

**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, 2019²

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 Act⁴:

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.



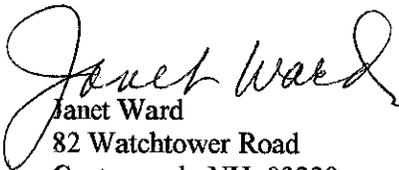
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Enclosures:

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:

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