

-Road Systems Application to Construct
A Hot Mix Asphalt Plant on Ferry Street in the City of St. Louis

I. BACKGROUND

On August 15, 2001, the City of St. Louis Division of Air Pollution Control (the Division) received a permit application for a hot mix asphalt plant to be operated by Nu-Road Systems, LLC (Nu-Road). Nu-Road proposed to locate the asphalt plant at the intersection of Morin and Prescott Avenues in the City of St. Louis (the location of the plant was later changed to the intersection of Bushmann and Ferry Streets).

On September 27, 2001, the Division first responded to the permit applicant, noting that the area in the vicinity of Morin and Prescott Avenues has a high background of PM₁₀ (particulate matter smaller than 10 microns in diameter).

Over the next several months elected officials expressed their opposition to the proposed asphalt plant. On March 6, 2002, Alderman Freeman Bosley, Sr., wrote to Timothy Dee, the former Commissioner of the Division, pointing out that a public hearing was needed so that people living in the neighborhood would be aware of the additional air polluting entity. He noted that the area already has sources including MSD, Procter & Gamble, and Monsanto Chemical Company in a very close area.

On April 8, 2002, Alderwoman Diane Flowers wrote to the former Division Commissioner, asserting that it is essential that the Division deny the permit application to protect the health of the people of her ward.

On April 15, 2002, the Division denied the application to construct and operate the asphalt plant. The Division's letter pointed out that there are two PM₁₀ monitors within two miles of the proposed site, and that the maximum 24-hour PM₁₀ concentrations are very close to the 150 micrograms per cubic meter standard when combined with Nu-Road's contribution. The letter reported that if the applicant wished to demonstrate that the project would not appreciably affect air quality standards, it could conduct preconstruction monitoring. If proven after one year that the project would not appreciably affect the air quality standards, the applicant could reapply for a construction permit.

Nu-Road next revised its permit application, proposing to implement additional air pollution controls, and proposing to pave various unpaved surfaces outside of its facility, purportedly to offset particulates that the asphalt plant would generate.

On August 27, 2002, Eric Brown, Acting Chief of Permitting, wrote to the project applicant. After setting out the projected emissions increase for the project, the Division purported to grant permission to construct the asphalt plant. The statement of basis attached to the letter notes that the ambient impact model for the project estimates a PM₁₀ contribution of 100.25 micrograms per cubic meter at maximum design capacity and, that when combined with the maximum ambient impact in the area over the past two years, the ambient impact totals 227.25 micrograms per cubic meter (well above the 150 micrograms per cubic meter standard). However, according to the statement of basis, in lieu of the twelve-month preconstruction monitoring requirement, Nu-Road could take some emissions credits by paving roads outside its facility

boundaries. The statement of basis concluded that these credits could be transferred over to the ambient impact model to determine a net decrease to the ambient air.

Approximately two months later, the division had decided that its prior attempt to grant the permit was invalid. On Oct. 8, 2002, Melba R. Moore, Commissioner of Health, rescinded further review of the project, purportedly for two reasons. First, the permit was not properly approved. According to her letter, Department of Health policy requires the Commissioner to review and approve all such construction permits. Second, upon review of recent high PM₁₀ readings from area monitoring stations, and discussions with the Missouri Department of Natural Resources Air Pollution Control Program, Ms. Moore was requiring additional review of the air quality impact of the project.

In October, 2002, Great Rivers Environmental Law Center (Great Rivers) submitted a public records request to the Division, requesting records concerning the proposed asphalt plant. Great Rivers submitted a follow-up letter to the Division on January 13, 2003, asking for information that included whether the Division was considering Environmental Justice principles in its permit review process, and also about the emissions credits for paving off-site surfaces. The Division's responses show that Environmental Justice factors were not evaluated.

II. THE DIVISION HAS FAILED TO TAKE ENVIRONMENTAL JUSTICE CONSIDERATIONS INTO ACCOUNT

Agencies that implement the Clean Air Act are required to evaluate Environmental Justice concerns

Executive Order 12898 requires federal agencies to make Environmental Justice part of their mission by identifying and addressing disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low income populations.¹ Consistent with the President's order, on August 9, 2001, the U. S. Environmental Protection Agency (EPA) committed to administering environmental laws and implementing regulations to assure that Environmental Justice is secured for all communities:

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Congress has authorized EPA, along with states and local agencies that implement the Clean Air Act, to condition, on Environmental Justice grounds, permits that the agencies issue to regulated entities. For example, section 173(a)(5) of the Clean Air Act expressly conditions the issuance of a nonattainment new source review permit upon a demonstration that benefits of the proposed source outweigh the social costs imposed as a result of the location of the

proposed source. 42 U.S.C. § 7503 (a)(5). Further, an objective of the Clean Air Act's nonattainment programs is to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process. 42 U.S.C. § 7470.

The Environmental Protection Agency has a firm commitment to the issue of Environmental Justice. . . [Environmental Justice] is the fair treatment of people of all races, cultures, and incomes with respect to the development, implementation, and enforcement of environmental laws and policies, and their meaningful involvement in the decisionmaking processes of the government. □²

□ fair treatment □ means that:

no group of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal environmental programs and policies.³

Concisely stated, EPA along with EPA's delegate agencies, have an obligation to ensure that no community bears a disproportionate share of the burdens resulting from the implementation of federal, state, and local environmental programs.⁴

Pursuant to Missouri's Air Conservation Law (along with the Certificate of Authority issued to the City by the Missouri Air Conservation Commission), the City is authorized to operate the air pollution control program within the City's limits, and issue permits subject to the requirements of the Missouri Air Conservation Law and the federal Clean Air Act.⁵ As the entity authorized to issue air pollution permits within the City of St. Louis, the City stands in the shoes of EPA (and the Missouri Department of Natural Resources), and is required to evaluate Environmental Justice concerns before issuing a permit:

² August 9, 2001, Memorandum from Administrator Christine Todd Whitman (emphasis in original).

³ U.S. Environmental Protection Agency Environmental Justice Frequently Asked Questions

⁴ The requirement that Environmental Justice concerns be evaluated in air pollution permitting matters appears in Missouri's Air Conservation Law by reason of section 643.078.12, R.S. Mo. (□ The Director shall enforce all applicable federal rules, standards and requirements issued under the federal Clean Air Act... □).

⁵ See □ 643.140, R.S. Mo. See also May 1, 1974, agreement between the Missouri Air Conservation Commission and the City of St. Louis.

[The City], of course, is not a federal agency, and thus the Executive Order does not apply to [the City] directly. However, [the City] exercises delegated authority to administer and enforce the federal... program. As such, [the City] stands in the shoes of EPA for purposes of implementing the federal... program and... permits issued by [the City] are considered federal permits. See 45 Fed. Reg. 33,290, 33,413 (May 19, 1980)... Like the Regional Administrator, the delegate must follow the procedural requirements...⁶

The City's Records Show that it has not Evaluated Environmental Justice Concerns

The City has not even attempted to evaluate Environmental Justice concerns as part of the Nu-Road permitting process. When Great Rivers asked the Division whether it had examined Environmental Justice principles during the permitting process, the City's lone reply was that it issues permits based on emission increases and ambient air quality standards.⁷

Before acting upon a permit application to construct an air contaminant source the City is required to adopt and implement a methodology for evaluating Environmental Justice concerns. No effort was made to comply with Environmental Justice requirements here.

Environmental Justice Requirements

⁶ In re Knauf Fiber Glass, GMBH, 8 E.A.D. PSD Appeal Nos. 98-3 through 98-20, 1999 WL 64235 (February 4, 1999) (PSD permit proceeding).

⁷ See January 30, 2003, letter from Eric Brown, Chief of Permitting, to Great Rivers Environmental Law Center.

There is no one method used to evaluate Environmental Justice concerns. Methods used by other agencies typically involve evaluating the number of facilities in the community that require environmental permits, gathering information about the health of the community's residents, identifying the major health concerns of the residents, and evaluating the potential vulnerability of the residents to existing and potential stress factors.⁸

⁸ See, e.g., Draft Toolkit for Assessing and Addressing Potential Allegations of Environmental Injustice, Environmental Protection Agency, May 8, 2002, cited in Environmental Justice Report Regarding Proposed Washington County Landfill. See also, e.g., Missouri Department of Transportation Draft Environmental Impact Statement for The New I-64, p. IV-14 (to briefly summarize the intent of E.O. 12898, the proposed action is to be reviewed for effects on minority populations and/or low-income populations. This is done by development of demographic baseline conditions, use of field observations, public involvement, contacts with community representatives and by examining the potential disproportionate impacts...).

Nothing shows that the City has considered these factors, or any other potential Environmental Justice factor. This is so even though available data suggests that the community that would be primarily affected by the proposed facility is a minority community, already bearing a disproportionate environmental burden. It appears that the population around the intended site is predominantly African-American.⁹ Racially disproportionate concentrations in the area are excessive.¹⁰ The average low birth weight in the community that would be most impacted by the facility is 12 to 15 percent of all live births, compared with a nationwide average of 7.3 percent.¹¹ In the United States infant mortality averages 7.7 deaths for every 1000 live births. In the area that would be most impacted by the proposed facility infant mortality is between 13.5 and 16.5 deaths per 1000 live births.¹² Further, for asthma hospital admission rates within the City of St. Louis, the ZIP codes with the rates of most concern are predominantly African-American, while the ZIP codes with the most favorable rates are predominantly white.¹³

These facts point to an environmental injustice problem that the Division is ignoring during the permitting process.

Summary

The City of St. Louis is required to address Environmental Justice concerns as part of its permitting process. The City may not lawfully issue a permit for the proposed Nu-Road asphalt facility without conducting the Environmental Justice evaluation required by law.

III. ESTIMATED EMISSIONS OFFSETS ARE SPECULATIVE

Sound engineering practice requires that emissions credits be properly quantified. This practice is explicitly set forth in the rule that is to take effect within the next several weeks.¹⁴ Sound engineering practice does not appear to have been followed here. The starting point for the estimated paving offsets appears to be a conversation between Nu-Road's environmental consultant and the environmental coordinator for the

⁹ Public Health, Understanding Our Needs, Volume 1, City of St. Louis Department of Health, p. 27 (April 2001) (population in the 63147 ZIP code is reportedly 76.8 percent black).

¹⁰ At the monitor located on North Market Street, during the first nine months of 2002, the 150 micrograms per cubic meter standard was exceeded thirteen times.

¹¹ *Id.* at 63.

¹² *Id.* at 69.

¹³ *Id.* at 110.

¹⁴ See 10 CSR 10-6.410(2)(f).

company that owns the road (and the parking lot) that Nu-Road proposes to pave. It does not appear that the Division has made any effort to verify the accuracy of the facts that underlie the estimated offsets.

Summary

The area that would be most burdened by the emissions from the proposed asphalt plant is already burdened with excessive particulate concentrations. The Division needs to make some effort to ensure that the proposed paving of the roads (and parking lot) will result in the hoped-for emissions offsets.

Great Rivers Environmental Law Center
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