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March 12, 2004

Mr. Michael Sclafani, Appeals Clerk
New Hampshire Air Resources Council
Department of Environmental Services
6 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095

RE: Docket No. 04-04 - Lajoie/Working on Waste Appeal
Docket No. 04-06 – J. Duncan McCutchan Appeal

Dear Mr Sclafani:

This firm represents Wheelabrator Claremont Co., L.P. ("Wheelabrator"), the permit applicant and permittee for proposed Title V Permit No. TV-OP-050 issued by the New Hampshire Department of Environmental Services ("DES") on January 28, 2004 (the "Permit Decision"). Wheelabrator received copies of two (2) separate notices of appeal filed with respect to the Permit Decision: filed by Katie Lajoie for Working on Waste, received by the Council February 9, 2004, assigned Docket No. 04-04 (the "Lajoie Notice"); and by J. Duncan McCutchan, received by the Council February 23, 2004, assigned Docket No. 04-06 (the "McCutchan Notice")(collectively, the "Notices"). Neither of the Notices asserts a claim or present an issue that can provide a basis at law to support the requested appeals.

McCutchan Notice

At the outset, the McCutchan Notice is untimely, as it was received on February 23, 2004 and seeks to address the Permit Decision rendered by DES on January 28, 2004. Any person seeking to appeal a DES decision on an air permit application must do so within ten days of such decision. RSA 125-C:12, III; Env-AC 206.02(d). Clearly, the McCutchan Notice fails to comply with the requisite time for filing an appeal and is defective.

Timing aside, the McCutchan Notice prevents the Council from accepting this Appeal. The relief sought by the McCutchan Notice is exclusively premised upon petitioner's desire for additional testing of land. It fails to raise an issue or make a claim that pertains to the regulatory requirements for Title V permit decisions. Nor does it minimally attempt to meet the Council's requirements for commencement of an appeal. See, Env-AC 206.03(b). As a consequence, it

fails to assert any facts or claim upon which the Council can grant relief. Accordingly, the McCutchan Notice should be dismissed.

Lajoie Notice

Similarly, the Lajoie Notice is deficient and does not provide adequate basis for an appeal as a matter of law. The Lajoie Notice asserts four (4) grievances that purportedly provide the basis for the petition, each addressed below. In sum, no assertion in the Lajoie Notice provides either facts or law that can provide the basis for action by the Council. Each is premised on a grievance that bears no legal or factual connection to the requirements of statute and regulations governing DES' review and determinations on a Title V permit application.

I. The Permit Decision "ignores economic and social values that are protected under the New Hampshire Constitution." Lajoie Notice, page 1.

This claim fails to assert facts or law which can provide a basis for relief. Petitioner's constitutional assertion is apparently premised on its claim that DES' reliance on the emissions standards applicable to the Wheelabrator facility does not provide an adequate basis for the Permit Decision. According to the Lajoie Notice, "[a] narrow focus on air emission standards ignores [constitutionally protected] economic and social values." Page 2. It takes issue with the Permit decision "because the only factor considered for issuance of the permit is whether Wheelabrator complies with air emissions standards." Page 1. Current law requires that DES shall review title V permit applications to ensure compliance with the applicable emissions requirements and standards under state and federal law. RSA 125-C:11, I-a; Env-A 609.10. The alleged defect set forth in the Lajoie Notice is neither relevant to DES' review, nor within the purview of DES or the Council in reviewing a title V permit determination.

II. The Permit Decision "ignores emerging and established research concerning incinerator pollution." Lajoie Notice, page 1.

On its face, this claim fails to assert facts or law which can be the basis for relief. As is the case with petitioner's first claim, this grievance does not address, nor is it relevant to the standards for DES review provided by applicable law. Accordingly, it cannot provide a basis for review or relief by the Council.

III. The Permit Decision "fails to address when or how DES would revoke the permit." Lajoie Notice, page 1.

This assertion does not constitute a claim that can legally be the basis for relief. First, it is not raised with adequate specificity to determine what relief petitioner is requesting. In addition, applicable law does not require, nor authorize DES to delineate in a permit "when or how DES would revoke the permit." Lastly,

Petitioner is simply incorrect. The proposed permit condition addressing permit revocation (XIX) fully complies with the regulatory requirements for permit content and clearly provides the language required by the applicable regulations with respect to cause for permit revocation. Env – A 609.05(b), referencing 40 CFR 70.6(a)-(c). Indeed, the proposed permit goes beyond the requirements of the regulations in this regard which require a statement that the "permit may be . . . revoked . . . for cause." 40 CFR 70.6(a)(6)(iii). Accordingly, neither DES nor the Council would have a legal basis for modifying the proposed permit in response to this claim and it does not provide a basis for review or relief by the Council.

IV. The Permit Decision "fails to promote public health, welfare and safety in accordance with state law." Lajoie Notice, page 1.

Petitioner's claim is not actionable under law. The Lajoie Notice cites RSA 125-C:1 as the basis for this claim. However, as a declaration by the legislature of public policy, the provision does not create any enforceable rights or obligations that can support an appeal before the Council.

The substantive requirements imposed upon sources subject to Title V and the duties and authorities of DES in implementing the legislative policy are enumerated in various sections of the statutory chapter and the DES regulations. The absence of any assertion of a failure by DES to comply with the legislative and regulatory requirements for rendering a valid Permit Decision and the lack of any legally cognizable basis for denial of Wheelabrator's application for a Title V permit are fatal flaws to the Lajoie Notice. The grievances set forth cannot be properly heard before the Council as an appeal of the Permit Decision.

In the event that the Council determines to accept either of the Notices, attached hereto please find our Appearances and Motions to Intervene in each proposed appeal.

Yours sincerely,

COPY

Gregory H. Smith

GHS:NJP:kg
Enclosure(s)