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Exhibit 3 to Clean Air Motion  
2/25/05

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**FAX TRANSMITTAL**

**To: Frank J. Jablonski, Esq.**

**Fax Number  
442-9494**

**From: Todd Palmer**

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**Date: February 18, 2005**

**Time Sent: 2:02**

**Respond To: Jamie Hayter at 608-283-5524 (tel)/608-252-9243 (fax)**

**MESSAGE**

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February 18, 2005

**VIA FACSIMILE 442-9494  
AND FIRST CLASS MAIL**

Frank J. Jablonski, Esq.  
Progressive Law Group LLC  
354 West Main Street  
Madison, WI 53703-3115

RE: In the Matter of an Air Pollution Control Construction 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 are 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 a result of the deposition testimony of Steven Klafka, we are writing to inform you that we believe that certain claims advanced by you and your clients in the above-referenced proceeding are frivolous and justify an award of costs and reasonable attorneys fees pursuant to Wis. Stat. § 227.483.

Specifically, during his deposition on February 11, 2005, Mr. Klafka confirmed the following:

- The methodologies which Mr. Klafka advocates using for the subject permit have never been utilized by the WDNR in previous air permitting actions or decisions.

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- The methodologies advocated by Mr. Klafka for the subject permit have never been utilized by Mr. Klafka in filing permit applications for his own clients.
- The methodologies advocated by Mr. Klafka for the subject permit had never been utilized by Mr. Klafka when he was a regulator.
- The WDNR has never directed Mr. Klafka to utilize the methodologies which he now states were required to be utilized in issuing Madison-Kipp its permit.
- Mr. Klafka acknowledged that if his methodologies were accepted by the WDNR, it would represent a major policy change which would need to be applied to all permit applicants throughout the state.
- Mr. Klafka asserts that the reason WDNR did not use his methodologies is that WDNR staff are motivated by racial and ethical discrimination. Yet, Mr. Klafka admits that none of the individuals who worked on the Kipp permit are racist.

Even under the most strained view of advocacy, Mr. Klafka's theories simply do not withstand any test of legitimacy given the concessions and admissions he made at his deposition. We strongly encourage you to reevaluate your position in light of these developments.

As you know, we had previously expressed concern regarding positions and statements made by Mr. Klafka regarding PM<sub>2.5</sub> emissions during the Motion to Dismiss phase of this litigation. See, Letter to you dated December 9, 2004. Those issues still have not been addressed, nor have we received any response from you in defense of Mr. Klafka's statements in that context.

Here again, before considering a formal process before ALJ Boldt, we are interested in your response to the above. Our client would be willing to forego its claims for costs and reasonable attorneys fees if you and your client are willing to dismiss this case with prejudice. If you are not, we reserve the right to move Judge Boldt for such fees and costs at the appropriate time.

On several occasions during this litigation, you have attempted to avoid the merits of the case by portraying the petitioners in this case as "*pro bono*" clients. As an initial matter, it is my understanding that indeed you are being compensated for this litigation. Further, as you know, the City of Madison Assessor's Office posts property assessments on the internet. A very cursory review shows that the named petitioners in

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the case (including Mr. Klafka) own property in the City of Madison alone which is assessed at over \$1.1 million. These individuals are not "*pro bono*" clients and are not immune from the provisions of Wis. Stat. § 227.483.

If you would like to discuss this further, please do not hesitate to call.

Sincerely yours,

DEWITT ROSS & STEVENS s.c.



Todd Palmer

TEP:jav