

November 8, 2010

Attention: Marvin Patton
Wisconsin Department of Natural Resources
Southeast Region Headquarters
2300 North Dr. Martin Luther King Jr. Drive
Milwaukee, WI 53212

Re: Air Pollution Operation Permit Revision No. 241007800-P20;

Valley Power Generation and District Heating Facility at 1035 W. Canal Street, Milwaukee, WI

COMMENTS OF AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION, BLACK HEALTH
COALITION OF WISCONSIN, INC., MIDWEST ENVIRONMENTAL ADVOCATES, and MILWAUKEE LATINO
HEALTH COALITION

The American Civil Liberties Union of Wisconsin Foundation (ACLU-WIF), the Black Health Coalition of Wisconsin (BHCW), Midwest Environmental Advocates (MEA), and Milwaukee Latino Health Coalition (MLHC), submit these comments in response to the Department's Preliminary Determination to Renew an Air Pollution Control Permit for WE Energies, Inc. to operate its Valley Power Plant.

Since 1920, the American Civil Liberties Union has been the nation's guardian of liberty, defending and preserving individual rights and liberties, including the right to equal justice that the Constitution and laws of the United States guarantee everyone in this country. It has nearly 9,000 members throughout Wisconsin. The American Civil Liberties Union of Wisconsin Foundation is the state affiliate of the national ACLU and is a non-profit, non-partisan private organization.

The Black Health Coalition of Wisconsin, Inc., incorporated in 1988, is a not-for profit, 501c3 organization of 26 organizations and 19 individual members, all of whom are African-American, dedicated to the mission of improving the health status of African Americans in the state of Wisconsin and to insure equitable and comprehensive health for all people. The coalition is made up of health care professionals, social service agencies, professional organizations, and grassroots organizations.

Founded in 1999, Midwest Environmental Advocates is a non-profit environmental law center which provides legal and technical support to grassroots groups that are working for environmental justice in the Western Great Lakes and Mississippi River regions. MEA has offices in Madison and Milwaukee, Wisconsin.

The Milwaukee Latino Health Coalition is a group of health care professionals, social service professionals, community advocates, health promoters, community members and others who are passionate about Latino health. MLHC's mission is to increase the health and well being of Latino communities by organizing power for social change.

ACLU-WIF, BHCW, MEA, and MLHC object to the Department's issuance of the proposed operation permit for the reasons set forth below. We believe the Department's proposed permit: (1) fails to protect public health, which is its essential purpose; (2) violates applicable state law and Federal Clean Air Act provisions and regulations, which are the sole authorities for the Department's permitting activities; and (3) fails to comply with the Department's environmental justice and civil rights duties as a recipient of federal funds and as the administrator of the Federal Clean Air Act program within Wisconsin.

THE DEPARTMENT SHOULD NOT ISSUE THE PROPOSED OPERATION PERMIT BECAUSE IT FAILS TO PROTECT PUBLIC HEALTH AND VIOLATES APPLICABLE LAWS & REGULATIONS

We object to the proposed permit because we believe that it:

- fails to protect the health of people who will be breathing air polluted by the Valley Plant's soot and smog emissions (including nitrogen oxides, sulfur dioxide, and fine particulate matter), and the Department must make the emission limits for those pollutants more protective of public health;

- violates provisions of Wisconsin law and of the Federal Clean Air Act and regulations promulgated thereunder, which violations must be corrected by the Department;
- fails to contain some required provisions in an Amended Consent Decree in U.S. v. Wisconsin Electric Power Company, Case No. 03-C-312 (E.D. Wis. Oct. 1, 2007), which provisions must be included by the Department;
- fails to contain appropriate, adequate, and required provisions for monitoring particulate matter emissions which are sufficient to assure consistent and continuous compliance with the terms and conditions of the permit, and which provisions must be included by the Department;
- fails to evaluate the health impacts of coal dust from the Plant's fuel handling and storage operations, and fails to protect people from those impacts, both of which are required to be done by the Department;
- fails to include lower emission limits which are legally required under the Federal Clean Air Act and regulations due to a number of modifications made to the Valley Plant between 1979 and 2010, which make the Plant subject to a lower total PM limit, Best Available Control Technology, Lowest Achievable Emission Rate, and New Source Performance Standards, which must be included by the Department;
- fails to model compliance with 1-hour NO₂ (NO_x), 1-hour SO₂, or 24-hour and annual PM_{2.5} health standards (National Ambient Air Quality Standards), and therefore cannot ensure that it does protect public health, which is the Department's duty;
- fails to establish hourly emission rate limits for the Plant using the Department's currently approved modeling program (AERMOD), consistent with the assumptions made in the

Preliminary Determination for Air Quality Modeling, and consistent with the limits established in the Mandatory Operating Permit in 1990 under Title I of the Clean Air Act, all of which needs to be included by the Department;

- fails to include applicable BART limits, which are required for this Plant, and must be included by the Department.¹

THE DEPARTMENT SHOULD NOT ISSUE THE PROPOSED OPERATION PERMIT BECAUSE IT FAILS TO ADDRESS ENVIRONMENTAL JUSTICE CONSIDERATIONS OR COMPLY WITH FEDERAL CIVIL RIGHTS ACT REQUIREMENTS

Funds of the United States cannot be used in programs or activities that support racial discrimination or that have a discriminatory effect. There is no question that the Department is covered by these requirements. It long has been and continues to be a recipient of federal funds, including substantial federal funding from the United States Environmental Protection Agency (EPA) amounting to millions of dollars on an annual basis for administering delegated federal programs under the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act. The Department's actions and decisions regarding this permit involve both a federal program and federal funds.

Title VI of the Civil Rights Act of 1964 prohibits the exclusion from, participation in, denial of benefits of, and discrimination based on race, color, or national origin under programs or activities that receive Federal funding.² Regulations issued pursuant to Title VI clearly prohibit actions that have a racially discriminatory effect, not only those that are intentionally discriminatory.³ These regulations

¹With respect to each of the above comments, we reference and hereby adopt the detailed comments separately submitted to the Department by Clean Wisconsin and the Sierra Club, in which we join.

² 42 U.S.C. § 2000d.

³ See, e.g., 40 C.F.R. §7.35 ("A recipient shall not use criteria or methods of administering its program or activity *which have the effect of subjecting individuals to discrimination* because of their

mean that, among other prohibitions, recipients of federal funding may not provide a service or benefit (e.g., the ability to breathe clean air) that is different than what is provided to persons of other races, or site facilities in a way that has a discriminatory effect. Further, the Department may not take actions that have a discriminatory effect if less discriminatory alternatives are available.

To further protect individuals from discrimination, in 1994 President Clinton issued Executive Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, with the intention of promoting nondiscrimination in programs substantially affecting human health and the environment by making it part of each Federal agency's mission to achieve environmental justice. For example, each Federal agency must "identify[] and address[], as appropriate, disproportionately high and adverse environmental effects of its programs, policies, and activities on minority populations and low-income populations . . ."⁴ The Center for Economic Development at the University of Wisconsin-Milwaukee recently completed a study for the Southeastern Wisconsin Regional Planning Commission which included a section entitled "Environmental Justice Principles and Regulation." A copy of that section of the UWM study, which provides a concise summary of the subject, is attached to these Comments. The entire document is available at http://www4.uwm.edu/ced/publications/seianalysis_2010a.pdf

The United States EPA has defined Environmental Justice as follows:

Environmental Justice is 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. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health

race, color, national origin, or sex, or *have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity* with respect to individuals of a particular race, color, national origin, or sex.)(emphases added).

⁴ E.O. 12898 § 1-101

hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.

<http://www.epa.gov/compliance/environmentaljustice/>

For the above reasons, it is critical that the Department consider and address environmental justice and Title VI requirements in the Department's permitting decisions, and ensure that the least discriminatory alternative is utilized.

The air pollution permit for the Valley Plant indisputably raises Title VI and environmental justice issues. This Plant is the utility's oldest power plant that lacks modern air emission controls. It is located in the heart of the State's largest (and only majority-minority) city, between the state's largest concentration of African-American residents to the north and its largest concentration of Latino residents, and a significant concentration of Asian residents, to the south.^{5,6}

In addition, according to the U. S. Census' 2006-2008 American Communities Survey, 19.6% of families in the City of Milwaukee lived below the poverty level. Milwaukee County currently has an unemployment rate of 10.2%, compared to the statewide unemployment rate of 8.2%, with much higher unemployment rates – well into double digits - for African-Americans and Latinos. Of all residents of the City of Milwaukee, 39.9% are African-American, 15.7% are Latino, 3.5% are Asian, and 1.3% are Native American. People of color and low income communities bear a disproportionate health impacts burden from this highly-polluting coal facility, and are less likely to have the financial means to access adequate health care when their health is harmed by coal plant emissions.

The adverse health impacts of air pollution, of which power plants are a major source, are well-recognized. The health problems are exacerbated by the fact that Milwaukee has been designated by

⁵ For example, as of 2000, in census tract 156 to the south of the plant, the population was only 13.4% white/non-Hispanic, and 28% of residents were low income; census tract 140 to the north of the Menomonee Valley had only 5% white/non-Hispanic residents and 56% of its residents were low income. The City of Milwaukee as a whole was only 45% white/non-Hispanic.

⁶ In this regard, the Department's failure to distribute notices and publicity in Spanish and Hmong about the hearing and comment period regarding this permit itself indicates inattention to environmental justice issues.

the EPA as out of compliance with air quality standards.⁷ Asthma, caused and exacerbated by air pollution, affects nearly 100,000 Wisconsin children under age 18; is far more common in southeastern Wisconsin; and is far more prevalent among blacks than whites.⁸ On days when air pollution levels are high, health professionals see more frequent, severe and deadly asthma attacks, heart attacks, and strokes.

Similarly, the American Lung Association has continuously given Milwaukee "F" grades for air quality, resulting from high ozone days and excessive particulate pollution. Milwaukee has had 25 health advisories relating to its poor air quality so far in 2010 alone. According to a report commissioned by the Clean Air Task Force, fine particulate pollution from the Valley Power Plant was estimated to cost \$280 million in health care related expenses. Milwaukee County was ranked among the dirtiest 10% of all counties in the United States for toxic chemicals released by power plants and industry, with the Valley Plant ranked as the top polluter in the city. (www.sourcewatch.org).

As noted in a Milwaukee Journal-Sentinel business section article on July 10, 2010, while many other old coal-fired power plants in the state are shutting down or being upgraded, the Valley plant has largely avoided installation of pollution controls. (Copy attached; also available at <http://www.jsonline.com/business/98179294.html>.)

In contrast, WE Energies' coal-fired generating plant in Port Washington, a community with very few non-white residents,⁹ was razed and replaced with a natural gas fueled plant. In Oak Creek, another overwhelmingly white community,¹⁰ four old coal generating units were retired, construction of the second of two new units with pollution controls is nearing completion, and four other old coal

⁷We believe that some of the worst air quality conditions occur when polluted air from local sources is trapped over the Milwaukee area during what is known as a temperature inversion, and not dispersed by prevailing winds away from local sources.

⁸ *Wisconsin Medicaid HMO Comparison Report: 1998/1999* (Wisc. DHFS), citing *Children's Health System: Milwaukee Allies Against Asthma* (April 2000).

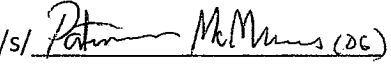
⁹ As of 2000, Port Washington was 97% white/non-Hispanic.

¹⁰ As of 2000, Oak Creek was 90% white/non-Hispanic.


generating units are continuing in operation, but with installation of improved air emission controls. Emission rates from these plants located in overwhelmingly non-minority communities are significantly lower than those proposed by the Department for the renewed permit for the Valley Plant.

These circumstances indicate that, compared to previous decisions regarding permitting of air emissions for generating plants in white communities, the Department's regulation of emissions from the Valley Plant has resulted in disproportionate adverse impacts upon minority and low-income communities in Milwaukee and has provided disproportionate benefits to predominantly white suburban communities. The proposed renewal permit will continue this pattern. In making its decisions on the Valley Plant's air pollution permit, the Department needs to recognize the extent to which the pattern of its regulation of WE Energies' air emissions is causing disproportionate adverse impacts on minority or low-income communities, and ensure that its decision-making regarding the renewal permit for the Valley Plant mitigates those impacts. ¹¹

Respectfully submitted this 8th day of November, 2010.

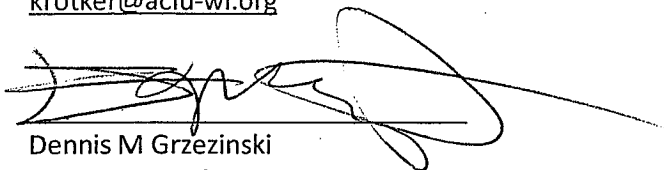
/s/  (DC)
Patricia McManus PhD., RN
President/CEO
Black Health Coalition of Wisconsin
3020 W. Vliet Street
Milwaukee, WI 53208
414 933-0064
bhcpmc@aol.com

¹¹ We are not requesting here that the Department deny the Plant an air permit. Rather, the Department must ensure that the permit satisfies all state and federal legal requirements, is fully protective of public health, and that minority and low-income communities near the power plant are not subject to greater levels of pollution than white and/or non-low income communities near other power plants.

/s/ 

Karyn L. Rotker
Staff Attorney

Poverty, Race & Civil Liberties Project
American Civil Liberties Union of Wisconsin Foundation
207 East Buffalo St., #325
Milwaukee, WI 53202
414 272-4032 ext. 21
414 272-0182
krotker@aclu-wi.org



Dennis M Grzezinski
Senior Counsel

Midwest Environmental Advocates
312 East Wisconsin Avenue, Suite 210
Milwaukee, WI 53202
414 289-9200
414 289-0664 fax
dennisg@midwestadvocates.org



Ms. Masiel Gómez
Chair

Milwaukee Latino Health Coalition
611 West National Avenue
Milwaukee, WI 53204
414 384-2673
414 384-4585 fax
Masiel.Gomez@dhs.wisconsin.gov