

Trial Ends over Kipp Air Pollution Permit

On May 3rd, a 5-day trial concluded over the last air pollution permit issued by the Department of Natural Resources to the Madison-Kipp aluminum foundry. The permit allowed Kipp to increase its particulate emissions by 61 tons per year. Neighbors, organized as Clean Air Madison or CAM, presented their case to the administrative law judge, Jeffrey Bolt, explaining why the permit should not have been issued. The primary issue was DNR failure to accurately estimate the impacts on air quality in the neighborhood due to Kipp air pollution discharges. While the DNR was primarily responsible for defending its decision to issue the permit, Kipp hired its own lawyers and consultants to defend its permit.

As explained during the trial, the air pollution regulations which apply to Kipp are over 30 years old, so their discharges are released uncontrolled into the neighborhood. Before these discharges can be permitted, state environmental laws require that the DNR must also verify that downwind air pollutant concentrations are within air standards. To estimate these concentrations, the DNR uses computer modeling and five years of wind and weather data. The use of computer modeling is a common tool used by other state environmental agencies when approving new air pollution from industry.

CAM's litigation team included attorneys Frank Jablonski and Kimberly Wright, and environmental engineer Steven Klafka. All are neighborhood residents who donated their time or worked for reduced fees. During the trial, CAM showed how DNR made many mistakes by copying old computer modeling files rather than verifying information provided by Kipp. The DNR placed stacks and buildings in the wrong location, and used stack dimensions which violated Kipp's air pollution permit. DNR staff did not account for seasonable changes in flow rates from the eleven Atwood plant roof vents or vent obstructions shown on Kipp's building plans. Klafka explained how the DNR ignored its own modeling guidelines which required the consideration of terrain in the neighborhood, and ignored its own memorandum which stated that pollutant concentrations close to Kipp buildings and in neighborhood backyards exceeded air quality standards.

CAM showed that despite a long standing problem with air pollution releases from Kipp doors and windows, DNR did not consider these 'fugitive' releases in its modeling analysis, prohibit Kipp from having these releases, or require any monitoring to verify they no longer occurred. It was shown how DNR modeling decisions favored issuance of a permit to Kipp, provided less protection of the air quality in the surrounding neighborhood, and completely ignored air quality concerns raised by neighborhood residents. If any of the dispersion modeling errors were corrected, Klafka showed that air quality standards would be violated and the permit should not have been issued to Kipp.

The cut and paste approach used by the DNR for their modeling analysis was also apparent in their written responses to comments submitted by neighborhood residents. DNR staff had simply copied their responses from another project approved four years ago, even though these responses contained numerous errors. For instance, DNR stated that it did not need to consider pollutant concentrations at above ground locations such as balconies on nearby homes or the roof top on Lowell Elementary School. However, more recent guidance from USEPA clearly directed the DNR to apply air standards at these locations. DNR had also dismissed the effects of terrain by stating the difference

between Kipp and Lowell was only 15 feet. This ignored the Kipp plant on Fair Oaks Avenue, which is located at a lower elevation down a hill, where DNR modeling guidance clearly required the consideration of terrain.

Contested case hearings over DNR air pollution permits are typically arguments over proper interpretation of the regulations or accurate technical analyses. However, Kipp and its attorneys spent much of their time creating unanticipated hurdles for CAM. They refused to respond to provide documents such as test results requested by CAM, threatened to take the homes of residents challenging the permit, and fought to keep Klafka from testifying for CAM. These hardball tactics are why it is estimated that Kipp has spent over \$100,000 so far defending its air pollution permit.

For example, Kipp attorney Jon Axelrod spent much time during the trial attacking Klafka's qualifications. Judge Bolt brought Axelrod's cross-examination to an end, when Axelrod accused Klafka of being a "menace to national security". One insightful moment during the hearing came when Axelrod warned Judge Bolt and attending reporters that if Kipp lost the permit, it would move its jobs to China. Later, Kipp Vice President Mark Meunier under oath recanted when responding questions by CAM attorney Frank Jablonski, and made it clear this was not true, and Kipp had no such plans to move if it lost its permit. Meunier later agreed that DNR had approved additional tall stacks at the foundry to address neighborhood air quality concerns but Kipp did not intend to install them.

After the trial, Judge Bolt and attorneys from all sides conducted a "view" and walked around the neighborhood near Kipp. It was a day when neighbors reported a strong die lube odor from Kipp. Ironically, DNR staff conducting the modeling analysis for the contested permit acknowledged during the trial that they never bothered to visit the neighborhood even though it was only 3 miles from their office.

When the hearing ended, Kipp attorneys insisted that transcripts be prepared, resulting in another unanticipated cost for CAM. All sides must now prepare briefs summarizing arguments for Judge Bolt to consider. By the end of this summer, it will be up to Judge Bolt to sort through the testimony and determine if the DNR should have issued Kipp a permit to discharge another 61 tons per year of particulate into the surrounding neighborhood.

Current information on the hearing and other CAM activities are available at the CAM web site: www.cleanairmadison.org.