

STATE OF MICHIGAN

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY

In the matter of **CITIZENS FOR ENVIRONMENTAL INQUIRY**, et. al.,
request for Declaratory Ruling Regarding the
Applicability of the Michigan Environmental
Protection Act to Emissions of Carbon
Dioxide from Coal-Fired Electric-Generating
Plants

Case No.:

Dated: December 7, 2007

RESPONSE OF THE MICHIGAN MANUFACTURERS ASSOCIATION

I. INTRODUCTION

On October 10, 2007, Citizens for Environmental Inquiry, *et. al.*, (“Petitioners”) filed a request with the Michigan Department of Environmental Quality (“DEQ”) pursuant for a declaratory ruling regarding the applicability of the Michigan Environmental Protection Act to emissions of

carbon dioxide (“CO₂”) from coal-fired electric-generating plants.¹ Specifically, the Petitioners requested:

the Michigan Department of Environmental Quality (MDEQ) **make a declaratory ruling** pursuant to MCL § 24.263 and Mich. Admin Code R §§ 299.3095 and 324.81 **that state laws requiring regulation of air pollution, including MCL §§ 324.5501, 5503 and 5512, apply to carbon dioxide and other heat-trapping gases, including such emissions from the new coal-fired power-plant proposals** that will shortly be pending (or are already pending) before the agency. (*Emphasis added.*) (See Petition p. 1.)

In addition to the request for a declaratory ruling that “carbon dioxide is an air pollutant”, Petitioners allege that “the Clean Air Act and state law” mandates that DEQ impose “new source performance standards” on new or modified electric generating units. (See Petition, p. 2.)

Petitioners further request that the DEQ “not issue any air permit for any coal-fired electric generating plants proposed to be located in the State of Michigan, pursuant to MCL Chapter 324, Part 55 and the Clean Air Act, without including in the permit a binding limit on CO₂ emissions from the plant.” (Petition p. 2.)

Petitioners then allege what they describe as “uncontested facts” regarding climate change. However, many of the “facts” presented are in dispute. Moreover, Petitioners fail to provide “an actual state of facts of a statute administered by the agency or of a rule or order of the agency” for which a declaratory ruling could be issued. MCL § 24.263. Petitioners fail to provide any evidence that reducing emissions of carbon dioxide (“CO₂”) from companies located in Michigan would provide any relief from “climate change”. Instead, Petitioners merely

¹ In addition to the Citizens for Environmental Inquiry, the other parties listed on the petition are as follows: Clean Water Action, Environment Michigan Research and Policy, Center Environmental Law & Policy Center, Lone Tree Council, Michigan Environmental Council, Michigan Land Use Institute, Michigan League of Conservation Voters Education Fund, Midland Cares, Northern Michigan Environmental Action Council, Natural Resources Defense Council, and the Sierra Club.

provide estimates of emissions, generalized statements of how world-wide emissions of CO₂ may be contributing to climate change, and then Petitioners proceed to make conclusory statements that the DEQ should regulate CO₂. Petitioners also fail to recognize that the DEQ's scope of authority is limited by statute and that statute does not provide, nor did it envision, the regulation of CO₂ as an air pollutant. Finally, Petitioners fail to describe how they meet the requirement of being an "interested person" for purposes of filing a request for a declaratory ruling.

The Michigan Manufacturers Association ("MMA") asserts that the request for a declaratory ruling does not meet the criteria set forth in MCL § 24.263 or rule R 324.81 and thus the DEQ must deny the request for a declaratory ruling.

II. STANDARDS GOVERNING DECLARATORY RULINGS

Section 63 of the Administrative Procedures Act of 1969 ("APA"), as amended, MCLA 24.263, provides the standard governing declaratory rulings:

Sec. 63. On request of an **interested person**, an agency *may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency*. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. **A declaratory ruling is binding on the agency and the person requesting it** unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case. (*Emphasis added.*) MCL 24.263

Petitioners fail to state a basis for being an "interested person" sufficient to constitute standing to request a declaratory ruling. DEQ rules require that a petitioner provide information

describing their “interest in the matter, including assertions regarding the person’s legal standing to request a declaratory ruling.” Mich. Admin. Code R324.81. In a recent case, the Michigan Supreme Court stated

Standing ensures that a genuine case or controversy is before the court. It **“requires a demonstration that the plaintiff’s substantial interest will be detrimentally affected in a manner different from the citizenry at large.”**[cite to Lee, 464 Mich at 738-739, quoting House Speaker v Governor, 441 Mich 547, 554; 495 NW2d 539 (1993)] To successfully allege standing, a plaintiff must prove three elements.

“First, the plaintiff must have suffered an **‘injury in fact’**—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not “conjectural” or “hypothetical.”’ Second, there must be a **causal connection between the injury and the conduct complained of**—the injury has to be ‘fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.’ Third, **it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’**” [Nat’l Wildlife, 471 Mich at 628-629, quoting Lee, 464 Mich at 739, quoting Lujan v Defenders of Wildlife, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992).]

Where the plaintiff claims an injury related to the environment, this Court lacks the “judicial power” to hear the claim if the plaintiff cannot aver facts that he has suffered or will imminently suffer a concrete and particularized injury in fact. *Michigan Citizens For Water Conservation, et.al., v. Nestle Waters North America*, 479 Mich. 280 (2007) (“*Nestle*”).

The Petitioners argue that they will be harmed by global warming and that global warming is caused by man-made² emissions of gases such as CO₂. However, petitioners fail to meet the third element necessary for standing, i.e., they have to demonstrate that it is “likely...

² Petitioners assert that “global warming is occurring and that its cause is man-made”. (Petition p. 2.) This is at misstatement. There is no undisputed study that proves that man-made emissions cause global warming. Indeed there is considerable dispute as to whether man-made or naturally occurring CO₂ is causing global warming. Regardless, man-made emissions are not the sole cause of the increased temperature of the planet – they may well however contribute to the temperature change.

that the injury will be ‘redressed by a favorable decision.’” *Nestle*. Since the Petitioners do not have legal standing, they do not have standing as an “interested party” under APA and thus the petition should be denied.³

According to the APA, the DEQ may only issue a declaratory ruling “as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency.” MCL 24.263. There is no statute or rule that provides DEQ the authority to regulate CO₂. Moreover, DEQ’s own rules mandate that the “actual state of facts” actually be facts – undisputed and uncontested facts. Rule 81(1)(d) requires that a petition for a declaratory ruling include a “detailed statement of the **actual uncontested facts** to which the statute, rule, or order may apply.” (*Emphasis added.*) Mich Admin Code R 324.81(1)(d). In fact, DEQ’s rules prohibit the Department from issuing a declaratory ruling if the facts are contested. Rule 81(4) makes this prohibition clear by stating that the Department “shall issue a declaratory ruling **only** in matters **where all relevant facts are stipulated to** by the requesting party and appropriate division. **If relevant facts necessary to issue a declaratory ruling are contested, then a declaratory ruling shall not be issued.**” (*Emphasis added.*) Mich. Admin. Code 324.81(4).

In addition, Section 63 of the APA clearly states that a “declaratory ruling is binding on the agency and the person requesting it”. Yet the Petition is seeking a declaratory judgment from

³ Since the declaratory judgment is subject to judicial review, the same standing that applies in a Michigan court would apply to a Petitioner requesting a declaratory judgment. Indeed, Petitioners do not even argue that they meet the third element to constitute standing.

the DEQ that will directly “bind” other parties, i.e., the parties specified in the Petition for which the Petitioners request the DEQ deny air pollution permits.⁴ (Petition pps. 3 and 13.)

III. DISCUSSION

A. Petitioners Falsely Assert Their “Facts” as Uncontested

1. Petitioners Falsely Assert That Global Warming is Entirely “Man-made”

Petitioners cite to the United Nations' Intergovernmental Panel on Climate Change (“IPCC”) as announcing “that there is overwhelming consensus in the scientific community that global warming is occurring and that its **cause is man-made!**” The IPCC has concluded that greenhouse gases, including CO₂, contribute to “global warming”. But IPCC is very clear that climate change is a very complex problem. Some of the warming can be attributed to biogenic emissions and some to anthropogenic emissions. They have even been trying to study which emissions (such as from volcanic eruptions) may contribute to global cooling. IPCC does not however assert that all global warming is “man-made”. That is an unnecessary exaggeration that merely serves to weaken the Petitioners credibility.

2. Petitioners Estimates of Emissions Are “Estimates” and Not “Actual Facts”

Petitioners assert that the construction and operation of new coal-fired electrical generating units will automatically increase the emissions of carbon dioxide from facilities in Michigan. Petitioners claim that four new “massive coal-fired power plants” that are being proposed to be

⁴ The listed parties are Wolverine Power Supply Cooperative, Mid-Michigan Energy, Consumers Energy, and Great Lakes Energy.

constructed in Michigan will result in an increase in emissions of CO₂ of “approximately 24 million tons annually.”

First, these plants are “proposed”. They have not been constructed and have not increased emissions of CO₂ by 24 tons per year. Thus, any “emissions” are merely speculative. Second, Petitioners assume that new generation will automatically result in increased emissions. Petitioners ignore the possibility that new generation could result in a decrease in CO₂ emissions if the new units replace older and less efficient units.

Petitioners then proceed to discuss potential increases in CO₂ in Michigan with potential reductions in CO₂ that may be achieved through various voluntary programs (e.g., the Regional Greenhouse Gas Initiative, Wal-Mart’s initiative, etc.) (Petition pps. 3 – 4.) However, Petitioners do **not state any actual uncontested facts regarding the impact of CO₂ emissions from sources currently located in Michigan** (or from emissions that may or may not occur in the future). Instead, Petitioners describe the impact of rising temperatures on various ecosystems. Petitioners make no attempt to quantify, or even qualitatively describe, Michigan’s contribution to the rising temperatures that are being observed around the globe.

For example, what if Michigan prohibited all combustion processes. That would result in a dramatic decrease in CO₂ emissions from sources located in Michigan. But what would be the impact on global warming? Would it stop? Would it slow down? Would the increase in emissions from developing countries simply draw whatever reductions occur in Michigan? In short, what reduction in CO₂ is necessary in Michigan to have an impact on global warming? Petitioners provide no “actual facts” correlating Michigan’s specific releases of CO₂ to the specific effects of global warming. Instead, Petitioners merely summarize some of the impacts of global warming and imply that emissions from Michigan are the cause and that any new electrical generating units will only

further increase the damage caused by Michigan sources – but they provide no factual basis for that assertion.

B. Petitioner’s Falsely Argue That If CO₂ May Be Regulated in the Future as an Air Pollutant under the federal Clean Air Act then it Must be Separately Regulated as an Air Pollutant Under Michigan Law

One of the Petitioner’s key arguments for a declaratory ruling that CO₂ is an air pollutant requiring control under the federal Clean Air Act (“CAA”), 42 U.S.C. §§ 7401 *et. seq.*, as amended, and Michigan’s Natural Resources and Environmental Protection Act (“NREPA”), MCL 324.5501, *et. seq.*, as amended, is that in a case earlier this year, the U.S. Supreme Court held that EPA had the authority under the Clean Air Act to regulate emissions of CO₂. *Massachusetts v. EPA*, 549 U.S. ____, 127 S. Ct. ____, (2007). The Court did not mandate such regulations, but instead concurred with the petitioning states in the case that the CAA did not prohibit EPA from issuing regulations governing emissions of CO₂.⁵

EPA is now drafting proposed rules to regulate CO₂ emissions. Although EPA has not published their proposed rules yet, they will likely be broad enough to not only regulate emissions of CO₂ from electric generating plants, but also from other industrial processes as well. Traditionally, under the CAA, EPA has two general mechanisms for regulating air pollutants: 1) they either establish a health-based limit for ambient air (known as the National Ambient Air Quality Standards or “NAAQS”); and/or 2) they establish specific emission limits

⁵ *Massachusetts v. EPA* challenged EPA’s position that the CAA did not grant authority to EPA to regulate CO₂ emissions under Title II of the CAA for mobile sources. Mobile sources are not an issue in this case and indeed Michigan’s statute specifically precludes the Department from regulating emissions from mobile sources. (“With respect to any mode of transportation, nothing in this part or in the rules promulgated under this part shall be inconsistent with the federal regulations, emission limits, standards, or requirements on various modes of transportation.” NREPA, MCL 324.5501(b).)

or technology-based standards for categories of industries and industrial processes.^{6 7} Once EPA finalizes a regulation controlling CO₂, each state – including Michigan – will have to submit a plan describing how the state will implement the new requirements. These state plans are called “state implementation plans” or SIPs.

This is the same approach that Michigan takes to regulate air pollution from major sources, such as the electric generating units that are the subject of the Petition, i.e., EPA establishes a health-based or technology based limit on emissions and the DEQ develops a program to implement the requirements. Congress intended the CAA to operate through this “state and federal” partnership to assure that states are consistent in protecting public health and welfare.⁸ So, within a matter of months, the Department will know how EPA plans to regulate emissions of CO₂ and the Department will have to write rules to implement a state program to comply with the federal requirements. But the CAA and Michigan’s NREPA have very different provisions for identifying and regulating air pollution, and the Department does not have the authority or the regulatory framework to regulate CO₂ over and above whatever program EPA promulgates.

Petitioners argue that the DEQ should simply declare CO₂ an air pollutant and then establish emission limits for the four specified electric generating units stating:

⁶ Section 111 of the CAA authorizes EPA to establish standards of performance for new sources. These standards are commonly referred to as “new source performance standards” or “NSPS”. (See 40 C.F.R. Part 60.) Section 112 authorizes EPA to establish national emission standards for hazardous air pollutants (“NESHAPs”). (See 40 C.F.R. Part 61 and Part 63.)

⁷ In addition to establishing source specific standards such as NSPS or NESHAPs, EPA has increasingly been using a market-based “cap and trade” approach to air pollution control where they establish company specific or statewide emission caps and then authorize either controls to meet the caps or emission trading. (See, for example, the NOx SIP call, the Clean Air Mercury Rule, and the Clean Air Interstate Rule.)

⁸ See, *GM Corp. v. United States*, 496 U.S. 530, 532 (U.S. 1990), “Congress enacted the Clean Air Act Amendments of 1970, 84 Stat. 1676, a comprehensive national program that made the **States and the Federal Government partners in the struggle against air pollution.**” (*Emphasis added.*)

Since carbon dioxide and other heat-trapping gases have been designated as "air pollutants" under federal law and fall within the definition of air pollutants under state law, MDEQ must make a declaratory ruling that state law, and the federal law that has been delegated to state authority, apply to CO₂ emissions from coal-fired power plants. The applicable state laws include the Michigan Constitution and the Michigan Natural Resources and Environmental Protection Act. (Petition p. 10.)

Petitioners misinterpret NREPA's grant of authority to DEQ. NREPA defines air pollution as "the presence in the outdoor atmosphere of air contaminants in quantities, of characteristics, under conditions and circumstances, and of a duration that are or can become injurious to human health or welfare, to animal life, to plant life, or to property, or that interfere with the enjoyment of life and property in this state. MCL § 324.5501(b). Where the term "air contaminant" is defined by NREPA as "a dust, fume, gas, mist, odor, smoke, vapor, or any combination thereof." MCL § 324.5501(a). Petitioners argue that these definitions are sufficient to delegate authority to DEQ to regulate CO₂.

Petitioners neglect to note the Court in *Massachusetts v. EPA* was able to extend the definition of "air pollutant" to include CO₂ because, unlike NREPA, the CAA defines the term "welfare". Specifically,

effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, **weather**, visibility, and **climate**, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants. (*Emphasis added.*)42 U.S.C. § 7602(h).

NREPA's definition of "air pollutant" has never been interpreted by the DEQ or any Michigan court to be so broad as to include substances that impact "weather" or "climate".

Using Petitioners interpretation, DEQ would also have to regulate water. Water, in the form of

mist or vapor, is frequently present in the outdoor atmosphere. Water can be present in the “outdoor atmosphere. . . . in quantities, of characteristic, under conditions and circumstances, and of a duration that are or can become injurious to human health or welfare, to animal life, to plant life, or to property”. For example, heavy storms can deposit enough water to cause floods that endanger human life and damage animal life, plants, and property. Similarly, water vapor or mist that is present during winter months can result in snow, sleet, and ice which can also endanger human life and damage animal life, plants, and property (e.g., slippery roads, crop damage, downed power lines, etc.).

Petitioners provide no information indicating that the legislature intended to grant authority to DEQ to regulate “air pollutants” based on impacts to “weather” or “climate”. Petitioners do not argue that the DEQ or any Court of competent jurisdiction has interpreted the definition of “welfare” as broadly as the CAA. Using Petitioners reading of NREPA, the definition of “air pollutant” is so vague, it violates the basic principles of Due Process in that it does not clearly indicate the conduct that is acceptable or prohibited by the statute. (“A law fails to meet the requirements of the Due Process Clause if it is **so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not** in each particular case.” (*Emphasis added.*) Giaccio v Pennsylvania, 382 U.S. 399, 402; 86 S Ct 518; 15 L Ed 2d 447 (1966).)

C. Petitioners Implore DEQ to Create NSPS Even Through the DEQ Lacks Authority

In addition to the request for a declaratory ruling that “carbon dioxide is an air pollutant”, Petitioners allege that “the Clean Air Act and state law” mandates that DEQ impose “new source

performance standards” on new or modified electric generating units. (See Petition, p. 2.) The DEQ does not have the authority under either state or federal statute to promulgate “new source performance standards”. NREPA does not delegate any authority to DEQ to establish new source performance standards. Section 111 of the CAA does authorize EPA to promulgate new source performance standards (“NSPS”), but that authority is not delegated to DEQ. Petitioners provide no support for their assertion that DEQ has the authority to create NSPS.

D. Petitioners Request That DEQ “Not Issue” Permits Violates NREPA

Petitioners request that the DEQ arbitrarily and capriciously “not issue any air permit for any coal-fired electric generating plants proposed to be located in the State of Michigan, pursuant to MCL Chapter 324, Part 55 and the Clean Air Act, without including in the permit a binding limit on CO₂ emissions from the plant.” (Petition p. 2.) However, DEQ does not have the authority to simply deny a permit without cause. Section 5510 of NREPA specifies the grounds by which the DEQ may deny (or revoke) a permit.

324.5510 Denial or revocation of permit; circumstances.

In accordance with this part and rules promulgated under this part, the department may, after notice and opportunity for public hearing, deny or revoke a permit issued under this part if any of the following circumstances exist:

- (a) Installation, modification, or operation of the source will violate this part, rules promulgated under this part, or the clean air act, unless the source is in compliance with a legally enforceable schedule of compliance contained in a permit or order.
- (b) Installation, construction, reconstruction, relocation, alteration, or operation of the source presents or may present an imminent and substantial endangerment to human health, safety, or welfare, or the environment.
- (c) The person applying for the permit makes a false representation or provides false information during the permit review process.
- (d) The source has not been installed, constructed, reconstructed, relocated, altered, or operated in a manner consistent with the application for a permit or as specified in a permit.
- (e) The person owning or operating the source fails to pay an air quality fee assessed under this part.

- (f) The person proposes a major offset source or the owner or operator of a proposed major offset modification that owns or operates another source in the state that has the potential to emit 100 tons or more per year of any air contaminant regulated under the clean air act and that source is in violation of this part, rules promulgated under this part, the clean air act, or a permit or order issued under this part, unless the source is in compliance with a legally enforceable schedule of compliance contained in a permit or order.

Petitioners have not provided any evidence that one or more of the provisions of Section 5510 apply to any of the facilities mentioned in their Petition. The DEQ does not have the authority to merely “deny” a permit. Such denials must be based on the criteria in Section 5510.⁹ Denial of a permit on other grounds is beyond the authority delegated to DEQ.

IV. CONCLUSION

MMA does not dispute that global warming is occurring. MMA is not even disputing the that greenhouse gases, including CO₂, are contributing to global warming. Instead, MMA is objecting to the approach suggested by the Petitioners – that the DEQ act unlawfully to deny permits.

Petitioners have not demonstrated that prohibiting or reducing emissions of CO₂ from companies located in Michigan will either slow down or halt global warming. In short, petitioners have failed to meet the third element necessary for standing, i.e., they have not demonstrated that it is “likely... that the injury will be ‘redressed by a favorable decision.’”

⁹ Although Petitioners argue that emissions of CO₂ contribute to global warming, even the Petitioners do not argue that such emissions present an “imminent and substantial endangerment to human health, safety, or welfare, or the environment” as the grounds for denying the permits. Indeed, if the DEQ believed that emissions of CO₂ did present an “imminent and substantial endangerment to human health, safety, or welfare, or the environment”, they would not only be obligated to deny the aforementioned permits, but they would have to take steps to force companies that emit CO₂ to cease operation.

Nestle. Without legal standing, Petitioners are not an “interested party” under the APA and thus the petition should be denied.

In addition, Petitioners have failed to provide “an actual state of facts of a statute administered by the agency or of a rule or order of the agency” for which a declaratory ruling could be issued. MCL § 24.263. Petitioners merely provide estimates of emissions, generalized statements of how world-wide emissions of CO₂ may be contributing to climate change, and then proceed to make conclusory statements that the DEQ should regulate CO₂. The APA specifies that declaratory rulings may be issued “as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency.” MCL § 24.263. According to the DEQ’s own rules, “an actual state of facts” must be uncontested facts. Mich. Admin. Code R 324.81. Petitioners “facts” regarding emissions of CO₂ from the “proposed” electric generating units are presented without any substantiation, are speculative at best and certainly do not meet the threshold of being “uncontested”.

Petitioners also fail to recognize that the DEQ’s scope of authority is limited by statute and that statute does not provide, nor did it envision, the regulation of CO₂ as an air pollutant. Petitioners request for a declaratory ruling does not meet the criteria set forth in MCL § 24.263 or rule R 324.81 and thus the DEQ must deny the request for a declaratory ruling.

“Global warming” is a “global” problem. MMA implores the DEQ to deny the Petitioners request for a declaratory ruling and instead focus the Department’s efforts on working with EPA to develop national standards regulating emissions of CO₂. Such national standards can then form the basis for negotiations with other countries. Global problems require global solutions.

Respectfully Submitted

MICHIGAN MANUFACTURERS ASSOCIATION

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