

Exhibit 2 to Clean Air Motion <input type="checkbox"/>
2/25/05



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From: Jon P. Axelrod

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Respond To: Jon P. Axelrod at 608-252-9326 (tel)/608-252-9243 (fax)

MESSAGE

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December 9, 2004

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VIA FACSIMILE 442-9494

Frank J. Jablonski, Esq.
Porter Jablonski & Associates S.C.
354 West Main Street
Madison, WI 53703-3115

RE: In the Matter of an Air Pollution Construction Control Permit Issued to
Madison-Kipp Corporation, Located in Madison, Wisconsin
Permit Number 03-POY-328 (Case No. IH-04-12)

Dear Mr. Jablonski:

As you may be aware, 2003 Wisconsin Act 118 revised various aspects of the Wisconsin Administrative Procedure and Review Act, Chapter 227 of the statutes. Among other things, Act 118 created a statute which directs a hearing examiner to award a successful party for the costs and reasonable attorneys fees that are directly attributable to responding to frivolous claims or defenses raised in contested case hearings. *See*, Wis. Stat. § 227.483.

As indicated in our "Reply Brief in Support of Madison-Kipp Corporation's Motion to Dismiss/Summary Judgment" filed on November 1, 2004, we are writing privately to inform you we believe that certain claims advanced by your office in the above-referenced proceeding were frivolous and justify an award of costs and reasonable attorneys' fees pursuant to § 227.483.

Specifically, Petitioners in the above-referenced matter argued that DNR has required air permit applicants to model PM_{2.5} emissions for various permitting decisions. *See*, Response Brief, p. 11. For example, Petitioners asserted that "DNR required PM_{2.5} modeling to be included in the July 13, 2004 construction permit application submitted by ThyssenKrupp Waupaca, Inc. for its Plant 1 MACT/Upgrade project." In support of

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this assertion, Petitioners attached an affidavit from Steven Klafka wherein he makes the following sworn declaration:

On July 14, 2004 DNR required me to model PM_{2.5} for the July 14, 2004 construction permit application for the ThyssenKrupp Waupaca, Inc. Plant 1 MACT/Upgrade project.

In order to respond to this allegation, Madison-Kipp reviewed the ThyssenKrupp July 14, 2004 construction permit application referenced by Mr. Klafka in his affidavit. Mr. Klafka signed the cover letter for that application on behalf of ThyssenKrupp. Mr. Klafka's affidavit is plainly inconsistent with the representations he had made to DNR in the ThyssenKrupp permit application.

In the permit application, Mr. Klafka acknowledges that the DNR did not "require" PM_{2.5} modeling for purposes of the construction permit application. Rather, the modeling was "requested" by DNR for "informational purposes and presentation in the project Environmental Assessment." Specifically, Mr. Klafka included the following statement in the ThyssenKrupp permit application which is directly to the position taken by Petitioners in the above-referenced matter and in Mr. Klafka's affidavit:

There are currently no regulations for incorporating the PM_{2.5} NAAQS into new source review for construction permit applications. However, the Department requested that this project evaluate compliance with the NAAQS for information purposes and presentation in the project Environmental Assessment.

Aside from the ThyssenKrupp application, Petitioners' Response Brief identified the MGE UW West Campus Cogeneration permit and Weston Four Power Plant permit as situations where DNR modeled PM_{2.5} for purposes of "permit decisions." Here again, Madison-Kipp reviewed those files and Petitioners' assertions were demonstrably inaccurate and baseless. In both situations, the modeling was performed for information purposes and inclusion the Environmental Impact Statements for the two projects.

Any uncertainty as to the frivolous nature of Petitioners' assertions was resolved with the affidavit of John Roth. Mr. Roth clearly stated that as leader of the Stationary Source Modeling Team, he has never asked nor required a source to model PM_{2.5} emissions for purposes of issuing an air permit.

Before initiating a formal process before the ALJ in the pending contested case proceeding to seek costs and attorney fees, we are interested in your response to the

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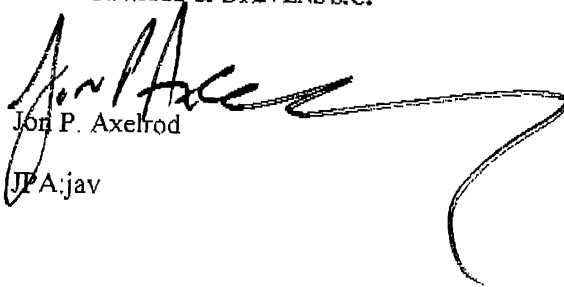
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above. We are also willing to resolve this matter privately, if we can, foregoing the need to expend additional resources and time on briefing this issue in a more formal context. If you would like to discuss this possibility, please call.

I look forward to your response.

Sincerely yours,

DEWITT ROSS & STEVENS S.C.


Jon P. Axelrod
JPA:jav