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Title V/Clean Air Act: U.S. Environmental Protection Agency Order Denying Petition Objecting to Rochester, New Hampshire Solid Waste Management Facility

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The Administrator of the United States Environmental Protection Agency (“EPA”) issued an August 16th Order Denying a Petition Objecting to the issuance of a Clean Air Act Title V Operating Permit (“Permit”) for the Turnkey Recycling and Environmental Enterprises facility (“Facility”). See Petition No. I-2024-4.

The Facility is stated to be a subsidiary of Waste Management of New Hampshire, Inc.

The Petition had been submitted by a number of individuals (collectively, “Petitioners”).

The federal Clean Air Act Title V program includes a provision that allows EPA to object to a Title V Permit issued by a delegated state. In other words, Congress provided EPA a Clean Air Act oversight role by mandating that every Title V Permit be subject to a 45-day review period before the Title V Permit is finalized.

The EPA Administrator can object to a Title V Permit at two points.

Any objection may be made during the 45-day review period and in response to a public petition within 60 days after the end of the 45-day review period. Further, even if EPA fails to object to a proposed Title V Permit, a right to petition the agency to reconsider its failure to object to the permit is potentially available. However, only those persons who have submitted comments to the draft permit during the applicable comment period have a right to petition.

The right to petition EPA arises at the close of the agency’s 45-day review period.

The Petition describes the Facility as an integrated solid waste management facility located in Rochester, New Hampshire. The Facility is stated to consist of three landfills.

Two of the landfills have previously been capped. A third commenced operation in December 1995 and continues as an active landfill. The referenced Facility collects landfill gas (“LFG”) from all three landfills. Further, it operates several combustion and electrical generating devices to control and produce energy from the collected gas.

The Facility is described as a major source for nitrous oxides, carbon monoxide, and sulfur dioxide.

The Facility first obtained a Title V Permit in 2012. It was renewed in 2022. Further, in 2022 the Facility applied for a significant modification of the Title V Permit. The Permit modification is the subject of the Petition.

The Petitioners argued that the New Hampshire Department of Environmental Services (“NHDES”) violated 42 U.S.C. § 7661a(b)(6) by:

...Failing to provide an adequate, streamlined, and reasonable Title V review for the Turnkey Landfill and that NHDES has also violated the Clean Air Act by failing to submit any information necessary to review adequately the proposed Permit.

The Petitioners’ argument is premised on their assertion that in New Hampshire appealing an administrative decision to the Air Resources Council and subsequent appeal to the New Hampshire Supreme Court are the exclusive means for obtaining judicial review of Title V Permit decisions. Therefore, they argue that NHDES failed to provide an adequate and reasonable process due to a decision to categorize some public comments as germane and some as non-germane. The bifurcation of responses is characterized by Petitioners as a:

...problematic strategy that undermines the appeal process by making the majority of public comments outside the purview of the findings of fact and Director’s decision that NHDES released on October 25, 2023.

The Order provides that the Petitioners are seeking to have all public comments addressed within the findings of fact and Director’s decision. They claim this would ensure an inclusive opportunity for appeal and judicial review and not eliminate those options for the majority of public comments that are received.

The Petitioners also contend that the NHDES did not provide a complete record to EPA regarding comments received during the public comment period because of the bifurcation of responses.

The Order denies the Petitioners’ request for an objection on this claim.

The federal agency cites NHDES’s explanation that it considered all comments in arriving at its final decision. It also states that the state agency provided a written response to “germane comments” as required under 40 C.F.R. § 70.7(h)(6).

Such written response was submitted to EPA as required under 40 C.F.R. § 70.8(a)(1). The Order provides that the state agency satisfied its obligations to consider comments under the cited New Hampshire Administrative Code and exercised its discretion under 40 C.F.R. § 70.7(h)(6) to bifurcate and provide written response to significant comments.

The Order also provides that while Section 502(b)(6) of the Clean Air Act requires that the permit program provide an opportunity for judicial review of the final permit action in state court, the decision to bifurcate comments does not necessarily preclude this opportunity.

As to the allegation that NHDES did not submit certain information to review adequately the proposed Permit, the Order provides that the Petitioners did not identify any particular comments that might have been improperly designated non-germane. Further, they are found to have not provided an analysis or supporting evidence for why those comments should be deemed germane.

A copy of the Order can be downloaded [here](#).