹²⁴

¹²⁰ *Monroe*, at p. 20.

¹²¹ *Cypress Casa Grande*, at p. 7. See also *Cenco*, 179 F. Supp. 2d at 1144; *ASARCO letter*, *supra*.

¹²² *Reactivation of Noranda Lakeshore Mines’ RLA Plant and PSD Review* (May 27, 1987); see also *Cenco*, 179 F Supp 2d at 1144 (finding the EPA Reactivation Policy “is a permissible and reasonable standard to apply in interpreting the Clean Air Act”).

¹²³ Mich Admin Code R 336.1201(5).

¹²⁴ *Sierra Club v. Franklin County Power of Illinois, LLC*, 546 F 3d 918, 934 (7th Cir. 2008); see also *United States v Pacific Gas & Electric*, 776 F Supp 2d 1007, 1013 (ND Cal 2011).

Any future rebuild or operation of the B Blast Furnace requires a new permit due to the furnace's long dormancy. In fact, the shutdown of the B Blast Furnace is presumptively "permanent" because it has been inoperable for more than two years, and its emissions have been removed from the Michigan air emissions inventory. As such, it is contrary to the Act to authorize the future operation of the B-Blast furnace. Because the proposed amendment of the company's operating permit purports to do that, EPA must object to it.

2. The netting analysis for PTI 182-05C is erroneous because it does not assign zero emissions to the B Blast Furnace.

Because the B Blast Furnace has been inoperable and shut down for years (regardless of whether the company would or could ever bring it back online), it was error to include emissions from that furnace in the netting analysis for PTI 182-05C. By failing to zero out emissions from the B Blast Furnace, the company and MDEQ overstated the emissions reductions and diluted the impact of its emissions increases. Absent an analysis of the emissions increased by PTI 182-05C without the B-Blast Furnace emissions, the application and analyses were incomplete. EPA should object to the proposed amendment of the operating permit on this basis.

The baseline actual emissions from an inactive plant should be zero.¹²⁵ This is so when the plant is permanently shutdown, which is presumed (but rebuttable) after two years of inoperability.¹²⁶ It is also the case when the source is temporarily shut down, if startup would involve substantial changes.¹²⁷ As discussed above, the B Blast Furnace has been inoperable since 2008 and would require complete rebuild to become operational in the future. The company has been reporting "zero" emissions from the B Blast Furnace since 2009, with only minimal emissions in 2008 after it stopped operating in January of that year.¹²⁸ In fact, MDEQ relied on the lack of emissions from the B Blast Furnace in its appeal to EPA to allow the

¹²⁵ See *Cenco*, 179 F Supp. 2d at 1143-44 (concluding that a unit modified after "six years of non-operation" should be compared to a "zero baseline" and explaining that "for a long-dormant facility (at least those shutdown for two years or more), the emissions baseline for determining whether it has undergone an emissions increase subject to NSR will be zero"); *Cyprus Casa Grande* (emissions from a facility that had been shut for 13 years "should be zero."); *Monroe*, at p. 16 ("EPA has made clear that in calculating the net emissions increase for reactivation of long-dormant sources potentially subject to PSD, the source is considered to have zero emissions as its baseline.").

¹²⁶ See *Monroe*, at p 8 ("Shutdowns of more than two years, or that have resulted in the removal of the source from the State's emissions inventory, are presumed to be permanent.").

¹²⁷ *Id.*; see also *Cyprus* (considering the rehabilitation work necessary to make a non-operating plant operable again would be considered a "physical change," and increasing hours of operation from zero for ten years to full operation would be considered a "change in method of operation"); *Cenco*, 179 F Supp 2d at 1144 (proposed startup would trigger new source review because "1) there is not a mere variation in the hours of operation but a fundamental change in the facility's operational status, from six years of non-operation to full operations and 2) the restart will be accompanied by independent physical modifications to the Refinery triggering a comparison of new emissions to the zero baseline.").

¹²⁸ See <http://www.deq.state.mi.us/maers/> for AK Steel facility, for emissions to 2009.

Dearborn area to remain "attainment" for PM2.5.¹²⁹ This is akin to the situation in *Cyprus*, where EPA considered a state's removal of a non-operating source from its air emissions inventory as supporting a conclusion that the facility should be treated as inoperable for purposes of PSD baseline emissions.¹³⁰

Further, it would be speculative and hypothetical to assign future potential emissions and reductions to the B Blast Furnace. As it did with the C Blast Furnace rebuild in 2007, the company may seek to increase the B Blast Furnace capacity as part of an eventual rebuild. These factors render any "future potential emissions" assigned to the B Blast Furnace arbitrary. The B Blast Furnace is not an "emissions unit" because it is shut down, and it does not emit or have the potential to emit any regulated pollutant without a new permit analyzed under current laws and regulations.¹³¹ And as a result, emissions from the B Blast Furnace were incorrectly included in the netting analysis for PTI 182-05C.

Throughout the negotiations and analyses related to PTI 182-05C, neither the company nor MDEQ considered the impact on the netting analysis of the removal of emission attributable to the B Blast Furnace. Regardless of whether the emission increases in PTI 182-05C are netted against the emission limits in PTI 182-05B or against the company's 2001 emissions, this appropriate assignment of zero emissions to the B Blast Furnace has a substantial impact. Without the B Blast Furnace emissions, the emissions levels in PTI 182-05C result in significant increases in PM10, PM2.5, NOx, SO₂, and CO. As a result, a new BACT analysis is required for PM10, PM2.5, NOx, and CO, while LAER is required for SO₂.

For illustration purposes, using the company's Appendix B December 2011 Revised Netting Analysis spreadsheets, the results of netting without the B Blast Furnace are:¹³²

Pollutant	PTI-C Table 5 (tpy)	Significant Increase Threshold	Scenario A ¹³³ with B-BF at zero emissions	Scenario B ¹³⁴ with B-BF at zero emissions
-----------	---------------------	--------------------------------	---	---

¹²⁹ Request to Redesignate to Attainment Status For Both the Annual and 24-Hour PM2.5 NAAQS, including Appendix D (SEMOG, July 5, 2011) (details of Severstal emissions) (Ex 33).

¹³⁰ *Cyprus* at p 3.

¹³¹ Mich Admin Code R 336.2801(r) ("Emissions unit" means any part of a stationary source that emits or would have the potential to emit any regulated new source review pollutant").

¹³² We provide this only as demonstrative of the point that improperly including emissions from the B Blast Furnace has a substantial impact on the netting analysis underlying the Draft Permit. For complete Excel spreadsheets, see Exhibit 45 to SDEIA Comments (Ex 36) (2012-02-02 Appx B Dec 2011 Scenario A 1214 (zero B-BF)) and Exhibit 46 to SDEIA Comments (Ex 36) (2012-02-02 Appx B Dec 2011 Scenario B 1214 (zero B-BF)).

¹³³ Scenario A is based upon a production limit at B furnace of 1,168,000 tpy and the remaining 2,153,500 tpy at C Furnace. Severstal will maintain the combined B/C production limit of 3,321,500 tpy from 182-05B.

¹³⁴ Scenario B is based upon a production limit at C furnace of 2,920,000 tpy and the remaining 401,500 tpy at B Furnace. Severstal will maintain the combined B/C production limit of 3,321,500 tpy from 182-05B.

		(tpy)	(tpy)	(tpy)
PM10	-61.08	15	-16.2	38.92
PM2.5	-10.09	10	14.53	67.86
SO ₂	666.69	40	238	501.46
NOx	33.23	40	84.40	185.88
VOC	36.33	40	20.84	32.40
CO	20,777.23	100	19,691	21,728
Hg	Not provided	n/a	1.63E-02	1.97E-02

MDEQ never required the company to perform a netting analysis without B Blast Furnace emissions, as required by state and federal law. The netting analysis for PTI 182-05C was erroneous, and including the B Blast Furnace emissions and emissions reductions diluted the impact of the proposed emissions increases. As a result, the permit is contrary to the Act and EPA must object to the proposal to amend the Title V permit to incorporate its terms.

C. The proposed permit is contrary to Environmental Justice requirements.

EPA must object to the proposed Title V permit amendment because no agency has analyzed the disproportionate impact of the increased emissions permitted by the preconstruction and operating permits on Michigan's most vulnerable residents. As a result, federal and state environmental justice mandates have not been satisfied, the amendment to the operating permit is not in compliance with law, and EPA must object to it.

1. The facility is located in an Area of Critical Concern for Environmental Justice.

The facility here is adjacent to a Dearborn neighborhood known as the "South End."¹³⁵ The South End neighborhood is 80% Arab-American, and 43% of the population is below the poverty level.¹³⁶ There is an air monitor (the "Dearborn" monitor) in the parking lot of the Salina Elementary School.¹³⁷

¹³⁵ SDEIA Comments, at pp. 53 to 56 (Ex 5).

¹³⁶ *Id.*; see also attachments to SDEIA Comments (Ex 36) (Ex 2 – Census Tract 5735; Ex 3 – CT 5735 Ancestry Report; Ex 4 – CT 5735 Economic Characteristics).

¹³⁷ Attachment 12 to SDEIA Comments (Ex 36) (Ex 12 – 2005 Hopke-Gildemeister, Local sources of fine urban particulate matter in Dearborn, MI); see also *Ambient Air Levels of Manganese in Southeast Michigan: Evaluation and Recommendations by the AQD Manganese Workgroup*, Mar 27, 2012 ("*Manganese Report*"), at p. 19, Fig. 5 (Ex 34) (showing air quality monitors in relation to Severstal)).

Also downwind are the neighborhoods of Southwest Detroit, including the 48217 ZIP code,¹³⁸ which EPA designated as an Environmental Justice area due to its minority and low-income populations.¹³⁹ Researchers have described the 48217 neighborhood as the most polluted zip code in Michigan.¹⁴⁰ The North Delray and South Delray air quality monitors are located in this neighborhood.¹⁴¹

Residents in the South End and Southwest Detroit suffer disproportionately from air pollution. EPA designated Wayne County as "nonattainment" for fine particulates (PM_{2.5})¹⁴² from January 2005 to August 2013.¹⁴³ The Dearborn monitor records the highest ambient levels of fine particulates in Michigan.¹⁴⁴ Scientific studies link fine particulate exposure to premature mortality, increased hospital admissions and emergency department visits, and chronic respiratory disease.¹⁴⁵ A scientific consensus is emerging that there is no safe threshold for exposure to PM_{2.5}.¹⁴⁶

EPA designated part of Wayne County (including the South End and Southwest Detroit neighborhoods) as nonattainment for sulfur dioxide in August 2013.¹⁴⁷ The health concerns associated with sulfur dioxide include bronchoconstriction and increased asthma symptoms, particularly while exercising or playing, and increased visits to emergency departments and hospital admissions for respiratory illnesses, particularly in at-risk populations including children and the elderly.¹⁴⁸

An MDEQ report found that manganese levels in South Delray and Dearborn "remain consistently above the health protective benchmark level, higher than other Michigan sites, and some of the highest values measured within [EPA] Region 5 and across the U.S."¹⁴⁹ Manganese is a neurotoxin that, among other adverse effects, can cause deficits in motor skills.¹⁵⁰ Based on meteorological and pollution data, the Report found, "[t]he primary source contributor at the Dearborn site was Severstal," and Severstal is by far the largest regional source of manganese.¹⁵¹

¹³⁸ *Id.*; Comments from GLELC and Sierra Club, pp. 3-5 (Ex 6).

¹³⁹ Aug. 17, 2012, email from A. Banninga (MEDC) to J. Sygo (MDEQ) (Ex 35); *see also* Michigan Environmental Justice Plan (Dec. 11, 2009) (Draft) available at http://www.michigan.gov/documents/mdcr/envjustplan_304917_7_307167_7.pdf (last checked Sept. 24, 2016).

¹⁴⁰ Comments from GLELA and Sierra Club, at pp. 3-5 (Ex 6).

¹⁴¹ *Manganese Report*, at p. 19, Fig. 5 (Ex 34) (showing air quality monitors in relation to Severstal).

¹⁴² "PM2.5" refers to particulate matter (PM) that is less than 2.5 microns in diameter, and is also referred to as "fine particulate matter."

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

¹⁴⁴ Attachments to SDEIA Comments, Ex 10 – 2013-10-01 DEQ AQD PM_{2.5} Summary (Ex 5).

¹⁴⁵ Attachment to SDEIA Comments, Ex 5 – EPA Tech Support Document PM_{2.5} threshold.

¹⁴⁶ *Id.*, Exs 5 through 9, scientific studies regarding PM_{2.5} (Ex 5).

¹⁴⁷ 78 Fed Reg 47191 (Aug. 5, 2013).

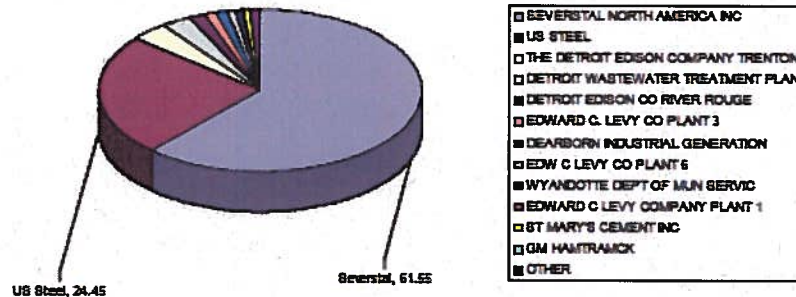
¹⁴⁸ *Id.*

¹⁴⁹ *Manganese Report*, p. 10.

¹⁵⁰ *Id.* at p. 6.

¹⁵¹ *Id.* at p. 26, Figure 6.

Figure 6: Percent of Total Manganese from Wayne County Sources



Residents of the South End and Southwest Detroit suffer in disproportionately high numbers from a number of diseases and ailments associated with environmental pollution, including but not limited to asthma and other respiratory diseases.¹⁵² The Michigan Department of Community Health coined Detroit, “the epicenter of asthma burden in Michigan,” stating that the severity of the asthma burden in Detroit warrants “immediate attention,” that rates of asthma hospitalizations in Detroit were three times higher than Michigan as a whole, asthma prevalence among adults in Detroit was 50% higher than the statewide average, and rates of asthma death in Detroit are over two times higher than overall state numbers.¹⁵³

2. There has been no Environmental Justice analysis of the impact of the emissions increases.

Before amending the company’s permit – both the preconstruction permit and the Title V permit - both MDEQ and EPA are obligated to analyze the potential impacts of the permit on minority and low-income populations surrounding the facility. Executive Order 12898 requires each federal agency to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”¹⁵⁴ Federal agencies are required to implement this order “consistent with, and to the extent permitted by, existing law.”¹⁵⁵ Although MDEQ is not a federal agency, it

¹⁵² Attachments to SDEIA Comments (Ex 5), ACCESS Health Journal, Fall 2013. See, esp., *Health Disparities Between Arab and Chaldean Americans in Southeast Michigan and Michigan Residents: Differences in Access to Health Providers and Insurance*, Harry Perlstadt, Stephen Gasteyer, Rosina Hassoun, Stephanie Nawyn, Miles McNall, and Hiam Hamade (*id*, at Pages 21-27); *A First Look at Chronic Diseases and Lifestyle Behaviors Among Arab and Chaldean Americans in Southeast Michigan*, Rosina Hassoun, Elizabeth Hughes, Mona Farroukh, Miles McNall, and Karen Patricia Williams (*id*, at Pages 17-20); *Abstract: Place Matters: The Social Determinants for Infant Mortality*, Mouhanad Hammami (*id*, at Page 153) (“More babies die before their first birthdays in Wayne County and the city of Detroit than in many parts of the United States and the world.”).

¹⁵³ Comments of GLELC and Sierra Club, pp. 4-5 (Ex 6).

¹⁵⁴ Exec Order 12,898, 59 Fed Reg 7629, 7629 (Feb 11, 1994).

¹⁵⁵ *Id.* at 7632.

"exercises delegated authority to administer and enforce the federal PSD program" and thus "stands in the shoes" of EPA for purposes of implementing the federal PSD program."¹⁵⁶

Federal guidance provides that a permit issuer should examine "any 'superficially plausible' claim that a minority or low-income population may be disproportionately affected by a particular facility."¹⁵⁷ Related to the emissions increases at issue here, MDEQ received numerous comments that raised concerns about environmental justice.¹⁵⁸ The agency dismissed these concerns by stating, among other things, that it "provided an extended comment period as well as a public information meeting and public hearing . . . which is consistent with the environmental justice principle of providing opportunities for enhanced public participation."¹⁵⁹ Providing a single "public information meeting" falls far short of the agency's environmental justice responsibilities.

Moreover, an agency's "outreach" efforts (even if "extensive", which MDEQ's certainly were not) may satisfy procedural aspect of the environmental justice mandate, but they are irrelevant to the analytical obligations of an environmental justice analysis.¹⁶⁰ MDEQ was required to "identify[] and address[] . . . disproportionately high and adverse human health or environmental effects" of the emissions increases "on minority populations and low-income populations."¹⁶¹ The same burden falls on EPA.

MDEQ has argued that its environmental justice obligations are satisfied because "the state and federal air quality standards that have been established are designed to be protective for all segments of society, including the most sensitive."¹⁶² However, MDEQ did not consider all air quality standards in effect at the time it issued PTI 182-05C. Even if there were authority to issue a grandfathered permit (which there is not), the agency is required to consider the current air quality standards as part of its environmental justice analysis. EPA replaced the pre-2013 sulfur dioxide NAAQS applied by MDEQ, concluding the old standard is not sufficiently protective of public health.¹⁶³

In the *Shell Gulf* case, the state agency issued a preconstruction permit after updated an one-hour NO₂ NAAQS rule had been published, but before they were effective, and the permit did not analyze its impact under the updated standards.¹⁶⁴ The agency satisfied its environmental justice obligation by noting that the proposed permit would comply with the prior standard; it refused to consider the new standard because that would "inappropriately" require it to comply with the new standard before it had become effective.¹⁶⁵ The Board rejected this rationale.¹⁶⁶ The Board recognized that EPA sets the NAAQS using updated technical and

¹⁵⁶ *Knauf Fiber Glass, GmbH*, 8 EAD 121 (1999), quoting 45 Fed Reg 33413.

¹⁵⁷ *Shell Gulf of Mex (supra)*, at p. 149, n. 71 (citations omitted).

¹⁵⁸ See, e.g., MDEQ Response to Comments, pp. 23, 44 (Ex 4).

¹⁵⁹ *Id.* at 44.

¹⁶⁰ *Shell Gulf of Mexico (supra)*, at p. 152.

¹⁶¹ Exec Order 12,898, 59 Fed Reg at 7629.

¹⁶² MDEQ Response to Comments, p. 44 (Ex 4).

¹⁶³ See Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed Reg 35520, 35521 (June 22, 2010) ("EPA is making revisions to the primary SO₂ NAAQS so the standards are requisite to protect public health with an adequate margin of safety.") (emphasis added).

¹⁶⁴ *Shell Gulf of Mexico (supra)*, pp. 152-153.

¹⁶⁵ *Id.*, at 154.

¹⁶⁶ *Id.*

scientific evidence to protect the public health. By considering the NAAQS in effect that the time of issuance, in that case, the agency effectively ignored EPA's "unequivocal determination, made prior to the issuance of either final Permit, that the annual NO₂ NAAQS alone was not requisite to protect the public health with an adequate margin of safety."¹⁶⁷

In this case, there is no question the emissions increased at issue do not comply with current Clean Air Act regulations, and the company's Grandfathering Analysis suggests such compliance is not possible. MDEQ's reliance on 2007 standards to conclude the permit is sufficiently protective of protected populations ignores the subsequent determinations by EPA that those standards are *not* sufficiently protective of public health. Neither MDEQ nor EPA have made any attempt to analyze the disparate impact on these emissions increases in the minority, protected communities downwind of the facility using current evidence and insight into the relationship between exposure to various pollutants and public health. Not only have the standards changed, but evidence has been established documenting the facility's impact on high ambient levels of manganese and other toxins in the community. Blind reliance on the company's purported compliance with outdated air quality standards cannot satisfy the environmental justice obligations.

The only other response to environmental justice concerns that MDEQ has offered is that it "strives to protect the health and welfare of all citizens of the State of Michigan equally."¹⁶⁸ MDEQ also recited a definition of environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies" and noted that "the applicable legal requirements were applied equally to all groups."¹⁶⁹ None of these statements amounts to a substantive or meaningful environmental justice analysis, and, indeed, they have nothing to do with an analysis of environmental justice issues. MDEQ seems to be confusing some notion of equal protection with the goal of an environmental justice analysis, which is to identify and address adverse environmental effects on populations consisting of minorities and the poor.¹⁷⁰

To date, MDEQ has wholly failed to comply with its environmental justice obligations before issuing the preconstruction permit. EPA and MDEQ have an obligation to consider the full impact of the emissions increases at issue in this Title V permit amendment, including the disparate impact on the protected populations near the facility. Such an analysis was not undertaken prior to issuing the underlying permit, so EPA must object to the amendment.

¹⁶⁷ *Id.* at pp. 156-157.

¹⁶⁸ MDEQ Response to Comments, p. 44 (Ex 4).

¹⁶⁹ *Id.*

¹⁷⁰ See 59 FR 7629.

VI. CONCLUSION

For the reasons outlined above, EPA must object to the proposed amendment of the AK Steel Dearborn Title V operating permit to increase emission limits.

Date: September 27, 2016

By: /s/ Christopher M. Bzdok
Christopher M. Bzdok (P53094)
Olson, Bzdok & Howard, PC
Attorneys for SDEIA
420 E. Front St.
Traverse City, MI 49686
Phone: 231/946-0044;
Fax: 231/946-4807
Email: chris@envlaw.com

By: /s/ Tracy Jane Andrews
Tracy Jane Andrews (P67467)
LAW OFFICE OF TRACY JANE ANDREWS, PLLC
Attorney for SDEIA
619 Webster St.
Traverse City, MI 49686
Phone: 231.714.9402
Email: tjandrews@ymail.com

By: /s/ Nicholas Schroeck
Nicholas Schroeck (P70888)
GREAT LAKES ENVIRONMENTAL LAW CENTER
Attorney for GLELC and Sierra Club
4444 Second Avenue
Detroit, MI 48201
Telephone: 313-782-3372
Email: Nick.Schroeck@glelc.org