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DEPARTMENT OF JUSTICE

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Via UPS Overnight Mail

Thomas L. Samsonetti
Assistant Attorney General
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U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20044-7611

Re: Comments Relating to the Notice of Lodging Proposed Consent Decree Between the United States and Wisconsin Electric Power Company Under the Clean Air Act, published at 68 Fed. Reg. 26354 (May 15, 2003)

Dear Mr. Samsonetti:

I write to express my concerns and questions about the proposed consent decree lodged in the case the United States filed recently against Wisconsin Electric Power Company ("WE Energies") in federal court for its alleged violation of, among other laws, the "State Implementation Plan developed by the State of Wisconsin (the 'Wisconsin SIP')."[1] I do so in my capacity as the chief law enforcement officer in Wisconsin. The Wisconsin Department of Justice, which I direct, has primary authority to prosecute violations of the Wisconsin SIP and all other Wisconsin air pollution control laws in Wisconsin's courts in the interest of protecting public health and the environment.[2] I understand that, if comments submitted in response to the lodging of the proposed consent decree reveal "considerations which indicate that the proposed judgment is inappropriate, improper or inadequate,"[3] your office may withdraw or withhold its consent to the entry of judgment. Because I believe that there are serious questions about both the propriety and the adequacy of the proposed consent decree, I ask that the United States Department of Justice withdraw its consent to the entry of judgment, at least until the following questions have been answered in a satisfactory manner.

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[1] 68 Fed. Reg. 26354 (May 15, 2003)
[2] Wis. Stat. § 299.95
[3] 28 C.F.R. § 50.7(b). Pursuant to that regulation, I understand too that you will file these comments with the district court.

My primary concern relates to the peculiar approach taken by the prosecution in this case. It appears that the federal government may have filed suit against WE Energies, proposed to collect millions of dollars in penalties, and proposed to require WE Energies to make hundreds of millions of dollars in improvements at various facilities, all without ever identifying any specific violations of the Wisconsin SIP or the federal Clean Air Act ("CAA"). Neither this office nor the Wisconsin Department of Natural Resources, to my knowledge, has learned of any violations and none are identified in any meaningful way in the civil complaint the United States Department of Justice has filed in federal court. Without knowing the precise nature of the violations, the State of Wisconsin is unable to determine whether the remedies called for in the consent decree are commensurate with the alleged unlawful conduct, or whether additional enforcement action by the State is warranted.

While the complaint alleges that WE Energies made unpermitted "major modifications" associated with its "replacement of economizers, induced draft fans, waterwall tubes, reheaters and superheaters on one or more units at the plant,"[4] the complaint does not allege:

- When any of the violations occurred. While paragraph 2 suggests the case concerns events occurring after 1982, paragraph 41 refers only to violations taking place at "various times."

- Which, if any, of the replacement parts caused the requisite[5] "significant net emissions increase" of pollutants. As you know, the simple replacement of equipment like that listed in the complaint does not require a permit if it does not cause such an increase and often times they don't. The complaint filed in federal court does not allege facts indicating how any such change violated the law.

It may be that a settlement like the one proposed would be entirely appropriate, *if* WE Energies repeatedly and seriously violated the PSD provisions of the CAA over the last two decades, *if* the proposed penalty actually constitutes a meaningful deterrent to future violations and *if* the proposed remedial measures are genuinely offered in resolution of this prosecution. The problem is that none of those facts are clear from a review of the documents lodged with the federal court or otherwise.

Furthermore, until such facts are made known your office has given the district court no way to assess, under "the standard of review to be applied by a district court in reviewing a settlement, i.e., whether it is 'reasonable, fair and consistent with the purpose of the statute under

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[4] Complaint, paragraph 41.
[5] As noted in paragraph 24, et seq., under the Prevention of Significant Deterioration (PSD) program of the Clean Air Act, only modifications to sources of air pollution which cause a "significant net emissions increase of any pollutant" require a PSD permit.

which the action is brought.'" *United States v. Fina Oil And Chemical Company*, 1993 WL 470430 *1 (E.D. Tex.), quoting *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990), and citing *Local 93, International Association of Firefighters, AFL-CIO v. Cleveland*, 478 U.S. 501, 525 (1986) for the proposition that "before a reviewing court can enter a consent decree, it must make sure the decree furthers the objectives upon which the complaint is based" (emphasis omitted). "The underlying purpose of the court in making these inquiries is to determine whether the decree adequately protects the public interest." *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1337 (S.D. Ind. 1982). How may the district court assess the reasonableness of the proposed fine if it is unclear: whether any violations actually occurred; when they occurred; what cost savings the defendant may have enjoyed because of the violations;[6] whether the proposed remedial measures properly may be regarded as offsetting the penalties which otherwise might be imposed in the matter;[7] and how effective the proposed measures are for protecting the environment (or for that matter, even complying with the Wisconsin SIP on a prospective basis)?

It seems too that if the federal government had followed the public notification requirements of the CAA, neither the State of Wisconsin nor the district court would be put in the position of trying to evaluate the proposed settlement with inadequate information. While the Act requires the EPA to give notice of the alleged violation (an "NOV") to the prospective defendant *and* to the state in which the violation is believed to have occurred before filing a complaint in court, 42 U.S.C. § 7413(a)(1), and although both the complaint (at paragraph 11) and the proposed consent decree (on page 2) assert that Wisconsin has received "actual notice" of WE Energies' violations, no such notice has in fact been provided. I acknowledge that a representative of this office was invited to attend a meeting in Chicago earlier this year at which the proposed consent decree was to be discussed. I declined that invitation because of the federal government's insistence that Wisconsin agree not to divulge any information it might obtain at the meeting, even if it related to evidence that Wisconsin laws had been violated. That condition was and is unacceptable to me. I understand too, based on conversations with staff members from the Wisconsin Department of Natural Resources, that the information EPA provided them

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[6] The United States Environmental Protection Agency ("EPA") has long had a policy of seeking to recover as the minimum penalty the amount of any cost savings a violator may have enjoyed in association with violating the law, for example, by deferring capital investment in pollution control equipment. *See, e.g.,* *http://www.epa.gov/Compliance/resources/policies/civil/caa/stationary/penpol.pdf.* Here again, knowing the dates of violations is critical because the longer legally required pollution control expenses are deferred, the greater the appropriate penalties.

[7] EPA also has a formal policy pertaining to so-called "supplemental environmental projects" or "SEPs" under which it allows otherwise appropriate penalties to be offset by clean up or pollution control measures which go above and beyond what the law might require in the situation. *See* http://www.epa.gov/Compliance/resources/policies/civil/seps/sepguide-mem.pdf and *see* http://www.epa.gov/Compliance/resources/policies/civil/seps/sepfinal2.pdf (EPA's Final SEPs policy).

about the alleged violations is essentially no more specific than the vague allegations appearing in the complaint. I submit that Wisconsin has never been provided the notice required by the CAA. If such information had been provided this office we might be in a better position to evaluate the proposed consent decree for its legality and reasonableness. Without it, this office, and presumably the district court, simply cannot make that evaluation.

Left unanswered due to this dearth of information are a number of other important questions, one of which is the actual economic value of the proposed settlement. EPA and WE Energies have emphasized in their descriptions of the proposed consent decree that it is a "$600 million agreement,"[8] or a "$600 million Clean Air Act settlement."[9] Substantial components of the agreement, however, appear to pertain to remedial measures WE Energies previously committed to perform. For example, the TOXECON mercury control project slated for WE Energies' Presque Isle, Michigan facility[10] was something the company in fact began planning last summer[11] and for which the company received a $25 million Department of Energy grant four months before the proposed settlement was even announced.[12] Was the company given an offset against otherwise appropriate penalties for this project? If so, why and how much was the offset? On the subject of mercury emissions control, why does the proposed consent decree – the terms of which run for more than a decade into the future – not contemplate applying the TOXECON technology to WE Energies' Wisconsin facilities – which are larger and located in much more populous areas – if this project proves successful? Aside from the TOXECON component it appears that some other parts of the touted $600 million in air pollution controls overlap commitments the company made to the State of Wisconsin last fall to qualify for an "Environmental Cooperative Agreement" pursuant to Wis. Stat. § 299.80.[13] Yet other components of the proposed consent decree may duplicate commitments WE Energies made to the City of Oak Creek, before this case was filed, to resolve anticipated litigation with the community. The Oak Creek agreement, like this one, reportedly involves "enforceable emission limits and daily monitoring of air quality in areas where atmospheric emissions are expected to have the greatest effect."[14] What is there that's actually new in the proposed consent decree's package of pollution controls?

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[8] *See* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=wec&script=410&layout=-6&item_id=406722
[9] *See* http://cfpub.epa.gov/compliance/newsroom/index.cfm?id=1253&templatePage=9
[10] Proposed Consent Decree at paragraphs 105-114.
[11] http://wwwstg.we-energies.com/environment/mercury_control_pipp.htm
[12] http://www.house.gov/apps/list/press/mi01_stupak/011503doemarqgrantrel.html
[13] *See* http://www.dnr.state.wi.us/org/caer/cea/ecpp/agreements/wepco2/agreements/finalagreement.htm
[14] *See* http://www.jsonline.com/news/metro/mar03/128837.asp

Depending on how that question is answered others arise. If the entire $600 million in additional controls is necessary either to bring WE Energies into compliance or to offset larger penalties, why is the proposed penalty in this case − less than 1% of the cost of controls − so small? Under EPA's final SEPs policy the minimum penalty in a settlement involving a SEP is supposed to "equal or exceed the economic benefit of noncompliance plus 10 percent of the gravity component or 25 percent of the gravity component only, whichever amount is greater."[15] Did EPA apply its final SEPs policy in this matter? How? If, on the other hand, some or all of these control measures don't represent new pollution reduction efforts, why are they referred to in the consent decree? In other words, if there is *any* overlap between the components of the proposed settlement and the company's past commitments to others, why is EPA suggesting this case involves more?

If the reason that the violations are not alleged with particularity in the complaint (and why no NOV was issued, etc.) is that EPA is uncertain as to whether any violations occurred, why is WE Energies proposing to pay, and the federal government to accept, $3.25 million in penalties? Given the company's reported insistence that this settlement should be expedited, and in light of the foregoing anomalies, some speculate that the proposed consent decree is, in essence, more about WE Energies' purchase of prospective immunity than about payment of penalties for past misdeeds. The company has, after all, proposed a $7 billion "Power the Future" initiative involving, among other projects, the construction of three new coal-fueled generating plants at Oak Creek, Wisconsin. If WE Energies had outstanding compliance issues, however, it might be ineligible under Wis. Stat. § 285.63(2)(c)[16] for permits to construct or operate new facilities. If this is what motivates the proposed settlement it could be argued that WE Energies has realized a good bargain – spending less than 1% of the cost of a new $7 billion project on penalties to insure that it does not get tripped up on unanticipated environmental compliance problems. But if that is in fact what is going on here, has the role of the federal government shifted from prosecutor to insurance broker? Would such an approach be "reasonable, fair and consistent" with the CAA? Wisconsin hopes that the facts are otherwise but believes it is entitled to a more detailed explanation of the underlying facts to dispel this possible explanation for an extraordinary agreement.

Finally, I must ask for an explanation of the proposal to allow WE Energies another decade to bring some of its allegedly non-complying sources of air pollution facilities into compliance with the Wisconsin SIP. As noted previously, the lawsuit suggests that the violations have been occurring for 21 years. Nevertheless, paragraphs 54, 55, and 70 of the Consent Decree would appear to give the company another nine years – a cumulative total of 30 years – to achieve compliance with some regulations. Why is the company being given so much time to reach compliance with the Wisconsin SIP? And is paragraph 119 of the Consent Decree really intended to provide prospective immunity for some types of unpermitted modifications until 2015? If so, why? If not, what is the purpose of that paragraph? Have settlements in any other federal air pollution cases against utility companies involved such extended compliance deadlines? And, on the subject of prospective compliance, is paragraph 123(E) intended to waive WE Energies' need to comply with any more stringent National Ambient Air Quality

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[15] EPA's Final SEPs policy at page 20.
[16] Which is based in turn upon § 173(a)(3) of the CAA, 42 U.S.C. § 7503(a)(3).

Standards which may be adopted, at least with respect to its so-called "other sources" of air pollution? Again, if so why, and if not, what is the purpose of that language?

I ask that your office please refrain from filing a motion to enter the proposed consent decree until these and any other substantial questions which Wisconsin citizens may ask about the matter are answered. In the event that the federal government fails to answer these questions, I respectfully submit that the district court should decline to approve the proposed consent decree because there is simply no way to ensure that the proposed settlement is reasonable, fair and consistent with the purposes of the CAA. Thank you very much for your consideration of these comments.

Very truly yours,

Peggy A. Lautenschlager
Attorney General

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