

STATE OF WISCONSIN
SUPREME COURT

CLEAN WISCONSIN, INC.
p/k/a Wisconsin's Environmental
Decade Institute, Inc.,
SC JOHNSON & SON, INC. and
CALPINE CORPORATION

Petitioners-Respondents-Cross-
Appellants-Cross-Respondents,

Appeal No. 04-3179

TOWN OF CALEDONIA,
Petitioner-Cross-Respondent,

v.

Circuit Court Case Nos.
03CV003478, 03CV003731,
04CV000133, 04CV000149,
04CV000530, 04CV000533

PUBLIC SERVICE COMMISSION OF
WISCONSIN and WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,
Respondents-Co-Appellants-
Cross-Respondents,

WISCONSIN ELECTRIC POWER
COMPANY, W.E. POWER, LLC and
WISCONSIN ENERGY CORPORATION,
Interested Parties-Appellants-
Cross Respondents,

(Caption continued on following pages)

APPEAL FROM A DECISION OF THE CIRCUIT COURT OF DANE
COUNTY, THE HONORABLE DAVID FLANAGAN, PRESIDING

**RESPONSE BRIEF OF INTERESTED PARTIES-APPELLANTS-CROSS
RESPONDENTS WISCONSIN ELECTRIC POWER COMPANY, W.E.
POWER, LLC AND WISCONSIN ENERGY CORPORATION**

DAIRYLAND POWER COOPERATIVE,
Interested Party-Cross-Respondent,

MADISON GAS & ELECTRIC COMPANY
AND WISCONSIN PUBLIC POWER, INC.,
Interested Parties-Co-Appellants-
Cross-Respondents,

CITY OF OAK CREEK,
Interested Party-Respondent-
Cross-Appellant,

ROBERT H. OWEN,
Interested Party-Respondent-
Cross-Respondent.

CALPINE CORPORATION,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF
WISCONSIN and WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,
Respondents,

WISCONSIN ELECTRIC POWER
COMPANY, W.E. POWER, LLC and
WISCONSIN ENERGY CORPORATION,
DAIRYLAND POWER COOPERATIVE,
MADISON GAS & ELECTRIC COMPANY,
ROBERT H. OWEN, JR., and
CITY OF OAK CREEK,
Interested Parties.

CLEAN WISCONSIN, INC.
p/k/a Wisconsin's Environmental
Decade Institute, Inc.,
SC JOHNSON & SON, INC. and
CALPINE CORPORATION,
Petitioners,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,
Respondent,

WISCONSIN PUBLIC POWER, INC.,
CITY OF OAK CREEK, DAIRYLAND
POWER COOPERATIVE, MADISON
GAS & ELECTRIC COMPANY,
WISCONSIN ELECTRIC POWER
COMPANY, WISCONSIN ENERGY
CORPORATION and W.E. POWER, LLC,
Interested Parties.

CALPINE CORPORATION,
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WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,
Respondent,

CITY OF OAK CREEK, DAIRYLAND
POWER COOPERATIVE, MADISON GAS
& ELECTRIC COMPANY, WISCONSIN
PUBLIC POWER, WISCONSIN ELECTRIC
POWER COMPANY, WISCONSIN ENERGY
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CITY OF OAK CREEK,
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WISCONSIN ELECTRIC POWER
COMPANY, WISCONSIN ENERGY
CORPORATION, W.E. POWER, LLC,
DAIRYLAND POWER COOPERATIVE,
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TABLE OF CONTENTS

	<u>Page</u>
ISSUES PRESENTED FOR REVIEW	vi
INTRODUCTION	1
STANDARDS OF REVIEW	2
ARGUMENT	4
I. The Commission Properly Determined that ERGS is “In The Public Interest” Pursuant to the Factors Set Forth in § 196.491(3)(d)3, Wis. Stats.	4
A. The Commission fully understood the requirements of § 196.491(3)(d)3 and rendered appropriate findings that ERGS is “in the public interest.”	5
B. The Commission properly used EGEAS modeling as one tool to assist in assessing need, source, and timing issues.....	8
1. SCJ/CW’s claim that speculative “health costs” related to air pollution should have been included in the EGEAS model is incorrect and was properly rejected by the Commission.....	11
2. Mitigation costs and local community impacts need not be part of EGEAS modeling and were independently considered by the Commission.....	15
3. The Commission’s EGEAS modeling expressly addressed the criticisms of SCJ/CW.....	16
4. The Commission’s EGEAS modeling considered alternatives to coal.	18
5. Calpine’s “least cost” argument is without valid basis.....	19

II.	The Commission Properly Determined that ERGS Will Not Have an Undue Adverse Impact on Other Environmental Values in Accordance with § 196.491(3)(d)4.	22
III.	The Commission Properly Determined that ERGS Will Not Have a Material Adverse Impact on Competition in the Relevant Wholesale Electric Service Market in Accordance with § 196.491(3)(d)7.	26
IV.	The Commission and DNR Properly Determined that the Environmental Impact Statement was Adequate and Complied with WEPA.....	27
	A. The EIS appropriately addresses the cost-effectiveness of lower-emitting alternatives.	30
	B. The EIS appropriately addresses water-related impacts.....	31
	C. The EIS appropriately addresses site alternatives.....	34
	D. The EIS appropriately addressed potential adverse impacts and appropriately responds to public comments.....	36
	CONCLUSION	39

TABLE OF AUTHORITIES

Cases

<i>Baltimore Gas & Electric Co. v. NRDC</i> , 462 U.S. 87 (1983).....	4, 27, 37
<i>Citizens' Utility Board v. PSC</i> , 211 Wis. 2d 537, 565 N.W. 2d 554 (Ct. App. 1997).....	3, 29, 30, 39
<i>City of New Richmond v. DNR</i> , 145 Wis. 2d 535, 428 N.W.2d 279 (Ct. App. 1988).....	9, 30
<i>County of Bergen v. Dole</i> , 620 F. Supp. 1009 (D. N.J. 1985), <i>aff'd</i> , 800 F.2d 1130 (3rd Cir. 1986).....	32-33
<i>Custer County Action Association v. Garvey</i> , 256 F.3d 1024 (10th Cir. 2001).....	35
<i>Holtz & Krause, Inc. v. DNR</i> , 85 Wis. 2d 198, 204, 270 N.W.2d 409 (1978)	3
<i>Inman Park Restoration, Inc. v. Urban Mass Transportation Association</i> , 414 F. Supp. 99 (N.D. Ga. 1975), <i>aff'd</i> , 576 F.2d 573 (5th Cir. 1978)	28
<i>Izaak Walton League of America v. Marsh</i> , 655 F.2d 346 (D.C. Cir. 1981).....	28
<i>Kegonsa Joint Sanitary District v. City of Stoughton</i> , 87 Wis. 2d 131, 274 N.W.2d 598 (1979).....	2
<i>Kleppe v. Sierra Club</i> , 427 U.S. 390 (1976)	27-28
<i>Laguna Greenbelt, Inc. v. U.S. Department of Transportation</i> , 42 F.3d 517 (9th Cir. 1994).....	35, 37
<i>Liberty Homes, Inc. v. DILHR</i> , 136 Wis. 2d 368, 401 N.W.2d 805 (1987)	18

<i>Mason County Medical Association v. Knebel</i> , 563 F.2d 256 (6th Cir. 1977).....	29
<i>Milwaukee Brewers Baseball Club v. DHSS</i> , 130 Wis. 2d 56, 387 N.W.2d 245 (1986).....	27, 29
<i>Seacoast Anti-Pollution League v. NRC</i> , 598 F.2d 1221 (1st Cir. 1979).....	32
<i>Sierra Club v. U.S. Department of Transportation</i> , 310 F. Supp.2d 1168 (D. Nev. 2004).....	13, 37
<i>State ex rel. Boehm v. DNR</i> , 174 Wis. 2d 657, 677, 497 N.W.2d 445 (1993)	3, 4, 24
<i>State ex rel. Harris v. Annuity & Pension Board</i> , 87 Wis. 2d 646, 275 N.W.2d 668 (1979).....	6
<i>Swanson v. United States Forest Service</i> , 87 F.3d 339 (9th Cir. 1996).....	29
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989)	27, 32
<i>Town of Ashwaubenon v. State Highway Commission</i> , 17 Wis. 2d 120, 115 N.W.2d 498 (1962).....	6
<i>Vermont Yankee Nuclear Power Corp. v. NRDC</i> , 435 U.S. 519 (1978)	9, 32, 38
<i>Westring v. James</i> , 71 Wis. 2d 462, 238 N.W.2d 695 (1976)	5, 6, 9
<i>Wisconsin’s Environmental Decade, Inc. v. PSC</i> , 98 Wis. 2d 682, 298 N.W.2d 205 (Ct. App. 1980).....	6, 9, 12, 18, 38

Statutes

§ 1.11, Wis. Stats.....	2, 32
§ 196.491(3)(d), Wis. Stats.	<i>passim</i>
§ 227.01(13)(b), Wis. Stats.	21

§ 227.10(1), Wis. Stats.	21
§ 227.47(1), Wis. Stats.	6, 7
§ 227.57(6), Wis. Stats.	<i>passim</i>

Miscellaneous

<i>In re Fond du Lac Energy Center, LLC</i> , 2003 WL 21673685 (Wis. PSC May 5, 2003)	23
<i>In re W.E. Power</i> , 2002 WL 32067560 (Wis. PSC Dec. 20, 2002)	21

ISSUES PRESENTED FOR REVIEW

1. Whether the Commission properly used econometric computer modeling as one tool to assist in determining whether ERGS is “in the public interest” under § 196.491(3)(d)3, Wis. Stats.

Answered by the Circuit Court: Yes.

2. Whether the Commission properly determined that ERGS will not have an undue adverse impact on other environmental values in accordance with § 196.491(3)(d)4, Wis. Stats.

Answered by the Circuit Court: Yes.

3. Whether the Commission properly determined that ERGS will not have a material adverse impact on competition in the relevant wholesale electric service market in accordance with § 196.491(3)(d)7, Wis. Stats.

Answered by the Circuit Court: Yes.

4. Whether the Commission and the Department of Natural Resources (“DNR”) properly determined that the joint Environmental Impact Statement was adequate and complied with the Wisconsin Environmental Protection Act (“WEPA”), § 1.11, Wis. Stats.

Answered by the Circuit Court: Yes.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Oral argument has been scheduled for March 30, 2005. Publication of the opinion is appropriate because the decision will clarify Wisconsin law regarding the regulatory process for approval of a Certificate of Public Convenience and Necessity (“CPCN”) and the discretion appropriately accorded the technical expertise of the Wisconsin Public Service Commission with respect to that highly complex process.

INTRODUCTION

Cross-Appellants do not challenge the Commission’s fundamental determination that the new-technology, coal-fired facilities approved by the Commission are necessary to “satisf[y] the reasonable needs of the public for an adequate supply of electric energy.” *Final Dec.* at 5. SC Johnson & Son and Clean Wisconsin (“SCJ/CW”) concede that “[t]he issues before the Court do not turn on whether the new power plants are needed.” SCJ/CW Brief at 2. As the Commission unanimously found, the evidence conclusively demonstrates that construction of the Elm Road Generating Station (“ERGS”) is necessary to meet the State’s baseload energy needs in the next decade. *Final Dec.* at 20, 22, 24, 27.

Instead, the cross-appeal challenges isolated, and particularly fact-intensive, aspects of the Commission’s § 196.491(3)(d), Wis. Stats., inquiry. SCJ/CW challenges one component of the § 196.491(3)(d) criteria—the “public interest” inquiry under (3)(d)3—and focuses its criticisms on various inputs selected by the PSC for inclusion in a complex, econometric computer model used to facilitate the Commission’s assessment of certain aspects of a proposed facility. Calpine Corporation (“Calpine”) asserts that the Commission must mandate the “least cost” proposal derived from such computer modeling, and challenges two additional aspects of § 196.491(3)(d): (1) the “other environmental values” determination under (3)(d)4; and (2) the “impact on competition in the relevant wholesale electric service market” assessment under (3)(d)7.

As set forth below, the Commission properly exercised its delegated authority to weigh the conflicting evidence presented on each of these issues and rendered sound determinations “supported by substantial evidence in the record.” § 227.57(6), Wis. Stats. There is no ground for judicial reversal of the appropriate judgments of the agency on these factual issues that are well within the discretion and institutional expertise of the Commission.

SCJ/CW and Calpine also independently challenge the PSC and DNR determinations of the adequacy of the joint Environmental Impact Statement (“EIS”). The EIS was the product of comprehensive proceedings under the Wisconsin Environmental Protection Act (“WEPA”), § 1.11, Wis. Stats., and comprises approximately 900 pages, including highly technical analyses.¹ The Commission and DNR have independently determined that the EIS was adequate to address the respective agency actions and complies with the requirements of WEPA. Under applicable principles of judicial review, the EIS prepared here readily comports with WEPA and provided an appropriate “hard look” at the potential environmental impacts of the proposed project.

STANDARDS OF REVIEW

SCJ/CW begins its discussion of the standards of review with a misleading citation. SCJ/CW cites *Kegonsa Joint Sanitary District v. City of Stoughton*, 87 Wis. 2d 131, 274 N.W.2d 598 (1979) for the purported proposition that “broad deference in lieu of careful analysis is inconsistent with the legislative policy favoring judicial review.” SCJ/CW Brief at 8. The case contains no such statement. The decision addresses *jurisdiction* to review agency actions. See *Kegonsa*, 87 Wis. 2d at 145. To the extent the decision touches upon standards of review, it merely confirms that Chapter 227 “outlines the scope of judicial review” and reiterates that the “court has often pointed out that ‘a court cannot compel that discretion be exercised in a particular way.’” *Id.* at 151-52 & 153 n.14 (citing *State ex rel. Knudsen v. Board of Education*, 43 Wis. 2d 58, 70, 168 N.W.2d 295 (1969)).

The deference properly accorded to administrative determinations of the fact-intensive matters at issue in this cross-appeal is well settled and statutorily defined:

¹ The EIS (R.18-119) has been submitted as a supplemental appendix. Thus, references to the EIS in this brief cite directly to the EIS page designations.

If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

§ 227.57(6), Wis. Stats. A reviewing court may not overturn an agency's finding of fact "even if it may be against the great weight and clear preponderance of the evidence." *Holtz & Krause, Inc. v. DNR*, 85 Wis. 2d 198, 204, 270 N.W.2d 409 (1978).

The Commission's determination that an EIS is adequate for purposes of assessing the action at issue has been accorded "great weight deference." *See Citizens' Utility Board v. PSC*, 211 Wis. 2d 537, 553, 565 N.W.2d 554 (Ct. App. 1997). Recognizing the Commission's "particular competence or expertise" in determining whether an EIS complies with § 1.11, Stats., *id.* at 550, the Court of Appeals held:

The PSC's determination of EIS adequacy will be sustained if it is "merely . . . reasonable," and the burden of proof is on the challenger to show that the PSC's determination of adequacy is unreasonable. An interpretation is unreasonable only if it directly contravenes the words of a statute, if it is clearly contrary to legislative intent or it is without a rational basis.

Id. at 552-53 (citation omitted). A reviewing court should "sustain the PSC's determination of [EIS] adequacy unless [the challenger] persuades [the Court] that there is no rational basis for that determination." *Id.* at 553. *See also State ex rel. Boehm v. DNR*, 174 Wis. 2d 657, 677, 497 N.W.2d 445 (1993) ("In determining the reasonableness of the DNR's decision that an EIS is not required, we defer to the technical

expertise of the department.”); *accord Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97-98 (1983) (National Environmental Policy Act (“NEPA”) requires “only that the agency take a ‘hard look’ at the environmental consequences before taking a major action. The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.”).²

ARGUMENT

I. The Commission Properly Determined that ERGS is “In The Public Interest” Pursuant to the Factors Set Forth in § 196.491(3)(d)3, Wis. Stats.

Section 196.491(3)(d)3, Wis. Stats., provides that the Commission shall determine whether a proposed facility’s

design and location . . . is in the public interest considering alternative sources of supply, alternative locations . . . , individual hardships, engineering, economic, safety, reliability and environmental factors. . . . In its consideration of environmental factors, the commission may not determine that the design and location . . . is not in the public interest because of the impact of air pollution if the proposed facility will meet the requirements of ch. 285.³

The “public interest” determination does not turn upon any one of these statutory factors in isolation; rather, it requires that the Commission exercise its expertise and judgment to balance the various, often-conflicting considerations. As the Commission noted:

² Federal cases interpreting NEPA are persuasive authority in interpreting WEPA. *State ex rel. Boehm*, 174 Wis. 2d at 675 n.4.

³ The full text of relevant statutes and regulations is appended to this brief.

The Commission must consider the extent to which a proposal may cause individual hardships, as well as concerns about its engineering, economics, safety, reliability, environmental impacts, interference with local land use plans, and impact upon wholesale competition. *The Commission is required to balance all of these competing elements, which frequently lead in different directions; no single primary factor is the measure of a CPCN project.*

Final Dec. at 15 (emphasis added).

The Commission appropriately weighed the extensive evidentiary record developed through the contested case proceedings and balanced this array of factors to render a rational judgment that the design and location of ERGS is in the public interest. Cross-Appellants' disagreement with the agency's judgment in balancing these factors and weighing the evidence on disputed issues of fact provides no grounds for judicial reversal of the Commission's considered decision. § 227.57(6), Wis. Stats.; *see generally Westring v. James*, 71 Wis.2d 462, 470, 238 N.W.2d 695 (1976) (holding with respect to an analogous "in the public interest" analysis that "it is within the legislative delegation to the administrative director to determine in which respects the enumerated considerations are pertinent to the effectuation of the broad legislative standards.").

A. The Commission fully understood the requirements of § 196.491(3)(d)3 and rendered appropriate findings that ERGS is "in the public interest."

SCJ/CW asserts, without citation to authority, that PSC "fail[ed] to perform th[e] statutorily required analysis" under § 196.491(3)(d)3. *See* SCJ/CW Brief at 10. No precedent defines a specific manner by which the Commission must "perform" the balancing of the competing qualitative and quantitative factors necessary to assess whether the design or location of a facility is "in the public interest." Nor is it the province of the judiciary to direct how the Commission

should exercise its delegated responsibilities in balancing these various, and often competing, factors. *See, e.g., Westring*, 71 Wis. 2d at 469; *Town of Ashwaubenon v. State Highway Commission*, 17 Wis. 2d 120, 130-31, 115 N.W.2d 498 (1962). Here, there can be no dispute that the Commission fully understood its responsibilities under § 196.491(3)(d)3—it specifically referenced the statutory factors on multiple occasions. *Final Dec.* at 5, 6, 15, 21, 44, 47, 51.

SCJ/CW’s challenge is thus not legal, but rather a factual dispute over the agency’s weighing of the evidence. As to these evidentiary matters, SCJ/CW asserts that the Commission “failed to make findings that would support its conclusory determination that the project is in the ‘public interest’ and meets other statutory criteria.” SCJ/CW Brief at 9-11. The argument is meritless. The Commission’s 62-page Final Decision sets forth in more than adequate detail the bases on which the Commission determined that ERGS is in the public interest.

Section 227.47(1), Wis. Stats., specifies the manner by which findings of fact should be set forth in final agency decisions:

[E]very final decision of an agency shall be in writing accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise and separate statement of the *ultimate conclusions* upon each material issue of fact *without recital of evidence*.

Id. (emphasis added). *See also State ex rel. Harris v. Annuity & Pension Board*, 87 Wis. 2d 646, 661, 275 N.W.2d 668 (1979) (no requirement for “recitation of what evidence was believed and what was rejected” or an “elaborate opinion”); *Wisconsin’s Environmental Decade, Inc. v. PSC*, 98 Wis. 2d 682, 701, 298 N.W.2d 205 (Ct. App. 1980) (“*WED*”) (“It is sufficient if the findings of fact and conclusions of law are specific enough to inform the parties and the courts on appeal of the basis of the decision.”).

Consistent with § 227.47(1), the Commission identified the following “ultimate conclusions” regarding the “public interest” requirement of § 196.491(3)(d)3:

5. The two SCPC units are reasonable and in the public interest after considering alternative sources of supply, individual hardships, engineering, economic, safety reliability, and environmental factors. The IGCC unit does not meet this standard.

6. The North Site—CUP alternative is in the public interest after considering alternative locations, individual hardships, engineering, economic, safety, reliability, and environmental factors.

Final Dec. at 5. These “ultimate conclusions” are supported throughout the Final Decision, which addresses various underlying bases for the determination that the “design and location” of the ERGS facility are “in the public interest,” including, *inter alia*:

- Computer modeling demonstrates that new, high-technology, coal-based facilities are necessary to meet the State’s baseload generation needs in the coming decade. *Id.* at 20, 27.
- “[T]he evidence presented demonstrates that WEPCO’s existing fleet of baseload plants is aging.” *Id.* at 21.
- The evidence “demonstrates the advantages of using cleaner burning coal technologies like SCPC as a baseload resource over gas-fired generation.” *Id.* at 21.
- The evidence demonstrates that “relying on natural gas to meet WEPCO’s baseload needs as well as intermediate and peaking requirements would raise

the risk of not properly diversifying the utility’s fuel mix.” *Id.* at 31.

- “[B]ased on a number of qualitative and quantitative factors . . . coal-fired generation provides the most cost-effective, prudent and practical means of meeting WEPCO’s baseload capacity needs over the next decade.” *Id.* at 22.
- And, although “any of the four sites proposed would meet the standards established under Wis. Stat. § 196.491,” a number of qualitative factors point toward “the North Site—CUP alternative as the proper location for ERGS.” *Id.* at 47-48.

B. The Commission properly used EGEAS modeling as one tool to assist in assessing need, source, and timing issues.

SCJ/CW devotes much of its brief to various criticisms of the EGEAS (Electrical Generation Expansion Analysis System) econometric modeling used by the Commission to assist in its assessment of timing, cost, and source issues. As the Commission notes, EGEAS modeling is “the primary tool to consider optimal resource options on a quantitative basis for [] future electric demand.” *Final Dec.* at 23. This computer model requires “three forms of inputs: data about the utility’s existing generating system; economic and engineering data for proposed new generating units; and a variety of base forecasts for demand and fuel prices.” *Id.* PSC staff use different model runs, with differing inputs, as a quantitative basis to assist in assessing need, source, and timing considerations. *Id.* at 23-24.

The EGEAS model has inherent limitations and is just one tool used by the Commission in its broader consideration of whether a given facility is “in the public interest.” “The EGEAS model . . . depends upon a great deal of numerical data inputs, assumptions, and forecast uncertainty. Although its results are complex estimates, EGEAS is a useful tool—albeit one important quantitative tool—for the Commission

to use in deciding the timing of the proposed facilities.” *Final Dec.* at 25. EGEAS projections do not mandate the Commission’s final decision. Nothing in the CPCN statute mentions EGEAS modeling, or suggests that results of that or any other econometric tool should dictate the Commission’s decision making under § 196.491(3)(d)3. Rather, “[d]etermining what resource options will ensure low cost, reliability and environmental sensitivity for the consuming public requires the exercise of judgment and consideration of a wide variety of qualitative factors.” *Id.*

SCJ/CW seeks to have this Court ignore the Commission’s “consideration of a wide variety of qualitative factors” and reverse the Commission’s Final Decision based on SCJ/CW’s contention that the Commission “arbitrarily ignored undisputed categories of costs in its EGEAS modeling.” SCJ/CW Brief at 16. Presumably, and without any basis in specific statutory language or administrative rule, SCJ/CW seeks to have this Court mandate, *as a matter of law*, the different inputs that must be used in EGEAS modeling undertaken by the Commission. No precedent or principle of law would support such judicial intervention and micromanagement of the evidentiary considerations and decision processes of the PSC. *See generally Westring*, 71 Wis. 2d at 469-70 (the administrative body, not the courts, “determine[s] in which respects the enumerated considerations are pertinent” to deciding what is “in the public interest”); *City of New Richmond v. DNR*, 145 Wis. 2d 535, 548, 428 N.W.2d 279 (Ct. App. 1988) (“We must rely on the department for its expertise in making such technical scientific determinations as long as it acts reasonably based on an adequately developed record.”); *WED*, 98 Wis. 2d at 701 (“[T]he methods for computing precise cost allocation and differential figures are complex, and this court cannot say that the PSC abused its discretion in choosing one figure over another.”); *accord Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-544 (1978).

SCJ/CW asserts that “cost-inputs” selected by PSC staff for the EGEAS modeling were flawed in three respects: (1) EGEAS models did not include “health-related costs from

ERGS’ planned air emissions”; (2) EGEAS models did not include Oak Creek mitigation costs; and (3) EGEAS models did not include “other local community impacts.” SCJ/CW Brief at 18, 21, 22. SCJ/CW also alleges that PSC did not model a “natural gas . . . alternative” to the ERGS facility. *Id.* at 24. Finally, SCJ/CW alleges sundry “inconsistencies and flaws” in the modeling. *Id.* at 25. As set forth below, each of these arguments is meritless.

More troubling, SCJ/CW plainly misrepresents the record throughout its argument. For instance, SCJ/CW goes so far as to suggest that “PSC uncritically accepted WEC’s biased assumptions in its own EGEAS modeling.” SCJ/CW Brief at 30. This is false. The Commission prepared various different model runs “us[ing] different data inputs.” *Final Dec.* at 24. Indeed, although SCJ/CW fails to mention the fact anywhere in its brief, the Commission staff ***specifically took into account*** SCJ/CW’s criticisms of the modeling inputs and prepared additional EGEAS runs reflecting revised inputs. *Id.* at 26-27. The matter is ***explicitly*** addressed in the Final Decision, *id.*, and the results of the “SC Johnson Blended” EGEAS runs were the subject of testimony in the contested proceedings. (R.18-158:Exh. 273; R.18-157:4706-4718).

The Commission determined that all EGEAS runs, even those reflecting the SCJ/CW concerns, pointed to the same conclusion: baseload, coal-fired capacity is needed to meet Wisconsin’s energy needs. *Id.* at 24, 27. “After considering the quantifiable evidence presented in the EGEAS runs, the key question in this docket is not ***whether*** additional coal-fired baseload generation should be approved, but ***when*** it should be installed.” *Id.* at 24 (emphasis supplied). Exercising its technical expertise, and taking into account the “paramount” concerns over “electric reliability” and the “five-year” process involved in construction and permitting of baseload facilities, the Commission concluded that approval was necessary now so that the facilities could be operational in 2009 and 2010. *Id.* at 22, 25.

As set forth below, each of Cross-Appellants' arguments relating to the EGEAS computer modeling are misplaced factually and legally.

1. SCJ/CW's claim that speculative "health costs" related to air pollution should have been included in the EGEAS model is incorrect and was properly rejected by the Commission.

Without citation to any supporting authority, SCJ/CW argues that the Commission erred by not including alleged "health-related costs from ERGS' planned air emissions" as an input in the EGEAS modeling. SCJ/CW Brief at 18-19. This argument fails on multiple grounds.

First, the Legislature made clear that environmental and health factors relating to the "impact of air pollution" are the jurisdiction of DNR and are *not* to be the subject of the Commission's CPCN decision:

§ 196.491(3)(d)3, Wis. Stats.

In its consideration of environmental factors, the commission *may not determine that the design and location or route is not in the public interest because of the impact of air pollution* if the proposed facility will meet the requirements of ch. 285.

§ 196.491(3)(d)4, Wis. Stats.

In its consideration of the impact on other environmental values [which expressly include public health and welfare], the commission *may not determine that the proposed facility will have an undue adverse impact on these values because of the impact of air pollution* if the proposed facility will meet the requirements of ch. 285.

(Emphasis supplied.)

The Commission was well aware of this statutory delegation of agency responsibility:

[I]f DNR declares that a project will meet the agency's air pollution requirements under Wis. Stat. Ch. 285, the Commission loses its authority under Wis. Stat. §§ 196.491(3)(d)3 and 4 to determine that a project would have undue adverse air pollution impacts.

Final Dec. at 51. The Commission understood ERGS would “meet the requirements of ch. 285,” as DNR had “issued preliminary determinations that both the North Site and North Site—CUP alternative should meet applicable criteria for permit approval.” *Id.*

SCJ/CW seeks to circumvent this plain legislative mandate by recasting purported adverse “impact[s] of air pollution” into “health-related costs” that it claims should be monetized and factored into the EGEAS model. That result cannot be squared with the statutory directive that air-impact issues be addressed and handled within the specialized expertise and competence of the DNR. If the Commission were to deny the CPCN due to alleged external costs of air pollution, it would—quite obviously—be rendering a decision based on the “impact of air pollution” in contravention of the plain language of § 196.491(3)(d)3 and 4.

Second, even assuming *arguendo* that it would be jurisdictionally appropriate for the Commission to address “impact[s] of air pollution” in determining whether a facility was “in the public interest,” nothing in § 196.491(3)(d), or in precedent, could plausibly be construed to *mandate* that the Commission quantify such impacts and include them as inputs in the EGEAS model. As the Commission recognized, it would have been inappropriate to do so here given the highly speculative and uncertain nature of the expert testimony on the issue. *Final Dec.* at 52-53; *see generally WED*, 98 Wis. 2d at 694-96 (PSC’s decision not to

incorporate “unreliable” and “speculative” data into an econometric analysis was reasonable).

The Commission heard sharply conflicting expert testimony regarding the controversial endeavor of attempting to translate health-related air pollution impacts into cost figures. With respect to fine particulate matter (“PM_{2.5}”), which SCJ/CW discusses at length, expert testimony before the Commission demonstrated: (1) there is great uncertainty in the epidemiology and laboratory studies about whether there is any causal relationship between PM_{2.5} and human health effects (R.18-157:4222-4224, 2379, 4253); and (2) the particular species of PM_{2.5} emitted by these high-technology coal plants has not been shown to have adverse health impacts (R.18-157:2397-2398, 2383-2386). SCJ/CW’s own experts conceded that the dose-response function they used to generate cost calculations is “quite uncertain.” (R.18-157:4253-4254). Economist testimony also established that, even assuming *arguendo* some level of health impacts, the cost-quantification numbers set forth by SCJ/CW were grossly exaggerated. (R.18-157:2462-2488).

Given this conflicting expert testimony, the Commission was well within its discretion to conclude it did not have appropriate “expertise to render an independent judgment on this topic.” *Final Dec.* at 52. As the Commission explained,

[t]o do so would require the Commission to pick appropriate methods for modeling emission dispersion, determine if a causal relationship exists between emissions and adverse health impacts, decide whether a threshold level exists below which no impacts occur, and establish how to translate any identified impacts into dollars. These are primarily the functions of the EPA and DNR. . . .

Id. at 52-53. See generally *Sierra Club v. U.S. Department of Transportation*, 310 F. Supp. 2d 1168, 1188 (D. Nev. 2004)

(rejecting similar challenge based upon alleged impacts of PM_{2.5}).

In fact, DNR, applying its superior expertise, concluded in its decision granting the Chapter 285 air permit that “ERGS would not likely pose a significant inhalation risk if operated according to required standards.” (WE App. 272, ¶ 41). DNR also “determined that the benefits of construction of ERGS significantly outweighed the environmental and social costs imposed as a result of its location and construction.” *Id.* ¶ 34.⁴

Finally, the evidence establishes that ambient concentrations from the ERGS facility will not exceed the national ambient air quality standards (“NAAQS”), *see* EIS at 169-171, which are specifically designed to prevent adverse impacts on public health. *Id.* at 146. Indeed, viewing the question from a broader perspective, the Commission noted that the Power The Future (“PTF”) project as a whole ***improves*** air quality in the state. Given the newer technology used in these modern coal facilities, consent agreements, and voluntary emission reductions, the evidence “demonstrates that ***total air emissions will decrease substantially from current levels*** after completion of all PTF projects.” *Final Dec.* at 22 (emphasis supplied).⁵

⁴ The final air permit decision also notes the uncertainty and current lack of regulatory acceptance of these “emergen[t]” techniques “that attempt to quantify the adverse health impacts from a particular source.” WE App. 285-286. Based on prior “DNR analyses,” the DNR “found that, from an inhalation perspective, the risks resulting from well controlled facilities with tall stacks are low.” *Id.* (quoting EIS Vol. 3 at 20).

⁵ In its Agreement with Oak Creek, WE agreed to limit total air emissions from ERGS and the existing Oak Creek facilities to a “baseline” level established in 2000. EIS Vol. 1, Appx. E ¶¶ I(A)-(B).

2. Mitigation costs and local community impacts need not be part of EGEAS modeling and were independently considered by the Commission.

SCJ/CW argues that the Commission erred by not incorporating mitigation costs and “other local community impacts” as inputs in the EGEAS modeling. Again, SCJ/CW cites no authority for the proposition. Nothing requires either cost to be made part of the EGEAS modeling process. The Commission addresses each issue through other means.

The Commission discusses mitigation payments in its Final Decision, ultimately authorizing payments of approximately \$10 million. *Final Dec.* at 48-51. SCJ/CW ignores this finding and, focusing solely on the EGEAS modeling, suggests that “PSC erred as a matter of law by ignoring this substantial cost, without explanation.” SCJ/CW Brief at 21. As the Final Decision demonstrates, the Commission obviously took mitigation payments into account. There is no requirement that this cost be input into the EGEAS model rather than assessed independently.

Similarly, there is no need to include the alleged external costs of “other local community impacts” in EGEAS modeling. Local community impacts of utility projects are addressed instead by identifying the likely impacts and requiring that project sponsors take reasonable steps to mitigate them. The Commission expressly ordered WE to “work with the neighboring communities to mitigate valid impacts and concerns.” *Final Dec.* at 58. WE and Oak Creek negotiated and agreed to a variety of mitigation measures, and the City approved a conditional use permit (“CUP”) for the project detailing specific mitigation measures. *See* EIS Appx. E, R.18-157:2632-2634. To the extent residual impacts remain, they are balanced against the external *benefits* of such projects (R.18-157:1162-1167) and by devices such as the state’s shared revenue program for host communities. *See generally* *Final Dec.* at 49-50.

3. The Commission's EGEAS modeling expressly addressed the criticisms of SCJ/CW.

SCJ/CW further asserts various alleged “inconsistencies and flaws” in the Commission’s EGEAS modeling, and suggests that modeling assumptions “artificially reduced the availability of existing facilities,” ignored “hidden costs,” “shifted costs,” and rested on “unduly optimistic assumptions.” SCJ/CW Brief at 25-30.

During its discussion of these purported “flaws,” SCJ/CW does not once cite the Final Decision of the Commission. Instead, SCJ/CW variously asserts, without citation, that “PSC’s decision . . . ignores these issues,” *id.* at 27, PSC “did not account for these inconsistencies in its model runs,” *id.* at 28, and PSC “uncritically accepted WEC’s biased assumptions,” *id.* at 30. SCJ/CW’s representations to this Court are disturbing. These assertions flatly misstate the Commission’s work and the Final Decision itself.

The Commission *expressly* addressed and considered the purported “flaws” now alleged by SCJ/CW:

S.C. Johnson criticizes a number of modeling inputs, alleging that WEC is using improper engineering and fuel data for existing WEPCO units, an improper common systems cost allocation to the OCPP units, a demand and energy forecast that is too high, an improper addition of 200 MW of demand obligations for WPPI and MEUW, overly favorable engineering assumptions for the proposed SCPC units, and an improper early retirement of certain OCPP and Presque Isle units, while it is also ignoring the likely availability of additional energy efficiency efforts that would reduce the growth in electric demand. *Commission staff evaluated these concerns, revised some of its assumptions, and prepared an EGEAS run to demonstrate how these*

changes would affect the optimal expansion plan.

Final Dec. at 26 (emphasis supplied). Even accounting for the criticisms raised by SCJ/CW, “the EGEAS model results are not significantly different” and new-technology coal plants remain necessary to meet baseload needs in the next decade. *Id.* at 27.

Various factual assertions set forth in the SCJ/CW Brief are also inaccurate. For instance, SCJ/CW asserts that it is “[p]erhaps most significant[]” that WE selected a “performance efficiency” of 8,700 Btu/kWh even though the “contractually guaranteed heat rate for the SCPC units is 8,850 Btu/kWh.” SCJ/CW Brief at 30 & n.7. SCJ/CW fails to advise the Court that PSC staff ***did not*** “uncritically accept” WE’s heat rate, but rather, in fact, used the rate guaranteed by the contractor—8,850 Btu/kWh. (R.18-157:4655).

Although SCJ/CW fails to bring these matters to the Court’s attention in its brief, the law is clear: Where, as here, an agency has expressly addressed the factual matters at issue, weighed the evidence, and rendered a determination within its delegated discretion and expertise, the Court may not “substitute its judgment” for that of the agency. § 227.57(6), Wis. Stats.

Moreover, abundant evidence in the record rebuts the “flaws” alleged by SCJ/CW. Various witnesses testified on these matters, and presented evidence that: (1) modeling assumptions for existing capacity were reasonable (R.18-157:1772-1780); (2) the allocation of site common costs was reasonable (R.18-157:1225-1226); (3) the performance assumptions were reasonable (R.18-157:1772-1774); (4) WE’s base case EGEAS analysis did not unreasonably presume the early retirement of Oak Creek Units 5 and 6; and (5) WE did not use unrealistically low equivalent forced

outage assumptions or unreasonably high unit efficiency assumptions (R.18-157:1755-1757).⁶

PSC's weighing of this competing evidence, its determination as to which assumptions were reasonable and appropriate for input into the EGEAS model, and its assessment of the various different modeling runs, are fact-intensive inquiries within the unique expertise and discretion of the Commission. There are no grounds for judicial reversal of such matters. *See* § 227.57(6), Wis. Stats.; *see also Liberty Homes, Inc. v. DILHR*, 136 Wis. 2d 368, 391-93, 401 N.W.2d 805 (1987); *WED*, 98 Wis. 2d at 701.

4. The Commission's EGEAS modeling considered alternatives to coal.

SCJ/CW argues that "PSC failed to run a comparable modeling analysis for a non-coal alternative to the two ERGS SCPC units" and specifically asserts that the Commission "did not evaluate the cost of relying upon natural gas units (or a combination of higher priority alternatives) as a substitute for coal-fired generation from ERGS." SCJ/CW Brief at 24. This is also a misrepresentation of the record.

The Final Decision expressly states: "The Commission also considered whether gas-fired generation is a cost-effective or technically feasible alternative that could replace the need for new baseload generation facilities." *Final Dec.* at 19. It was not. *Id.* Specifically addressing its computer modeling, the Commission explained: "Commission staff did conduct an 'integrated alternative' EGEAS analysis that examines the feasibility of combining renewable resources with natural gas, while also reflecting a more aggressive energy efficiency approach. . . . Even this integrated alternative run shows that an SCPC unit is needed during the

⁶ WE also disputed certain modeling assumptions by the Commission that skewed the analysis *against* ERGS. (R.18-157:749-755, 848-851). Moreover, as to the "admitted" error discussed in the SCJ/CW Brief at 40, this issue was first identified by WE, was corrected by PSC staff, and did not undermine the utility of prior EGEAS runs for comparative purposes. (R.18-157:4706, 4716-4717, 4730).

forecasting period.” *Id.* at 20. Moreover, the EIS expressly sets forth EGEAS modeling that “rel[ies] exclusively on natural gas” as a substitute for coal-fired generation from ERGS. EIS at 66-73. That EGEAS run found that relying upon natural-gas units “would cost ratepayers \$1.9 billion more than a balanced plan using optimally timed gas- and coal-fired electric generation, as well as some wind generation development.” *Id.* at 73.

The Commission determined that, under any plausible scenario accounting for the State’s impending energy needs, the advanced coal-technology of the SCPC units was necessary. *Final Dec.* at 20. The issue was timing, and the Commission found that “it is in the public interest to have more reliable baseload generation in place sooner rather than later as a matter of public policy.” *Id.* at 22.

5. Calpine’s “least cost” argument is without valid basis.

Calpine is an independent wholesale power producer that sought to have the Commission mandate that WE purchase power from Calpine to meet the baseload energy needs at issue. The Commission fully considered and ultimately rejected Calpine’s proposal. The Final Decision identifies two principal bases for the Commission’s determination that the Calpine proposal could not displace the need for ERGS:

(1) “Calpine’s projects are natural-gas fired, combined-cycle units. Ordinarily, such units are considered intermediate load generating stations, with capacity factors up to 50 percent. Almost without exception, though, EGEAS model runs in this record show that WEPCO needs additional baseload capacity within the next decade, in which generating stations must operate between 70 and 90 percent capacity factors.” *Final Dec.* at 30.

(2) Although “some EGEAS runs identify a \$57 million cost reduction if a 523 MW,

combined-cycle Calpine plant is included in 2006 or 2007, [] the EGEAS models demonstrate that approving such units *would not replace the need for additional coal-fired baseload generation. In addition, relying upon natural gas to meet WEPCO's baseload needs as well as its intermediate and peaking requirements would raise the risk of not properly diversifying the utility's fuel mix.*" *Id.* at 30-31 (emphasis supplied).

Calpine does not challenge these conclusions. Instead, Calpine advances an unprecedented, and ultimately groundless, legal argument that the Commission was *required* "to include Calpine's proposal as part of the authorized expansion plan" because § 196.491(3)(d)3 purportedly mandates that the Commission "implement the least cost requirement." Calpine Brief at 15. This argument fails on multiple bases.

First, and most obviously, nothing in § 196.491(3)(d)3 requires that the Commission "implement the least cost requirement." To the contrary, the statutory provision expressly requires that the Commission assess whether the "design and location" of a facility "is in the public interest considering" multiple factors: "alternative sources of supply, alternative locations[,]. . . individual hardships, engineering, economic, safety, reliability and environmental factors." *Id.* Calpine's "least cost requirement" argument would render *one* economic consideration dispositive, nullifying the breadth of remaining factors the Commission is directed to take into account in assessing the "public interest."⁷ As the Commission correctly noted: "The Commission is required to balance all of these competing elements, which frequently lead in different directions; *no single primary factor is the measure of a CPCN project.*" *Final Dec.* at 15 (emphasis supplied).

⁷ Even the "economic" component of the multi-factor § 196.491(3)(d)3 inquiry is broader than "least cost" (e.g., price volatility, risk of default, etc.).

Second, Calpine's references to prior PSC Orders do not support its claim. As a legal matter, such prior orders do not establish a binding "rule," as Calpine suggests. See §§ 227.01(13)(b) and 227.10(1), Wis. Stats. Regardless, Calpine misstates the Commission's prior decisions. The *112 Order* (which addressed a bidding process to select among independent power producers) did not impose a "least cost" requirement. The order expressly states that the Commission considers "a number of factors which are important, but defy a reasonable assignment at dollar costs, such as performance guarantees and community support/opposition." Calpine App. 209. So too, none of the remaining cited orders rested upon a "least cost requirement." See, e.g., *Repap Order*, Calpine App. 152 ("The Commission chose the LS Power Whitewater project based on a balanced consideration of costs and intangible factors of all the bids."); *Rhineland Order*, Calpine App. 243 (same); *MGE Order*, Calpine App. 462 ("[P]lans with the WCCF were either superior to or virtually tied with plans without the WCCF.").

Notably, the Commission's Order approving the first Phase of PTF (not cited by Calpine) recognizes that enactment of the leased generation law (under which these facilities are financed) underscores the importance of "qualitative factors" such as "reliability" and "long-term price certainty" in assessing whether a facility is "in the public interest":

The enactment of this new law permits the Commission to consider leased generation through a non-utility affiliate as a new way to ensure greater reliability in Wisconsin and deliver greater long-term price certainty to ratepayers at a time of unprecedented price volatility in wholesale energy markets across the country.

In re W.E. Power, 2002 WL 32067560, at *11 (Wis. PSC Dec. 20, 2002).

Finally, although the Commission noted that "some EGEAS runs identify a \$57 million cost reduction" (a

0.0028% difference in the context of the 30-year EGEAS projection)⁸ under proposals that included both Calpine facilities *and* coal-fired facilities, *Final Dec.* at 30, a “gas-only” proposal “would cost ratepayers \$1.9 billion more” than the ERGS plan ultimately approved. EIS at 73. Evidence before the Commission also addressed the substantial problems presented by the “extreme volatility of natural gas prices,” *id.* at 62, R.18-157:4529-4530, and the significant uncertainties in the wholesale energy market. EIS at 45 (“[M]any independent power producers have been experiencing financial difficulties.”). Indeed, at the time of the contested case hearings, Calpine’s debt had been downgraded to “junk bond” status (R.18-157:1784), and its SEC filings stated that it “may be unable to secure additional financing in the future” and “may be unable to obtain an adequate supply of natural gas in the future.” (R.18-158:Exh. 195, Tab 5 at 3, 5).

In sum, there is no “least cost requirement” by statute or rule. The Commission appropriately considered, and rejected, the Calpine proposal given the countervailing considerations and qualitative concerns regarding over reliance on gas-based generation.

II. The Commission Properly Determined that ERGS Will Not Have an Undue Adverse Impact on Other Environmental Values in Accordance with § 196.491(3)(d)4.

Calpine argues that the Commission’s Final Decision violates § 196.491(3)(d)4’s requirement that the Commission determine “[t]he proposed facility will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use.” *Id.* Calpine bases this argument on two purported grounds: (1) “PSC inappropriately departed

⁸ The \$57 million difference arose in the “Revised Staff Base” EGEAS run. (R.18-158:Exh. 273, Sch. 3 Revised). Various runs reflected different amounts. *Id.*

from its past interpretation of its mandate under Wis. Stat. § 196.491(3)(d)4”; and (2) “The Final Decision confirms that ERGS’s once through cooling system will not comply with applicable numeric environmental performance standards.” Calpine Br. at 30. Neither argument is correct.

First, nothing in the Commission’s prior rulings establishes any “mandate” under § 196.491(3)(d)4 that differs from the Commission’s appropriate treatment of the issue here. Calpine references *two* proceedings as purported support for this legal proposition—namely, Calpine’s own CPCN proceedings regarding the Fond du Lac Energy Center and a proposed “Sherry plant.” Calpine Brief at 31. Nothing in either proceeding “mandates” how the Commission must exercise its discretion under § 196.491(3)(d)4. Indeed, the Commission’s decision process in those proceedings is analogous to the process applied here, as the Final Decision approving the Fond du Lac application demonstrates. There, the Commission similarly rendered an “ultimate conclusion” that “[t]he Fond du Lac Energy Center will not have undue adverse impact on other environmental values,” directed that Calpine be “responsible for obtaining, maintaining, and complying with the water diversion permit associated with plant use,” and required that Calpine “be responsible for obtaining a Wisconsin Pollutant Discharge Elimination System (WPDES) Permit from the DNR in order to discharge its cooling water” into Lake Winnebago. *In re Fond du Lac Energy Center, LLC*, 2003 WL 21673685, at *2, 5 (Wis. PSC May 5, 2003). As here, the specific parameters of the WPDES permit had not been resolved by the DNR at the time of the CPCN decision.⁹

Second, contrary to Calpine’s argument, PSC required and considered extensive evidence relating to the ERGS water intake structure and discharge. The EIS devotes extensive discussion to these matters. EIS at 179-221; EIS Vol. 3 at 34-35. Moreover, testimony on the matter was presented at the contested hearings by multiple witnesses. (R.18-157:1514-

⁹ The WPDES permit (which relates to the water intake structure and discharge) is not a permit deemed necessary prior to issuance of a CPCN. WE Brief, at 37; PSC/DNR Brief at 28 n.9.

1545 (Krause); 3319-3361 (Goodwin); 3529-3588 (Jude); 4280-4332 (Henderson); 4337-4348 (Ehlinger); 4461-4503 (Schuettgeltz)). Initial entrainment studies indicated that, in fact, the proposed off-shore intake structure, if in compliance with “Best Technology Available” requirements, would, in fact, greatly *reduce* fish entrainment compared to the existing on-shore intake canal currently in use at the Oak Creek facility. (R.18-157:1516).

With the understanding that “ERGS could utilize once-through cooling, as [the existing Oak Creek Power Plant] does now, if applicants can demonstrate that the intake structure represents Best Technology Available for controlling impingement and entrainment of aquatic organisms,” *Final Dec.* at 53, and in light of the evidence presented, the Commission appropriately deferred to the superior institutional expertise of DNR and EPA to ensure that these “Best Technology Available” requirements were, in fact, met. *Id.* The Commission’s Order also specified: “If the EPA or DNR determine that once-through cooling is not permissible, WEC shall submit a revised project application for the Commission’s approval that redesigns or relocates ERGS as needed.” *Id.* at 58. *See State ex rel. Boehm*, 174 Wis. 2d at 676 (“[A]n agency may control potential adverse environmental consequences through conditions that must be complied with to obtain approval [and] . . . may assume that any environmental consequences will be controlled through compliance with the applicable administrative code provisions.”).

Calpine’s argument that the ERGS facility “does not comply with water intake standards” is wrong and incorrectly states that the proposed intake structure will have “a velocity of 1.0 feet/second.” Calpine Br. at 35. On January 12, 2005, DNR published notice of its intent to issue the WPDES permit for the ERGS facility and found to the contrary. *See DNR Public Notice of Intent to Reissue a WPDES Permit No. WI-0000914-07-0* (WE Supp. App. 101-104).¹⁰ That notice

¹⁰ The DNR Notice is attached to this brief. WE requests judicial notice of this formal agency notice for the reasons set forth in the PSC/DNR’s Motion for Judicial Notice.

specifies that WE has “proposed an array of submerged wedge-wire screens and a design through-screen *velocity of 0.5 feet per second or less*,” which DNR “tentatively determined . . . meets the [Best Technology Available] requirement with regard to reduction in fish impingement.” (WE Supp. App. 101) (emphasis supplied). Calpine’s claim that ERGS will not meet “thermal plume requirements” is also incorrect. DNR preliminarily concurred that the “thermal discharges will assure the protection and propagation of a balanced indigenous population of shellfish, fish, and aquatic life in Lake Michigan.” (WE Supp. App. 101). Finally, the Chapter 30 permit issued by DNR concludes that construction of the intake structure “will not cause environmental pollution,” and “impacts of the construction dredging will be short-lived and minor.” (WE App. 296, ¶¶ 10-11).

With respect to wetlands, Calpine’s arguments are similarly misplaced. The EIS addresses wetlands issues at length, *see* EIS at 197-200, 216-217, and testimony was presented relating to wetlands. (R.18-157:4400-4402, 4409-4429). Moreover, “DNR would have advised the PSC if DNR considered any of the sites to be unpermittable, but did not do so because DNR did not consider any of the four sites to be unpermittable.” (WE App. 299, ¶ 29). DNR has, in fact, found that ERGS complies with wetlands requirements, noting “the two highest quality wetlands . . . will not be impacted by the project” and “the North Site—CUP avoids detrimental impacts to wetland functional values to the maximum extent possible.” (WE App. 300, ¶¶ 35-36).

In sum, substantial evidence supports the Commission’s reasoned determination that, provided WE complies with DNR’s environmental permitting requirements, ERGS will not have “an undue adverse impact on other environmental values.” That evidence included the materials presented through the EIS, which devoted hundreds of pages to a broad array of potential environmental impacts, *see* EIS at 133-390, and testimony and evidence offered at the technical hearings regarding potential impacts on environmental values and how such impacts would be

mitigated. (e.g., R.18-157:1162-1167, 1505-1547, 2812-2841, 2187-2192).

The Commission's judgment on these fact-intensive issues is supported by substantial evidence in the record and borne out by DNR's permitting decisions. § 227.57(6), Wis. Stats.

III. The Commission Properly Determined that ERGS Will Not Have a Material Adverse Impact on Competition in the Relevant Wholesale Electric Service Market in Accordance with § 196.491(3)(d)7.

Calpine argues that the Commission undermined wholesale electric competition by approving ERGS but rejecting Calpine's efforts to have the Commission mandate that power be purchased, in part, from Calpine's own facilities. The argument is without basis. Acting well within its delegated expertise, and after evaluating substantial evidence regarding the impact of ERGS on the relevant wholesale market, the Commission properly found that the proposed project will have no material adverse impact on competition. *Final Dec.* at 5, 27-29.

The Commission was presented with extensive evidence regarding market effects through both the EIS and expert testimony during the contested hearings. Chapter 3 of the EIS addresses the potential impacts of ERGS on the wholesale market. As the EIS states, market power is defined as "the ability of a firm to charge prices for its product above what a competitive market would allow." EIS at 44. The EIS notes that the leased generation structure approved by the Wisconsin Legislature impacts pricing mechanisms and requires that any rate changes be regulated by the PSC through its ongoing "review of the lease's economic terms and conditions. Essentially, *PSC economic regulation prevents any material adverse impact on competition.*" *Id.* (emphasis supplied).

At the hearings, Dr. Gary Roberts, who served as Associate Director for Antitrust in the Bureau of Economics of the Federal Trade Commission, testified that “the proposed generating plants will have no material impact on competition in any relevant wholesale market.” (R.18-157:2137). In reaching that conclusion, Dr. Roberts employed standard analytical techniques for evaluating competitive impacts. *Id.* at 2159. Dr. Roberts also developed an economic model that allowed him to evaluate whether ERGS would afford WE either the ability or the incentive to exercise market power. *Id.* at 2149-2152. He determined it would not. *Id.* at 2149.

Although Calpine would certainly prefer that the Commission mandate that power be purchased from its facilities, there is no basis in this record for the Court to substitute its judgment for that of the Commission regarding the expert testimony and evidence presented. § 227.57(6), Wis. Stats. The Commission fully understood its responsibility to ensure that ERGS would not “have a material adverse impact on competition in the relevant wholesale electric service market” and exercised its delegated authority on the basis of an appropriate record addressing the issue.

IV. The Commission and DNR Properly Determined that the Environmental Impact Statement was Adequate and Complied with WEPA.

The purpose of an EIS is to enable agencies to take a “hard look” at the environmental impacts of proposed actions. *See, e.g., Milwaukee Brewers Baseball Club v. DHSS*, 130 Wis. 2d 56, 72, 387 N.W.2d 245 (1986). “NEPA itself does not mandate particular results, but simply prescribes the necessary process.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). “The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.” *Baltimore Gas & Electric Co.*, 462 U.S. at 97-98. “Neither [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental

consequences of its actions.” *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

The final EIS prepared jointly by PSC and DNR in this case fills approximately 900 pages and represents the collective efforts of 38 agency staff members. EIS at xv-xvi. It contains three volumes, which include separate chapters addressing: “Background and Regulatory Requirements,” “PTF Costs and Financing Mechanism,” “Need for Baseload Capacity in Southeastern Wisconsin,” “Alternatives to the Proposed Project,” “Overview of Proposed Sites and Technologies,” “Air Emissions,” “Water Resources,” “Solid and Hazardous Waste Disposal and Remediation,” “Land Resources,” “Community Impacts,” “The Conditional Use Permit (CUP) Option,” and “Overview of the Required Decisions and Summary of Impacts.” EIS at iii-vii. Volume 3 of the EIS reflects statements received during the public comment process (more than 270 individuals provided comments on the draft EIS) and sets forth a 43-page response discussing the manner by which the final EIS incorporates and addresses the issues raised. *See* EIS Vol. 3.

As with all EIS’s addressing complex and dynamic projects (which necessarily and appropriately undergo modification in response to public and regulatory comments), this EIS is comprehensive, but it also recognizes and acknowledges various limitations inherent in its early-stage analysis. *See, e.g., Izaak Walton League of America v. Marsh*, 655 F.2d 346, 377 (D.C. Cir. 1981) (“So long as the environmental impact statement identifies areas of uncertainty, the agency has fulfilled its mission under NEPA. . . . ‘If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated.’”) (citations omitted); *Inman Park Restoration, Inc. v. Urban Mass Transportation Association*, 414 F. Supp. 99, 117-118 (N.D. Ga. 1975), *aff’d*, 576 F.2d 573 (5th Cir. 1978) (“The early stages at which the EIS must be done of necessity contemplates that all detailed planning for each component of the project unit will not have been completed at that time.”). Indeed, if a project were not

allowed to be modified, it would undermine a fundamental purpose of the EIS and regulatory process.

Courts recognize that no EIS could ever be perfect. “No matter how exhaustive the discussion of environmental impacts in a particular EIS might be, a challenger can always point to a potentiality that was not addressed.” *Citizens’ Utility Board*, 211 Wis.2d at 554; *accord Mason County Medical Association v. Knebel*, 563 F.2d 256, 265 (6th Cir. 1977) (“[N]o matter how well the EIS has been written, someone later can always find fault with it. We would question whether a perfect EIS has ever been prepared.”). Accordingly the adequacy of an EIS is “to be construed in light of reason.” *Milwaukee Brewers*, 130 Wis. 2d at 72. *See also Swanson v. United States Forest Service*, 87 F.3d 339, 343 (9th Cir. 1996) (“[T]his court need not ‘fly-speck’ the document . . ., but will instead employ a ‘rule of reason’ to determine whether it contains ‘a reasonably thorough discussion of the significant aspects of the probable environmental consequences.’” (citation omitted)).

Both DNR and the Commission independently found the EIS to be adequate for purposes of their respective responsibilities and to comport with the requirements of WEPA. *Final Dec.* at 56; WE App. 301, ¶ 41. In its Final Decision, the Commission recounted the procedural history of the EIS, addressed the Respondents’ challenges, and concluded:

After hearing these concerns and reviewing the detailed record prepared in this case, much of which concerns environmental impacts, the Commission finds that this EIS properly discusses the significant aspects of probable environmental consequences. In those areas where the likely environmental consequences associated with ERGS are unknown, the EIS identifies these uncertainties.

Final Dec. at 56.

Despite the breadth of the EIS prepared for this project, and the independent findings by both the PSC and DNR that the EIS was adequate, SCJ/CW and Calpine both isolate components of the EIS for challenge. Viewed in its totality under the “rule of reason,” and according appropriate great weight to the agency decisions, *see, e.g., Citizens’ Utility Board*, 211 Wis. 2d at 552, *City of New Richmond*, 145 Wis. 2d at 548, the EIS fully satisfies WEPA.

A. The EIS appropriately addresses the cost-effectiveness of lower-emitting alternatives.

Simply recasting its EGEAS modeling complaints within the context of an attack on the EIS, SCJ/CW asserts that “PSC committed legal error by failing to do any modeling or analysis of less-polluting alternatives to ERGS.” SCJ/CW Brief at 40. Aside from the lack of any legal authority that would dictate that EGEAS modeling be conducted in any particular manner, SCJ/CW’s argument simply misstates the content of the EIS.

Chapter 4 of the EIS is devoted to “Alternatives to the Proposed Project.” EIS at 47-77. Contrary to SCJ/CW’s assertion, that chapter addresses, analyzes, and models various alternatives to ERGS. In particular, the chapter discusses the feasibility of energy efficiency measures, renewable resources (including wind, biomass, solar, and fuel cell alternatives), and natural gas-fired plants as alternatives to ERGS. *Id.* Neither energy efficiency measures nor renewable resources were viable means to address the energy needs at issue. *Id.* Modeling runs based on natural gas-only options increased costs by \$1.9 billion, and those based on a combination of natural-gas and biomass were \$1.4 billion more expensive. *Id.* at 48. The EIS also notes concerns relating to “the high cost of natural gas on a Btu-adjusted basis, and also the extreme volatility of natural gas prices.” *Id.* at 62.

The EIS analysis—which considers, analyzes and models these various alternatives in a technically dense chapter dedicated to the subject—demonstrates that new-

technology, coal-fired generation is necessary to meet the state's baseload energy needs in a cost-effective and reliable manner. While SCJ/CW may take issue with this result, it is simply a misrepresentation to suggest that the EIS "fail[ed] *to do any* . . . analysis of less-polluting alternatives." SCJ/CW Brief at 40. As Chapter 4 of the EIS evidences, it unquestionably did.

B. The EIS appropriately addresses water-related impacts.

Cross-Appellants suggest that the EIS is inadequate because it did not "include sufficient information on once-through technology" or "alternative" cooling mechanisms. SCJ/CW Brief at 40-42; Calpine Brief at 39-40. SCJ/CW and Calpine also suggest that the EIS does not appropriately address wetlands issues, and Calpine suggests generally that the EIS does not adequately address the "cumulative impacts" on "water-related resources." SCJ/CW Brief at 47-48; Calpine Brief at 40-41. As both DNR and PSC concluded, the criticisms are misplaced.

Chapter 8 of the EIS sets forth a nearly 50-page, detailed analysis of water resource impacts associated with ERGS. Contrary to Cross-Appellants' assertion, the EIS contains an extensive discussion of the anticipated impacts of "once-through cooling" (a cooling system already in use at the existing Oak Creek Power Plant) and evaluates the expected aquatic impacts of the ERGS cooling system, including impacts on reproduction and spawning, *see* EIS at 188-189; effects of impingement and entrainment of fish and ichthyoplankton, *id.* at 190, 193-195; and impacts on benthic macroinvertebrates and zooplankton. *Id.* at 190-191. Efforts to mitigate aquatic impacts using the "Best Technology Available" for existing facilities and the treatment of water discharge are also addressed. *Id.* at 203-208, 217-224.

DNR and PSC possessed substantial information relating to the potential impacts of once-through cooling because the Oak Creek Power Plant has used once-through cooling for decades and it has been the subject of extensive

study. EIS at 192-193. Such studies have demonstrated that “the impacts of entrainment and impingement were inconsequential to aquatic life in Lake Michigan,” *id.* at 193, and “have consistently indicated a lack of significant impact” from thermal discharge. *Id.* at 195. The EIS addresses DNR’s determination that ERGS would be required to meet the “Best Technology Available” requirements for purposes of modifying the existing facilities. *Id.* at 204.

Cross-Appellants’ criticism that the EIS should have more fully addressed alternative technologies to the once through cooling system is misplaced. The purpose of the alternatives analysis is to consider reasonable alternatives “to the proposed action,” § 1.11(2)(c)3, Wis. Stats., not alternatives to each and every technical component of an engineering plan. *See, e.g., Seacoast Anti-Pollution League v. NRC*, 598 F.2d 1221, 1230 (1st Cir. 1979) (“[T]he process of studying alternatives is not endless.”).¹¹ Here, the EIS properly examined, in detail, several reasonable alternatives to the “proposed action,” including “taking no action,” *see* EIS at 47, reducing energy load and peak demand, *id.* at 48-53, and employing different fuel sources to meet the identified energy needs. *Id.* at 53-77. With respect to the proposed once-through cooling technology, the EIS properly explained the process and its efficiencies, *see* EIS at 92, 95-96, 103, 200-208, and responded to comments concerning other cooling technologies, *id.* at Vol. 3, 34-35.

The EIS also addresses mitigation efforts with respect to the intake structure, noting that EPA and DNR regulations will mandate that “the proposed offshore intake structure must be designed to minimize environmental impacts” and that the specific details of such mitigation would be refined through the WPDES process. EIS at 204. An EIS does not impose a “substantive requirement that a complete mitigation plan be actually formulated and adopted.” *Robertson*, 490 U.S. at 352. “[I]t is not necessary, nor is it possible, that every detail be contained in an FEIS. General commitments

¹¹ As the Supreme Court noted, “the term ‘alternatives’ is not self-defining.” *Vermont Yankee*, 435 U.S. at 551.

to future action suffice to meet mitigation requirements.” *County of Bergen v. Dole*, 620 F. Supp. 1009, 1061 (D. N.J. 1985), *aff’d*, 800 F.2d 1130 (3rd Cir. 1986). Indeed, the EIS notes that ERGS is “an opportunity to attain the [Best Technology Available] requirements.” *Id.* at 204. Testimony indicated that such “Best Technology Available” structures would *improve* present impacts on Lake Michigan, and that fish entrainment would be *reduced* compared to the existing intake system. (R.18-157:1516, 3559). After thorough and detailed consideration of the issue, DNR has issued a public notice setting forth its preliminary determination that the proposed once-through cooling system will not cause undue impacts from impingement or entrainment. (WE Supp. App. 101-104).¹²

As to wetlands issues, SCJ/CW’s arguments are similarly misplaced. The “Water Resources” Chapter of the EIS (Chapter 8) addresses wetlands at length, describing the implicated wetlands by acreage, type, and significance, *see* EIS at 197-200; outlining anticipated impacts, *id.* at 216-217; and noting the independent DNR requirements that must be satisfied. *Id.* at 217, 226. The “Land Resources” Chapter of the EIS (Chapter 10), further addresses the “potential impacts on the natural resources that are part of [the] landscape,” including wetlands and wildlife issues relating to development on this “brownfield” land. *Id.* at 247-283. The “Conditional Use Permit (CUP) Option” Chapter of the EIS (Chapter 12) addresses wetlands modifications based on the North Site—CUP alternative. *Id.* at 400-401. Through the Chapter 30 permitting process, DNR has, in fact, concluded that ERGS complies with wetlands requirements, will not cause any undue adverse environmental impacts, and “avoids detrimental impacts to wetland functional values to the maximum extent possible.” (WE App. 300, ¶¶ 35-36). SCJ/CW’s suggestion of vast degradation to wetlands from development of ERGS is simply inaccurate. The EIS appropriately addressed wetlands issues, and DNR has

¹² Notably, one of the major requests during the CPCN public comment period was for a public fishing dock located near the discharge because of the excellent fishing opportunities. EIS at 345.

conclusively determined that development of ERGS will not compromise important wetlands needs.

Finally, Calpine's suggestion that the EIS is inadequate because it did not make a direct comparison between "water-related impacts" from the ERGS facilities and those at Calpine's facilities has no basis. The EIS did, in fact, include a discussion of Calpine's proposed Fond du Lac facility and the environmental impacts from that facility. EIS at 417-430. Moreover, as set forth above, the EIS thoroughly analyzed the alternative of using natural gas-fired facilities, including Calpine's proposed facility, as a substitute for ERGS.

C. The EIS appropriately addresses site alternatives.

SCJ/CW asserts that "the EIS fails to include any analysis of alternative sites." SCJ/CW Brief at 43. SCJ/CW attempts to redefine the record and substitute its own judgment for the factual determinations of PSC and DNR. Indeed, SCJ/CW seeks to dictate the conclusion of its argument by simply asserting, without citation to the record, that "WEC proposed a single site for the new units: the OCPP." SCJ/CW Brief at 6. This misstates the record. As the CPCN application itself plainly sets forth, and as both DNR and PSC understood and found:

Three sites for the proposed ERGS were identified in the CPCN application. One of the proposed sites is in the city of Oak Creek in Milwaukee County at the east end of Elm Road, north of the existing OCPP. This site is referred to as the North Site throughout this EIS. A second site, the South Site, is located south of the existing OCPP along the lakeshore. A variation of the South Site was proposed as the applicant's third site alternative. . . . Since the draft EIS was issued, WEPCO and the city of Oak Creek agreed upon another site layout plan for the North Site. This site layout was negotiated as part of the Conditional Use Permit (CUP) process that the applicants agreed to follow

in their agreement with the city of Oak Creek.

EIS at 2-3.

The EIS assessed the differences among these site alternatives throughout its analysis, including differences with respect to “Land Resources,” *see* EIS at 247; “Water Resources,” *id.* at 216; and “Air Emissions,” *id.* at 162.

Chapter 6 of the EIS is entitled “Overview of Proposed Sites and Technologies,” *see* EIS at 95-132, and explains that the site selection process “started with over 140 potential sites . . . reduced through a process that evaluated the sites on various social, environmental, and technical/economic parameters that were embodied in 55 screening criteria.” *Id.* at 95. *See, e.g., Custer County Action Association v. Garvey*, 256 F.3d 1024, 1041 (10th Cir. 2001) (noting that alternatives that do not accomplish the goals of the project being proposed need not be addressed); *Laguna Greenbelt, Inc. v. U.S. Department of Transportation*, 42 F.3d 517, 524 (9th Cir. 1994) (“[T]here is no minimum number of alternatives that must be discussed.”).

As to the final sites selected for ultimate comparison in the EIS, Chapter 6 notes:

Although the sites would share the use of some of the common existing OCPP infrastructure such as the coal-handling equipment, rail lines and ash landfills, there are several ways in which the sites can be differentiated as alternative sites. These differences include: 1) having building footprints in different municipalities and counties resulting in different entities receiving shared-revenue payments if the ERGS proposal is approved, 2) separate [surface] water discharge locations, and 3) significant differences in the amount of excavation to build and safely operate the facilities.

Id. at 96.

SCJ/CW's simple re-labeling of these alternative sites as "the OCPP site" provides no grounds to cast aside the factual findings and exercise of delegated discretion of the agencies that "alternative sites" were presented and analyzed. § 227.57(6), Wis. Stats.

Moreover, it bears emphasis that despite the repeated suggestions by SCJ/CW that grave adverse environmental consequences attend the site ultimately approved for ERGS, the findings of DNR rendered throughout the environmental permitting process are squarely to the contrary: By its air permit, "DNR determined that ERGS would not likely pose a significant inhalation risk if operated according to required standards" and that "the benefits of construction of ERGS significantly outweighed the environmental and social costs imposed as a result of its location and construction" (WE App. 272, ¶¶ 34, 41); by its Chapter 30 permit, DNR concluded that dredging and grading activities at the location "will not cause environmental pollution," that the site "avoids detrimental impacts to wetland functional values to the maximum extent possible," and that "the most important wetlands have largely been preserved and will be protected and enhanced by the plan to minimize secondary impacts," *id.* at 296-301, ¶¶ 10, 24, 36, 39; by its public notice on the WPDES permit, DNR has preliminarily concluded that the cooling system will have no undue adverse impact on aquatic life and "assure[s] the protection and propagation of a balanced indigenous population of shellfish, fish, and aquatic life in Lake Michigan." (WE Supp. App. 102).

D. The EIS appropriately addressed potential adverse impacts and appropriately responds to public comments.

Despite the 53-page Chapter 7 of the EIS dedicated to the subject of "Air Emissions," *see* EIS at 133-178, SCJ/CW argues that the EIS fails to competently address the potential impacts of air pollution. SCJ/CW Brief at 44-45. It does so

on the grounds that the testimony proffered by its retained expert warranted further examination of health impacts. *Id.* The argument is unavailing.

First, the discussion of air emissions in the EIS is extensive. The EIS discusses the “criteria” air pollutants involved, *see* EIS at 133-140, 146, as well as other potentially hazardous air pollutants and mercury, *id.* at 141-42, greenhouse gases, *id.* at 138, and ozone and ozone precursors. *Id.* at 139. The EIS includes estimates of emissions expected at ERGS and National Ambient Air Quality Standards (NAAQS). *Id.* at 169-171, 457-62. The effects of these emissions are considered with respect to the federal acid rain program, *id.* at 152; the Wisconsin ambient air quality requirements, *id.* at 154; and the program for prevention of significant deterioration, *id.* at 161-62. The EIS discusses mitigation of these emissions using the “Best Available Control Technology” throughout construction and operation of ERGS. *Id.* at 168-170, 447-456.

Second, as set forth above with respect to SCJ/CW’s arguments regarding EGEAS modeling, and as noted in the EIS, the purported adverse health impacts presented by SCJ/CW’s expert are highly controversial and speculative. Volume 3 of the EIS notes: (1) there is no clear threshold defining a safe versus an unsafe exposure to PM_{2.5}; (2) initial air modeling showed that PM_{2.5} emissions would be below the limits promulgated by EPA; and (3) given the current state of scientific knowledge, it is not possible to quantify the effects of mercury. EIS at 20-23. *See also Sierra Club*, 310 F. Supp. 2d at 1188 (rejecting similar challenge to EIS because of scientific uncertainty); *Laguna Greenbelt*, 42 F.3d at 526 (“NEPA does not require us to decide whether an EIS is based on the best scientific methodology available or to resolve disagreements among various experts.”); *accord Baltimore Gas & Electric*, 462 U.S. at 103 (“When examining this kind of scientific determination, . . . a reviewing court must generally be at its most deferential.”).

In issuing the air permit, DNR ultimately concluded that ERGS is not likely to pose a significant inhalation risk if

operated according to required standards. (WE App. 272, 285-286).

SCJ/CW also asserts that the EIS fails to appropriately address impacts from required upgrades to transmission facilities. SCJ/CW Brief at 45-47. The argument is factually incorrect. The EIS does, in fact, address potential transmission upgrades and contains preliminary estimates of ERGS-related transmission costs. Chapter 6 discusses “electric transmission” issues, including “interconnection,” “substation changes,” “possible system-wide transmission impacts,” “stability issues,” and “projected costs.” EIS at 126-132. Chapter 11 of the EIS also contains a section entitled “Electric Transmission Proposals and Impacts” further addressing the design, location, and potential environmental impacts of “electric transmission needs” for ERGS. EIS at 381-89.

Calpine’s conclusory and unsupported assertion that the EIS does not address “cumulative impacts on water related resources” is wrong. Calpine Brief at 40-41. Chapter 8 of the EIS provides just such a comprehensive, cumulative 47-page analysis of the potential impacts of ERGS on “water-related resources.” EIS at 179-226.

Finally, SCJ/CW’s argument that the “responsiveness summary is inadequate” is belied by the record. PSC staff produced a 43-page “responsiveness summary” responding to comments on the draft EIS and explaining whether and how comments were used to prepare the final EIS. As the EIS states: “The staff of PSC and DNR have given careful consideration to all of the comments received and have attempted to reflect as many of the comments as possible in the text of the final EIS as well as this volume.” EIS Vol. 3, at 2. WEPA does not require that the agency adopt every request made during the comment period. *See WED*, 98 Wis. 2d at 702 (“[A]n agency has no duty to justify the rejection of figures or methods urged by other interested parties.”); *accord Vermont Yankee*, 435 U.S. at 551.

Viewed under an appropriate “rule of reason” and according appropriate great weight deference to the independent determinations of both DNR and the Commission that the EIS was adequate for purposes of the decision at issue, Cross-Appellants’ isolated challenges provide no basis for reversal. *See, e.g., Citizens’ Utility Board*, 211 Wis. 2d at 551-53.

CONCLUSION

For the foregoing reasons, WE respectfully requests that the Court deny the issues raised on this cross appeal and promptly reinstate the Commission’s November 10, 2003 Final Decision and Order.

Dated this 24th day of February, 2005.

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**CERTIFICATION PURSUANT TO
§ 809.19(8)(b), WIS. STATS.**

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,943 words.

Dated at Milwaukee, Wisconsin this 24th day of February, 2005.

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CPCN Statute - § 196.491(3), Wis. Stats. (2002)

(3) CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY. (a) 1. No person may commence the construction of a facility unless the person has applied for and received a certificate of public convenience and necessity from the commission as provided in this section. An application in the form and containing the information required by commission rules for such certificate shall be filed with the commission not less than 6 months prior to the commencement of construction of a facility. Within 10 days after filing the application, the commission shall send a copy of the application to the clerk of each municipality and town in which the proposed facility is to be located and to the main public library in each such county.

2. The commission shall determine whether an application filed under subd. 1. is complete and, no later than 30 days after the application is filed, notify the applicant about the determination. If the commission determines that the application is incomplete, the notice shall state the reason for the determination. An applicant may supplement and refile an application that the commission has determined to be incomplete. There is no limit on the number of times that an applicant may refile an application under this subdivision. If the commission fails to determine whether an application is complete within 30 days after the application is filed, the application shall be considered to be complete.

3. a. At least 60 days before a person files an application under subd. 1., the person shall provide the department with an engineering plan showing the location of the facility, a description of the facility, including the major components of the facility that have a significant air, water or solid waste pollution potential, and a description of the anticipated effects of the facility on air and water quality. Within 30 days after a person provides an engineering plan, the department shall provide the person with a listing of each department permit or approval which, on the basis of the information contained in the engineering plan, appears to be required for the construction or operation of the facility.

b. Within 20 days after the department provides a listing specified in subd. 3. a. to a person, the person shall apply for the permits and approvals identified in the listing. The department shall determine whether an application under this subd. 3. b. is complete and, no later than 30 days after the application is filed, notify the applicant about the determination. If the department determines that the application is incomplete, the notice shall state the reason for the determination. An applicant may supplement and refile an application that the department has determined to be incomplete. There is no limit on the number of times that an applicant may refile an application under this subd. 3. b. If the department fails to determine whether an application is complete within 30 days after the application is filed, the application shall be considered to be complete. The department shall complete action on an application under this subd. 3. b. for any permit or approval that is required prior to construction of a facility within 120 days after the date on which the application is determined or considered to be complete.

(b) The commission shall hold a public hearing on an application that is determined or considered to be complete in the area affected pursuant to s. 227.44. A class 1 notice, under ch. 985, shall be given at least 30 days prior to the hearing.

(d) Except as provided under par. (e) and s. 196.493, the commission shall approve an application for a certificate of public convenience and necessity only if the commission determines all of the following:

2. The proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy. This subdivision does not apply to a wholesale merchant plant.

3. The design and location or route is in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors, except that the commission may not consider alternative sources of supply or engineering or economic factors if the application is for a wholesale merchant plant. In its consideration of environmental factors, the commission may not determine that the design and location or route is not in the public interest because of the impact of air pollution if the proposed facility will meet the requirements of ch. 285.

3m. For a high-voltage transmission line, as defined in s. 30.40 (3r), that is to be located in the lower Wisconsin state riverway, as defined in s. 30.40 (15), the high-voltage transmission line will not impair, to the extent practicable, the scenic beauty or the natural value of the riverway. The commission may not require that a high-voltage transmission line, as defined in s. 30.40 (3r), be placed underground in order for it to approve an application.

3r. For a high-voltage transmission line that is proposed to increase the transmission import capability into this state, existing rights-of-way are used to the extent practicable and the routing and design of the high-voltage transmission line minimizes environmental impacts in a manner that is consistent with achieving reasonable electric rates.

3t. For a high-voltage transmission line that is designed for operation at a nominal voltage of 345 kilovolts or more, the high-voltage transmission line provides usage, service or increased regional reliability benefits to the wholesale and retail customers or members in this state and the benefits of the high-voltage transmission line are reasonable in relation to the cost of the high-voltage transmission line.

4. The proposed facility will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use. In its consideration of the impact on other environmental values, the commission may not determine that the proposed facility will have an undue adverse impact on these values because of the impact of air pollution if the proposed facility will meet the requirements of ch. 285.

5. The proposed facility complies with the criteria under s. 196.49 (3) (b) if the application is by a public utility as defined in s. 196.01.

6. The proposed facility will not unreasonably interfere with the orderly land use and development plans for the area involved.

7. The proposed facility will not have a material adverse impact on competition in the relevant wholesale electric service market.

(dm) In making a determination required under par. (d), the commission may not consider a factual conclusion in a strategic energy assessment unless the conclusion is independently corroborated in the hearing under par. (b).

(e) If the application does not meet the criteria under par. (d), the commission shall reject the application or approve the application with such modifications as are necessary for an affirmative finding under par. (d). The commission may not issue a certificate of public convenience and necessity until the department has issued all permits and approvals identified in the listing specified in par. (a) 3. a. that are required prior to construction.

(g)1. The commission shall take final action on an application within 180 days after the application is determined or considered to be complete under par. (a) 2. If the commission fails to take final action within the 180-day period, the commission is considered to have issued a certificate of public convenience and necessity with respect to the application, unless the commission, within the 180-day period, petitions the circuit court for Dane County for an extension of time for taking final action on the application and the court grants an extension. Upon a showing of good cause, the court may extend the 180-day period for no more than an additional 180 days. If the commission fails to take final action within the extended period, the commission is considered to have issued a certificate of public convenience and necessity with respect to the application.

1m. Subdivision 1. does not apply to an application for a certificate of public convenience and necessity if another state is also taking action on the same or a related application.

(gm) The commission may not approve an application filed after October 29, 1999, under this section for a certificate of public convenience and necessity for a high-voltage transmission line that is designed for operation at a nominal voltage of 345 kilovolts or more unless the approval includes the condition that the applicant shall pay the fees specified in sub. (3g)(a). If the commission has approved an application under this section for a certificate of public convenience and necessity for a high-voltage transmission line that is designed for operation at a nominal voltage of 345 kilovolts or more that was filed after April 1, 1999, and before October 29, 1999, the commission shall require the applicant to pay the fees specified in sub. (3g)(a). For any application subject to this paragraph, the commission shall determine the cost of the high-voltage transmission line, identify the counties, towns, villages and cities through which the high-voltage transmission line is routed and allocate the amount of investment associated with the high-voltage transmission line to each such county, town, village and city.

(h) The commission may waive compliance with any requirement of this section to the extent necessary to restore service which has been substantially interrupted by a natural catastrophe, accident, sabotage or act of God.

(i) If installation or utilization of a facility for which a certificate of convenience and necessity has been granted is precluded or inhibited by a local ordinance, the installation and utilization of the facility may nevertheless proceed.

(j) Any person whose substantial rights may be adversely affected or any county, municipality or town having jurisdiction over land affected by a certificate of public convenience and necessity may petition for judicial review, under ch. 227, of any decision of the commission regarding the certificate.

(k) No person may purchase, or acquire an option to purchase, any interest in real property knowing that such property is being purchased to be used for the construction of a high-voltage transmission line unless the person gives written notice to the prospective seller of the size, maximum voltage and structure type of any transmission line planned to be constructed thereon and the person by whom it will be operated. Contracts made in violation of this paragraph are subject to rescission by the seller at any time prior to the issuance of a certificate of public convenience and necessity for the high-- voltage transmission line by the commission.

(3c) COMMENCEMENT OF CONSTRUCTION OF LARGE ELECTRIC GENERATING FACILITIES. (a) Except as provided in par. (b), an electric utility that has received a certificate of public convenience and necessity under sub. (3) for constructing a large electric generating facility shall commence construction no later than one year after the latest of the following:

1. The date on which the commission issues the certificate of public convenience and necessity.

2. The date on which the electric utility has been issued every federal and state permit, approval, and license that is required prior to commencement of construction.

3. The date on which every deadline has expired for requesting administrative review or reconsideration of every federal and state permit, approval, and license that is required prior to commencement of construction.

4. The date on which the electric utility has received the final decision, after exhaustion of judicial review, in every proceeding for judicial review described in sub. (3)(j).

(b) Upon showing of good cause, the commission may grant an extension to the deadline specified in par. (a).

(c) If an electric utility does not commence construction of a large electric generating facility within the deadline specified in par. (a) or extended under par. (b), the certificate of public convenience and necessity is void, and the electric utility may not commence construction of the large electric generating facility.

WEPA - § 1.11, Wis. Stats.

§ 1.11. Governmental consideration of environmental impact. The legislature authorizes and directs that, to the fullest extent possible:

(1) The policies and regulations shall be interpreted and administered in accordance with the policies set forth in this section and chapter 274, laws of 1971, section 1; and

(2) All agencies of the state shall:

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the human environment, a detailed statement, substantially following the guidelines issued by the United States council on environmental quality under P.L. 91-190, 42 USC 4331, by the responsible official on:

1. The environmental impact of the proposed action;
2. Any adverse environmental effects which cannot be avoided should the proposal be implemented;
3. Alternatives to the proposed action;
4. The relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity;
5. Any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; and

6. Such statement shall also contain details of the beneficial aspects of the proposed project, both short term and long term, and the economic advantages and disadvantages of the proposal.

(d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any agency which has jurisdiction or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate agencies, which are authorized to develop and enforce environmental standards shall be made available to the governor, the department of natural resources and to the public. Every proposal other than for legislation shall receive a public hearing before a final decision is made. Holding a public hearing as required by another statute fulfills this section. If no public hearing is otherwise required, the responsible agency shall hold the hearing in the area affected. Notice of the hearing shall be given by publishing a class 1 notice, under ch. 985, at least 15 days prior to the hearing in a newspaper covering the affected area. If the proposal has statewide significance, notice shall be published in the official state newspaper;

(e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(h) Initiate and utilize ecological information in the planning and development of resource-oriented projects.

(j) Annually, no later than September 15, submit a report to the chief clerk of each house of the legislature for distribution to the legislature under s. 13.172(2), including the number of proposed actions for which the agency conducted an assessment of whether an impact statement was required under par. (c) and the number of impact statements prepared under par. (c).

(4) Nothing in this section affects the specific statutory obligations of any agency:

(a) To comply with criteria or standards of environmental quality;

(b) To coordinate or consult with any other state or federal agency;

or

(c) To act, or refrain from acting contingent upon the recommendations or certification of any other state or federal agency.

(5) The policies and goals set forth in this section are supplementary to those set forth in existing authorizations of agencies.

Wis. Admin. Code § PSC 4.30

PSC 4.30 Environmental impact statement procedures.

(1) General information. (a) An EIS shall inform the commission and the public of significant environmental impacts of a proposed action and its alternatives, and reasonable methods of avoiding or minimizing adverse environmental effects. The environmental analysis shall be consistent with the regulations issued by the U.S. council on environmental quality, 40 CFR Parts 1500 to 1508.

(b) Each EIS shall evaluate reasonably foreseeable, significant effects to the human environment and significant socioeconomic effects of the proposal and its alternatives. If information relevant to evaluating these effects is incomplete or unavailable, the EIS shall:

1. Indicate the availability of the information.
2. Describe the information's relevance.
3. Summarize available, credible scientific evidence that is relevant to the evaluation.
4. Evaluate effects based upon theoretical approaches or research methods generally accepted in the scientific community.

(c) For each action requiring an EIS, the commission shall prepare both a draft EIS and a final EIS.

(2) Scoping. Scoping shall begin early in the process of preparing an EIS. The commission shall request any person it believes is interested in a proposed action to participate in scoping the proposed action. Scoping is an aid to help the commission identify all of a project's relevant environmental concerns and reasonable alternatives. Scoping may be achieved by means of meetings, hearings, workshops, surveys, questionnaires, interagency committees, requests for written comments, and other methods and combinations of methods that the commission considers appropriate. The commission may also integrate scoping with other public participation requirements.

(3) Content. Based on information obtained from the project applicant, scoping, site inspection, commission research, governmental agencies and other relevant sources, an EIS shall include:

(a) A description of the proposed action and the affected environment and other relevant information.

(am) A description of the purpose of the proposed action and of the need for the proposed action.

(b) An analysis of the probable impact of the proposed action on the environment, including:

1. An evaluation of positive and negative effects on the affected local and regional environments, including the proposed action's direct, indirect and cumulative environmental effects.

2. An analysis of any probable adverse environmental effects that would be unavoidable if the action is approved. This analysis shall consider:

a. The proposed action's short-term and long-term effects.

b. Any irreversible and irretrievable commitments of resources.

3. A statement of how other adverse effects could be mitigated or prevented if the commission approves a proposed action.

(c) An evaluation of the reasonable alternatives to the proposed action and significant environmental consequences of the alternatives, including those alternatives that could avoid some or all of the proposed action's adverse environmental effects and the alternative of taking no action.

(d) A proposed action's socioeconomic effects.

(e) A proposed action's effect on energy usage, including an evaluation of the technical feasibility of alternatives, pursuant to s. 1.12, Stats.

(f) An evaluation of the archeological, architectural and historic significance of any affected resources. This evaluation shall include consultation with the state historical society of Wisconsin.

(g) An evaluation of the effects of a proposed action on agriculture. If the proposed action may result in condemnation of farmland, the commission shall coordinate preparation of an EIS with the Wisconsin department of agriculture, trade and consumer protection. To the extent possible, an EIS for a proposed action that affects agriculture shall incorporate the provisions of an agricultural impact statement under s. 32.035 (4), Stats., so the EIS can also serve the functions of an agricultural impact statement under s. 32.035 (3), Stats.

(h) A summary of the scoping process used and the major issues identified for analysis in the EIS.

(4) Draft environmental impact statements. (a) A draft EIS is a preliminary document, clearly describing a proposed project and the alternatives being considered so that other persons can begin assessing the environmental effects of the proposal.

(b) Each draft EIS shall include a preliminary evaluation of the information described in sub. (3).

(c) The commission shall distribute a copy of each draft EIS to:

1. The governor.
2. Each county, state or federal agency and each Indian tribe the commission knows has special expertise or interest in the proposed project.
3. The state historical society of Wisconsin library.
4. The Wisconsin legislative reference bureau.
5. Each of the regional depository libraries.
6. The Wisconsin department of natural resources.
7. The project applicant.
8. Any person who requests a copy.
9. For a proposed action affecting a local area:
 - a. The public library nearest to the proposed project.
 - b. The county and the town or municipality chief executive officer for the project area.
 - c. Each regional, county and town or municipal planning agency with jurisdiction over the project area.
 - d. The Wisconsin department of natural resources field office with jurisdiction over the project area.
10. For a proposed action affecting a region of the state or the state as a whole:
 - a. One or more public libraries whose geographic distribution provides public access without undue travel.
 - b. The chief executive officer of each county in the project area.
 - c. Each regional planning commission and each county planning or zoning agency with jurisdiction over the project area.
 - d. Each Wisconsin department of natural resources field office with jurisdiction over the project area.

(d) The commission shall notify the public about the availability of the draft EIS. The notice shall include a description of the proposed action and of the administrative procedures to be followed, the last date to submit comments on the draft EIS to the commission, the locations where copies of the draft EIS are available for review, the commission's contact person and, if known, the date of the public hearing. The commission shall deliver a copy of the notice to:

1. Any person with a demonstrated interest in the draft EIS or who has requested to receive this type of information.
 2. Any person who participated in scoping the EIS.
 3. For a proposed action affecting a local area:
 - a. The nearest public library.
 - b. The county clerk and the town or municipal clerk for the project area, with a request that the clerks post the notice publicly.
 - c. The county, town, village or city chief executive officer in the project area.
 - d. Local news media.
 - e. The regional planning commission.
 4. For a proposed action affecting a region of the state or the state as a whole:
 - a. The public libraries specified in par. (c) 10.
 - b. The county clerks in the proposed project area, with a request that the clerks post the notice publicly.
 - c. The county chief executive officers in the proposed project area.
 - d. Regional news media.
- (e) 1. Except as provided in subd. 2., the commission shall allow the public at least 45 days, commencing with the date the draft EIS is mailed or personally served, to comment on the draft EIS.

2. The commission may shorten the public review period under subd. 1. for cause. If so, the commission shall include in its notice under par. (d) a statement calling attention to the reduced review period, specifying the date comments on the draft EIS are due to the commission in order to be considered in developing a final EIS, and describing the reasons why the commission decided to shorten the review period. The commission may also grant reasonable requests to extend the comment period.

(5) Final environmental impact statements.

(a) Following the public review period on a draft EIS, the commission shall prepare a final EIS. The final EIS may vary from the draft EIS in scope, based on comments received on the draft EIS or other pertinent information that becomes known to the commission. The final EIS shall contain the information described in sub. (3).

(b) The commission shall distribute a copy of the final EIS to the same persons who received a copy of the draft EIS under sub. (4) (c), and to any other person who requests a copy of the draft EIS or comments on the draft EIS.

(c) The commission shall notify the public about the availability of the final EIS in the manner specified for a draft EIS under sub. (4) (d), or by including a statement in a notice of hearing.

(d) 1. Except as provided in subd. 2., the commission shall distribute copies of the final EIS to the public and announce its availability at least 30 days before it holds a public hearing on the proposed action. The review period required under this paragraph commences with the date a final EIS is distributed.

2. The commission may shorten the public review period under subd. 1. for cause. If so, the commission shall include in its notice under par. (c) a statement calling attention to the reduced review period, and describing the reasons why the commission decided to shorten the review period. The commission may also grant reasonable requests to extend the public review period.

History: Cr. Register, July, 1995, No. 475, eff. 8-1-95.
Current through Reg. No. 586 (October 2004)

§ 227.57, Wis. Stats. (2002)

§ 227.57. Scope of review.

(1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court and, if leave is granted to take such testimony, depositions and written interrogatories may be taken prior to the date set for hearing as provided in ch. 804 if proper cause is shown therefor.

(2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

(3) The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.

(4) The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.

(5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

(6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

(7) If the agency's action depends on facts determined without a hearing, the court shall set aside, modify or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility.

(8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

(9) The court's decision shall provide whatever relief is appropriate irrespective of the original form of the petition. If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as it finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.

(10) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to the appellant shall not be foreclosed or impaired by the fact that the appellant has applied for or holds a license, permit or privilege under such act.

INDEX TO WE SUPPLEMENTAL APPENDIX

January 12, 2005 Wisconsin Department of Natural Resources Notice of Intent to Reissue a Wisconsin Pollutant Discharge Elimination System (WPDES) Permit	101-04
July 2003 Final Environmental Impact Statement (R.18-119).....	Submitted Separately

**STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES
PUBLIC NOTICE OF:**

- **INTENT TO REISSUE A WISCONSIN POLLUTANT DISCHARGE ELIMINATION SYSTEM (WPDES) PERMIT No. WI-0000914-07-0**
- **RECEIPT OF AN APPLICATION FOR A WATER LOSS APPROVAL**
- **INFORMATIONAL HEARING TO ADDRESS THE ABOVE ITEMS**

INTENT TO REISSUE PERMIT

Permittee: **Wisconsin Electric (WE) Power Company**

Discharge Facility Location: **4801 EAST ELM ROAD, OAK CREEK, WI 53154**

Receiving Water: **LAKE MICHIGAN, MILWAUKEE COUNTY**

Brief Facility Description:

The existing Oak Creek Power Plant (OCPP) is a coal fired steam electric power generating station located on the shore of Lake Michigan. It is comprised of four operating boilers supplying steam to individual turbine generators with a total capacity of about 1,170 megawatts (MW). The power plant generating units are identified as 5, 6, 7, and 8. Units 1, 2, 3, and 4 were retired in 1989. WE is proposing to construct two new coal fired generating units to be located immediately north of retired units 1-4. Each unit is to have a rated capacity of 615 MW. The proposed two new units are known as the Elm Road Generating Station (ERGS), and the combined existing and new generating units are known as the Oak Creek/Elm Road (OCER) Power Plant. The proposed reissued WPDES permit is intended to regulate the wastewater discharges from the entire OCER Power Plant.

In conjunction with the construction of the ERGS, WE is proposing to construct a new offshore intake structure in Lake Michigan that will supply water for the service water and condenser cooling water needs of the OCER Power Plant. The existing on-shore intake channel will be modified to serve as a back-up intake.

Section 316(b) of the Clean Water Act and s. 283.31(6), Wis. Stats., require that the location, design, construction, and capacity of cooling water intake structures (CWIS) reflect the best technology available (BTA) for minimizing adverse environmental impacts. WE has proposed that the new intake structure be located approximately 7,900 feet off-shore from the existing OCPP, that it consist of an array of 24 submerged wedge-wire screens with a screen slot-width of 9.5 millimeters, and that the through-screen velocity be no greater than 0.5 feet per second.

The Department has tentatively determined that the proposed intake structure meets the BTA requirement with regard to reduction in fish impingement, by virtue of having proposed an array of submerged wedge-wire screens and a design through-screen velocity of 0.5 feet per second or less.

WE has conducted two years of sampling for ichthyoplankton at the existing intake and at the site of the proposed off-shore intake. The purpose of the sampling program is to demonstrate that the national performance standard of a minimum of 60% reduction in ichthyoplankton entrainment can be met. Following an analysis of the sampling results, the Department has tentatively determined that the entrainment performance standard in the U.S. EPA regulation will be attained. The modified existing shoreline intake structure will serve as a back-up intake that will be used only for emergency purposes. WE has projected that use of this

emergency intake will occur only 3% of the time. The reissued permit authorizes use of the existing intake for the OCPP until the new CWIS is constructed.

The proposed permit includes a compliance schedule for the additional submittals required by the U.S. EPA regulation for CWIS, including a Verification Monitoring Plan to evaluate the efficacy of the new intake.

The proposed permit contains limitations regulating the discharge of mercury from the ERGS portion of the plant. Part of the air quality system WE is required to install is a flue gas desulfurization (FGD) system. Mercury is present in the FGD system wastewater. This wastewater is treated by a system representing best available technology. The effluent limitation for the combined cooling water and ERGS wastewater system is equal to the most stringent criterion for mercury (1.3 ng/L).

The OCER facility will be discharging heat to Lake Michigan via the condenser cooling water outfalls. Presently, the OCPP facility is not subject to thermal effluent limitations under ss. 283.13 or 283.19, Wis. Stat. WE has proposed thermal effluent limitations, and has filed a petition with the Department under s. 283.17, Wis. Stat., and NR 209, Wis. Adm. Code, for alternative effluent limitations. WE also submitted evidence in support of its request for alternative effluent limitations and requested the establishment of alternative thermal effluent limitations based on the maximum increase in temperature of the cooling water. The report concludes that the existing (OCPP) and proposed (ERGS) thermal discharges will assure the protection and propagation of a balanced indigenous population of shellfish, fish and aquatic life in Lake Michigan. The Department has tentatively concurred with this conclusion and is placing in the proposed permit alternative limitations expressed as 1500 MBTU/hr for outfalls 003 and 004, 1700 MBTU/hr for outfalls 005 and 006, and 6,200 MBTU/hr for outfall 013.

The petition, technical report, and other information are available for public inspection during normal office hours at the permit drafter's office at the address listed below. Any interested party may comment on WE's proposed alternative effluent limitations during the public comment period or by participating in the hearing (as described in this public notice). There may be a further opportunity to address alternative effluent limitations if a valid petition for a contested case hearing pursuant to s. 283.63, Wis. Stats., is filed with the Department.

The Department has tentatively determined that the WPDES permit for the WE OCER plant should be reissued subject to the limitations, monitoring requirements and other terms and conditions contained in the proposed permit.

APPLICATION FOR WATER LOSS APPROVAL

Under the provisions of s. 281.35, Wis. Stats., any water withdrawal that results in a water loss of greater than 2 million gallons per day of water from waters of the Upper Mississippi River or Great Lakes basins is subject to a water loss review by the Department. The OCER power plant is expected to have a water loss that averages in excess of 2 million gallons per day over a 30-day period. As a consequence, WE has applied to the Department for a water loss approval. The grounds for a water loss approval are specified at s. 281.35(5)(d), Wis. Stats., and NR 142.06(3), Wis. Adm. Code, and the approval of the water loss is subject to the review process provided under s. NR 142.06(5), Wis. Adm. Code. The Department has determined that WE has submitted a complete application.

Facility Where Water Loss Will Occur: The OCER power plant, as previously described.

Source of Water Withdrawal and Location: All of the water withdrawn by the OCER power plant comes directly from Lake Michigan. A relatively small amount of water (about 0.6 million gallons per day) is supplied by the City of Oak Creek public water supply that is also drawn from Lake Michigan.

Brief Description of Facility and Water Loss:

The existing OCPP uses Lake Michigan water for cooling water and various other process purposes. The proposed ERGS will also use Lake Michigan water for cooling water, process uses, and air pollution control purposes.

When all condenser cooling water pumps are in operation, the OCPP withdraws 1.177 billion gallons of water per day from Lake Michigan. Nearly all of this water is used for once-through condenser cooling and is returned to Lake Michigan. Not all condenser cooling water pumps are in operation all year. On an annual average basis, the flow rate is 0.08718 billion gallons per day. Actual consumptive water use (i.e., water not returned to Lake Michigan), is 36,648 gallons per day. The consumption is a result of steam losses to the atmosphere (14,434 gallons per day) and water contained in byproduct ash and wastewater treatment plant sludge (22,214 gallons per day). The consumptive water loss from the OCPP is, therefore, 0.0042% of the water withdrawn.

When all condenser cooling water pumps are in operation, the ERGS is expected to withdraw 1.0648 billion gallons of water per day from Lake Michigan. Nearly all of this water is used for once-through condenser cooling and is returned to Lake Michigan. Not all condenser cooling water pumps will be in operation all year. On an annual average basis, the expected flow rate is 1.0636 billion gallons per day. Actual consumptive water use is designed to be 2.53 million gallons per day (annual average). The consumption is a result of the following losses:

Bottom ash system evaporative losses	11,520 gallons per day
Water removed with bottom ash solids	8,640 gallons per day
Deaerator & cycle misc. losses	63,360 gallons per day
Soot blowing losses	460,800 gallons per day
Fly ash conditioning	57,600 gallons per day
Water loss at scrubber	1,823,040 gallons per day
Water with gypsum	102,240 gallons per day
Water loss with filter cake	5,760 gallons per day

The total consumptive loss from the combined OCER facility is, therefore, approximately 2.57 million gallons per day. The 0.6 million gallons per day that is withdrawn from the City of Oak Creek public water supply is used primarily as the water source for the demineralizers serving the OCPP and for domestic and miscellaneous potable water uses. The OCPP boiler blowdown and demineralizers regenerant wastes all discharge to the OCPP wastewater treatment plant and consumptive losses from these activities are accounted for in the aforementioned treatment plant sludge. Used domestic and potable water goes to the sanitary sewer and is discharged to Lake Michigan via the Milwaukee Metropolitan Sewerage District South Shore wastewater treatment facility in Oak Creek. Therefore, there is no consumptive loss associated with domestic/potable water uses.

Department's River Basin Contact Name, Address, and Phone: Mike Luba, 9531 Rayne Rd., Suite 4, Sturtevant, WI 53177, 262-884-2369

Permit Drafter's Name, Address and Phone: Daniel Joyce, 101 S. Webster St. PO Box 7921, Madison, WI, 53707-7921, (608) 266-0289

Basin Engineer's Name, Address, and Phone: Jason Chappelle, 9531 Rayne Rd., Suite 4, Sturtevant, WI 53177, 262-884-2362

NOTICE OF INFORMATIONAL HEARING

The Department has scheduled an informational hearing, pursuant to s. 283.49, Wis, Stats., for the purpose of giving all interested persons an opportunity to provide comments to the Department with respect to the above issues. The informational hearing shall be held on February 16, 2005 - 12:30 - 4:00 p.m. at the courtroom of the Oak Creek Police Department, 301 West Ryan Road, Oak Creek, WI.

A hearing officer will conduct the hearing in an orderly and speedy way and will use procedures necessary to insure broad public participation in the hearing. The hearing officer will open the hearing and make a concise statement of the scope and purpose of the hearing and shall state what procedures will be used during the course of the hearing. The hearing officer shall explain the method of notification of the final decision to grant or deny the permit and the methods by which the decision may be reviewed in a public adjudicatory hearing. The hearing officer may put limits on individual oral statements to insure an opportunity for all persons present to make statements in a reasonable period of time and to prevent undue repetition. The hearing officer may also limit the number of representatives making oral statements on behalf of any person or group. Informational and clarifying questions and oral statements shall be directed through the hearing officer. Cross-examination shall not be allowed.

Persons wishing to comment on or object to the proposed permit action, or persons wishing to comment on the application for a water loss approval, are invited to do so by attending the public hearing or by submitting any comments or objections in writing to the Department of Natural Resources, at the above named permit drafter's address. All written comments or suggestions received from members of the public no later than 7 days following the date of this public hearing will be used, along with other information on file and testimony presented at the hearing, in making a final determination.

Information on file for this permit action may be inspected and copied at either the above named permit drafter's address or the above named basin engineer's address, Monday through Friday (except holidays), between 9:00 a.m. and 3:30 p.m. Information on this permit action may also be obtained by calling the permit drafter at (608)266-0289 or by writing to the Department. Reasonable costs (usually 20 cents per page) will be charged for copies of information in the file other than the public notice and fact sheet. Permit information is also available for downloading from the internet using a world wide web browser at: <http://www.dnr.state.wi.us/org/water/wm/ww>. Pursuant to the Americans with Disabilities Act, reasonable accommodation, including the provision of informational material in an alternative format, will be made to qualified individuals upon request.

FOR THE SECRETARY:

By Charles Hammer, Hearing Officer

PUBLISHING NEWSPAPERS:

Racine Journal-Times – January 14, 2005

Oak Creek Pictorial – January 13, 2005

Milwaukee Journal-Sentinel – January 12, 2005

Wisconsin State Journal – January 13, 2005