

STATE OF WISCONSIN

CIRCUIT COURT

MARATHON  
DANE COUNTY  
Branch \_\_\_\_

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SAVE OUR AIR RESOURCES,  
PAUL SCHWANTES, and ROBERT HUGHES

Petitioners,  
vs.

Case No.:  
Case Code: 30607  
Administrative Agency Review

WISCONSIN DEPARTMENT OF  
NATURAL RESOURCES,

Respondent.

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**PETITION FOR JUDICIAL REVIEW**

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Now come the Petitioners, Save Our Air Resources (“SOAR”) and Paul Schwantes and Robert Hughes, by their attorneys, and petition the Court pursuant to Wis. Stat. § 227.52, for judicial review of a decision of the Respondent, Wisconsin Department of Natural Resources (“DNR”), dated June 13, 2011 (the “Decision”), a copy of which is attached hereto as *Exhibit A*. Petitioners further show to the Court as follows:

**CHALLENGED DECISION**

1. Petitioners challenge DNR’s refusal to act upon the Petitioners’ April 27, 2011 “Notice of Contested Case and Request for a Hearing” (Request). The Request sought review of the March 28, 2011 Air Pollution Control Construction Permit No. 10-SSD-058 (“the Permit”) issued by DNR for a biomass power incinerator to be located in Rothschild, Wisconsin (“the Project”), and review of DNR’s failure to do an

Environmental Impact Statement for the Project. The Request was filed on behalf of fifteen Wisconsin residents who will be directly and substantially impacted by the project, and by SOAR. A copy of the Request is attached hereto as *Exhibit B*.

2. The Permit authorizes We Energies, a public utility that provides electricity to parts of Wisconsin and Michigan, to construct an electric generating facility on the site of the Domtar paper mill in the Village of Rothschild. The project will consist of a circulating fluidized bed boiler (Boiler B01), two natural gas-fired package boilers (Boilers B02 and B03), a cooling tower, solid waste and biomass fuel receiving, unloading, storage, conveyance and processing areas, ash handling and storage areas and an emergency diesel feed water pump.

3. The Project will emit hundreds of tons per year of air pollutants, including particulate matter, carbon monoxide, dioxin, mercury, lead, hydrochloric acid, NO<sub>x</sub>, SO<sub>2</sub>, arsenic, beryllium, cadmium, chromium manganese, PCBs, and greenhouse gases. The Permit was issued pursuant to various sections in Wis. Stat. ch. 285 and related administrative regulations. That Permit is required before We Energies can initiate construction of the biomass incinerator and related infrastructure.

### **PARTIES**

4. Save Our Air Resources (SOAR) is an unincorporated association of citizens living, working, residing and recreating in the area proximate to the Project. SOAR is a membership based organization with several hundred members. SOAR members will be impacted by the Project, including but not limited to suffering harm from air pollution allowed to be emitted under the Permit. Members of SOAR include families who use the playing fields, playgrounds, and recreation areas referred to as River Street Park. SOAR maintains its mailing

address at 604 Birch Street, Rothschild, WI 54474. SOAR and its members have a direct interest in the physical environment that would be adversely affected by the biomass incinerator. The construction of the incinerator will result in air pollution emissions that will include particulate matter, which causes mortality, lung cancer, heart attacks, chronic bronchitis and asthma attacks; sulfur dioxide, which causes acid rain and particulate matter pollution; nitrogen oxides, which cause smog and particulate matter pollution; mercury, which contaminates fish and, through fish consumption, causes irreversible neurological damage to humans; and climate change gases, which cause a number of natural resource and public health impacts. SOAR and its members are aggrieved by the Decision and Permit for all of the reasons specified in this Petition.

5. Appellant Paul Schwantes lives at 604 Birch Street, Rothschild, Wisconsin. He owns his own home which is about ¼ of a mile from the Project site. He lives, works, and recreates in the area proximate to the Project site. He uses the trails around the area for walking and uses the Wisconsin River for fishing and boating. He will be harmed by the actions allowed under the Permit. His home will suffer a decrease in value if the Project is built.

6. Robert Hughes lives at 113 Edgar Avenue, Rothschild, Wisconsin, approximately 300 feet from the Project site. He owns his home where he lives with his wife and young child. He is concerned about the air pollution allowed under the Permit, including diesel emissions from delivery vehicles, noise and fugitive emissions. The value of his home will decline if the Project is built. He will be harmed by the actions allowed under the Permit.

7. DNR is an independent agency of the State of Wisconsin, created under Wis. Stat. § 15.34, whose principal office is located at 101 South Webster Street,

Madison, Dane County, Wisconsin, and which has the responsibility for the protection of water and other natural resources in Wisconsin, pursuant to, *inter alia*, Wis. Stat. ch. 283.

## **STATEMENT OF FACTS**

### **A. The Project**

8. The Permit authorizes construction of an electric generating facility consisting of a circulating fluidized bed boiler, two natural gas-fired package boilers, a cooling tower, solid waste and biomass fuel receiving, unloading, storage, conveyance and processing areas, ash handling and storage areas and an emergency diesel feed water pump.

9. The Project will combust solid waste, including biomass, paper mill sludge, and natural gas to make approximately 50 megawatts of electricity for commercial sale to the electric grid by We Energies. A portion of the steam generated by burning solid waste, including biomass, wastewater treatment plant sludge, and/or fossil fuels, will be used to provide process steam for the Domtar Mill.

10. The Project is a “solid waste facility” within the meaning of Wis. Stat. § 289.01(35), but DNR failed to require compliance with state statutes for the combustion of solid waste for energy recovery.

11. The Project will receive shipments of up to 778,700 tons of solid waste, including biomass, per year via truck for combustion and will generate about 29,200 tons per year of ash.

### **B. Administrative Proceeding**

12. Under Wis. Stat. ch. 285, and related statutes and regulations, a person or other entity, including a public utility, is required to obtain an air construction permit in order to emit air pollutants in quantities above a certain threshold.

13. In February, 2011, DNR issued a “Public Notice of an Air Pollution Permit Review,” consisting of a draft permit for the project.

14. On March 4, 2011, comments on the draft permit were submitted by and on behalf of residents, including Petitioners. These comments objected to the permit issuance and contained detailed information about the ways in which the draft permit violates state and federal law.

15. On March 28, 2011, DNR issued the final permit, and failed to adequately address the Petitioners’ comments. The permit contained no provisions informing affected parties about their rights to seek administrative or judicial review of the permit.

16. On April 1, 2011, in response to a request, DNR’s staff by email informed petitioners’ counsel that the permit could be appealed pursuant to s. 285.81, Wis. Stats. by serving a petition for a contested case on the Secretary of DNR. DNR counsel was copied on the email.

17. On April 27, 2011 petitioners submitted to DNR a request for a contested case hearing challenging the Permit. DNR received the Request by fax and certified mail.

18. On May 17, 2011, DNR sent petitioners a letter stating that DNR would not act on the Request because petitioners did not “ask the DNR for a hearing.”

19. On June 3, 2011, petitioners responded to DNR's letter describing the manner in which the DNR's decision to not act on the Request was unlawful and unreasonable, and seeking reconsideration, and without waiving its objections, again asked the Secretary of DNR for a hearing.

20. On June 13, 2011, DNR responded to petitioners' June 3, 2011 letter denying petitioners request for reconsideration and denying the Request for a hearing.

21. This complaint seeks judicial review of the June 13, 2011 denial.

### **ADVERSE EFFECTS ON PETITIONERS' INTERESTS**

22. Petitioners have a direct and substantial interest in the Decision and in the Domtar incinerator project. They are aggrieved by the Decision for at least the following reasons:

a. Members of SOAR and the two individual petitioners are residents in the vicinity of the We Energies biomass incinerator, with a substantial interest in the economic and environmental well-being of the region, and are adversely affected by the Decision and the Permit.

b. The project as approved will have an adverse impact on public health and the environment in the vicinity of the biomass incinerator including the areas in which members of SOAR and the individual petitioners work, reside, and recreate and, as a result, directly threatens their health and well-being.

### **GROUND FOR REVIEW**

23. The Decision is unlawful, arbitrary, capricious, erroneous, and an abuse of discretion, and should be reversed, vacated, and remanded for, *inter alia*, the following reasons:

- a. DNR has erroneously interpreted and applied the applicable law, in that the Request was served upon the DNR Secretary in the manner proscribed by s. 285.81, Wis. Stat.
- b. The Request was received by the Secretary within the time frame proscribed by s. 285.81, Wis. Stat., and conforms to the statute in form and content.
- c. The Request specifically states it is a request for a contested hearing on the permit.

**PRAYER FOR RELIEF**

WHEREFORE, petitioners request judgment in their favor as follows:

1. Declaring that DNR's Decision is contrary to the law and facts,
2. Ordering DNR to act on the Request by either granting or denying the Petitioners' "Request for Hearing on Contested Case" dated April 27, 2011.
3. Ordering such interlocutory or final relief as is necessary to preserve the interests of petitioners and other members of the public; and
4. For such other relief as the Court may deem just and equitable.

Dated this 20th day of June 2011.

Margaret E. Sheehan, Esq.

\_\_\_\_\_ **signed** \_\_\_\_\_

**ADDRESS:**

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Massachusetts Bar No. 456915

CERTIFICATE OF SERVICE

I, Margaret E. Sheehan, hereby certify that on this 20<sup>th</sup> day of June 2011 I served the foregoing document upon the following parties in the manner described:

On Respondent We Energies via mailing U.S. mail first class, certified mail to person identified as Responsible Official on DNR Air Pollution Control Construction Permit No. 10-SSD-058: Scott A. Patulski, VP-Fossil Operations, We Energies, 200 Grand Avenue, Rothschild WI.

On the Secretary of the Department of Natural Resources by mailing U.S mail, first class, certified, postage prepaid to 101 S. Webster Street, PO Box 7921, Madison, WI 53707-7921.

\_\_\_\_\_ **signed** \_\_\_\_\_

Margaret Sheehan, Esq.

Date: June 20, 2011