

March 7, 2020
Via certified mail and electronic mail

Andrew R. Wheeler
Environmental Protection Agency
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460
Wheeler.andrew@Epa.gov

RE: Response to EPA Order, Wheelabrator Concord Company, Permit No. TV-0032

Dear Administrator Wheeler,

On March 14, 2019, we filed a petition with the Environmental Protection Agency (EPA) regarding the Wheelabrator incinerator in Concord, NH (*Petition*). The *Petition* objects to renewal of the incinerator's Title V permit (Caplan, Lajoie, MacKenzie, & Ward, 2019).

On October 30, 2019, the EPA issued an *Order Denying Petition for Objection to Permit*, hereafter *EPA Order* (Wheeler, 2019). For ease of reference, we have enclosed the *Petition* as Enclosure #1 and the *EPA Order* as Enclosure #2.

The *EPA Order* contains inaccurate statements, and we are writing to put the record straight.

Our *Petition* (p. 3) lists the following stipulated facts:

1. The Wheelabrator incinerator in Concord continuously releases persistent toxic substances to the air and to the ash. These chemicals accumulate in our bodies (known as body burden) and in our environment (known as toxic loading) and cause harm in low doses. Operation of the Wheelabrator incinerator in Concord violates RSA 125-C which says it is the state's policy to "*promote* the public health, welfare, and safety" and "*prevent* injury or detriment to human, plant, and animal life, physical property and other resources [emphasis added]." The Wheelabrator incinerator does neither.
2. Snapshot testing of smokestack emissions can neither determine nor ensure continuous compliance with air standards that are themselves not health based.

3. The New Hampshire Department of Environmental Services (NHDES) has discretionary authority to either deny or approve a Title V permit and is not constrained by a requirement to only consider whether Wheelabrator's stack test results comply with emission standards.
4. Wheelabrator violated state and federal law and its solid waste permit by incinerating thousands of used baghouse filters. (New Hampshire Revised Statutes Annotated (NHRSA), 1979; Working on Waste, 2011, p. 5; NH RSA, 2010; Hoyt-Denison, 2012, pp. 2, 4)

As noted in the *Petition* (pp. 2-3), the above are stipulated facts that the hearing officer for the New Hampshire Air Resources Council (NHARC) accepted on September 5, 2018 as part of an appeal we filed on February 1, 2018 (NHARC, 2018, p.2; Caplan, et al., 2018a).

DISCUSSION

We have listed below inaccuracies in the *EPA Order* along with our comments.

I. *EPA Order* (page 3):

"Another factor the EPA examines is whether a petitioner has provided adequate analyses and citations to support its claims." **Later at page 5:** "With regard to all issues raised in the *Petition*, the Petitioners' arguments are general, conclusory, and unsupported, and the Petitioners accordingly have not met their burden of demonstrating noncompliance" with the Clean Air Act.

Petitioners' response:

The *EPA Order* states at page 1 that its decision is "based on a review of the *Petition* and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities...." It is therefore baffling that the EPA considers our claims to be "general, conclusory, and unsupported."

We provided extensive documentation regarding the airborne release of persistent toxic substances from the Wheelabrator incinerator and regarding Wheelabrator's long-term and secret practice of incinerating toxic baghouse filters. These issues are extensively documented in the *Petition* and its enclosures and in the accompanying documents that the *EPA Order* references above.

II. *EPA Order* (page 5):

“First, with respect to the Petitioners’ statements that NHDES has violated the general statutory provision, RSA 125-C:1 because the ‘incinerator continuously releases persistent toxic substances to the air and to the ash,’ the Petitioners fail to demonstrate that this provision of state law is derived from or implements a federal applicable requirement.”

Petitioners’ response:

This is an odd statement from the EPA because the Clean Air Act and RSA 125-C:1 are closely related. Wheelabrator’s Title V permit states the permit “is issued by the New Hampshire Department of Environmental Services, Air Resources Division pursuant to its authority under New Hampshire RSA 125-C and in accordance with the provisions of the Code of Federal Regulations, Title 40, Part 70” (NHDES, 2019, p. 1). Title 40, Part 70 regulates the Clean Air Act (Code of Federal Regulations (CFR), 2002, pp. 206-251).

RSA 125-C:1 upholds the purposes of the Clean Air Act and is derived from it.

According to CFR Title 42 (2010), the purposes of the Clean Air Act are-

1. to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population;
2. to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

3. to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and
4. to encourage and assist the development and operation of regional air pollution prevention and control programs.

Compare this with RSA 125-C:1: Declaration of Policy and Purpose:

It is hereby declared to be the public policy of the state of New Hampshire and the purpose of this chapter to achieve and maintain a reasonable degree of purity of the air resources of the state so as to promote the public health, welfare, and safety, prevent injury or detriment to human, plant, and animal life, physical property and other resources, foster the comfort and convenience of the people, promote the economic and social development of this state and to facilitate the enjoyment of the natural attractions of the state (NH RSA, 1979).

III. EPA Order (page 6):

RSA 125-C:1 “serves as a broad, sweeping ‘declaration of policy and purpose’ to the entire chapter on air pollution control and does not establish any specific applicable requirements on its face.”

Petitioners’ response:

The preamble to the Clean Air Act and the similar preamble to New Hampshire RSA 125-C provide statutory authority to address pollution threats, even in the absence of specific regulations. See RSA 125-C:13 (II) (b) and Clean Air Act section 7429 (e), last paragraph (NH RSA, 2010; CFR, 2013):

- o RSA 125-C:13 (II)(b):

The commissioner may suspend or revoke any permit or authorization issued hereunder if, following a hearing, the commissioner determines that emissions from the device or non-Title V source to which the permit applies,

alone or in conjunction with other sources of the same pollutants, presents an immediate danger to the public health.

o Clean Air Act Section 7429 (e), last paragraph:

Notwithstanding any other provision of this subsection, the Administrator or the State shall require the owner or operator of any unit to comply with emissions limitations or implement any other measures, if the Administrator or the State determines that emissions in the absence of such limitations or measures may reasonably be anticipated to endanger public health or the environment. The Administrator's determination under the preceding sentence is a discretionary decision.

As a major stationary source of persistent toxic substances and greenhouse gases, the Wheelabrator incinerator creates an unacceptable, ongoing, and unnecessary risk to public health and the environment. That is why we want state and federal regulators to use their authority to close it.

IV. EPA Order (page 8):

"To the extent the Petitioners are claiming that Wheelabrator Concord violated its title V permit by burning the baghouse filters, the Petitioners have provided no evidence or identified a relevant permit term or applicable requirement."

Petitioners' response:

As noted above, petitioners have provided extensive information regarding Wheelabrator's history of burning used baghouse filter bags (BFBs), including a *Notice of Past Violation* that NHDES issued to Wheelabrator on December 5, 2012. (Hoyt-Denison, 2012). Here NHDES states unequivocally at page 4 that "Wheelabrator violated its Solid Waste Facility Permit by burning D006 and D008 hazardous waste BFBs in the facility boilers." NHDES also states at page 2 that Wheelabrator violated state law and rules "by disposing, or causing to be disposed of at an unauthorized facility, hazardous waste BFBs as a non-hazardous solid waste."

Petitioners also identified “a relevant permit term or applicable requirement” pursuant to Section XX of the Title V permit (NHDES, 2019, pp. 39-40):

Any noncompliance with a permit condition constitutes a violation of RSA 125-C:15, and, as to the conditions in this permit which are federally enforceable, a violation of the Clean Air Act, 42 U.S.C. Section 7401 et seq., and is grounds for enforcement action, for permit termination or revocation, or for denial of an operating permit renewal application by the department and/or USEPA. Noncompliance may also be grounds for assessment of administrative, civil or criminal penalties in accordance with RSA 125-C:15 and/or the Clean Air Act. This Permit does not relieve the owner or operator from the obligation to comply with any other provisions of RSA 125-C, the New Hampshire Rules Governing the Control of Air Pollution, or the Clean Air Act, or to obtain any other necessary authorizations from other governmental agencies, *or to comply with all other applicable Federal, State, or Local rules and regulations, not addressed in this Permit* [emphasis added]. In accordance with 40 CFR 70.6 (a)(6)(ii), the owner or operator shall not claim as a defense in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this Permit.

There is more information in the documents we provided with the *Petition*.

V. EPA Order (page 8, footnote 13)

“In addition, the Petitioners did not address New Hampshire’s RTC [*Response to Comments*], which explained that Wheelabrator Concord stopped burning baghouse filters in 2010 and that the title V permit in effect from 1996 through 2010 did not prohibit the burning of the baghouse filters.” (See Wright, 2018, pp. 4-18 for NHDES’ *Response to Comments*.)

Petitioners' response:


EPA's statement is incorrect. We addressed this issue in the appeal we filed with the Air Resources Council on February 1, 2018. Here we state in Section IV that, to our knowledge, "the filter bags were never a permitted waste under the Title V permit...." We asked for clarification but never received it because the Council refused to hear the appeal (Caplan, et al., 2018a, p.10; NHARC, 2018, p.2).

There is a well-documented history regarding incineration of the baghouse filters at the Wheelabrator incinerator in Concord, and that history does not absolve Wheelabrator. In 2018, NHDES stated the department "does consider the baghouse filters as state regulated hazardous waste" (Wright, 2018, p. 10). This designation as a hazardous waste reiterates what NHDES stated in its *Notice of Past Violation* referenced above. As we state in our response to the pre-hearing conference memorandum from Wheelabrator (Caplan, et al., 2018b, p. 4), "NHDES' 2018 position that baghouse filters are hazardous waste is the same position the department took in 2012 when issuing the *Notice of Past Violation*...." We then point out that the *Notice of Past Violation* "states unequivocally that Wheelabrator violated hazardous waste rules by burning used baghouse filter bags. Wheelabrator Concord has never been permitted as a hazardous waste incinerator."

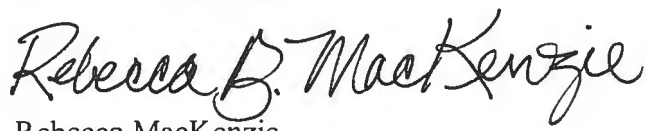
The Wheelabrator incinerator in Concord is a major source of toxic air emissions that include greenhouse gases and heavy metals. Incineration also destroys valuable materials that could otherwise be reused or recycled. Our petition seeks safe alternatives to the status quo because the Title V program does not protect the public. This correspondence and the enclosures referenced on page one testify to the unnecessary and unacceptable risks associated with the Wheelabrator incinerator.

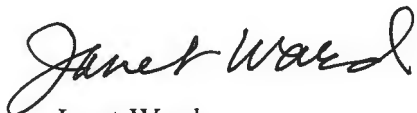
Please attach this filing to the public record for the *Petition* and the *EPA Order*. Please also note that we have sent this correspondence and enclosures to Air Permitting Manager Patrick Bird at Region 1 Environmental Protection Agency and to Commissioner Robert Scott at the New Hampshire Department of Environmental Services.

Sincerely,


Anthony Caplan
810 Ray Road
Henniker, NH 03242
603-428-7042
tcaplan@mcttelecom.com


Katherine Lajoie
429 Wheeler Rand Road
Charlestown, NH 03603
603-826-4803
ilje23@hotmail.com


Rebecca MacKenzie
7 Glenwood Drive
Claremont, NH 03743
603-504-2851
reb178@myfairpoint.net


Janet Ward
82 Watchtower Road
Contoocook, NH 03229
603-746-4991
jwardnh@comcast.net

References

- Caplan, A., Lajoie, K., MacKenzie, R., & Ward, J. (2018a). *Notice of appeal before the New Hampshire Air Resources Council*. Docket No. 18-02 ARC. Retrieved February 19, 2020, from <https://www4.des.state.nh.us/Legal/Documents/Appeals/Air%20Resources%20Council/Docket%20No.%2018-02%20ARC%20-%20Anthony%20Caplan.%20et%20al.%20Appeal/02-01-18%20-%20Notice%20of%20Appeal.pdf>
- Caplan, A., Lajoie, K., MacKenzie, R., & Ward, J. (2018b). *Appellant's response to Wheelabrator's prehearing conference memorandum dated May 4, 2018*. Before the New Hampshire Air Resources Council, Docket No.18-02 ARC. Retrieved February 23, 2020, from <https://www4.des.state.nh.us/Legal/Documents/Appeals/Air%20Resources%20Council/Docket%20No.%2018-02%20ARC%20-%20Anthony%20Caplan.%20et%20al.%20Appeal/06-01-18%20-%20Appellants%20Response%20to%20Permitee's%20PHC%20Memorandum.pdf>
- Caplan, A., Lajoie, K., MacKenzie, R., & Ward, J. (2019). *Petition for objection to the Title V operating permit for Wheelabrator Concord Company, L.P.* Retrieved February 29, 2020, from www.epa.gov/sites/production/files/2019_03/documents/wheelabrator_petition2019.pdf

References

- Code of Federal Regulations, Title 40 –Protection of Environment. (2002). *Part 70: State operating permit programs*. Washington, DC: Office of the Federal Register, National Archives and Records Administration. Retrieved March 6, 2020, from <https://www.govinfo.gov/content/pkg/CFR-2002-title40-vol12/pdf/CFR-2002-title40-vol12.pdf>
- Code of Federal Regulations, Title 42-The Public Health and Welfare. (2010). *Chapter 85, Section 7401(b): Congressional findings and declaration of purpose*. Washington, DC: US Government Printing Office. Retrieved March 6, 2020, from <https://www.govinfo.gov/content/pkg/USCODE-2010-title42/html/USCODE-2010-title42-chap85.htm>
- Code of Federal Regulations, Title 42-The Public Health and Welfare. (2013). *Section 7429: Solid waste combustion*. Washington, D.C.: U.S. Government Printing Office. Retrieved February 19, 2020, from <https://www.govinfo.gov/content/pkg/USCODE-2013-title42/html/USCODE-2013-title42-chap85-subchapI-partA-sec7429.htm>
- Hoyt-Denison, P. (2012). *Notice of past violation (re: Wheelabrator Concord Co., L.P.)*. Concord, NH: New Hampshire Department of Environmental Services. Retrieved February 19, 2020, from <https://www4.des.state.nh.us/Legal/Documents/Notice%20of%20Past%20Violations/2012%20Notice%20of%20Past%20Violations/Wheelabrator%20Concord%20Co%20-%202012-5-12.pdf>

References

- New Hampshire Air Resources Council, Docket No. 18-02 ARC. (2018). *Decision and order on State's motion to dismiss*. Concord, NH: ARC. Retrieved February 19, 2020, from <https://www4.des.state.nh.us/Legal/Documents/Appeals/Air%20Resources%20Council/Docket%20No.%2018-02%20ARC%20-%20Anthony%20Caplan,%20et%20al.%20Appeal/09-05-18%20-%20Decision%20and%20Order%20on%20State's%20Motion%20to%20Dismiss.pdf>
- New Hampshire Department of Environmental Services, Air Resources Division. (2019). *Title V operating permit: Wheelabrator Concord Company, L.P.* Concord, NH: Author. Retrieved February 24, 2020, from <https://www4.des.state.nh.us/OneStopPub/Air/330130010214-0175TypePermit.pdf>
- New Hampshire Revised Statutes Annotated, Title X, Public Health, Chapter 125-C, Air Pollution Control. (1979). *Section 125-C:1: Declaration of policy and purpose*. Concord, NH: NH General Court. Retrieved February 19, 2020 from <https://www.gencourt.state.nh.us/rsa/html/X/125-C/125-C-1.htm>
- New Hampshire Revised Statutes Annotated, Title X, Public Health, Chapter 125-C, Air Pollution Control. (2010). *Section 125-C:13: Criteria for denial; suspension or revocation; modification*. Concord, NH: NH General Court. Retrieved February 19, 2020, from <https://www.gencourt.state.nh.us/rsa/html/X/125-C/125-C-13.htm>

References

- Wheeler, A. (2019). *Order denying petition for objection to permit*. Washington, D.C.: United States Environmental Protection Agency. Retrieved March 1, 2020, from www.epa.gov/sites/production/files/2019-11/documents/wheelabrator_response2019.pdf
- Working on Waste. (2011). *The Wheelabrator incinerator in Claremont, NH: A Working on Waste report*. Claremont, NH: Author. Retrieved February 20, 2020, from www.americanhealthstudies.org/wheelabrator-claremont.pdf
- Wright, Craig A. (2018). *Findings of fact and director's decision in the matter of the issuance of a title V operating permit to Wheelabrator Concord Company, L.P.* Concord, NH: New Hampshire Department of Environmental Services, Air Resources Division. Retrieved February 24, 2020, from <https://www4.des.state.nh.us/OneStopPub/Air/330130010214-0175TypeFindingsOfFact.pdf>

Response to EPA Order

Enclosure #1

Petition to EPA (March 14, 2019)

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

**PETITION FOR OBJECTION TO THE
TITLE V OPERATING PERMIT FOR WHEELABRATOR CONCORD COMPANY, L.P.
FACILITY ID NO: 3301300102, APPLICATION NO: 14-0175**

Pursuant to the Clean Air Act, Title 42, Part 7661d (b) (2),¹ New Hampshire residents Anthony Caplan, Katherine Lajoie, Rebecca MacKenzie, and Janet Ward petition the Environmental Protection Agency (EPA) to object to the Title V operating permit for the Wheelabrator waste incinerator in Concord, NH. The New Hampshire Department of Environmental Services (NHDES) issued the permit to Wheelabrator on January 24, 2019.²

The Title V program “allows the public to petition the EPA Administrator to object to specific permits or operating permit program deficiencies” if there was “timely comment to the permitting authority during the public review period.”³ According to the Clean Air Act:⁴

Any such petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in §70.7(h) of this part, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period.

This petition includes objections to the Title V permit that we and other members of the public raised during the public review period that encompasses a public hearing in 2017 and an appeal in 2018. We have also included a letter to the New Hampshire Department of Justice (DOJ) that we submitted after the hearing officer for the appeal board issued a final decision.

¹ 42 U.S. Code § 7661d

<https://www.law.cornell.edu/uscode/text/42/7661d>

² Wright, Craig A. “Final Title V Operating Permit, Wheelabrator Concord Company, L.P.” Received by John LaRiviere, General Manager, Wheelabrator Concord Company, L.P. 24 Jan. 2019.

<http://www4.des.state.nh.us/OneStopPub/Air/330130010214-0175TypeLetter1.pdf>

NHDES issued the permit almost five years after receiving Wheelabrator’s permit application in April 2014. See “Permit Application and Review Summary.” 24 Jan. 2019, page 1.

<https://www4.des.state.nh.us/OneStopPub/Air/330130010214-0175TypeSummary.pdf>

³ United States Environmental Protection Agency. “Title V Operating Permits, Title V Petition Database.” Updated 5 Feb. 2019. www.epa.gov/title-v-operating-permits/title-v-petition-database

⁴ 40 U.S.C. §70.8 (d) (1992)

https://www.ecfr.gov/cgi-bin/text-idx?SID=ab3435a8a8ca22ae45103e4e2243a8db&mc=true&node=se40.16.70_18&rgn=div8

I. BACKGROUND

In April 2014, Wheelabrator submitted a Title V renewal application to NHDES. Three and one-half years later, on November 7, 2017 and following requests from the public, the department held a public hearing on a draft permit for the Concord incinerator.

Members of the public objected to the permit, and NHDES summarized these objections in the “Findings of Fact and Director’s Decision” dated January 2, 2018.⁵ Public comments addressed the risks associated with burning waste, including cumulative impacts from airborne deposition of persistent toxic substances such as lead, mercury, cadmium, and dioxin. The comments included a discussion about climate change and the state’s admission that Wheelabrator is a major source of greenhouse gas pollution. There was also discussion about Wheelabrator’s illegal and long-term incineration of used baghouse filters, a situation NHDES learned about eighteen months after the practice ended.

Despite objections, NHDES authorized renewal of Wheelabrator’s Title V permit on January 2, 2018. We appealed the “Findings of Fact and Director’s Decision” on February 1, 2018.⁶

We filed the appeal with the New Hampshire Air Resources Council (Council), the body with the statutory authority and responsibility to accept and decide appeals. Pursuant to New Hampshire state statute RSA 21-O:11, IV:⁷ “The air resources council shall hear all administrative appeals from department decisions relative to the functions and responsibilities of the division of air resources and shall decide all disputed issues of fact in such appeals, in accordance with RSA 21-O:14.” The Council accepted our appeal⁸ and the hearing officer accepted our stipulated facts,⁹ but the Council ultimately refused to hold an appeal hearing.

⁵ Wright, Craig A. “Findings of Fact and Director’s Decision In the Matter of the Issuance of a Title V Operating Permit To Wheelabrator Concord Company, L.P.” 2 Jan. 2018.

<https://www4.des.state.nh.us/OneStopPub/Air/330130010214-0175TypeFindingsOfFact.pdf>

⁶ To access the appeal docket: <https://www4.des.state.nh.us/Legal/>, Appeals, Air Resources Council, Docket No. 18-02 ARC.

⁷ State of New Hampshire. “Title 1, the State and Its Government, Chapter 21-O, Section 21-O:11.” 18 Sept. 2010.

<https://www.epa.gov/sites/production/files/2017-10/documents/nh-title-i-21-o.pdf>

⁸ The State of New Hampshire, Air Resources Council. “Docket No. 18-02 ARC - Anthony Caplan, et al. Appeal.” 12 Feb. 2018. <https://www4.des.state.nh.us/Legal/Documents/Appeals/Air%20Resources%20Council/Docket%20No.%2018-02%20ARC%20-%20Anthony%20Caplan.%20et%20al.%20Appeal/02-12-18%20-%20Appeal%20Accepted%20Letter.pdf>

⁹ State of New Hampshire, Air Resources Council. “Decision and Order on State’s Motion to Dismiss.” 5 Sept. 2018, page 2. <https://www4.des.state.nh.us/Legal/Documents/Appeals/Air%20Resources%20Council/Docket%20No.%2018-02%20ARC%20-%20Anthony%20Caplan.%20et%20al.%20Appeal/09-05-18%20-%20Decision%20and%20Order%20on%20State's%20Motion%20to%20Dismiss.pdf>

The stipulated facts include the following:

1. The Wheelabrator incinerator in Concord continuously releases persistent toxic substances to the air and to the ash. These chemicals accumulate in our bodies (known as body burden) and in our environment (known as toxic loading) and cause harm in low doses. Operation of the Wheelabrator incinerator in Concord violates RSA 125-C which says it is the state's policy to "promote the public health, welfare, and safety" and "prevent injury or detriment to human, plant, and animal life, physical property and other resources [emphasis added]."¹⁰ The Wheelabrator incinerator does neither.
2. Snapshot testing of smokestack emissions can neither determine nor ensure continuous compliance with air standards that are themselves not health based.
3. NHDES has discretionary authority to either deny or approve a Title V permit and is not constrained by a requirement to only consider whether Wheelabrator's stack test results comply with emission standards.
4. Wheelabrator violated state and federal law and its solid waste permit by incinerating thousands of used baghouse filters.

We assert the stipulated facts warrant a ruling that issuing a Title V operating permit to Wheelabrator is unreasonable and not in the public's interest.

II. SUPPORTING DOCUMENTATION

We have enclosed three appeal documents that highlight our position. We have also enclosed the DOJ letter referenced above. Enclosed:

1. Notice of Appeal (February 1, 2018);¹¹
2. Response to Wheelabrator's Prehearing Conference Memorandum (June 1, 2018);¹²
3. Motion for Reconsideration (October 5, 2018);¹³
4. Letter to Attorney Jon D. Lavallee, NH Department of Justice (February 12, 2019).

¹⁰ State of New Hampshire. "Title 10 Public Health, Chapter 125-C Air Pollution Control, Section 125-C:1." 1 July 1979. <http://www.gencourt.state.nh.us/rsa/html/x/125-c/125-c-mrg.htm>

¹¹ Caplan, A. et al. "Notice of Appeal Before the Air Resources Council." 1 Feb. 2018.

<https://www4.des.state.nh.us/Legal/Documents/Appeals/Air%20Resources%20Council/Docket%20No.%2018-02%20ARC%20-%20Anthony%20Caplan.%20et%20al.%20Appeal/02-01-18%20-%20Notice%20of%20Appeal.pdf>

¹² Caplan, A. et al. "Appellant's Response to Wheelabrator's Prehearing Conference Memorandum Dated May 4, 2018." 1 June 2018. <https://www4.des.state.nh.us/Legal/Documents/Appeals/Air%20Resources%20Council/Docket%20No.%2018-02%20ARC%20-%20Anthony%20Caplan.%20et%20al.%20Appeal/06-01-18%20-%20Appellants%20Response%20to%20Permitee's%20PHC%20Memorandum.pdf>

¹³ Caplan, A. et al. "Motion for Reconsideration." 5 Oct. 2018.

<https://www4.des.state.nh.us/Legal/Documents/Appeals/Air%20Resources%20Council/Docket%20No.%2018-02%20ARC%20-%20Anthony%20Caplan.%20et%20al.%20Appeal/10-05-18%20-%20Motion%20for%20Reconsideration.pdf>

III. DISCUSSION REGARDING ENCLOSED DOCUMENTS

Notice of Appeal: This document forms the basis for our position that the Wheelabrator incinerator in Concord presents unacceptable and unnecessary risks to public health and the environment. Central to this position is the International Joint Commission's seminal work concerning persistent toxic substances. See pages 3-6 and 10-11.

Also central to our appeal is Wheelabrator's history of secretly burning thousands of used baghouse filters in violation of New Hampshire law. See pages 7-11.

With the appeal we are seeking: (1) a long-range planning process that transitions the state away from incineration and leads to closure of the Wheelabrator incinerator in Concord; (2) additional information regarding Wheelabrator's combustion of used filter bags; and (3) revocation of the Title V permit due to the long-term violation of New Hampshire law.

Response to Wheelabrator's Prehearing Conference Memorandum: This document provides a point-by-point rebuttal of Wheelabrator's comments regarding both incinerator pollution and the combustion of used baghouse filter bags (BFBs). According to NHDES, Wheelabrator violated state law and rules "by disposing, or causing to be disposed of at an unauthorized facility, hazardous waste BFBs as a non-hazardous solid waste." Wheelabrator also "violated its Solid Waste Facility Permit" by burning "hazardous waste BFBs in the facility boilers."¹⁴

Motion for Reconsideration: This document explains why the hearing officer erred in the September 5, 2018 decision to deny our appeal.¹⁵ The Motion for Reconsideration addresses the Council's lack of due process and the Council's serious mischaracterization of the state's permitting authority under RSA 125-C-13. See page 4, Table 2. The Motion for Reconsideration also explains why issuing the Title V permit is unreasonable.

¹⁴ Hoyt-Denison, Pamela. "Re: Notice of Past Violation." Received by Wheelabrator Concord, Co., L.P., Attn: John LaRiviere. 5 Dec. 2012.
<https://www4.des.state.nh.us/Legal/Documents/Notice%20of%20Past%20Violations/2012%20Notice%20of%20Past%20Violations/Wheelabrator%20Concord%20Co%20-%2012-5-12.pdf>

¹⁵ State of New Hampshire, Air Resources Council. "Decision and Order of State's Motion to Dismiss." 5 Sept. 2018.
<https://www4.des.state.nh.us/Legal/Documents/Appeals/Air%20Resources%20Council/Docket%20No.%2018-02%20ARC%20-%20Anthony%20Caplan.%20et%20al.%20Appeal/09-05-18%20-%20Decision%20and%20Order%20on%20State's%20Motion%20to%20Dismiss.pdf>

NHDES violated its statutory obligation to protect public health by renewing Wheelabrator's permit despite the scientific evidence concerning the risks associated with persistent bioaccumulative toxic substances.

The Motion for Reconsideration also notes that Wheelabrator is on record for a long-term violation of disclosure requirements and rules governing incineration of hazardous baghouse filters. This practice went on for 21 years.

Letter to New Hampshire Department of Justice: This document looks at the Council's decision-making process and addresses our concerns about transparency. The letter also points out the disconnect between the Council's refusal to hear our appeal and the Council's stated interest in working with NHDES to address cumulative impacts associated with the deposition of airborne pollutants. These impacts include the accumulation of toxic chemicals in the body and in the environment. We have enclosed initial responses from the DOJ and the Council.^{16, 17} Attorney Lavallee and the Council met in executive session during the Council meeting on March 11, and we are awaiting additional information.

IV. REQUESTED RELIEF

The record demonstrates that continued operation of the Wheelabrator incinerator is not in the public's interest. The EPA has a responsibility to protect the public from the unacceptable and unnecessary risks that come with waste incineration. NHDES has violated its statutory responsibility to provide this protection.

We petition the EPA to object to the Title V operating permit for Wheelabrator Concord Company, L.P. Additionally, we petition the EPA to work with NHDES, Wheelabrator, and the public on long-range planning that helps New Hampshire replace the Wheelabrator incinerator with a statewide system that maximizes conservation, composting, and recycling.

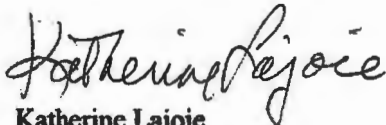
¹⁶ Lavallee, Jon. "Letter to NH Dept. of Justice RE: The New Hampshire Air Resources Council & Appeal of Anthony Caplan, et al. Docket No. 18-02 ARC." Received by Katherine Lajoie, Anthony Caplan, Rebecca MacKenzie, and Janet Ward. 14 Feb. 2019. E-mail.

¹⁷ Marshall, Shelley A. "RE: Request for Copies of All Council Communication Related to Your Appeal." Received by Katherine Lajoie. 21 Feb. 2019.

We submit this petition to the Administrator of the United States Environmental Protection Agency on March 14, 2019.



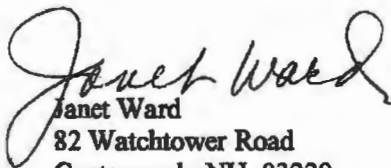
Anthony Caplan
810 Ray Road
Henniker, NH 03242
603-428-7042
tcaplan@mcttelecom.com



Katherine Lajoie
429 Wheeler Rand Road
Charlestown, NH 03603
603-826-4803
ilje23@hotmail.com



Rebecca MacKenzie
7 Glenwood Drive
Claremont, NH 03743
603-504-2851
reb178@myfairpoint.net



Janet Ward
82 Watchtower Road
Contoocook, NH 03229
603-746-4991
jwardnh@comcast.net

Enclosures:

1. Notice of Appeal
2. Response to Wheelabrator's Prehearing Conference Memorandum
3. Motion for Reconsideration
4. Letter to Attorney Jon D. Lavallee, NH Department of Justice
 - o E-mail from Attorney Lavallee
 - o Letter from the Air Resources Council

Copy:

1. NH Department of Environmental Services:

Robert R. Scott, Commissioner
robert.scott@des.nh.gov

Craig A. Wright, Director Air Resources Division
craig.wright@des.nh.gov

2. Region 1 Environmental Protection Agency

Deborah Szaro, Acting Administrator
szaro.deb@epa.gov
EPA-region01-RA@epa.gov

3. Wheelabrator Concord Company, L.P.

General Manager John LaRiviere
jlaviviere@wtienergy.com

EPA Petition

Enclosure #1

Notice of Appeal (February 1, 2018)

Notice of Appeal Before the New Hampshire Air Resources Council

Appeal of Findings of Fact and Director's Decision In the Matter of the Issuance of a Title V Operating Permit To Wheelabrator Concord Company, L.P.

We, the undersigned, appeal the *Findings of Fact and Director's Decision (Findings and Decision)*¹ regarding the Title V Operating Permit for the Wheelabrator incinerator in Concord. The New Hampshire Department of Environmental Services (NHDES) issued the *Findings and Decision* on January 2, 2018. We file this appeal in accordance with RSA 21-O:14² and the rules adopted by the Air Resources Council (Council), Env-AC 204.02.³

Appellants' contact information:

| | |
|--|--|
| Anthony Caplan 810 Ray Road Henniker, NH 03242 603-428-7042 tcaplan@mcttelecom.com | Katherine Lajoie 429 Wheeler Rand Road Charlestown, NH 03603 603-826-4803 ilje23@hotmail.com |
| Rebecca MacKenzie 7 Glenwood Drive Claremont, NH 03743 603-504-2851 reb178@myfairpoint.net | Janet Ward 82 Watchtower Road Cantoocook, NH 03229 603-746-4991 jwardnh@comcast.net |

Katherine Lajoie is the contact person for our group.

State law that authorizes the Council to hear the appeal:

The Council has the authority to hear this appeal under RSA 21-O:11, IV: *The air resources council shall hear all administrative appeals from department decisions relative to the functions and responsibilities of the division of air resources and shall decide all disputed issues of fact in such appeals, in accordance with RSA 21-O:14.*

¹ New Hampshire Department of Environmental Services. 2018. *Findings of Fact and Director's Decision In the Matter of the Issuance of a Title V Operating Permit to Wheelabrator Concord Company, L.P.* Enclosed as Exhibit #1
<https://www4.des.state.nh.us/OneStopPub/Air/330130010214-01751vpcFindingsOfFact.pdf>

Retrieved January 21, 2018

² RSA 21-O:14 <http://www.gencourt.state.nh.us/rsa/html/I/21-O/21-O-14.htm>

Retrieved January 30, 2018

³ New Hampshire Code of Administrative Rules. Chapter Env-AC 200 Procedural Rules
<https://www.des.nh.gov/organization/commissioner/legal/rules/documents/env-ac200.pdf>

Retrieved January 22, 2018

Standing:

We have standing to bring this appeal because:

1. We are New Hampshire residents and the *Findings and Decision* fail to protect our health.
2. We live in close proximity to the incinerator and are at risk for exposure to toxic incinerator emissions.

We also participated in the permitting process and provided both oral and written comments for the public record. In a similar appeal in 2013, the Council ruled that these factors “are sufficient to support a finding that Appellants have standing to bring this appeal.”⁴

3. Wheelabrator burned used baghouse filter bags in the Concord incinerator from at least 1995-2010.

Appellant Lajoie and Appellant MacKenzie were part of a larger group that filed an appeal of the *Findings of Fact and Director’s Decision* concerning the Wheelabrator incinerator in Claremont (Docket 12-11 ARC). In that appeal, Ms. Lajoie and Ms. MacKenzie raised the issue of the baghouse filters. Appellant Lajoie also raised the issue again before, during, and after the public hearing for the Title V permit for Wheelabrator Concord. The *Findings and Decision* presently under appeal raise new topics concerning the filter bags, and Ms. Lajoie and Ms. MacKenzie have the right to use the appeal process to clarify and counter NHDES’ assertions.

4. The Clean Air Act § 502 (b) (6) and the United States Code, Title 42, Section 7661a (b) (6) provide for judicial review to anyone who participated in the Title V permitting process.⁵ Appealing an administrative decision to the Air Resources Council is a step to judicial review.

Requested Relief: See Section V

⁴ New Hampshire Air Resources Council. April 2, 2013. *Order on Wheelabrator Claremont Company, L.P.’s Motion to Dismiss* (Docket 12-11 ARC). Retrieved January 23, 2018

<https://www4.des.state.nh.us/Legal/Documents/Appeals/Air%20Resources%20Council/Docket%20No.%2012-11%20ARC%20-%20Katherine%20Lajoie.%20Rebecca%20MacKenzie.%20et%20al/04-02-13%20-%20Order%20on%20Motion%20to%20Dismiss.pdf>

⁵Rosenberg, William G., U.S. Environmental Protection Agency. *Guidance to States on Authority Necessary to Implement the Operating Permits Program in Title V of the Clean Air Act Amendments of 1990*. Received by Regional Administrators, Regions I-X, May 21, 1991, page 4. <https://www.epa.gov/sites/production/files/2015-08/documents/guidance.pdf> Retrieved January 30, 2018

42 U.S.C., Sec. 7661a (b) (6) The Title V permitting process shall include “an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.”

<https://www.epa.gov/clean-air-act-overview/clean-air-act-title-v-permits>

Retrieved January 30, 2018

STATEMENT OF CASE AND FACTS

I. NHDES HAS DISCRETIONARY AUTHORITY TO EITHER DENY OR APPROVE A TITLE V PERMIT. NHDES IS NOT CONSTRAINED BY A REQUIREMENT TO ONLY CONSIDER WHETHER WHEELABRATOR'S STACK TEST RESULTS COMPLY WITH EMISSION STANDARDS.

The *Findings and Decision* document under consideration states twice on page 7 that "NHDES' review is limited to currently applicable requirements." This is incorrect.

In December 2014, the Attorney General's Office filed a Brief on behalf of NHDES concerning the Title V permit for Wheelabrator Claremont.⁶ Senior Assistant Attorney General Peter C.L. Roth stated on page 22: "While Air Resources could revoke or suspend the Permit for violations of air pollution laws and permit conditions, such is completely within its discretion and the decision not to do so is not subject to judicial review. Deciding whether to renew the Permit is also discretionary" (emphasis added).

Since renewal of a Title V permit is discretionary, NHDES has the option and responsibility to thoroughly weigh the benefits that would accrue with closing the incinerator and replacing it with conservation and maximum recycling. The discussion below explains why this course of action is legal and necessary.

II. DES VIOLATES RSA 125-C:1 BY UNJUSTLY IGNORING SCIENTIFIC EVIDENCE ABOUT THE RISKS ASSOCIATED WITH PERSISTENT BIOACCUMULATIVE TOXIC SUBSTANCES.

NHDES issued the Title V permit to Wheelabrator pursuant to its authority under NH RSA 125-C:1.⁷ This governing statute states it is the State of New Hampshire's public policy to "promote the public health, welfare, and safety" and to "prevent injury or detriment to human, plant, and animal life...."

In addressing cumulative and synergistic impacts associated with the Wheelabrator incinerator in Concord, the *Findings and Decision* state that "NHDES' review is limited to currently applicable requirements" (Comment #5, page 7). NHDES' position is contrary to the intent and language of RSA 125-C:1.

⁶ *Appeal of Katherine Lajoie, et al.* December 30, 2014. Brief of Appellee, State of New Hampshire Department of Environmental Services, NH Supreme Court Docket No. 2014-0242

⁷ Enclosed as Exhibit #2

NHDES must begin to comprehensively address the risk associated with persistent toxic substances. These chemicals accumulate in our air, water, and soil (toxic loading), and they accumulate in the human body (body burden).

Persistent toxic substances include toxic elements such as lead, mercury, cadmium, and arsenic. Toxic elements never degrade once dispersed into the environment but remain a threat forever.

Dioxin is not an element but rather an organochlorine that is created during the incineration process. Dioxin is a persistent toxic substance because it degrades very slowly and is linked to cancer and other serious health problems.

The prestigious International Joint Commission (IJC) is comprised of representatives from the United States and Canada who monitor and protect Great Lakes water quality. Their *Seventh Biennial Report Under the Great Lakes Water Quality Agreement of 1978*⁸ promotes important environmental, public health, and regulatory concepts. We quote from the IJC report:

- Persistent toxic substances are too dangerous to the biosphere and to humans to permit their release in any quantity.
- All persistent toxic substances are dangerous to the environment, deleterious to the human condition, and can no longer be tolerated in the ecosystem, whether or not unassailable scientific proof of acute or chronic damage is universally accepted.
- The characteristics of persistent toxic substances make them much less amenable to traditional pollution control efforts such as discharge limits to set acceptable levels in the environment, end-of-the-pipe technology and disposal regulations.
- The idea of a nonzero "assimilative" capacity in the environment or in our bodies (and hence allowable discharges) for such chemicals is no longer relevant.
- Within the environment's carrying capacity for human activity, there is no space for human loadings of persistent toxic substances. Hence, there can be no acceptable loading of chemicals that accumulate for very long periods, except that which nature itself generates.
- Conventional scientific concepts of dose response and acceptable "risk" can no longer be defined as "good" scientific and management bases for defining acceptable levels of pollution. They are outmoded and inappropriate ways of thinking about persistent toxics.

⁸ International Joint Commission. 1993. *Seventh Biennial Report Under the Great Lakes Water Quality Agreement of 1978*. <http://ijc.org/files/publications/seventh-biennial-report-under-glwqa-ijc.pdf> Retrieved January 20, 2018

The Wheelabrator Incinerator in Claremont, NH: A Working on Waste Report provides further information about persistent, bioaccumulative toxic substances.⁹

Lead and mercury provide two examples where NHDES must rethink how it regulates persistent toxic substances. Lead is a well-known environmental threat, and the New Hampshire legislature has passed legislation to increase protections for the pediatric population.¹⁰ The Centers for Disease Control and Prevention have stated “no safe blood lead level in children has been identified.”¹¹ The New Hampshire Department of Health and Human Services states that living near a municipal waste incinerator “may increase the likelihood of [lead] exposure for children in the surrounding community.”¹²

Mercury pollution has led to fish advisories in New Hampshire.¹³ The graphic below from the Hubbard Group Research Foundation illustrates the toxic loading associated with the continuous deposition of mercury into the environment.

Dioxin, lead, mercury, and other persistent toxic substances present an ongoing and cumulative threat to people and the environment. The Wheelabrator incinerator in Concord continuously releases these chemicals in a form that can be easily inhaled and ingested, thereby increasing exposure risks.

The persistent toxic substances that Wheelabrator has released during its 28 years of operation continue to circulate in the environment, and each day Wheelabrator adds more.

⁹ Working on Waste. 2011, addendum 2015. *The Wheelabrator Incinerator in Claremont, NH: A Working on Waste Report*. www.americanhealthstudies.org/wheelabrator-claremont.pdf Retrieved January 20, 2018

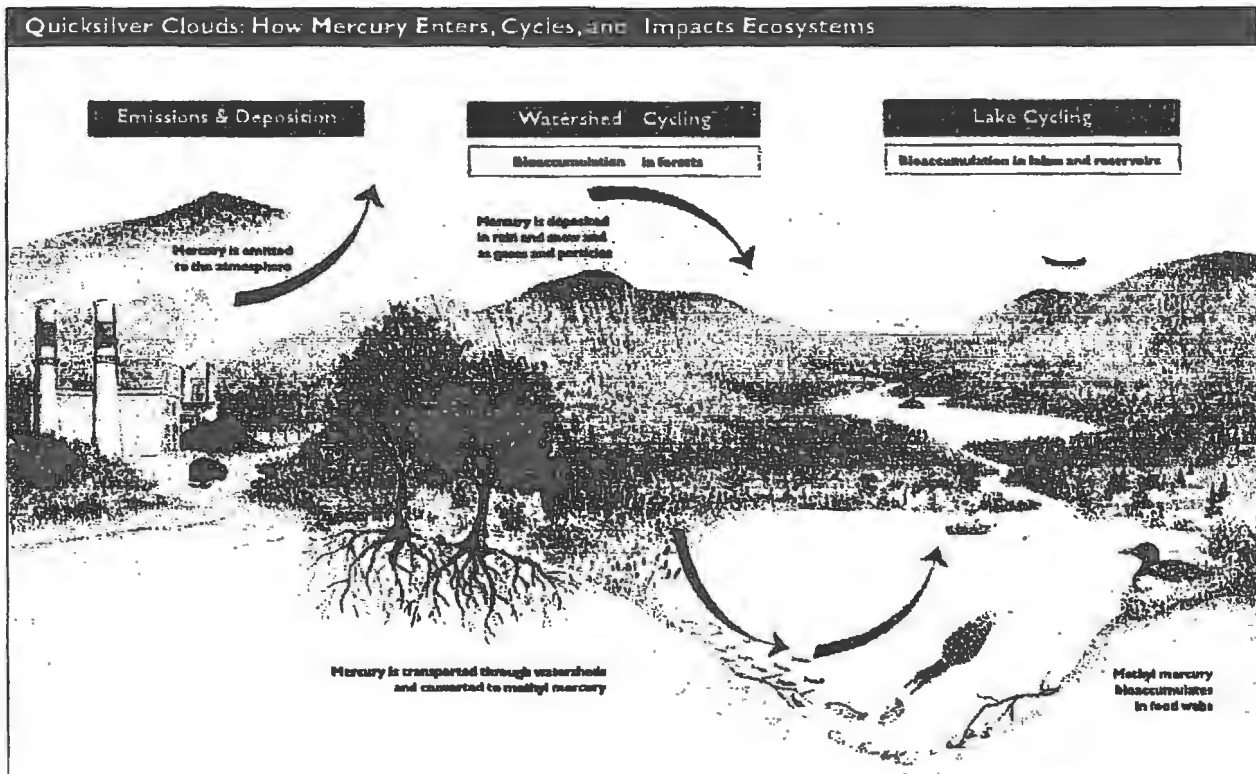
¹⁰ New Hampshire General Court. 2017. *Senate Bill 247-FN-A: An Act Preventing Childhood Lead Poisoning from Paint and Water*. http://gencourt.state.nh.us/bill_status/billText.aspx?sy=2017&id=978&txtFormat=html Retrieved January 21, 2018

¹¹ Centers for Disease Control and Prevention. 2017. *Lead*. <https://www.cdc.gov/nceh/lead/> Retrieved January 20, 2018

¹² New Hampshire Department of Health and Human Services. 2015. *New Hampshire Childhood Lead Poisoning Screening and Management Guidelines*, page 14 <https://www.dhhs.nh.gov/dohs/bchs/clpp/documents/screening.pdf> Retrieved January 20, 2018

¹³ New Hampshire Department of Environmental Services. 2013. *New Hampshire Fish Consumption Guidelines*. <https://www.des.nh.gov/organization/commissioner/pip/factsheets/ard/documents/ard-ehp-25.pdf> Retrieved January 20, 2018

Quicksilver Clouds: How Mercury Enters, Cycles, and Impacts Ecosystems



© Hubbard Brook Research Foundation. Used with permission

Smokestack equipment to address air pollution does not stop toxic loading and does not remediate the past buildup of these dangerous chemicals in our environment and bodies. This is unacceptable and unnecessary.

NHDES cannot state this is a policy issue and therefore outside the department's purview in the Title V permitting process. This is instead a legal issue where NHDES must comply with RSA 125-C:1. The language of the law is clear: DES must prevent harm and must promote public health and environmental protection.

Ongoing operation of the Wheelabrator incinerator does neither.

III. FOR AT LEAST FIFTEEN YEARS, WHEELABRATOR SECRETLY BURNED THOUSANDS OF USED BAGHOUSE FILTER BAGS THAT NHDES HAS STATED ARE HAZARDOUS WASTE. WHEELABRATOR'S ACTIVITIES RISE TO THE LEVEL OF COMPLIANCE VIOLATIONS THAT WARRANT REVOCATION OF THE TITLE V PERMIT.

Comment #8 on pages 9 and 10 of the *Findings & Decision* concerns combustion of used baghouse filter bags (BFBs).¹⁴ Here NHDES states that "New Hampshire has taken a more stringent approach than the federal requirements, and does consider the baghouse filters as state regulated hazardous waste." The hazardous waste designation aligns with the position NHDES took in a December 5, 2012 *Notice of Past Violation* to Wheelabrator.¹⁵

The *Notice of Past Violation* alerted the public to the fact that (1) Wheelabrator had secretly burned used filter bags at the Concord incinerator prior to 2010; (2) tested bags exceeded hazardous waste thresholds for cadmium and lead; (3) NHDES has "no record of receiving a hazardous waste facility permit application from Wheelabrator to dispose of hazardous waste in its facility boilers and no such permit has been issued;" (4) "Wheelabrator violated its Solid Waste Facility Permit" by burning hazardous waste baghouse filter bags in the facility boilers, and (5) Wheelabrator began sending BFBs for off-site hazardous waste disposal in November 2010.

As part of the *Notice of Past Violation*, NHDES requested that Wheelabrator disclose (1) how long the company had burned the filter bags, and (2) how many bags were burned. Wheelabrator responded on March 25, 2013. In answering #1, Wheelabrator said the incinerator "first began operation in the 1980s." In answering #2, Wheelabrator said the Concord incinerator burned an estimated 15, 073 filter bags between 1995 and 2010.¹⁶

¹⁴ The incinerator baghouse traps and concentrates toxic substances that make up the fly ash from incinerator operations.

¹⁵ Hoyt-Denison, Pamela. "Re: Notice of Past Violation." Received by Wheelabrator Concord, Co., L.P., Attn: John LaRiviere, December 5, 2012. Wheelabrator received a *Notice of Past Violation* for both the incinerator in Claremont and the incinerator in Concord. <https://www4.des.state.nh.us/Legal/Documents/Notice%20of%20Past%20Violations/2012%20Notice%20of%20Past%20Violations/Wheelabrator%20Concord%20Co%20-%202012-5-12.pdf>
Retrieved January 20, 2018

¹⁶ Gosine, Jairaj. "Re: Responses to Requests for Information For Wheelabrator Concord and Claremont Resource Recovery Facilities." Received by Pamela Hoyt-Denison, March 15, 2013

Wheelabrator told NHDES there were no hazardous waste violations. Wheelabrator based its defense on a US Supreme Court ruling in 1994¹⁷ and on 1995 guidance documents that stipulated testing of incinerator ash at the "point-of-generation."¹⁸ In the response to the *Notice of Past Violation*, Wheelabrator stated the baghouse filter bags "were enclosed and managed entirely within the facility" prior to 2010. According to Wheelabrator, the filter bags were not exposed to the environment and did not reach a "point-of-generation." They were therefore not subject to hazardous waste regulation.

However, in a June 2012 e-mail to NHDES regarding the Claremont incinerator, Wheelabrator manager John LaRiviere admits the company knew that burning used filter bags was "potentially problematic" due to "adhered fly ash."¹⁹

Despite indications that the company was dealing with hazardous filter bags, Wheelabrator has insisted the company did nothing wrong by burning them. This is not what Senior Assistant Attorney General Peter C.J. Roth said in 2014 regarding combustion of baghouse filters at the Wheelabrator incinerator in Claremont. In discussing NHDES' response to this activity, Attorney Roth states: "Regardless of its casting as a disclosure problem, the real issue is the agency's decision not to enforce against Wheelabrator's violation of law and permit terms" [emphasis added].²⁰

We agree with NHDES' position that Wheelabrator violated the law and permit terms when secretly burning used filter bags at its two New Hampshire incinerators prior to 2010. The *Findings and Decision* reinforce this position with the designation of the baghouse filters as a "state regulated hazardous waste."²¹

¹⁷ *City of Chicago v. EDF* 511 US 328, May 2, 1994 <https://supreme.justia.com/cases/federal/us/511/328/case.html> Retrieved January 30, 2018

¹⁸ Environmental Protection Agency. *Determination of Point at Which RCRA Subtitle C Jurisdiction Begins for Municipal Waste Combustion Ash at Waste-to-Energy Facilities* 60 Federal Register 6666, February 3, 1995 <https://www.gpo.gov/fdsys/pkg/FR-1995-02-03/pdf/95-2627.pdf> Retrieved January 30, 2018, and

Laws, Elliott P. and Steven A. Herman, Environmental Protection Agency. "Revised Implementation Strategy for City of Chicago v. EDF Municipal Waste Combustion (MWC) Ash Supreme Court Decision." Received by Regional Administrators (Regions I-X), March 22, 1995 <https://www.epa.gov/sites/production/files/documents/impstr-laws-mem.pdf> Retrieved January 30, 2018

¹⁹ LaRiviere, John. "Re: Information Request." Received by Eric Abrams, June 27, 2012

²⁰ *Appeal of Katherine Lajoie, et al.* December 30, 2014. Brief of Appellee, State of New Hampshire Department of Environmental Services, NH Supreme Court Docket No. 2014-0242, page 19.

²¹ New Hampshire Department of Environmental Services. 2018. *Findings of Fact and Director's Decision In the Matter of the Issuance of a Title V Operating Permit to Wheelabrator Concord Company, L.P.*, page 10 <https://www4.des.state.nh.us/OneStopPub/Air/330130010214-0175TypeFindingsOfFact.pdf>

It is expected that Wheelabrator would have known that fly ash usually tests out as hazardous waste due to the concentrations of lead, cadmium, and other toxics in a baghouse filter. Wheelabrator was well versed in ash sampling and analysis, and the toxicity of fly ash was well known among regulators and industry in 1989 when the Concord incinerator became operational. Wheelabrator used the Supreme Court decision of 1994 to construct a narrative that would retroactively approve of how the company managed used filter bags prior to 2010. This is not acceptable.

Wheelabrator secretly burned hazardous waste filter bags. This is a serious enough compliance violation to warrant revocation of the Title V permit.

IV. THE FINDINGS AND DECISION CONTAIN INFORMATION THAT IS UNCLEAR AND QUESTIONABLE.

Wheelabrator has admitted burning thousands of used baghouse filter bags between 1995 and 2010. It is the NHDES narrative regarding this situation that is of interest in this present appeal. Two important points have come to light: NHDES now states definitively on page 9 of the *Findings and Decision* that (1) Wheelabrator began burning the used filter bags in 1989 when the incinerator became operational, and (2) Wheelabrator was not required to inform NHDES of the company's decision in 2010 to send the bags off-site because the bags were a waste stream that was "already approved" and "previously allowed under [Wheelabrator's] permit."²²

The point at which Wheelabrator began burning the bags is of interest. As noted above, Wheelabrator used the 1994 Supreme Court decision to defend burning an estimated 15, 073 bags between 1995 and 2010. NHDES however says Wheelabrator started burning the filter bags when the incinerator began operating in 1989. Why did Wheelabrator not report to NHDES how many bags the company burned between 1989 and 1995? Is it because they cannot retroactively use the Supreme Court decision as a defense, since the decision did not come out until 1994?

²² New Hampshire Department of Environmental Services. 2018. *Findings of Fact and Director's Decision In the Matter of the Issuance of a Title V Operating Permit to Wheelabrator Concord Company, L.P.*

<https://www4.des.state.nh.us/OneStopPub/Air/330130010214-0175TypeFindingsOfFact.pdf>

NHDES states on page nine of the *Findings and Decision* that the Concord incinerator became operational in 1988. However, NHDES' October 29, 2007 *Offsite Full Compliance Evaluation Records Review* states on page 2 that Wheelabrator Concord "was constructed from 1987 to 1989." We have used 1989 as the year Wheelabrator became operational.

https://www4.des.state.nh.us/OneStopPub/Air/330130010220070927_1TypeInspection.pdf Retrieved January 31, 2018

Further, to appellant's knowledge, the filter bags were never a permitted waste under the Title V permit, as NHDES states in the *Findings and Decision*. This characterization also appears to be an attempt to retroactively approve what was actually never permitted.

V. REQUESTED RELIEF

- **PURSUANT TO RSA 21-O:11, THE AIR RESOURCES COUNCIL WILL ADVISE THAT NHDES INITIATE A LONG-RANGE PLANNING PROCESS THAT TRANSITIONS THE STATE AWAY FROM INCINERATION AND LEADS TO CLOSURE OF THE WHEELABRATOR INCINERATOR WITHIN TWO YEARS.**
- **THE AIR RESOURCES COUNCIL WILL INSTRUCT NHDES TO CLARIFY INFORMATION IN THE *FINDINGS AND DECISION* RELATED TO COMBUSTION OF USED BAGHOUSE FILTER BAGS.**
- **THE AIR RESOURCES COUNCIL WILL RULE THAT SECRETLY BURNING USED BAGHOUSE FILTER BAGS AT THE WHEELABRATOR INCINERATOR FOR AT LEAST FIFTEEN YEARS WARRANTS REVOCATION OF THE TITLE V PERMIT.**

Under RSA 21-O:11, III, the Air Resources Council "shall consult with and advise" NHDES "with respect to the policy, programs, goals and operations" of the department's air resources division. The Council shall do this "with particular emphasis on long-range planning for the division and on education of the public relative to the functions of the division." We support long-range planning that transitions the state away from incineration and leads to closure of the Wheelabrator incinerator within two years. Having provided the Council with reasons for closure, we are seeking concrete action that helps lead to this goal.

NHDES has the statutory authority and responsibility to uphold RSA 125-C:1, and the department fails to do this by allowing ongoing deposition of persistent toxic substances from stationary sources such as the Wheelabrator incinerator in Concord. While the incinerator is not the only stationary source emitting these chemicals, it is an avoidable source. In addition, Wheelabrator is the subject of this appeal and therefore we are specifically addressing this facility.

Appellants and many others have through the years provided NHDES with scientific and public health information about persistent bioaccumulative toxic substances. We have attended countless administrative and

legislative hearings, including those related to recent initiatives to weaken the ban on incineration of construction and demolition debris.²³

We have requested NHDES' support for a plan to transition away from incineration and toward comprehensive conservation and recycling programs for New Hampshire. NHDES cannot state this is a policy issue and therefore outside of its purview in the permitting process. This is instead a legal issue about NHDES' obligation to comply with RSA 125-C:1. The language of the law is clear: DES must prevent harm and must promote environmental protection. Closing the incinerator does both.

NHDES can accomplish this goal by working with interested parties to develop and implement a transition plan that closes the incinerator in two years and replaces it with programs that conserve resources and maximize recycling. The plan must provide for protection of incinerator workers by helping with job placement elsewhere and by ensuring continued health care coverage and other benefits.

The convoluted journey that NHDES has taken with regard to combustion of used baghouse filter bags necessitates a fresh review by the Council. NHDES has now established that the filter bags are a hazardous waste, a fact the NHDES knew in 2012 and surely something Wheelabrator was aware of since 1989. Wheelabrator used the US Supreme Court decision of 1994 to retroactively justify its activities. Wheelabrator failed to disclose these activities, in violation of state and federal requirements. The Council needs to rule that at least fifteen years of secretly burning hazardous filter bags warrants revocation of the Title V permit.

NHDES must explain questionable comments in the *Findings and Decision* related to combustion of used baghouse filter bags. Does NHDES have documentation that Wheelabrator burned the used bags beginning in 1989? Why has Wheelabrator only reported the quantity burned from 1995 to 2010? Where does the Title V permit (past and present) list used baghouse filter bags as an approved waste stream?

²³ In 2007, NHDES strongly supported a ban on incineration of construction and demolition debris. In a statement to the Senate Energy, Environment and Economic Development Committee dated April 24, 2007, then NHDES Commissioner Thomas Barack stated the department "supports the permanent extension of the prohibition on the burning of C&D wood because it is sound public policy to protect human health and the environment from the uncertain quality of emissions that may result from combustion of such materials, and because there are better ways to manage these materials." http://encourt.state.nh.us/SofS_Archives/2007/senate/HB428S.pdf pages 93-94 Retrieved January 28, 2018

We submit this appeal and fifteen copies to the Air Resources Council on February 1, 2018.

COPY
Anthony Caplan

COPY
Katherine Lajoie

COPY
Rebecca MacKenzie

COPY
Janet Ward

Exhibits:

1. Findings of Fact and Director's Decision In the Matter of the Issuance of a Title V Operating Permit To Wheelabrator Concord Company, L.P., January 2, 2018
2. NH RSA 125-C:1

I certify:

On January 31, 2018, I sent the original appeal and fifteen copies to the Air Resources Council via overnight mail.

On January 31, 2018, I sent a copy of the appeal to Wheelabrator Concord Company, L.P. via overnight mail.

COPY
Katherine Lajoie

EPA Petition

Enclosure #2

**Response to Wheelabrator's Prehearing Conference
Memorandum (June 1, 2018)**

**STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
AIR RESOURCES COUNCIL
RE: DOCKET NUMBER 18-02 ARC**

**APPELLANT'S RESPONSE TO WHEELABRATOR'S
PREHEARING CONFERENCE MEMORANDUM DATED MAY 4, 2018**

On January 2, 2018, the New Hampshire Department of Environmental Services (NHDES) issued *Findings of Fact and Director's Decision In the Matter of the Issuance of a Title V Operating Permit to Wheelabrator Concord Company, L.P. (Findings and Decision)*.

On February 1, 2018, Anthony Caplan, Katherine Lajoie, Rebecca MacKenzie, and Janet Ward appealed the *Finding and Decision* to the Air Resources Council (Council). The docket number for the appeal is 18-02 ARC. Mr. Caplan, Ms. Lajoie, Ms. MacKenzie, and Ms. Ward filed the appeal as a group and are collectively the appellant.

On May 4, 2018, the Council convened a pre-hearing conference regarding the appeal. At the meeting, Wheelabrator Attorney Gregory Smith distributed *Wheelabrator Concord Company, L.P.'s Prehearing Conference Memorandum*.

Appellant now files a response to Wheelabrator's memorandum.

I. Settlement

Appellant proposes a long-range planning process that transitions the state away from waste incineration. The process will include all interested parties and will focus on safe alternatives to the Wheelabrator incinerator. For further discussion, see pages 10 and 11 of the appeal.

II. Wheelabrator's Stipulations or Admissions as to Issues of Fact or Proof

Appellant disagrees with Wheelabrator's *Stipulations or Admissions as to Issues of Fact or Proof (Stipulations)*. Appellant is prepared to provide more detailed information during the appeal hearing. Using Wheelabrator's numbering system, appellant provides this initial rebuttal:

Wheelabrator's stipulation #i

Wheelabrator states the Title V permit in question "contains all of the applicable emission limitations and requirements for all regulated pollutants." Appellant disagrees. Section XX of the proposed permit states there are "rules and regulations not addressed in this Permit" that Wheelabrator must follow.¹ For example, the proposed Title V permit does not address Wheelabrator's ash sampling and analysis plan which also delineates emission limitations and requirements for regulated pollutants.

Also of importance is the overarching issue of NHDES' statutory obligation to protect public health and the public interest when deciding what is applicable and admissible in the Title V permitting process. As stated on page three of the appeal, "NHDES has discretionary authority to either deny or approve a Title V permit. NHDES is not constrained by a requirement to only consider whether Wheelabrator's stack test results comply with emission standards." Appellant seeks an expanded set of criteria for NHDES to consider when taking action on this Title V permit application. One example is a thorough consideration of cumulative and synergistic impacts associated with the incinerator's airborne emissions of lead, mercury, cadmium, dioxin, and other persistent bioaccumulative toxic substances. Such consideration would help NHDES weigh the economic, environmental, and social benefits that would accrue with ending the incinerator's toxic loading of these bioavailable pollutants into our air, soil, and water.

¹ Section XX of the proposed Title V Operating Permit states: *Any noncompliance with a permit condition constitutes a violation of RSA 125-C:15, and, as to the conditions in this permit which are federally enforceable, a violation of the Clean Air Act, 42 U.S.C. Section 7401 et seq., and is grounds for enforcement action, for permit termination or revocation, or for denial of an operating permit renewal application by the department and/or USEPA. Noncompliance may also be grounds for assessment of administrative, civil or criminal penalties in accordance with RSA 125-C:15 and/or the Clean Air Act. This Permit does not relieve the owner or operator from the obligation to comply with any other provisions of RSA 125-C, the New Hampshire Rules Governing the Control of Air Pollution, or the Clean Air Act, or to obtain any other necessary authorizations from other governmental agencies, or to comply with all other applicable Federal, State, or Local rules and regulations, not addressed in this Permit. In accordance with 40 CFR 70.6 (a)(6)(ii), the owner or operator shall not claim as a defense in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this Permit.*

Wheelabrator's stipulation #ii

Wheelabrator states NHDES has concluded incinerator operations "are in compliance with all applicable laws, emissions limitations, and other requirements." Appellant disagrees. Snapshot testing of smokestack emissions can neither determine nor ensure continuous compliance with air standards that are themselves not health based.

The appeal raises a compliance issue concerning combustion of used filter bags. The appeal also focuses on NHDES' statutory obligation under RSA 125-C:1 ("promote the public health, welfare, and safety" and "prevent injury or detriment to human, plant, and animal life, physical property and other resources"). NHDES' unwillingness or failure to carry out appropriate tests or protocols to ascertain cumulative and synergistic impacts makes it derelict in carrying out its statutory obligations to protect the public welfare. NHDES must prevent harm and must promote public health and environmental protection. Operation of the Wheelabrator incinerator does neither.

Wheelabrator's stipulation #iii

The *Notice of Past Violation (NOPV)* that NHDES issued to Wheelabrator in 2012 concerns combustion of used baghouse filter bags (BFBs). Wheelabrator states the *NOPV* "was not a legal determination that a violation had occurred." Appellant disagrees. The *NOPV* states on page 2: "Wheelabrator violated RSA 147-A:4,I, Env-Hw 303.01 and Env Hw 511.01(b) by disposing, or causing to be disposed of at an unauthorized facility, hazardous waste BFBs as a non-hazardous solid waste." The *NOPV* also states on page 4: "Wheelabrator violated its Solid Waste Facility Permit by burning D006 and D008 hazardous waste BFBs in the facility boilers."

Wheelabrator's stipulation #iv

Wheelabrator states "the disposal of used baghouse filter bags at the Concord facility was not a violation of State hazardous waste laws." Appellant disagrees. See iii.

Wheelabrator's stipulations #v, #vi, #vii, viii

In these stipulated facts, Wheelabrator reflects on the narrative the company created to explain combustion of used BFBs at the Concord incinerator. Appellant disagrees with Wheelabrator's version of

events. Pages 7-11 of the appeal detail appellant's position. As stated on page 9, "Wheelabrator was well versed in ash sampling and analysis, and the toxicity of fly ash was well known among regulators and industry in 1989 when the Concord incinerator became operational." Appellant is prepared to provide supporting documentation at the appeal hearing.

Wheelabrator's stipulation #ix

The *Findings and Decision* under appeal state on page 10 that "New Hampshire has taken a more stringent approach than the federal requirements, and does consider the baghouse filters as state regulated hazardous waste." Wheelabrator states NHDES "is not authorized to establish any new applicable requirements in a Title V Operating Permit in this proceeding." Appellant disagrees that NHDES has established a new requirement.

NHDES' 2018 position that baghouse filters are hazardous waste is the same position the department took in 2012 when issuing the *Notice of Past Violation* referenced above. The *NOPV* states unequivocally that Wheelabrator violated hazardous waste rules by burning used baghouse filter bags. Wheelabrator Concord has never been permitted as a hazardous waste incinerator.

To repeat, NHDES is not articulating a new position in 2018 but rather restating the position the department held in 2012.

III. Witness List, Exhibit List, Presentation of Case

Appellant agrees to exchange witness lists one week prior to the date of the appeal hearing and to exchange exhibit lists ten days prior to the hearing. Appellant asks for 120 minutes to present its case, with an opening and closing statement each limited to ten minutes in length. Appellant does not concur with Wheelabrator's proposal that "all witnesses should be directed to submit their testimony in writing (pre-filed testimony)."

With consent from Mr. Caplan, Ms. MacKenzie, and Ms. Ward, I hand delivered to the Appeals Clerk the original and ten copies of this filing.

Date: June 1, 2018

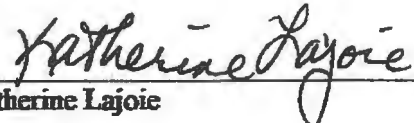

Katherine Lajoie

Certificate of Service:

I provided a copy of this filing to each of the following on June 1, 2018:

Via hand delivery: Christopher G. Aslin, Esq.; Adam M. Dunville, Esq.; Viggo C. Fish, Esq.; and Gregory H. Smith, Esq.

Via e-mail and US mail: Anthony Caplan; Rebecca MacKenzie; and Janet Ward.


Katherine Lajoie

EPA Petition

Enclosure #3

Motion for Reconsideration (October 5, 2018)

STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
AIR RESOURCES COUNCIL
RE: DOCKET NUMBER 18-02 ARC

MOTION FOR RECONSIDERATION

On February 1, 2018, Anthony Caplan, Katherine Lajoie, Rebecca MacKenzie, and Janet Ward appealed the *Findings of Fact and Director's Decision in the Matter of the Issuance of a Title V Operating Permit to Wheelabrator Concord Company, L.P. (Findings and Decision)*.¹ Mr. Caplan, Ms. Lajoie, Ms. MacKenzie, and Ms. Ward filed the *Notice of Appeal (Appeal)* as a group and are collectively the Appellant.

On June 4, the New Hampshire Department of Environmental Services (DES), represented by the Office of the Attorney General, filed the *State's Motion to Dismiss the Appeal*. On September 5, the Air Resources Council (Council) issued a *Decision and Order on State's Motion to Dismiss (Decision)*. The *Decision* upholds the State's motion and denies Appellant the opportunity for a hearing.

Pursuant to Env-AC 205.16, Appellant files a *Motion for Reconsideration of the Council's Decision*.² According to the *State's Motion to Dismiss* at page 2 "the facts alleged by Appellants, and the requested relief, do not, as a matter of law, allege a claim upon which the Council could rule in favor of Appellants and the Council lacks jurisdiction to grant the requested relief." We strongly disagree. We will show that (1) RSA 125-C:1, RSA 125-C:13, and corresponding federal provisions of the Clean Air Act provide the Council with the legal basis to grant the requested relief; and (2) the Council has the statutory authority and obligation to hear all appeals that are timely, complete, and pertain to a DES permitting decision. The *Notice of Appeal* meets those requirements. If this was not the case, the Appeals Clerk would have provided Appellant with a notice of insufficiency pursuant to Env-AC 204.03.

¹ <https://www4.des.state.nh.us/OneStopPub/Air/330130010214-0175TypeFindingsOfFact.pdf>
See Anthony Caplan, Katherine Lajoie, Rebecca MacKenzie, and Janet Ward. *Notice of Appeal Before the New Hampshire Air Resources Council (Appeal)*, February 1, 2018. To access the appeal documents, go to <https://www4.des.state.nh.us/Legal/>, then Appeals, Air Resources Council, Docket No. 18-02 ARC.

² Env-AC 205.16 is part of the Council's Procedural Rules:
<https://www.des.nh.gov/organization/commissioner/legal/rules/documents/env-ac200.pdf>
The *Decision* at page 4 provides a thirty day period for filing a *Motion for Reconsideration*.

The *Motion for Reconsideration* addresses the following:

- I. By failing to convene a hearing and decide all disputed issues of fact in this case, the *Decision* denies due process for the Appellant and undermines the Council's statutory authority and obligation to hear and decide all appeals.
- II. The *Decision* errs in stating that the sole appropriate legal reason for denying Wheelabrator's Title V permit is whether operation of the incinerator will violate an air quality standard or rule.
- III. Appellant presents a case for why issuing the permit is unreasonable.
- IV. Appellant seeks a hearing pursuant to RSA 21-O:14.

I. BY FAILING TO CONVENE A HEARING AND DECIDE ALL DISPUTED ISSUES OF FACT IN THIS CASE, THE *DECISION* DENIES DUE PROCESS FOR THE APPELLANT AND UNDERMINES THE COUNCIL'S STATUTORY AUTHORITY AND OBLIGATION TO HEAR AND DECIDE ALL APPEALS.

According to RSA 21-O:11, IV: "The air resources council shall hear all administrative appeals from department decisions relative to the functions and responsibilities of the division of air resources and shall decide all disputed issues of fact in such appeals, in accordance with RSA 21-O:14."³ [Emphasis added.] See Table 1 below for a full list of the Council's duties. Note the "particular emphasis on long-range planning."

Pursuant to RSA 21-O:14, I (c), a department decision includes a "department permitting decision."⁴ Mr. Caplan, Ms. Lajoie, Ms. MacKenzie, and Ms. Ward appealed the *Findings of Fact and Director's Decision in the Matter of the Issuance of a Title V Operating Permit to Wheelabrator Concord Company, L.P.* This is clearly within the Council's jurisdiction to review.

We have complied with the requirements for filing an appeal, and we have complied with the other requirements governing the appeal process. By refusing to hear the appeal, the Council is violating not only our right to a fair process but also the purpose of Council rules as stated in Env-AC 201.01:

³ <http://www.gencourt.state.nh.us/rsa/html/I/21-O/21-O-11.htm> and <http://www.gencourt.state.nh.us/rsa/html/I/21-O/21-O-14.htm>

⁴ RSA 21-O:14, I (a) defines "department permitting decision" as "the department's final action to grant in whole or in part, with or without conditions, or to deny an application or other request for a license as defined in RSA 541-A:1, VIII, whether the action is taken by the commissioner or by the department official who has statutory authority to take such final action or to whom the commissioner has properly delegated the authority to take such final action." <http://www.gencourt.state.nh.us/rsa/html/I/21-O/21-O-14.htm>

The purpose of these rules is to set forth the general procedures that will be used in the proceedings of the New Hampshire air resources council. The rules relative to conducting adjudicatory proceedings are established for the purpose of acquiring sufficient information to make fair and reasoned decisions on matters within the council's statutory jurisdiction, and shall be construed to secure the just, efficient and accurate resolution of council proceedings in accordance with recognized principles of due process and the requirements of RSA 541-A.

We ask Council members to review the *Notice of Appeal* (submitted February 1, 2018), the *Appellant's Response to Wheelabrator's Prehearing Conference Memorandum Dated May 4, 2018* (submitted June 1, 2018), and the *Objection to Motions to Dismiss* (submitted July 16, 2018). Our filings show the extensive work we have done to articulate our position.

Failure to hear and decide the merits of the *Appeal* also impedes the process for judicial review. As noted in our July 16 *Objection to Motions to Dismiss* at page 4, former Attorney General Jeffrey Howard stated "the exclusive means for obtaining judicial review of Title V permit decisions or failure to act on a permit request is by appeal to the Council and subsequent appeal to the New Hampshire Supreme Court."⁵

TABLE 1

Duties of the Air Resources Council include:

- To consult with and advise the Director of the Air Resources Division with respect to policy, programs, goals, and operations of the Air Resources Division, with particular emphasis on long-range planning and public education.
- To hear and decide administrative appeals from Department decisions relative to the functions and responsibilities of the Air Resources Division.
- To review all rules proposed to be implemented by the Air Resources Division

<https://www.nhec.nh.gov/air/index.htm>

II. THE *DECISION* ERRS IN STATING THAT THE SOLE APPROPRIATE LEGAL REASON FOR DENYING WHEELABRATOR'S TITLE V PERMIT IS WHETHER OPERATION OF THE INCINERATOR WILL VIOLATE AN AIR QUALITY STANDARD OR RULE.

The *Decision* states at page 2, and again at page 3, that RSA 125-C:13, I (a) "provides that a permit such as that involved here, may only be denied by DES if it is shown that operation of the facility in question will violate an air quality standard or rule." This is an important statement for two reasons.

⁵ Howard, Jeffrey R., Attorney General State of New Hampshire. *Attorney General's Certification, Clean Air Act Amendments, Title V Operating Permits Program*, September 13, 1995 at page 21

First, the *Appeal* asserts at page 3 that “DES violates RSA 125-C:1 by unjustly ignoring scientific evidence about the risks associated with persistent bioaccumulative toxic substances.” Violation of RSA 125-C:1 provides a reason to deny the permit.

The *Decision*, however, errs in its characterization of RSA 125-C:13, I (a) as the sole determining factor when making a decision regarding a permit. Appellant has provided below the complete text of this statute (Table 2).

TABLE 2

New Hampshire RSA 125-C:13 Criteria for Denial; Suspension or Revocation; Modification.

I. The commissioner shall deny an application for any permit or authorization if, on the basis of evidence available to the commissioner, the commissioner determines:

- (a) That the device or non-Title V source for which the permit or authorization is sought will result in a violation of any standard or rule in force under this chapter; or
- (b) That the device or non-Title V source will contribute disproportionately to pollution of the air in comparison with other similar sources able to perform the same function that are currently available; or
- (c) That the device or non-Title V source is located in a “clean air” area designated by state or federal rules or regulations and will or is reasonably likely to cause significant deterioration of the existing air quality in a part of the area.

II. The commissioner may suspend or revoke any permit or authorization issued hereunder if, following a hearing, the commissioner determines:

- (a) That the permit holder or registrant has committed a violation of this chapter or any rule, order, or permit conditions in force and applicable to it; or
- (b) That emissions from the device or non-Title V source to which the permit applies, alone or in conjunction with other sources of the same pollutants, presents an immediate danger to the public health.

III. The commissioner may order modification of any source of air pollution holding a valid permit issued under this chapter in the event that the commissioner determines, following a hearing:

- (a) That the device or non-Title V source to which the permit applies fails to meet existing emission limits established by state or federal rule or regulation;
- (b) That the device or non-Title V source is resulting or is reasonably likely to result in a violation of an air quality standard in force.

IV. The commissioner may terminate, modify, revoke, or reissue for cause any permit or authorization issued to an affected source prior to expiration of such permit consistent with the requirements of the Clean Air Act.

The Council will note that section I (a) concerns a permit application that would pertain to both yet-to-be-built facilities (initial application) and facilities that are already operating (renewal application).

The other sections of RSA-C:13 are also for operating facilities (such as Wheelabrator in Concord), and the review criteria are more substantive.⁶

⁶ See for example page 1 of the *Findings and Decision*: “After the application has been deemed complete, [DES] undertakes an extensive review, including but not limited to facility site visits and an analysis of historical information.”

Indeed, sections I (b) and (c) of RSA 125-C:13 allow the commissioner to deny a permit if operation of the facility "will contribute disproportionately to pollution of the air" or "is reasonably likely to cause significant deterioration of the existing air quality" in a part of a "clean air" area.

Sections II, III, and IV of RSA 125-C:13 provide the type of scrutiny that would be expected if a facility has been in operation for many years, such as is the case with the Wheelabrator incinerator in Concord. Sections II (a) and (b) allow permit revocation if a permittee has "committed a violation of this chapter or any rule, order, or permit conditions in force and applicable to it" or if emissions, "alone or in conjunction with other sources of the same pollutants," present "an immediate danger to the public health." Under section III, the DES commissioner has the authority to modify a permit.

Section IV of RSA 125-C:13 is of special interest and importance. Here the statute states that "the commissioner may terminate, modify, revoke, or reissue for cause any permit or authorization issued to an affected source prior to expiration of such permit consistent with the requirements of the Clean Air Act."

Under the Clean Air Act, 42 U.S.C., §7429:⁷

Notwithstanding any other provision of this subsection, the Administrator or the State shall require the owner or operator of any unit to comply with emissions limitations or implement any other measures, if the Administrator or the State determines that emissions in the absence of such limitations or measures may reasonably be anticipated to endanger public health or the environment. The Administrator's determination under the preceding sentence is a discretionary decision.

Clearly compliance with existing emissions standards is not the only criteria that DES must consider when determining whether to renew a Title V permit. Other relevant factors to be considered accordingly must include public health and previous violations of rules or standards. RSA 21-O:14, I (b) (2) allows for "the revocation of or the refusal to renew a license as defined in RSA 541-A:1, VIII based on the permit holder's non-compliance with the statute, rules, or terms and conditions of the license or on

⁷ <https://www.law.cornell.edu/uscode/text/42/7429>

other good or just cause as defined in rules adopted relative to the license.” [Emphasis added.]⁸

DES and Wheelabrator are wrong in their assessment on RSA 125-C:13. DES has an obligation to look beyond the type of regulatory compliance delineated in part I (a) of this statute. Think especially about this statement in the *Decision* at page 3 concerning combustion of used baghouse filter bags:

Assuming Appellants are correct that Permittee’s practice of burning filter bags was a violation of the law when it last occurred in 2010 or before, there is no applicable statute or rule that would cause DES to deny the Title V permit in the present circumstances in which no current violation is alleged.

Now look at RSA 125-C:13, II:

The commissioner may suspend or revoke any permit or authorization issued hereunder if, following a hearing, the commissioner determines: (a) That the permit holder or registrant has committed a violation of this chapter or any rule, order, or permit conditions in force and applicable to it...

It is clear past compliance violations are relevant in determining whether to renew a permit. Likewise, RSA 125-C:13, IV and the Clean Air Act provide DES with legal authority to protect the public from air pollution even in the absence of laws and regulations specific to the pollution in question.

This is clearly relevant to Appellant’s position concerning persistent bioaccumulative toxic substances. As noted in the *Appeal* at page 4, “persistent toxic substances include toxic elements such as lead, mercury, cadmium, and arsenic. Toxic elements never degrade once dispersed into the environment but remain a threat forever.” The *Appeal* at page 5 references the Centers for Disease Control and Prevention’s comment that “no safe blood lead level in children has been identified,” and the mercury graphic at page 6 illustrates how this toxic chemical impacts ecosystems. Given what we know about body burden and environmental impacts related to dioxin, lead, mercury, cadmium and other dangerous chemicals, it behooves DES to use its authority to address the problem now. Action is long overdue.

We strongly challenge the DES decision to issue the Title V permit despite long-term deposition of bioaccumulative air pollution and despite egregious hazardous waste violations spanning 21 years. These are serious issues that the Council has the authority and responsibility to address.

⁸ <http://www.gencourt.state.nh.us/rsa/html/I/21-O/21-O-14.htm>

In summary, State law allows DES to take action when there are past permit violations. DES can also act when there are concerns about pollution despite the lack of regulations that specifically address those concerns.

DES and the Council are ignoring their overarching duty to protect public health, even if Wheelabrator is not shown to violate current standards. These standards do not take into account the bioaccumulative effects of toxic substances. By wrongly insisting that the State can only deny a Title V permit if the incinerator fails to meet emission standards currently in place, DES fails to meet the duties clearly delineated under New Hampshire and US statutes.

III. APPELLANT PRESENTS A CASE FOR WHY ISSUING THE PERMIT IS UNREASONABLE.

The *Decision* asserts at page 3 that “the issue before the Council in its adjudicative capacity in this Appeal is whether DES acted unlawfully or unreasonably in finding that operation of the Concord facility does not violate an existing air quality standard or rule.”

Appellant has shown that Wheelabrator is on record for a long-term violation of disclosure requirements and rules governing incineration of hazardous baghouse filters. This practice went on for 21 years or 72% of the incinerator’s operational life. As petitioners before the Council, Mr. Caplan, Ms. Lajoie, Ms. MacKenzie, and Ms. Ward ask Council members to acknowledge the seriousness of Wheelabrator’s failure to disclose this practice. Consider also the fact that DES this year reaffirmed the Department’s 2012 position that Wheelabrator violated state and federal hazardous waste rules and laws and the facility’s solid waste permit by burning the toxic filters.⁹

Further, DES violated its statutory obligation to protect public health by renewing Wheelabrator’s permit despite the scientific evidence concerning the risks associated with persistent bioaccumulative

⁹ *Notice of Appeal* at pages 7-9, 11, and *Notice of Past Violation*, December 5, 2012 at pages 2 and 4 <https://www4.DES.state.nh.us/Legal/Documents/Notice%20of%20Past%20Violations/2012%20Notice%20of%20Past%20Violations/Wheelabrator%20Concord%20Co%20-%202012-5-12.pdf>

toxic substances.¹⁰ Appellant asserts that DES violates RSA 125-C:1 by unjustly ignoring these risks.¹¹ This has occurred despite DES having the legal authority to implement limitations or measures if “emissions in the absence of such limitations or measures may reasonably be anticipated to endanger public health or the environment.” Appellant has shown that persistent bioaccumulative toxic substances do just that. While Wheelabrator’s incinerator in Concord is not the only stationary source emitting these chemicals, it is an avoidable source.¹²

In summary, it is codified in law that DES can act on Wheelabrator’s violations (burning baghouse filters) and that DES can protect the public from cumulative impacts associated with the incinerator’s airborne emissions, even in the absence of specific regulations governing such impacts.

Issuing the Title V permit to Wheelabrator is unreasonable because DES has failed to take protective action concerning persistent bioaccumulative toxic substances from the incinerator smokestack. DES has also reaffirmed that used baghouse filters are hazardous waste. Issuing another Title V permit means that Wheelabrator is able to act with impunity for more than two decades and then be rewarded for its untrustworthy behavior.

We have explained in our filings why issuing the permit is unreasonable. We want an appeal hearing in order for the Council to acquire sufficient information to make a “fair and reasoned” decision regarding the *Appeal*.

IV. APPELLANT SEEKS A HEARING PURSUANT TO RSA 21-O:14.

Appellant requests that the Council:

- (1) Reverse the *Decision and Order on State’s Motion to Dismiss*.
- (2) Convene an appeal hearing as required under RSA 21-O:11, IV:

“The air resources council shall hear all administrative appeals from department decisions relative to the functions and responsibilities of the division of air resources and shall decide all disputed issues of fact in such appeals, in accordance with RSA 21-O:14.”

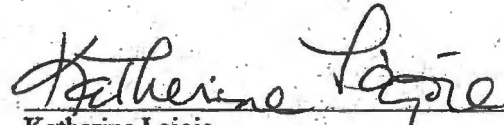
¹⁰ *Notice of Appeal* at pages 3-6, 10-11

¹¹ *Notice of Appeal* at pages 3, 10-11

¹² *Notice of Appeal* at page 10

With consent from Mr. Caplan, Ms. MacKenzie, and Ms. Ward, I submit this filing and ten copies to the Appeals Clerk, Air Resources Council.

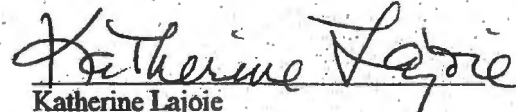
Date: October 5, 2018


Katherine Lajoie

Certificate of Service:

I provided a copy of this filing to each of the following on October 5, 2018:

Via e-mail and US mail: Christopher G. Aslin, Esq.; Anthony Caplan; Adam M. Dumville, Esq.; Viggo C. Fish, Esq.; Rebecca MacKenzie; Gregory H. Smith, Esq.; and Janet Ward.


Katherine Lajoie

**STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
AIR RESOURCES COUNCIL
RE: DOCKET NUMBER 18-02 ARC**

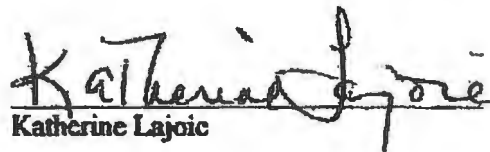
CORRECTION

Anthony Caplan, Katherine Lajoie, Rebecca MacKenzie, and Janet Ward (collectively "Appellant" in Docket Number 18-02 ARC) file this correction of a typographical error on page 7 of the *Motion for Reconsideration* dated October 5, 2018. Section III should read:

APPELLANT PRESENTS A CASE FOR WHY ISSUING THE PERMIT IS UNREASONABLE.

With consent from Mr. Caplan, Ms. MacKenzie, and Ms. Ward, I submit this filing and ten copies to the Appeals Clerk, Air Resources Council.

Date: October 29, 2018

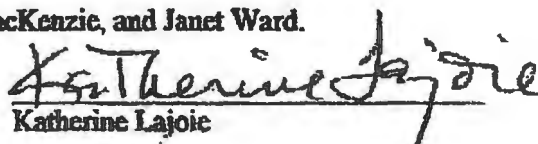

Katherine Lajoie

Certificate of Service:

I provided a copy of this filing to each of the following on October 29, 2018:

Via Hand Delivery: Christopher G. Aslin, Esq.; Adam M. Dumville, Esq.; Viggo C. Fish, Esq.; and Gregory H. Smith, Esq.

Via Electronic Mail and US Mail: Anthony Caplan, Rebecca MacKenzie, and Janet Ward.


Katherine Lajoie

EPA Petition

Enclosure #4

**Letter to Attorney Jon D. Lavalley, NH Department of Justice
(February 12, 2019)**

- **E-mail from Attorney Lavalley (February 14, 2019)**
- **Letter from the Air Resources Council (February 21, 2019)**

February 12, 2019
Via Certified Mail

Attorney Jon D. Lavallee
Office of the Attorney General
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301

**RE: The New Hampshire Air Resources Council &
Appeal of Anthony Caplan, et al., Docket No. 18-02 ARC**

Dear Attorney Lavallee:

On January 2, 2018, the New Hampshire Department of Environmental Services (DES) issued the *Findings of Fact and Director's Decision* extending the Title V operating permit for the Wheelabrator waste incinerator in Concord.¹ To challenge the *Findings of Fact and Director's Decision*, Anthony Caplan, Katherine Lajoie, Rebecca MacKenzie, and Janet Ward filed an appeal with the New Hampshire Air Resources Council (Council) on February 1, 2018.

The Council accepted the appeal but subsequently refused to hear it.² Council members did not deliberate in public regarding the decision to deny a hearing, and we were left in the dark regarding whether they had even read all that we submitted.

We understand that you are the Council's attorney advisor. In that role, we request that you examine the process the Council uses to decide appeals of administrative decisions from DES. We also

¹ Department of Environmental Services, Air Resources Division. *Findings of Fact and Director's Decision In the Matter of the Issuance of a Title V Operating Permit To Wheelabrator Concord Company, L.P.* January 2, 2018. <https://www4.des.state.nh.us/OneStopPub/Air/330130010214-0175TypeFindingsOfFact.pdf>
To access the appeal: <https://www4.des.state.nh.us/Legal/>, ->Appeals, ->Air Resources Council, Docket Number 18-02 ARC.

² Air Resources Council. *Docket No. 18-02 ARC - Anthony Caplan, et al. Appeal.* February 12, 2018. <https://www4.des.state.nh.us/Legal/Documents/Appeals/Air%20Resources%20Council/Docket%20No.%2018-02%20ARC%20-%20Anthony%20Caplan,%20et%20al.%20Appeal/02-12-18%20-%20Appeal%20Accepted%20Letter.pdf>

See RSA 21-O:11, IV: "The air resources council shall hear all administrative appeals from department decisions relative to the functions and responsibilities of the division of air resources and shall decide all disputed issues of fact in such appeals, in accordance with RSA 21-O:14."

request that you determine whether the process complies with the law. In addition, we request Council correspondence related to our appeal. We make these requests pursuant to RSA 91-A, New Hampshire's Right To Know Law.³ The law states:

Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussion and records of all public bodies, and their accountability to the people.

Background

Attorney David F. Conley is the Council's Hearing Officer, and his role is crucial to an understanding of our concerns about the appeal process. Pursuant to RSA 21-M:3, IX,⁴ it is Attorney Conley's duty to "regulate all procedural aspects of a proceeding, including presiding over the hearing and prehearing conferences." Attorney Conley is required to "adopt all findings of fact made by the council except to the extent any such finding is without evidentiary support in the record." In addition, Attorney Conley must "deliberate with the council before reaching conclusions on mixed questions of law and fact" and "decide all questions of law presented during the pendency of the appeal."

The audiotape for the Council's November 19, 2018 meeting indicates the Council rules have not been updated to include the Hearing Officer's role.⁵ The audiotape also reveals the following comments:

1. At approximately 39:15, Council Chair Robert Durval states "anytime two or more of us discuss an issue, it is really a meeting. So, we can't have these e-mail chains, and so David is very careful to just e-mail us all individually, so we individually give comments back to David for him to consider when he issues his ruling."

³ State of New Hampshire, *Title VI, Public Officers and Employees, Chapter 91-A, Access to Governmental Records and Meetings*.

<http://www.gencourt.state.nh.us/rsa/html/vi/91-a/91-a-mrg.htm>

⁴ State of New Hampshire, *Title 1, The State and Its Government, Chapter 21-M, Department of Justice, Section 21-M:3*.

<http://www.gencourt.state.nh.us/rsa/html/1/21-M/21-M-3.htm>

⁵ Audiotape at approximately 85:32 under New Business. The online minutes for the meeting state at page 12 that "there was no new business to report."

Air Resources Council. *Minutes of Meeting #255*. November 19, 2018.

<https://www.nhec.nh.gov/air/documents/20181119-minutes.pdf>

2. At approximately 45:48, a Council member states with regard to Attorney Conley: "This is newer. The Council worked differently a few years ago, but David now is sort of this in-between that basically does a lot of the legal components to avoid the Council having an issue before us that really doesn't... we have no ability to rule on anyway. So he is sort of that buffer for us."
3. At approximately 49:43, Appeals Clerk Paula Scott states: "I just email appeal stuff....It's OK for me to impart information as a group, no back and forth as a group. That's the best way to explain it."
4. At approximately 50:25, Ms. Scott states: "I'm the go between" when referring to communication between Attorney Conley and the Council.

These statements are of concern because one-on-one communication effectively precludes the ability to establish a quorum and deliberate as a group. This appears to contravene procedural rule Env-AC 203.01 (b):⁶ "The council shall take formal or official action only when a quorum is present." Pursuant to 91-A:2, I: "all participating members" must be "able to communicate with each other contemporaneously."⁷

In addition to Env-AC 203.01 (b) above, Attorney Conley's direct communication with individual Council members appears to violate procedural rule Env-AC 203.12 (b):

No person shall submit any documents or exhibits or otherwise communicate any information which pertains either directly or indirectly to the subject matter of a pending appeal directly to any member of the council, other than at a hearing or prehearing conference for which all parties have been given notice in accordance with these rules.

Also of importance is the *Memorandum on New Hampshire's Right to Know Law* that former

⁶ State of New Hampshire. *New Hampshire Code of Administrative Rules, Chapter Env-AC 200 Procedural Rules.* <https://www.des.nh.gov/organization/commissioner/legal/rules/documents/env-ac200.pdf>

⁷ State of New Hampshire. *Title VI, Public Officers and Employees, Chapter 91-A, Access to Governmental Records and Meetings.* <http://www.gencourt.state.nh.us/rsa/html/vi/91-a/91-a-mrg.htm>

Attorney General Joseph A. Foster released in March 2015. Here Attorney Foster states:⁸

E-mail use should be carefully limited to avoid an inadvertent meeting, albeit one where there is a failure to have a physical quorum at a noticed meeting place. Simultaneous e-mails sent to a quorum of a public body by a member discussing, proposing action on, or announcing how one will vote on a matter within the jurisdiction of the body would constitute an improper meeting. Sequential e-mail communications among members of a public body similarly should not be used to circumvent the public meeting requirement. For example, e-mail among a quorum of members of a public body in a manner that does not constitute contemporaneous discussion or deliberation and does not involve matters over which the body has supervision, control, jurisdiction, or advisory power does not technically constitute a meeting under the Right-to-Know law. E-mail discussions of a quorum concerning matters over which the public body has supervision, control, jurisdiction, or advisory power would run counter to its spirit and purpose.

Unless exempted from the definition of "meeting" under RSA 91-A:2, I, or by another statute, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with, the provisions of RSA 91-A:2-a, I. See e.g., RSA 363:17-c (making Public Utility Commission deliberations exempt from the Right-to-Know law).

We have another concern regarding the process the Council uses to make decisions. After Council members accepted the appeal in February, we never had an opportunity to discuss with them the extensive body of knowledge in the appeal regarding Wheelabrator's airborne emissions of dioxin, lead, mercury, cadmium, and other persistent toxic substances. We explain in the appeal that these dangerous chemicals accumulate in the human body and in soil and water following their release from the incinerator smokestack.

At the November 19 meeting, DES staff spoke about per- and polyfluoroalkyl substances (PFAS), a group of man-made chemicals that includes PFOA, PFOS, GenX, and many other chemicals.

According to the Environmental Protection Agency:

PFOA and PFOS have been the most extensively produced and studied of these chemicals. Both chemicals are very persistent in the environment and in the human body – meaning they don't break down and they can accumulate over

⁸ Joseph A. Foster, Attorney General, New Hampshire Department of Justice, *Memorandum on New Hampshire's Right-to-Know Law, RSA Chapter 91-A*. March 20, 2015 at page 8, number 3 and number 4. <https://www.doi.nh.gov/civil/documents/right-to-know.pdf>

time. There is evidence that exposure to PFAS can lead to adverse human health effects.⁹

Polyfluoroalkyl substances have caused serious groundwater contamination in New Hampshire following chronic atmospheric deposition.

At approximately 19:38 on the audiotape, Chairman Duval states polyfluoroalkyl substances are not the only family of compounds “that goes up in the air and comes down on the ground” with subsequent harmful effects. Upon questioning from a member of the public (audiotape at approximately 97:08), Chairman Duval acknowledges the concern is with all emitters of toxic chemicals and not just with industries that emit polyfluoroalkyl substances. At approximately 97:46, he states he is “trying to make sure that the department [DES] doesn’t focus only on one chemical, as they always do.” The online minutes indicate “the whole Air Resources Council is concerned.”¹⁰

There is a disconnect between the Council’s silence regarding the appeal and the Council’s interest in working with DES to deal with persistent toxic substances in a way that acknowledges their unique properties. We want to know whether Chairman Duval and other Council members ever spoke with Attorney Conley about their concerns surrounding cumulative toxic impacts associated with airborne emissions, again because this is a central topic in our appeal. On November 26, one week after the Council meeting in question, Attorney Conley denied a motion we filed in October requesting that the Council reconsider a previous decision to deny the appeal.¹¹

Refusing to hear the appeal was adversely prejudicial because the record for the November 19 meeting indicates the Council has the authority and responsibility to consider cumulative toxic impacts associated with sources of airborne emissions in New Hampshire, including Wheelabrator.

⁹ Environmental Protection Agency. *Basic Information on PFAS*. December 6, 2018.
<https://www.epa.gov/pfas/basic-information-pfas>

¹⁰ Air Resources Council. *Minutes of Meeting #255*. November 19, 2018 at page 12.
<https://www.nbec.nh.gov/air/documents/20181119-minutes.pdf>

¹¹ See *Motion for Reconsideration*. October 5, 2018. Docket No. 18-02 ARC.
<https://www4.des.state.nh.us/Legal/Documents/Appeals/Air%20Resources%20Council/Docket%20No.%2018-02%20ARC%20-%20Anthony%20Caplan%20et%20al%20Appeal/10-05-18%20-%20Motion%20for%20Reconsideration.pdf>

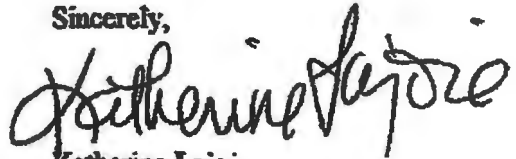
Requested Information

In light of the information above, we reiterate our request that you examine the process the Council uses to decide appeals of DES administrative decisions. We also request that you determine whether the Council's process complies with the law, including Council rules and enabling legislation.

In addition, we request copies of all Council communication related to our appeal. This pertains to correspondence between the Appeals Clerk and Attorney Conley; between the Appeals Clerk and Council members; between Attorney Conley and Council members; and between individual Council members.

The New Hampshire Right to Know Law requires a response time of five business days. We thank you in advance for your follow-up. Please address all correspondence to Katherine Lajoie at the address below.

Sincerely,



Katherine Lajoie
429 Wheeler Rand Road
Charlestown, NH 03603
603-826-4803
jlje23@hotmail.com

Ms. Lajoie has permission from Anthony Caplan, Rebecca MacKenzie, and Janet Ward to also file this correspondence of their behalf.

Anthony Caplan
810 Ray Road
Henniker, NH 03242
603-428-7042
tcaplan@mcttelecom.com

Rebecca MacKenzie
7 Glenwood Drive
Claremont, NH 03743
603-504-2851
reb178@myfairpoint.net

Janet Ward
82 Watchtower Road
Contoocook, NH 03229
603-746-4991
jwardnh@comcast.net

Copy:
DES Commissioner Robert R. Scott
Air Resources Council, Attn: ARC Council Clerk Shelley Marshall

From: Lavallee, Jon <Jon.Lavallee@doj.nh.gov>
Sent: Thursday, February 14, 2019 5:41 PM
To: 'jlje23@hotmail.com' <jlje23@hotmail.com>
Cc: 'jwardnh@comcast.net' <jwardnh@comcast.net>; 'reb178@myfairpoint.net' <reb178@myfairpoint.net>; 'tcaplan@mcttelecom.com' <tcaplan@mcttelecom.com>

Subject: Letter to NH Dept. of Justice RE: The New Hampshire Air Resources Council & Appeal of Anthony Caplan, et al. Docket No. 18-02 ARC

Ms. Lajoie, Mr. Caplan, Ms. Mackenzie, Ms. Ward,

Thank you for your letter dated February 12, 2019, which was received by my office today, February 14, 2019.

I will review the concerns you raise regarding the process the Air Resources Council uses to decide appeals from administrative decisions of the NH Department of Environmental Services. As their attorney-advisor, I will discuss with the Council their processes as well as compliance with Council rules and enabling legislation. To the extent, however, you seek to appeal the Air Resources Council decision, please be aware there is no independent right of appeal of Council decisions to the New Hampshire Department of Justice, Office of the Attorney General.

As for your request for records pursuant to New Hampshire's Right-to-Know law (RSA Chapter 91-A), this office does not maintain the records you request. I have forwarded your request to the Air Resources Council for response within the permitted five business days.

Very respectfully,

J.D. Lavallee
Client Counseling, Civil Bureau
Office of the Attorney General
33 Capitol Street
Concord, New Hampshire 03301
jon.lavallee@doj.nh.gov

STATEMENT OF CONFIDENTIALITY

The information contained in this electronic message and any attachment to this message may contain confidential or privileged information and are intended for the exclusive use of the intended recipient(s). Please notify the Attorney General's Office immediately at (603) 271-3658 or justice@doj.state.nh.gov if you are not the intended recipient and destroy all copies of this electronic message and any attachments. Thank you.



THE STATE OF NEW HAMPSHIRE

Air Resources Council

Robert Duval, Chairman

PO Box 95, 29 Hazen Drive, Concord, New Hampshire 03302-0095
Council Clerk (non-appeal related): (603) 271-1386; Appeals Clerk (appeal related only): (603) 271-6072
TDD Access: Relay NH 1-800-735-2964
Council Website: <http://www.des.nh.gov/councils/>

February 21, 2019

Katherine Lajoie
429 Wheeler Rand Road
Charlestown NH 03603

Dear Ms. Lajoie;

The NH Air Resources Council has received your request (dated February 12, 2019) on February 14, 2019 for copies of all Council communication related to your appeal, Docket No. 18-02. The Council will need to identify what documents it has that are responsive to your request, and review these with legal counsel to determine if they are subject to disclosure. It will take board staff at least three weeks from today to complete this analysis. Once it is determined what exists, we will contact you regarding format and costs for production.

The next Air Council meeting is scheduled for March 11, 2019 at 9:00.

Respectfully,

A handwritten signature in cursive script that reads "Shelley A. Marshall".

Shelley A. Marshall
Council Secretary

Air Resources Council
New Hampshire Department of Environmental Services
29 Hazen Drive
Concord, NH 03301
603-271-1386
Fax 603-271-1381
Shelley.Marshall@des.nh.gov

Response to EPA Order

Enclosure #2

EPA Order (October 30, 2019)

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

| | | |
|--|---|------------------------------|
| IN THE MATTER OF |) | |
| |) | |
| WHEELABRATOR ENVIRONMENTAL SYSTEM INC. |) | ORDER RESPONDING TO |
| WHEELABRATOR CONCORD COMPANY |) | PETITION REQUESTING |
| CONCORD, NEW HAMPSHIRE |) | OBJECTION TO THE ISSUANCE OF |
| PERMIT NO. TV-0032 |) | A TITLE V OPERATING PERMIT |
| |) | |
| ISSUED BY THE NEW HAMPSHIRE DEPARTMENT |) | |
| OF ENVIRONMENTAL SERVICES |) | |

ORDER DENYING PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated March 14, 2019, (the Petition), from Anthony Caplan, Katherine Lajoie, Rebecca MacKenzie, and Janet Ward (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to operating permit No. TV-0032 proposed on November 29, 2018, (the Permit) by the New Hampshire Department of Environmental Services (NHDES) to Wheelabrator Environmental System, Inc. for its Wheelabrator Concord facility (the Facility). This operating permit was issued pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and N.H. Code Amin. R. Env-A 600. *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further in Section IV below, the EPA denies the Petition requesting an EPA objection.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 C.F.R. part 70. New Hampshire originally submitted its title V program governing the issuance of operating permits on October 26, 1995, with supplemental materials submitted on May 14, 2001. The EPA granted full approval of New Hampshire's title V program on September 24, 2001. 66 Fed. Reg. 48806. This program, which

became effective on November 23, 2001, is codified at N.H. Code R. Admin. Env-A 600.

All major stationary sources of air pollution and certain other sources are required to apply for and operate in accordance with title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. CAA §§ 502(a), 503, 504(a), 42 U.S.C. §§ 7661a(a), 7661b, 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* CAA § 504(c), 42 U.S.C. § 7661c(c). One purpose of the title V program is to “enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements.” 57 Fed. Reg. at 32251. Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the source’s emission units and for providing adequate monitoring, recordkeeping, and reporting to assure compliance with such requirements.

B. Review of Issues in a Petition to Object

State and local permitting authorities issue title V permits pursuant to their EPA-approved title V programs. Under CAA § 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations found at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of the EPA’s 45-day review period, petition the Administrator to object to the permit. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

Such petitions shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority, unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).¹ Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.² The petitioner’s demonstration burden is a critical component of CAA § 505(b)(2). Certain aspects of the petitioner’s

¹ *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (*NYPIRG*).

² *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *cf. NYPIRG*, 321 F.3d at 333 n.11.

demonstration burden are discussed below. A more detailed discussion can be found in *In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013).

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority’s decision and reasoning. The EPA expects the petitioner to address the permitting authority’s final decision, and the permitting authority’s final reasoning (including the state’s response to comments), where these documents were available during the timeframe for filing the petition.³ Another factor the EPA examines is whether a petitioner has provided adequate analyses and citations to support its claims.⁴ Relatedly, the EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard.⁵ Also, the failure to address a key element of a particular issue presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the permit.⁶

The information that the EPA considers in making a determination whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) on a proposed permit generally includes, but is not limited to, the administrative record for the proposed permit and the petition itself, including attachments to the petition. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement of basis for the draft and proposed permits; the permitting authority’s written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; relevant supporting materials made available to the public according to 40 C.F.R. § 70.7(h)(2); and all other materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2). If a final permit and a statement of basis for the final permit are available during the agency’s review of a petition on a proposed permit, those documents may also be considered as the EPA determines whether to grant or deny the petition.

³ See *MacClarence*, 596 F.3d at 1132–33; see also, e.g., *Finger Lakes Zero Waste Coalition v. EPA*, 734 Fed. Appx. *11, *15 (2d Cir. 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 14, 2012).

⁴ See *MacClarence*, 596 F.3d at 1131; see also *In the Matter of Portland Generating Station*, Order on Petition at 7 (June 20, 2007).

⁵ See, e.g., *In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (January 15, 2013); see also *In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (September 21, 2011) (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring); *In the Matter of Portland Generating Station*, Order on Petition at 7 (June 20, 2007) (“[C]onclusory statements alone are insufficient to establish the applicability of [an applicable requirement].”); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (April 20, 2007); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (January 8, 2007); *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (March 15, 2005).

⁶ See, e.g., *In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).

III. BACKGROUND

A. The Wheelabrator Concord Facility

Wheelabrator Concord operates two large municipal waste combustors at the Facility. Wheelabrator Concord burns municipal solid waste in two identical mass burn waterwall boilers to generate steam. Each boiler is equipped with two auxiliary propane-fired burners. A single steam-driven turbine/generator uses the steam to generate electricity for sale to the local utility. The gross generating capacity of the turbine/generator is 16 megawatts.

Pollution control equipment for each boiler includes selective non-catalytic reduction with urea injection for control of nitrogen oxides (NO_x), a powdered activated carbon injection system for the control of mercury, a spray dryer absorber for the control of acid gases, namely sulfur dioxide (SO₂) and hydrogen chloride, and a baghouse for the control of particulate matter and metals. Each boiler stack is equipped with a continuous emissions monitoring system to measure NO_x, SO₂, carbon monoxide and opacity. Parametric monitoring systems are also used to monitor process conditions, including sorbent injection rates for the activated carbon and spray dryer systems. The quenched bottom ash is transported via a drag conveyor to an ash handling room. The ash is loaded into containers and stored under cover until it is transported to a landfill.

B. Permitting and Petition History

On October 23, 2009, NHDES issued Title V Operating Permit TV-0032 to Wheelabrator Concord. Wheelabrator Concord submitted a title V renewal application on April 15, 2014. NHDES issued notice of the draft title V permit renewal on July 6, 2017, subject to a public comment period that ended on August 7, 2017. No comments were received during the first comment period. At the request of the public, NHDES provided for a second public comment period from August 22, 2017 to September 21, 2017. NHDES then extended the public comment period to November 14, 2017 and held a public hearing on November 7, 2017. NHDES transmitted the proposed title V renewal permit along with a document titled "Finding of Facts," which contained its response to public comments (RTC), to the EPA on November 29, 2018. The EPA's 45-day review of the proposed permit ended on January 14, 2019, during which time the EPA did not object to the Permit. NHDES issued the final Permit on January 24, 2019. The Petition was received on March 14, 2019, which was within 60 days of the expiration of the EPA's 45-day review period.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

Petitioners' Claims: The Petitioners generally claim that the EPA should object to the Permit because NHDES has violated its statutory responsibility and failed to protect public health. In support of their claim, the Petitioners refer to three exhibits that relate to the Petitioners' state-level administrative appeal of the Permit⁷ and a fourth exhibit that is a letter to the Attorney

⁷ Notice of Appeal, Anthony Caplan, et al. Appeal, Docket No. 18-02 ARC, Air Resource Council (February 1, 2018) (Exhibit 1); Appellant's Response to Wheelabrator's Prehearing Conference Memorandum Dated May 4, 2018, Anthony Caplan, et al. Appeal, Docket No. 18-02 ARC, Air Resources Council (June 1, 2018) (Exhibit 2);

General of New Hampshire concerning the Permit.⁸ The Petitioners assert that these four exhibits provide additional support for their claims below. Petition at 4.

The Petitioners' first claim that operation of the Wheelabrator Concord incinerator violates RSA 125-C, Title 10 Public Health, Chapter 125-C Air Pollution Control, Section 125-C:1, which the Petitioners claim requires New Hampshire to “‘promote the public health, welfare, and safety’ and ‘prevent injury or detriment to human, plant, and animal life, physical property and other resources [emphasis added].” *Id.* at 3. The Petitioners contend that the continued operation of the “Wheelabrator incinerator does neither.” *Id.* at 3; *see also* Exhibit 1 at 6, 10, 11; Exhibit 2 at 4. The Petitioners assert that the Facility releases persistent toxic substances, such as lead, mercury, cadmium, and dioxin, that “accumulate in our bodies (known as body burden) and in our environment (known as toxic loading) and cause harm in low doses.” Petition at 3, Exhibit 1 at 4.

The Petitioners next state that “[s]napshot testing of smokestack emissions can neither determine nor ensure continuous compliance with air standards that are themselves not health based.” Petition at 3.; *see also* Exhibit 1 at 6; Exhibit 2 at 4. The Petitioner also claims that “NHDES has discretionary authority to either deny or approve a Title V permit and is not constrained by a requirement to only consider whether Wheelabrator’s stack test results comply with emission standards.” Petition at 3; *see also* Exhibit 1 at 3; Exhibit 2 at 3.

The Petitioners assert that Wheelabrator Concord “violated state and federal law and its solid waste permit by incinerating thousands of used baghouse filters” in the Facility’s boilers. Petition at 3; *see also* Exhibit 1 at 8; Exhibit 2 at 4; Exhibit 3 at 8.

Finally, the Petitioners contend that NHDES has mischaracterized its authority under RSA 125-C:13 and CAA § 129(e) and that NHDES can deny, suspend, or revoke the Permit, or order measures beyond existing emission limitations to protect public health. Petition at 4–5; Exhibit 3 at 3–7.

EPA’s Response: For the following reasons, the EPA denies the Petitioners’ request for an objection.

With regard to all issues raised in the Petition, the Petitioners’ arguments are general, conclusory, and unsupported, and the Petitioners accordingly have not met their burden of demonstrating noncompliance with the CAA.⁹

First, with respect to the Petitioners’ statement that NHDES has violated the general statutory provision, RSA 125-C:1 because the “incinerator continuously releases persistent toxic substances to the air and to the ash,” the Petitioners fail to demonstrate that this provision of state law is derived from or implements a federal applicable requirement. RSA 125-C:1 provides:

Motion for Reconsideration, Anthony Caplan, et al. Appeal, Docket No. 18-02 ARC, Air Resources Council, (October 5, 2018) (Exhibit 3)

⁸ Letter from Anthony Caplan, Katherine Lajoie, Rebecca MacKenzie, and Janet Ward to Jon Lavallee, Attorney General, New Hampshire Department of Justice (February 12, 2019) (Exhibit 4).

⁹ *See supra* note 5 and accompanying text.

Declaration of Policy and Purpose. It is hereby declared to be the public policy of the state of New Hampshire and the purpose of this chapter to achieve and maintain a reasonable degree of purity of the air resources of the state so as to promote the public health, welfare, and safety, prevent injury or detriment to human, plant, and animal life, physical property and other resources, foster the comfort and convenience of the people, promote the economic and social development of this state and to facilitate the enjoyment of the natural attractions of the state.

This provision serves as a broad, sweeping “declaration of policy and purpose” to the entire chapter on air pollution control and does not establish any specific applicable requirements on its face. RSA 125-C:1. The EPA has previously determined that these types of broad provisions do not generally require states to establish emission limits or monitoring at a source. *See, e.g., In the Matter of ABC Walter Coke*, Order on Petition Nos. IV-2014-5 and IV-2014-6 (July 15, 2016) at 9–11; *In the Matter of Hercules, Inc.*, Order on Petition No. IV-2003-1 (November 10, 2004) at 6–9 (concluding that the petitioners had not demonstrated that the permitting authority was required to add emission limits or standards to a permit to address a broadly worded SIP provision prohibiting emissions of injurious air pollution); *In the Matter of Transalta Centralia Generation, LLC*, Order on Permit No. SW98-8-R3 (April 28, 2011) at 7–8. In this case, the Petitioners do not even claim that RSA 125-C:1 requires NHDES to establish any particular emission limit, monitoring, recordkeeping, or reporting under the CAA. Rather, the Petitioners only assert that the operation of Wheelabrator Concord neither prevents harm nor promotes public health. Petition at 3. This general statement does not demonstrate that the Permit fails to meet applicable requirements. Further, the exhibits referenced by the Petitioners provide no additional analysis of permit terms or any applicable requirements. The Petitioners’ arguments comprise very brief, conclusory allegations, unsupported by citation to any regulatory authority or analysis of any permit terms. This type of general, conclusory allegation is insufficient to demonstrate that the Permit does not comply with, or assure compliance with, applicable requirements of the Act.¹⁰

To the extent the Petitioners are claiming that NHDES should establish new additional emission limits for pollutants such as lead, mercury, cadmium, or dioxin to protect public health, the Petitioners have not demonstrated that any such additional limits are necessary to bring the Permit into compliance with the CAA, and such a claim would be beyond the scope of this current title V action. *See In the Matter of Hyland Facility Associates Hyland Landfill*, Order on Petition No. II-2016-3 (April 10, 2019) at 5; *In the Matter of Waupaca Foundry, Inc. Plant 1*, Order on Petition No. V-2015-02 at 8 (July 14, 2016); *In the Matter of U.S. Dep’t of Energy Hanford Operations*, Order on Petition Nos. X-2014-01 and X-2013-01 at 27–28 (May 28, 2015).

The Petitioners also claim that the state ignored its authority to deny, revoke, or suspend the Permit or to order measures beyond existing emission limitations under state law, citing RSA 125-C:13. Petition at 4–5. Although not identified in the Petition, the Petitioners also cite the state’s authority under CAA § 129(e) in Exhibit 3, Motion for Reconsideration before New

¹⁰ *See supra* note 5 and accompanying text.

Hampshire's Air Resources Council. Exhibit 3, at 3–7. According to the Petitioners, state law authorizes the permitting authority to include measures or take action on permits beyond existing applicable requirements where certain determinations have been made, such as the source will contribute disproportionately to pollution or will cause an endangerment to public health. *See, e.g.*, RSA 125-C:13(I)(b). Further, under CAA § 129(e), the EPA or a state “shall require the owner or operator of any unit to comply with emissions limitations or implement any other measures, if the Administrator or the state determines that emissions in the absence of such limitations or measures may reasonably be anticipated to endanger public health or the environment. The Administrator’s determination under the preceding sentence is a discretionary decision.” 42 U.S.C. § 7429(e). However, the Petitioners have not demonstrated that either state or federal authorities have made any such predicate determinations for Wheelabrator Concord under the standards set forth by these provisions of state and federal law. Therefore, even if the State possesses authority to order or take measures beyond existing applicable requirements through its permitting process on the basis of such a determination, this in itself does not provide grounds for the EPA to object to the Permit for failure to include “applicable requirements” under CAA § 505(b)(2).

Regarding the Petitioners’ statements related to stack testing and NHDES’s authority to deny or approve a title V permit, the Petitioners do not identify—much less demonstrate—any emission limits or applicable requirements in the Permit related to stack testing that are inadequate or explain why the stack testing in the Permit does not comply with the requirements of the Act. Further, the Petitioners discussion about NHDES’s authority under state law to deny or approve a permit does not identify a flaw in the Permit. As noted above, these brief, conclusory allegations, unsupported by citation to any applicable or controlling regulatory authority or analysis of permit terms, are insufficient to demonstrate that the Permit does not comply with, or assure compliance with, applicable requirements of the Act.¹¹ In addition, the Petitioners did not address NHDES’s final reasoning in the RTC, which explained that continuous parametric monitoring (e.g., the carbon injection rate), combined with periodic stack testing, was sufficient to assure compliance. *See* RTC at 14.¹²

With respect with the Petitioners’ claims that Wheelabrator Concord violated federal and state solid waste regulations and the source’s solid waste permit by burning baghouse filters in the boilers, the Petitioners have not identified any CAA applicable requirements with which the Permit allegedly does not comply. *See In the Matter of Suncor Energy*, Order on Petition No. VIII-2018-5 at 7 (December 20, 2018); *In the Matter of Gateway Generating Station*, Petition No. IX-2013-1 at 12–14 (October 15, 2014) (“Gateway Order”) (finding that a petitioner cannot demonstrate that the permit is not in compliance with the CAA simply by alleging noncompliance with a separate environmental statute). Here, the Petitioners’ claim appears to be based on Wheelabrator Concord’s alleged violation of their solid waste permit or unspecified federal or state solid waste regulations. Thus, the Petitioners’ claim is not based on any alleged substantive deficiency in the Permit, or any alleged procedural deficiency in NHDES’s processing of the Permit, as required by CAA § 505(b)(2). *See Gateway Order* at 13. Even if the Petitioners demonstrated that Wheelabrator Concord violated its solid waste permit or federal or state solid waste regulations, the state’s solid waste permit and regulations are outside the scope

¹¹ *See supra* note 5 and accompanying text.

¹² *See supra* note 3 and accompanying text.

of this permitting action and do not demonstrate a flaw in the title V permit under the CAA. To the extent the Petitioners are claiming that Wheelabrator Concord violated its title V Permit by burning the baghouse filters, the Petitioners have provided no evidence or identified a relevant permit term or applicable requirement.¹³ Conclusory allegations unsupported by citation to any regulatory authority or analysis of any permit terms are insufficient to demonstrate that the Permit does not comply with, or assure compliance with, applicable requirements of the Act.¹⁴

In summary, the Petitioners neither identify any applicable requirements with which the Permit does not comply or assure compliance, nor do the Petitioners identify any specific permit terms that do not comply with the requirements of the Act. The Petitioners' claims fail to demonstrate any basis for an EPA objection. For the foregoing reasons, the EPA denies the Petitioners' request for an objection.

V. CONCLUSION

For the reasons set forth above, I hereby deny the Petition as described above.

Dated: OCT 30 2019



Andrew R. Wheeler
Administrator

¹³ In addition, the Petitioners did not address New Hampshire's RTC, which explained that Wheelabrator Concord stopped burning baghouse filters in 2010 and that the title V permit in effect from 1996 through 2010 did not prohibit the burning of the baghouse filters. See RTC at 9; *supra* note 3 and accompanying text.

¹⁴ See *supra* notes 5 and accompanying text.