BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF DOUGHERTY COUNTY LANDFILL FLEMMING/GAISSERT ROAD FACILITY ALBANY, GEORGIA MUNICIPAL SOLID WASTE LANDFILL PETITION IV-2001-2 PERMIT NO. 4953-095-0095-V-01-0 ISSUED BY THE GEORGIA ENVIRONMENTAL PROTECTION DIVISION	ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT

ORDER DENYING PETITION FOR OBJECTION TO PERMIT

On August 22, 2001, the United States Environmental Protection Agency ("EPA") received a petition from the Georgia Center for Law in the Public Interest ("GCLPI") on behalf of the Sierra Club ("Petitioner"), requesting that EPA object to the permit issued by the Georgia Environmental Protection Division ("EPD" or the "Department") to Dougherty County Flemming/Gaissert Road Municipal Solid Waste Landfill ("Dougherty") for its facility, located in Albany (Dougherty County), Georgia. The permit is a state operating permit issued on June 11, 2001, pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f.

Petitioner challenged the adequacy of the permit's reporting requirements, the permit's apparent limitations on enforcement authority and the use of credible evidence, and the adequacy of the public notice. Petitioner has requested that EPA object to the Dougherty permit pursuant to CAA section 505(b)(2), 42 U.S.C. § 7661d(b)(2). For the reasons set forth below, I deny the Petitioner's request.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act, 42 U.S.C. § 7661a(d)(1), calls upon each state to develop and submit to EPA an operating permit program intended to meet the requirements of CAA title V. The State of Georgia originally submitted its title V program governing the issuance of operating permits on November 12, 1993. EPA granted interim approval to the program on November 22, 1995. See 60 Fed. Reg. 57836 (Nov. 22, 1995). Full approval was granted by EPA on June 8, 2000. See 65 Fed. Reg. 36358 (June 8, 2000). The program is now incorporated into Georgia's Air Quality Rule 391-3-1-.03(10). All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission

limitations and other conditions as necessary to assure compliance with applicable requirements of the Act, including the applicable implementation plan. See CAA sections 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a).

The title V operating permit program does not generally impose new substantive air quality control requirements (referred to as "applicable requirements") on sources. The program does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with existing applicable requirements. See 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to "enable the source, States, EPA, and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements." Id. Thus, the title V operating permit program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units in a single document, therefore enhancing compliance with the requirements of the Act.

Permitting authorities must provide at least 30 days for public comment on draft title V permits and give notice of any public hearing at least 30 days in advance of the hearing. 40 CFR § 70.7(h). Following consideration of any comments received during this time, Section 505(a) of the Act, 42 U.S.C. § 7661d(a), and 40 CFR § 70.8(a) require that states submit each proposed permit to EPA for review. Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the permit if it is determined not to be in compliance with applicable requirements or the requirements of title V. 40 CFR § 70.8(c). If EPA does not object to a permit on its own initiative, CAA section 505(b)(2), 42 U.S.C. § 7661d(b)(2), and 40 CFR § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. These sections also provide that petitions shall be based only on objections to the permit raised with reasonable specificity during the public comment period (unless the petitioner demonstrates that it was impracticable to raise such objections within that period or the grounds for such objections arose after that period).

Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), requires the Administrator to issue a permit objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act, including the requirements of 40 CFR Part 70 and the applicable implementation plan. If, in responding to a petition, EPA objects to a permit that has already been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause. A petition for review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period. See 42 U.S.C. §§ 7661d(b)(2)-(b)(3); 40 CFR § 70.8(d).

II. PROCEDURAL BACKGROUND

A. Permitting Chronology

EPD received a title V permit application submitted by Dougherty on May 23, 2000. The Department determined that the application was administratively complete on June 16, 2000. On March 28, 2001, EPD published the public notice providing for a 30-day public comment period on the draft title V permit for Dougherty. The Petitioner submitted (via facsimile) comments to EPD in a letter dated April 18, 2001, which serves as the basis for this petition. EPD notified the Petitioner via an e-mail message, dated May 25, 2001, that the permit had been re-proposed to EPA on the same date as the e-mail message. See Exhibit 3 of the petition. EPD subsequently issued the final permit to Dougherty on June 11, 2001.

B. Timeliness of Petition

EPA's 45-day review period for the Dougherty permit ended on July 9, 2001. The sixtieth day following that date and the deadline for filing any petitions to object to this permit was September 7, 2001. As noted previously, on August 22, 2001, EPA received a petition from GCLPI on behalf of the Petitioner requesting that EPA object to the permit. Therefore, EPA considers this petition to be timely.

III. FACILITY BACKGROUND

Dougherty accepts municipal and industrial solid waste from the local area and deposits it directly into the ground. The waste is then covered with fill dirt to begin the process of natural decomposition.

The primary air emissions from this facility are non-methane organic compounds, which include volatile organic compounds, resulting from the decomposition of the waste materials. The facility is subject to the following federal requirements: 40 CFR 60, Subpart Kb, *Standards of Performance for Volatile Organic Liquid Storage Vessels (Including Petroleum Liquid Storage Vessels)*; 40 CFR 60, Subpart WWW, *Standards of Performance for Municipal Solid Waste Landfills*; and 40 CFR 61, Subpart M, *National Emissions Standard for Asbestos*. The facility is also subject to State Implementation Plan (SIP) requirements relating to fugitive emissions. Georgia Rule 391-3-1-.02(2)(n). See *Title V Application Review*, Dougherty, Permit No. 4953-095-0095-V-01-0.

IV. ISSUES RAISED BY THE PETITIONER

A. Inadequate Reporting

Petitioner's comment: First, 40 CFR § 70.6(a)(3)(iii)(A) and 42 U.S.C. § 7661c(a) require that permits include a requirement for submittal of reports of any required monitoring at least every six months. The Dougherty permit does not contain such a requirement. EPA should object to this permit and modify the permit to include a provision which requires the "submittal of reports of any required monitoring at least every 6 months." 40 CFR § 70.6(a)(3)(iii)(A). Second, the Dougherty permit also does not require the prompt reporting of all violations. Prompt reporting must be more frequent than the semi-annual reporting requirement for deviations not caused by malfunctions or breakdowns. Therefore, the permit should require the permittee to report all deviations within seven days.

EPA's response: Under the particular facts of this case, EPA believes that the reporting requirements in the Dougherty permit are adequate. The Dougherty permit requires that deviations be reported semi-annually, as required by 40 CFR § 70.6(a)(3)(iii)(B). The Dougherty landfill is subject to the work practice standards identified in Section III above and is required to report any deviations from compliance with those standards. EPD addresses the prompt reporting of deviations in Conditions 6.1.2 and 6.1.3 of the Dougherty permit. In accordance with the guidance provided in Georgia's proposed title V program interim approval notice, which defines "prompt" reporting to be within two to ten days of the deviation, Condition 6.1.2 requires deviations related to certain malfunctions or breakdowns to be reported within seven days.[1] See 60 Fed. Reg. 49535 (Sept. 26, 1995). All other deviations are required to be reported under Condition 6.1.3 on a semi-annual basis. In particular, Condition 6.1.3 requires Dougherty to submit written reports of any failure to comply with or complete a work practice standard or requirement in the Dougherty permit that is not subject to reporting under other permit conditions.

40 C.F.R. § 70.6(a)(3)(iii)(B) does not specify the meaning of "prompt" for purposes of deviation reporting. Instead, this provision requires permitting authorities to "define 'prompt' in relation to the degree and type of deviation likely to occur and the applicable requirements." EPD's interpretation of prompt reporting, as reflected in Conditions 6.1.2 and 6.1.3 of the Dougherty permit, is therefore acceptable. EPD's approach is also similar to the prompt reporting requirements of the federal operating permit program set forth at 40 C.F.R. § 71.6(a)(3)(iii)(B), which require that certain potentially serious deviations be reported within 24

[1]Specifically, Condition 6.1.2 provides that "the Permittee shall report to the Division in writing, within seven (7) days, any deviations from applicable requirements associated with any malfunction or breakdown of process, fuel burning, or emissions control equipment for a period of four hours or more which results in excessive emissions. The Permittee shall submit a written report which shall contain the probable cause of the deviation(s), duration of the deviation(s), and any corrective actions or preventive measures taken."

or 48 hours, but provide for semi-annual reporting of other deviations. EPA believes that interpreting "prompt" as being "within seven days" for all deviations is unnecessary.

EPA agrees with the Petitioner that it generally is not sufficient for a part 70 source to submit only semi-annual deviation reports in lieu of semi-annual monitoring reports, or for semi-annual monitoring reports to consist only of deviation reports. Given the nature of the monitoring and recordkeeping required of the Dougherty landfill, however, EPA believes that for this particular source it is not necessary to require the submittal of semi-annual monitoring reports in addition to the semi-annual deviation reports that already are required by the Dougherty permit.[2] The Dougherty landfill is uncontrolled and is not subject to any emission limitations other than work practice standards such as a dust suppression plan. It is required to keep records sufficient to show that the required work practices are being followed, and this recordkeeping serves as monitoring to assure compliance with such requirements. The landfill is required to report any deviations from compliance with all applicable work practice standards.

In addition to identifying all instances of deviations from permit requirements, the principal purpose of semi-annual monitoring reports is to summarize all monitoring required during the reporting period and (where applicable) to provide information on any separate monitoring reports required by the permit (such as reports required by 40 CFR parts 60, 61, or other applicable requirements) that are either submitted at this time or were submitted previously during the reporting period. Such a summary in turn provides a context within which permitting authorities may assess the adequacy of the identification of deviations. In this case, however, the nature of the work practice standards and their associated recordkeeping is such that the reports of deviations should be adequate to identify the recordkeeping requirements themselves. Under these circumstances, the absence of a discrete document for this purpose is at most harmless error. Therefore, the petition is denied with respect to the issue of inadequate reporting.

B. Limitation of Enforcement Authority

Petitioner's comment: The Dougherty permit impermissibly limits who may enforce against violations of the permit. The Act provides that any "person" may take civil action to stop a violation of a title V permit. 42 U.S.C. § 7604(a). The Act defines "person" to include "an individual, corporation, partnership, association, State, municipality, political subdivision of a state. . ." 42 U.S.C. § 7602(e). However, the Dougherty permit limits those who can take enforcement actions to "citizens of the United States." This is contrary to the statute; therefore, the phrase "of the United States" must be deleted from Condition 8.2.1.

EPA's response: EPA agrees with Petitioner that Condition 8.2.1's language limiting those persons who can enforce the terms and conditions of the Dougherty permit to "citizens of the United States" is contrary to the CAA and EPA's part 70 regulations, which provide for

[2]See, e.g., Conditions 6.2.4-6.2.8 (listing specific record keeping and reporting requirements).

broad public enforcement of title V permits and contain no such limitation. However, because EPD has agreed to remove the phrase "of the United States" from Condition 8.2.1 of the Dougherty permit, as discussed below, EPA finds that it is not necessary to grant the petition and object to the permit with respect to this issue.

EPD deleted the phrase "of the United States" from Condition 8.2.1 in the Dougherty permit by an administrative amendment effective October 31, 2001 (Permit Amendment No. 4953-095-0095-V-01-1).[3] Furthermore, EPD has already agreed to remove the phrase "of the United States" from Condition 8.2.1 of the permit template.[4] Therefore, the petition is denied with respect to this issue because the issue is moot.

C. Inadequate Public Notice

Petitioner's comment: 40 CFR § 70.7(h)(1) requires that EPD give notice of the draft permit to individuals on a mailing list developed by the permitting authority, including those who have requested to be on such a list. EPD, however, did not provide notice to people on the mailing list. § 70.7(h) also provides that the permitting authority shall provide "adequate" procedures for public notice. While part 70 and the Act do not define "adequate," it is apparent that adequate should at least include information that is accurate. The public notice itself is inadequate because it contains inaccurate information; it states that the permit is enforceable only by the EPA and EPD. The permit shall also be enforceable by any "person." 42 U.S.C. § 7604(a). Therefore, because § 70.7(a)(1)(ii) prohibits the issuance of a title V permit unless all the requirements for public participation pursuant to § 70.7(h) are satisfied, EPA should object to the permit and require a new 30-day public comment period and a public notice which clarifies that the public can also enforce this permit. EPD and EPA also have not provided the public with an adequate system of notice of when the public's petition period begins.

EPA's response: EPD has issued a number of final title V permits, including one for Dougherty, without first notifying the public of the draft permits via a mailing list required to be developed and maintained pursuant to § 70.7(h)(1). As of June 2001, however, EPD addressed the requirement for a mailing list by creating one. See e-mail message from Jimmy Johnston of EPD to Art Hofmeister of EPA, dated June 19, 2001. Although § 70.7(a)(1)(ii) requires that the permitting authority comply with the requirements of § 70.7(h) prior to permit issuance, EPA is

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[3]See letter from John Yntema, Manager, Combustion Permitting Unit, Stationary Source Permitting Program, EPD, to Merrill E. Baker, Dougherty County Gaissert/Flemming Road Municipal Solid Waste Landfill (Oct. 31, 2001) (transmitting the amendment).

[4]EPD provided EPA with a written commitment to delete the phrase "of the United States" from Condition 8.2.1 in EPD's title V permit template, and to include the revised condition in every final title V permit not already signed by the Director of EPD by the date of said letter. See letter from Ronald C. Methier, Chief, Air Protection Branch, EPD, to Stanley Meiburg, Acting Regional Administrator, EPA Region 4 (Sept. 6, 2001).

not convinced that the existence of a mailing list would have significantly increased the public participation related to previously issued permits. Therefore, EPA does not believe that re-noticing previously issued permits, including the Dougherty permit, is warranted.

Although the public notice does not specifically name "persons" as being designated enforcers of the title V permit, it satisfies the requirements of part 70 regarding the contents of an adequate notice. The public notice requirements specified under § 70.7(h)(2) do not require a statement of who may enforce a permit. Nevertheless, the public notice accurately states that the permit will be enforceable by the EPD and EPA. The public notice does not preclude "persons" from enforcing the permit since it does not state that the permit will be enforceable only by EPD and EPA. EPA does not believe that the omission of "persons" compromised the effectiveness of the public notice. For clarification purposes, however, EPD has agreed to change future notices to include "persons" as designated enforcers. See the public notice for Shaw Industries, Inc. Plant No. 4 (Permit No. 2273-313-0084-V-01-0) as an example of a revised notice.

Part 70 requires that the permitting authority provide at least 30 days for public comment; however, it does not mandate that the public notice define the end dates for the public comment period and EPA's 45-day review period. EPD's public notice actually goes beyond the requirements of part 70 by: (1) defining the end date of the public comment period as "30 days after the date on which this notice is published in the newspaper" and (2) establishing the earliest end date of EPA's 45-day review period by stating that EPA's review period immediately follows the public comment period. See the public notice for Shaw Industries, Inc. Plant No. 4 (Permit No. 2273-313-0084-V-01-0) as an example. With this information, any person may determine the earliest beginning and end dates of the 60-day petition period (i.e., the public may conservatively assume that it has 135 days from the date of publication in which to file a timely petition). EPD recently took further action to assist the public in defining the actual 60-day petition period by updating its title V permits website to include the end dates for both the 30-day public comment period and EPA's 45-day review period for respective draft/proposed permits. Any person may now determine, with minimal effort, the time period in which a timely petition must be filed (i.e., within 60 days of the end of EPA's review period).

For the reasons discussed above, the petition is denied with respect to the issue of inadequate public notice.

D. Limitation of Credible Evidence

Petitioner's comment: The Dougherty permit contains language that appears to limit the use of credible evidence in enforcement actions, specifically Conditions 4.1.3 and 6.1.3. EPD must remove language that intends or appears to limit the use of credible evidence. EPA should further require EPD to affirmatively state in the permit that any credible evidence may be used in an enforcement action.

EPA's response: EPA believes that the Dougherty permit as amended (see the discussion below) appropriately provides for the use of reference test methods as the benchmark for

determining compliance with applicable requirements and for the use of other credible evidence in enforcement actions and in compliance certifications. By way of background, EPA in 1997 issued final changes to 40 CFR Parts 51, 52, 60, and 61 to clarify the appropriate roles of reference test methods and of other credible evidence. 62 Fed. Reg. 8314 (Feb. 24, 1997). The final regulations made clear (1) that the reference test methods set forth or cited to in federal emissions standards and SIP emission limits remain the official benchmark for determining compliance with those standards; and (2) that other credible evidence such as emissions data, parametric data, engineering analyses, or other information must be taken into account in compliance certifications under Title V and may be used for enforcement purposes. For example, 40 CFR § 60.11(g) was amended to provide that such other data could be used for these purposes if it were "relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed." In addition, 40 CFR § 70.6(c)(5)(iii)(B) specifies that other material information, in addition to the methods and other means required under § 70.6(a)(3) that form the basis of a compliance certification, must be included in the certification where failure to do so would constitute a false certification of compliance. Here, it appears that Petitioner has mistakenly concluded that permit conditions specifying that certain test methods are the relevant reference test methods for the emission units in question – which as explained above are entirely proper – actually have the intent or effect of excluding the use of other credible evidence for compliance certification and enforcement purposes. As explained below, EPA believes that the permit as amended adequately provides for the use of other credible evidence to show whether the source would have been in compliance if the reference test had been performed at some particular time.

Thus, Condition 4.1.3 of the Dougherty permit identifies the required reference methods to be used to satisfy any testing requirements; it is not intended, in any way, to limit the use of credible evidence. In fact, Condition 4.1.3 provides for the use of all credible evidence and information. Georgia Rule 391-3-1-.02(3)(a), which serves as the underlying authority for Condition 4.1.3, references EPD's *Procedures for Testing and Monitoring Sources of Air Pollutants*, which permits the use of all credible evidence. Section 1.3(g) of this document states that "nothing. . .shall preclude the use, including the exclusive use, of any credible evidence or information." Both the rule and referenced procedures are approved parts of the Georgia SIP. In addition, Condition 8.14.1.d of the Dougherty permit requires the inclusion of credible evidence in compliance certifications by reciting the language from EPA's own regulation at 40 CFR § 70.6(c)(5)(iii)(B) that was promulgated expressly for that purpose.

Although the language in Condition 6.1.3 may appear to limit the use of credible evidence, EPA believes that this was not the intention of EPD and that such language does not ultimately limit the use of credible evidence because the Georgia SIP expressly prohibits such an exclusion. Condition 8.17.1 does not limit the use of credible evidence because it allows the use of "any information available to the Division" and the phrase "but is not limited to" renders the listed forms of acceptable information not exclusive.

Nonetheless, for further clarification, EPD added a general condition to the Dougherty title V permit via a minor modification which expressly states that nothing shall preclude the use of any credible evidence. See Dougherty Minor Permit Modification No. 4953-095-0095-V-01-

2. Furthermore, EPD added this condition to the permit template to ensure that such language will be included in future title V permits issued by EPD.[5] The petition is therefore denied with respect to the issue of limiting credible evidence.

V. CONCLUSION

For the reasons discussed above and pursuant to Section 505(b) of the CAA, 42 U.S.C. § 7661d(b), and 40 CFR § 70.8(d), I hereby deny the petition of GCLPI on behalf of the Sierra Club concerning the Dougherty title V operating permit.

So ordered.

July 3, 2002
Date

/s/
Christine Todd Whitman
Administrator

[5]EPD provided EPA with a written commitment to add a general condition to the title V permit template, which expressly states that nothing shall preclude the use of any credible evidence, and to include this condition in every final title V permit not already signed by the Director of EPD by the date of said letter. Existing title V permits will be revised upon renewal to include the new condition. See letter from Ronald C. Methier, Chief, Air Protection Branch, EPD, to James I. Palmer, Jr., Regional Administrator, EPA Region 4 (Mar. 22, 2002).