



www.plainsjustice.org

November 24, 2008

Richard Leopold, Director
Department of Natural Resources
Wallace State Office Building
502 East 9th Street
Des Moines, Iowa 50319-0034

Re: PM_{2.5} Regulation

Dear Director Leopold:

Plains Justice, Iowa Chapter of Physicians for Social Responsibility, Iowa Nurses' Association, and Community Energy Solutions, write to strongly encourage DNR to require information from air permit applicants that will enable full compliance with the New Source Review requirements under the Clean Air Act. To fully protect Iowa's air quality and public health there must be direct air quality modeling and "best available control technology" (BACT) limits of particulate matter less than 2.5 micrometers in diameter (PM_{2.5}). These steps are required under the Clean Air Act. Nonetheless, the air permit applications for the proposed coal-fired power plants of Interstate Power and Light and LS Power (the Proposed Coal Plants) do not meet these requirements. Instead, the Proposed Coal Plants use PM₁₀ emissions as a surrogate for PM_{2.5}. This surrogacy approach is legally untenable and technically unjustified.

EPA issued the National Ambient Air Quality Standard (NAAQS) for PM_{2.5} in 1997. Now, *eleven years later*, DNR is failing to comply with PM_{2.5} requirements. Iowa cannot agree to this prolonged and illegal polluting of its air quality, especially with the proposed PM_{2.5} "nonattainment" designations of Scott and Muscatine counties.

To fully protect Iowa's public health and environment, especially the health of its most vulnerable citizens, DNR should reject the continued use of PM₁₀ as a surrogate for PM_{2.5}, and require all air permit applicants to submit direct PM_{2.5} air quality modeling and BACT analyses.

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I. **PM_{2.5} presents severe harms to Iowa's public health**

In Iowa, power plants and fuel burning sources account for 10% of PM_{2.5} emissions.¹ Coal-fired power plants are one of the leading causes of fine particulate matter. PM_{2.5} comes in two distinct forms. Primary PM_{2.5} is present within the boiler stack and is generally subdivided into filterable PM_{2.5}, which can be collected on filter paper, and condensable PM_{2.5}, which condenses out of the gas phase. Secondary PM_{2.5} forms in the atmosphere, downwind of the stack, from the conversion of gases, mostly sulfur oxides, nitrogen oxides, and organic compounds, into particulate matter. Fine particle pollution from coal plants spreads over a wide area, with the majority occurring within a 500-mile radius of a plant and the greatest concentrations seen nearby and within a moderate distance of a coal plant.²

The PM_{2.5} fraction of particulate matter is a greater health concern than the coarse fraction, referred to as PM₁₀, as the smaller particles pose the “largest health risks.”³ Federal regulations have declared PM_{2.5} as a causal factor in premature death, in addition to:

aggravation of respiratory and cardiovascular disease (as indicated by increased hospital admissions, emergency room visits, absences from school or work, and restricted activity days), changes in lung function and increased respiratory symptoms, as well as new evidence for more subtle indicators of cardiovascular health.⁴

EPA also has identified lung cancer deaths, infant mortality, and developmental problems (such as low birth weight in children) as possibly linked to PM_{2.5}.⁵

According to the American Academy of Pediatrics, children and infants are among the most susceptible to PM_{2.5}.⁶ Among children, there have been higher asthma-related hospitalization rates, more severe asthma attacks, and slowed lung function growth.⁷ Children also have increased exposure to particulate pollution compared with adults because of higher minute ventilation and higher levels of physical activity. Older adults are also particularly susceptible to PM_{2.5} because of their weaker lungs and hearts. Studies suggest that serious health effects, such as premature mortality, are greater among older groups of individuals.⁸

¹ Pollution Chart, *available at*

<http://www.k12science.org/curriculum/airproj/3dchart/3d.asp?state=ia&pollutant=PercentPM25>.

² L. Deck (Abt Associates, Inc.), “Particulate-Related Health Impacts in 2001 From 41 Major US Power Plants,” (Nov. 2002); J. Levy et al., “The Importance of Population Susceptibility for Air Pollution Risk Assessment: A Case Study of Power Plants Near Washington, DC,” *Environ Health Perspect* 110, 1253, 1257 (2002).

³ See EPA, “PM_{2.5} NAAQS Implementation,” *available at* http://www.epa.gov/tnn/naaqs/pm/pm25_index.html.

⁴ Clean Air Fine Particle Implementation Rule, 72 Fed. Reg. 20,586, 20,586-20,587 (April 25, 2007) (codified at 40 C.F.R. Part 51).

⁵ National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 2620, 2627 (Jan. 17, 2006).

⁶ See also American Lung Association, “Particle Pollution Fact Sheet,” *available at* <http://www.lungusa.org/site/pp.asp?c=dvLUK9O0E&b=50324>.

⁷ *Id.*

⁸ National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 2620, 2637 (Jan. 17, 2006).

Additionally, older adults are also more likely than younger ones to have preexisting respiratory and/or cardiovascular conditions that become aggravated with exposure to PM_{2.5}.⁹

Respiratory disease is one of the leading causes of death of in Iowa, with asthma being the most common chronic disease among Iowa's children.¹⁰ In 2007, seven percent—45,000-50,000—of Iowa children have been diagnosed with asthma.¹¹ Studies suggest there are just as many undiagnosed cases.¹² Between nine and ten percent of Iowa children have ever been diagnosed with asthma, called lifetime asthma, which is 62,000-67,000 0-17 year olds.¹³ The 2007 study also showed 148,000 Iowa adults currently have asthma, while 223,000 have lifetime asthma.¹⁴

II. DNR has a duty to ensure protection of Iowa's air quality

DNR has a duty under the Clean Air and parallel state laws and regulations to ensure the health of Iowans by directly and stringently limiting fine particle pollution. Iowa law requires ambient air quality standards to be set “on the basis of providing air quality necessary to protect the public health and welfare. . . .”¹⁵

a. DNR must ensure enforcement of the National Ambient Air Quality Standards (NAAQS) for PM_{2.5}

The Clean Air Act requires EPA to establish ambient air quality standards at a level that protects public health, including the health of susceptible populations, “with an adequate margin of safety.”¹⁶ These standards must be based solely on the health effects of the pollutant, and may not take into consideration other factors such as cost of achieving the standard.¹⁷ These standards are critical measures for protecting air quality across the United States.

In 1997, EPA promulgated new annual and 24-hour NAAQS for PM_{2.5}.¹⁸ EPA's bases for regulating PM₁₀ and PM_{2.5} separately under distinct NAAQS were and remain the differences in people's exposure, where the particles lodge in the body (PM_{2.5} penetrates deeper into the lungs), and the health effects associated with each.¹⁹ EPA later tightened the PM_{2.5} 24-hour standard from 65 micrograms per cubic meter (µg/m³) to 35 µg/m³, but left the annual standard unchanged.²⁰ Iowa has adopted both of these standards.²¹

⁹ *Id.*

¹⁰ Scott County Health Department, *Update of the Profile of Older Adults in Scott County*, at 2.

¹¹ Muldoon, J., *Asthma in Iowa: Child and Youth Asthma Prevalence*, Center for Health Statistics, Iowa Dept. of Public Health, 2007.

¹² *Id.*

¹³ *Id.*

¹⁴ Muldoon, J., *Asthma in Iowa: Adult Asthma Prevalence, Symptoms and Services Used: BRFSS: 1999-2006*, Center for Health Statistics, Iowa Dept. of Public Health, 2007.

¹⁵ IOWA CODE § 455B.133(3) (2008).

¹⁶ 42 U.S.C. § 7409(b)(1).

¹⁷ *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 471 (2001).

¹⁸ National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,625 (July 18, 1997); 40 C.F.R. § 50.7.

¹⁹ National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61,144, 61,147 (Oct. 17, 2006).

²⁰ *Id.* The annual standard for PM_{2.5} is 15 µg/m³. 40 C.F.R. § 50.7.

In August 2008, EPA made its proposal to designate areas as nonattainment for PM_{2.5}.²² The nonattainment designations are based on violations of the 2006 24-hour PM_{2.5} NAAQS. Two Iowa counties have been proposed to be redesignated: Scott and Muscatine counties.²³ Modeling data shows air monitors in each county have reported violations of the PM_{2.5} NAAQS. Iowa cannot afford to have any more of its counties designated as nonattainment for PM_{2.5}. Other counties in the state have air monitors that have reported violations or are near violation of the PM_{2.5} NAAQS.²⁴ To prevent the further degradation of Iowa's air quality, PM_{2.5} emissions must be controlled.

b. The Prevention of Significant Deterioration (PSD) program requires compliance with NAAQS and PSD increments, as well as application of “best available control technology” (BACT)

In order to protect air quality in areas that are currently meeting the PM_{2.5} NAAQS, the PSD section of the New Source Review program requires a construction permit with “best available control technology” limits for new sources of air pollution. Section 165 prohibits construction of a major emitting facility in an attainment area unless the

owner or operator . . . demonstrates . . . that emissions from the construction or operation of the facility will not cause, or contribute to, air pollution in excess of *any* . . . maximum allowable increase or maximum allowable concentration . . . [or] national ambient air quality standard.²⁵

Section 165 also prohibits construction of a major source unless “the proposed facility is subject to the best available control technology for each pollutant *subject to regulation* under [the Clean Air Act] emitted from, or which results from, such facility.”²⁶ In other words, DNR must ensure that any proposed source of air pollution will not lead to a violation of any PSD increment or NAAQS, and require strict control of emissions for each pollutant subject to regulation.

²¹ See IOWA ADMIN. CODE 567-28.1 (2008).

²² See EPA Responses to State and Tribal 2006 24-Hour PM_{2.5} Designation Recommendations: Notice of Availability and Public Comment Period, 73 Fed. Reg. 51259 (Sept. 2, 2008).

²³ Rock Island County, Illinois, has also been proposed to be redesignated as nonattainment for PM_{2.5}.

²⁴ See Department of Natural Resources, *Iowa Fine Particulate Monitoring Network Design Values 2005-2007*; see also Letter from John B. Askew, Regional Administrator, EPA Region 7, to Chester J. Culver, Governor, State of Iowa (Aug. 18, 2008) at 8, Table 2.2 Air Quality Data for Individual PM_{2.5} Monitors in Davenport-Moline-Rock Island, IA-IL, Muscatine, IA and Select Surrounding Counties Compared to Individual Days when Exceedances were Monitored.

²⁵ 42 U.S.C. § 7475(a)(3)(B) (emphasis added) see also IOWA ADMIN. CODE 567-33.3(2) (a construction permit is required for all major stationary sources of air pollution in attainment areas).

²⁶ 42 U.S.C. § 7475(a)(4) (emphasis added); see also IOWA ADMIN. CODE 567-33.3(10) (adopting BACT requirements from 40 C.F.R. § 52.21(j)).

According to EPA, the promulgation of a NAAQS for PM_{2.5} on July 18, 1997 triggered the duty to apply these PSD requirements to fine particles.²⁷ Therefore, a proposed source cannot be constructed until there is a demonstration that the PM_{2.5} NAAQS will not be violated and the construction permit has a BACT limit for PM_{2.5}. As Iowa has already adopted the PM_{2.5} NAAQS, a BACT analysis for PM_{2.5} emissions should be required for each proposed emitter of PM_{2.5}, including the Proposed Coal Plants.²⁸ Furthermore, Iowa law requires the development of emission limitations and other measures to “assure attainment and maintenance of ambient air quality standards.”²⁹

Requiring BACT analyses for PM_{2.5} emissions is especially important for the Proposed Coal Plants. As noted above, coal-fired power plants are a large contributor to PM_{2.5} pollution, as well as a major contributor of PM_{2.5} precursors.³⁰ With the possibility of two PM_{2.5} nonattainment counties, DNR should do everything it can to prevent further PM_{2.5} NAAQS violations.

III. The use of PM₁₀ as a surrogate for PM_{2.5} is unacceptable as a matter of law

Despite clear bases for requiring direct regulation of PM_{2.5}, EPA has allowed state permitting authorities to regulate PM₁₀ only. A guidance memorandum was issued right after the first PM_{2.5} NAAQS was promulgated that suggested permitting authorities use PM₁₀ as a surrogate for PM_{2.5} because of difficulties in monitoring, estimating, and modeling PM_{2.5} emissions.³¹

a. The Clean Air Act prohibits the use of the surrogacy approach

The Clean Air Act and its implementing regulations require direct control of PM_{2.5}. The legal distinction between PM_{2.5} and PM₁₀ precludes the use of PM₁₀ as a surrogate. There is no way a determination of BACT for PM₁₀ can qualify as the required determination of BACT for the separate and distinct pollutant known as PM_{2.5}.³² The conclusion that a proposed source will not cause or contribute to a violation of the PM₁₀ NAAQS does not satisfy DNR’s legal duty to evaluate whether a proposed source will cause or contribute to a violation of the PM_{2.5} NAAQS.

In the intervening eleven years, EPA has declared that the basis for the 1997 guidance, “significant technical difficulties” with measuring PM_{2.5}, has been resolved.³³ Any assertions

²⁷ See Proposed Rule to Implement the Fine Particle National Ambient Air Quality Standards, 70 Fed. Reg. 65,984, 66,043 (Nov. 1, 2005) (obligation to implement PSD for PM_{2.5} was triggered on the effective date for the NAAQS); 42 U.S.C. § 7475(a)(1)-(4).

²⁸ IOWA ADMIN. CODE 567-28.1; *see also* 567-33.3(10).

²⁹ IOWA CODE § 455B.133(1) (2008).

³⁰ Power plants emit 52% of the SO₂ in Iowa and 25% of the NO_x. Pollution Chart, *available at* <http://www.k12science.org/curriculum/airproj/3dchart/3d.asp?state=ia&pollutant=PercentSO2>.

³¹ Memorandum from John S. Seitz, Director, Office of Air Quality Planning Standards, to Regional Air Directors, Interim Implementation of New Source Review for PM_{2.5} (Oct. 23, 1997).

³² See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (July 18, 1997); National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61,144, 61,147 (Oct. 17, 2006).

³³ Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5}), 73 Fed. Reg. 28,321, 28,340 (May 16, 2008) (Final PM_{2.5} Rule.); *see also* Prevention of Significant

regarding technical limitations relative to PM_{2.5} are outdated. Technical capabilities for modeling PM_{2.5} do exist.³⁴ EPA has identified available models to analyze the impacts of PM_{2.5}.³⁵ Appendix W to 40 C.F.R. Part 51 “addresses the regulatory application of air quality models for assessing criteria pollutants under the Clean Air Act.”³⁶ The Guideline provides for modeling of PM_{2.5} using both the ISC and AERMOD models. EPA has also approved two methods, CTM-039 and CTM-040, for measuring PM_{2.5}.³⁷ Iowa adopted Appendix W in 2005.³⁸

Of even greater concern, the surrogacy approach does not protect vulnerable Iowans from the harms that Iowa’s Air Quality rules were enacted to prevent. Condensable PM comprises a much larger fraction of PM_{2.5} than of larger PM.³⁹ The best controls for PM₁₀ are not necessarily the best controls for PM_{2.5}, as PM_{2.5} emissions are aggressively controlled by limiting the pollutant’s precursors that go on to form condensable PM. Even where PM₁₀ is properly controlled and compliance with PM₁₀ NAAQS has been sufficiently demonstrated, substantial harms are likely to occur from remaining PM_{2.5} pollution.⁴⁰

b. Other States are requiring PM_{2.5} regulation

Numerous experts have demonstrated that the technical concerns behind the surrogacy approach have been resolved. State adjudicative bodies faced with the surrogacy approach in New Source Review permitting challenges have rejected it on the basis that sufficient technical grounds exist to comply directly with PM_{2.5} requirements. Montana’s Board of Environmental Review has found that setting BACT emission limits for PM_{2.5} emissions from a boiler is feasible using existing test methods, emissions estimates from boiler manufacturers, and “design alternative equipment, work practices or operational standards to reduce emissions of PM_{2.5} to the maximum extent.”⁴¹ As the Board further noted, any legitimate remaining issues with the

Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers (PM[2.5])--Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC), 72 Fed. Reg. 54,112 (Sept. 21, 2007).

³⁴ Revision to the Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions, 70 Fed. Reg. 68,218, 68,234-68,235 (Nov. 9, 2005); 40 C.F.R. Part 51 Appendix W, 5.1(e), (t), (h), 5.2.2.1.

³⁵ 40 C.F.R. Part 51 Appendix W (prescribing modeling requirements for PM_{2.5}); 40 C.F.R. § 52.21(1); Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 61 Fed. Reg. 41,838, 41,850 (Aug. 12, 1996); 40 C.F.R. Part 51 Appendix W 7.2.2(c) (showing that historically, “ISC [was] recommended for point sources of small particles. . .”).

³⁶ Revision to the Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions, 70 Fed. Reg. 68,218 (Nov. 9, 2005).

³⁷ Clean Air Fine Particle Implementation Rule, 72 Fed. Reg. 20,586, 20,653 (April 27, 2007).

³⁸ IOWA ADMIN. CODE 567-33.3(2) (2008).

³⁹ Proposed Rule To Implement the Fine Particle National Ambient Air Quality Standards, 70 Fed. Reg. 65,984, 66,044 (Nov. 1, 2005).

⁴⁰ Board of Environmental Review of the State of Montana, “Findings of Fact, Conclusions of Law and Order on Claims of Petitioners that the Department of Environmental Quality Failed to Comply with Permitting Requirements Applicable to PM_{2.5} and Ruling on Regulation of CO₂ for BACT Purposes,” *In the Matter of: Southern Montana Electric Generation and Transmission Cooperative-Highwood Generating Station*, Case No. BER 2007-07 AQ, 23-24 (May 30, 2008) (*Highwood Order*) (finding that the vast majority of uncontrolled PM emissions from a coal-fired boiler will be in the smaller PM_{2.5} size range).

⁴¹ *Id.* at 27-28 and 36.

measurement of PM_{2.5} do not remove the duty to include PM_{2.5}-specific BACT limits in a new source air permit.⁴²

Similarly, a Georgia state court has accepted a PM_{2.5} modeling demonstration showing a violation of the PM_{2.5} NAAQS.⁴³ The court found that when faced with such a demonstration, a state agency could not rest on PM₁₀ modeling alone.⁴⁴ Additionally, at least one facility faced with a surrogacy challenge has agreed to install PM_{2.5}-specific controls, submit PM_{2.5} reports, propose PM_{2.5}-specific numeric emission limits, and install PM CEMS as a condition of a settlement agreement.⁴⁵ This agreement shows that direct PM_{2.5} control is feasible. Montana and Georgia are rightfully refusing to accept lax analyses of an inappropriate surrogate in place of the most protective analyses that are feasible in practice and required under the law.

c. DNR should not rely on the Final PM_{2.5} Rule's attempt to codify the surrogacy guidance

EPA's recent attempt to codify its earlier guidance on PM₁₀ surrogacy retroactively is also unlawful. In its Final PM_{2.5} Rule, EPA impermissibly waived the existing Clean Air Act requirements described above for sources with applications deemed complete prior to July 15, 2008.⁴⁶ In doing so, EPA purports to give the force of law to a guidance memorandum that was never adopted through notice-and-comment rulemaking.⁴⁷ By EPA's own admission, this guidance was never legally binding on state permitting authorities.⁴⁸ EPA memoranda do not supersede the authority of the Clean Air Act's implementing regulations, nor does EPA have the power to repeal a federal statutory requirement. States must ensure that emissions from a given facility will not result in the violation of NAAQS for *any* pollutant.⁴⁹ EPA promulgated NAAQS for PM_{2.5}, making it a pollutant for which modeling must be done to ensure that the standard will not be violated.⁵⁰ This regulation cannot be repealed with a guidance memorandum.

Iowa would do well to abstain from following an *optional* component of yet another faulty Clean Air Act rule. On numerous occasions, the D.C. Circuit and the Supreme Court have overturned EPA's recent failures to follow the plain language of the Clean Air Act in its rulemakings. The cases and overturned rules include:

- *Massachusetts v. EPA*, 549 U.S. 497 (2007), in which EPA erroneously decreed that the Clean Air Act does not give EPA authority to regulate greenhouse gases. In the related

⁴² *Id.*

⁴³ *Friends of the Chattahoochee v. Couch*, in the Superior Court of Fulton County, State of Georgia, Docket No. 2008CV146398, Final Order (June 30, 2008), at 9-12.

⁴⁴ *Id.*

⁴⁵ Settlement Agreement of March 10, 2008 among U.S. Steel Corporation, Gateway Energy & Coke Company, LLC, American Bottom Conservancy, and Sierra Club. The facility is located in Illinois.

⁴⁶ See Final PM_{2.5} Rule at 28,349; 40 C.F.R. § 52.21(i)(1)(xi) (allows use of surrogate approach for applications complete as of July 15, 2008 with respect to using PM₁₀ instead of PM_{2.5}).

⁴⁷ *Highwood Order*, at 25.

⁴⁸ See Memorandum from John S. Seitz, Director, Office of Air Quality Planning Standards, to Regional Air Directors, Interim Implementation of New Source Review for PM_{2.5} (Oct. 23, 1997); see also *Highwood Order*, at 25.

⁴⁹ 42 U.S.C. § 7410(a)(2)(D)(i)(1).

⁵⁰ 40 C.F.R. §§ 51.166(k)(1); 52.21(k)(1).

State of New York v. EPA, No. 06-1322 (D.C. Cir.), the court remanded the case based on EPA's refusal to regulate greenhouse gases in its New Source Performance Standards for power plants.

- *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936 (D.C. Cir. 2004), in which EPA failed to evaluate a required factor when it issued emissions standards for small municipal waste combustors.
- *Mossville Environmental Action Now v. EPA*, 370 F.3d 1232 (D.C. Cir. 2004), in which EPA failed to issue emissions standards for each listed hazardous air pollutant emitted from PVC plants.
- *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) (*New York I*), in which EPA promulgated a New Source Review rule impermissibly allowing the agency to evaluate emissions increases without measuring actual emissions from major pollution sources.
- *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) (*New York II*), in which EPA promulgated a rule impermissibly exempting plant process unit modifications valued at less than 20% of the process unit from triggered New Source Review.
- *SCAQMD v. EPA*, 472 F.3d 882 (D.C. Cir. 2006), in which EPA unlawfully evaded more protective and prescriptive measures intended by Congress to govern areas that fail to meet the Clean Air Act's ground-level ozone standard.
- *Sierra Club v. EPA*, 479 F.3d 875 (D.C. Cir. 2007), in which EPA promulgated hazardous air pollution standards for brick and cement kilns that failed to heed statutory requirements for minimum stringency.
- *NRDC v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007) (*NRDC I*), in which EPA promulgated rules covering hazardous air pollutants from commercial/industrial boilers and solid waste incinerators that employed unlawfully narrow definitions of the sources subject to the standards.
- *NRDC v. EPA*, 489 F.3d 1364 (D.C. Cir. 2007) (*NRDC II*), in which EPA unlawfully attempted to exempt an allegedly "low risk" subcategory of plywood and composite wood product manufacturing facilities from Clean Air Act standards limiting emissions of hazardous air pollutants.
- *New Jersey v. EPA*, No. 05-1097 (Feb. 8, 2008), in which EPA promulgated the Clean Air Mercury Rule without making the required public health findings before reversing a previous finding that regulation of hazardous air pollutants from electric generating units under Section 112 is "appropriate and necessary."
- *North Carolina v. EPA*, No. 05-1244 (July 11, 2008), in which EPA promulgated the Clean Air Interstate Rule based on numerous impermissible factors.
- *Sierra Club v. Environmental Protection Agency*, No. 04-1243 (August 19, 2008), in which EPA promulgated a rule that prohibited permitting authorities from including monitoring sufficient to assure compliance under Title V permits, in violation of the "statutory directive that each permit must include adequate monitoring requirements."

EPA is attempting, through the Final PM_{2.5} Rule, to undermine the Clean Air Act. Similar attempts were rejected in all of the cases listed above.⁵¹ Given this poor record, Iowa would act prudently by declining to follow a voluntary aspect of the Final PM_{2.5} Rule that is rife

⁵¹ An appeal of the Final PM_{2.5} Rule has been filed in the United States Court of Appeals for the District of Columbia. See *Natural Resources Defense Council and Sierra Club v. U.S. EPA*, No. 08-1250 (filed July 15, 2008).

with legal problems and makes sense, in the words of the U.S. Court of Appeals for the D.C. Circuit, only “in a Humpty Dumpty world.”⁵²

It is critical for DNR to keep in mind that even if the Final PM_{2.5} Rule is valid (which it is not), the Rule does not foreclose Iowa from protecting the health of its citizens by regulating PM_{2.5} directly. It is EPA’s longstanding policy that permitting authorities retain broad discretion to consider options and alternatives, both under BACT provisions and the “alternatives” analysis required under Section 110.⁵³ In fact, in the Final PM_{2.5} Rule, EPA specifically noted that States may go beyond the provisions of the Rule. For example, while the Final PM_{2.5} Rule improperly allows permitting agencies to avoid PM_{2.5} condensables until 2011, the Rule specifically states, “prior to this date, States are not prohibited from establishing limits in [New Source Review] permits that include the condensable fraction of PM_{2.5} emission.”⁵⁴

IV. Conclusion

Arguably, the Iowa Code prevents the adoption of standards and regulations that are more stringent than the Clean Air Act.⁵⁵ However, such is not the case here. Rejecting the surrogacy approach for PM_{2.5} regulation does not “exceed the standards or limitations” set by EPA. True, the Final PM_{2.5} Rule does suggest using PM₁₀ as a surrogate, but only during the EPA created three-year “transitional period.” The surrogacy approach is a voluntary aspect of the Final PM_{2.5} Rule.⁵⁶ Every State, within three years, will have to regulate PM_{2.5}. By setting PM_{2.5} emission limits now, DNR is not exceeding any federal regulation. Instead, DNR would be following the letter of the Clean Air Act, by regulating all pollutants for which a NAAQS has been promulgated.

To continue using PM₁₀ emissions as a surrogate for PM_{2.5} threatens Iowan’s public health and environment. EPA and other states recognize that the tools now exist for conducting air quality modeling and BACT analyses for PM_{2.5}. DNR should not wait for a separate rulemaking for PM_{2.5} but apply existing state and federal regulations to air permit applications. Relying on the surrogacy approach—put forth in a legally erroneous, outdated and technically unjustified guidance memorandum and codified only as an *opinion* in a tenuous federal rule—will result in harmful levels of PM_{2.5} pollution for decades to come. DNR can no longer justify this approach. With the pending designation of two Iowa counties as nonattainment for PM_{2.5}, and two proposed coal-fired power plants upwind of these counties, Iowa can ill afford the continued absence of PM_{2.5} BACT limits in air permits.

If I can be of any assistance in providing further information regarding full compliance with PM_{2.5} requirements, please do not hesitate to contact me.

⁵² *New York II*, 443 F.3d at 887.

⁵³ See 42 U.S.C. § 7410.

⁵⁴ Final PM_{2.5} Rule at 28,334-28,335.

⁵⁵ IOWA CODE § 455B.133(3) states: “The standards or limitation adopted under this section shall not exceed the standards or limitation promulgated by the administrator of the United States environmental protection agency or the requirements of the federal Clean Air Act. . . .”

⁵⁶ See Final PM_{2.5} Rule, at 28,341 (stating that the PM₁₀ surrogacy approach is “only recommend[ed] as an interim measure”).

Sincerely,

A handwritten signature in cursive script that reads "Nicole Shalla". The signature is written in black ink and includes a long horizontal flourish at the end.

Nicole Shalla
Staff Attorney

On Behalf of: Plains Justice, Iowa Chapter of Physicians for Social Responsibility, Iowa Nurses' Association, and Community Energy Solutions.