BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF Denver Regional Landfill South	)	
Permit Number: 03OPWE254	)	ORDER RESPONDING TO PETITIONERS' REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT
Issued by the Colorado Department of Public Health and Environment, Air Pollution Control Division	)	Petition Number: VIII-2006-01

ORDER DENYING PETITION FOR OBJECTION TO PERMIT

The United States Environmental Protection Agency ("EPA") received a petition dated March 9, 2006, from Rocky Mountain Clean Air Action (RMCAA) and Jeremy Nichols ("Petitioners") requesting that EPA object, pursuant to section 505(b)(2) of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. § 7661d, to the issuance of a state operating permit to Denver Regional Landfill South, located at 1441 Weld County Road Six, Erie, Weld County, Colorado. The permittee will be referred to as "DRLS" for purposes of this Order.

DRLS is a municipal solid waste landfill. The landfill generates landfill gas, which is primarily composed of methane and carbon dioxide, but also includes volatile organic compounds and hazardous air pollutants in trace amounts. Landfill gas is either emitted from DRLS as fugitive gas or it is combusted in a flare following collection in the landfill's migration control system. Various combustion by-products are emitted from the flare. DRLS also generates particulate emissions, which result from construction and operation of the landfill.

The Colorado Department of Public Health and Environment, Air Pollution Control Division ("CDPHE" or "Colorado"), issued the DRLS operating permit on March 1, 2006, pursuant to title V of the Act, the federal implementing regulations at 40 CFR part 70, and the Colorado State implementing regulations at Regulation No. 3 part C.

The petition alleges that the DRLS permit does not comply with 40 CFR part 70 in that: (I) Colorado did not respond to significant comments during the comment period on the permit, which resulted in deficiencies in the permit; (II) the operating permit fails to ensure compliance with the New Source Performance Standards (NSPS) for municipal solid waste landfills; (III) the operating permit fails to ensure compliance with startup, shutdown, and malfunction plan requirements in relation to the control of hazardous air pollutants; and (IV) the operating permit contains an inappropriate exemption from emission limits during upset conditions and thus, fails to ensure compliance with applicable requirements related to NAAQS and PSD increments. Petitioners have requested that EPA object to the issuance of the DRLS permit pursuant to section 505(b)(2) of the Act.

EPA has reviewed these allegations pursuant to the standards set forth by section 505(b)(2) of the Act, which provides that a petition may be based only on objections to the permit that were raised with reasonable specificity during the comment period provided by the permitting agency and places the burden on the Petitioners to "demonstrate to the Administrator that the permit is not in compliance" with the applicable requirements of the Act or the requirements of Part 70. See also 40 CFR § 70.8(c)(1) and (d); *New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2002).

In reviewing the various allegations made in the petition filed by the Petitioners, EPA considered information in the permit record including: the petition; Colorado's June 29, 2005 notice of the proposed DRLS title V operating permit, published in the Ft. Lupton Press; the proposed title V operating permit for DRLS that was the subject of the June 29, 2005 notice, labeled "Pending"; Jeremy Nichols' July 29, 2005 comments on the draft permit; the Petitioners' December 9, 2005 comments on the revised draft permit; Colorado's August 9, 2005 response to Mr. Nichols' July 29, 2005 comments; Colorado's December 28, 2005 response to Petitioners' December 9, 2005 comments; Colorado's November 9, 2005 notice of the proposed DRLS title V operating permit, published in the *Farmer & Miner*; Colorado's November 9, 2005 notice of the proposed DRLS title V operating permit, published on the Colorado Air Pollution Control Division's website; Colorado's operating permit for DRLS, dated March 1, 2006; and Colorado's technical review document for the DRLS operating permit, dated "March & October 2005".

Based on a review of all the information before me, I deny the Petitioners' request for an objection to the Denver Regional Landfill South title V permit for the reasons set forth in this Order.

STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA granted interim approval to the title V operating permit program submitted by the State of Colorado effective February 23, 1995. 60 Fed. Reg. 4563 (January 24, 1995); 40 CFR part 70,

Appendix A. *See also* 61 Fed. Reg. 56367 (October 31, 1996) (revising interim approval). Effective October 16, 2000, EPA granted full approval to Colorado's title V operating permit program. 65 *Fed. Reg.* 49919 (August 16, 2000). Major stationary sources of air pollution and other sources covered by title V are required to apply for an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. *See* CAA §§ 502(a) and 504(a).

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

Under section 505(a) of the Act and 40 CFR § 70.8(a), States are required to submit all proposed title V operating permits to EPA for review. Section 505(b)(1) of the Act authorizes EPA to object if a title V permit contains provisions not in compliance with applicable requirements, including the requirements of the applicable SIP. *See also* 40 CFR § 70.8(c)(1).

Section 505(b)(2) of the Act states that if the EPA does not object to a permit, any member of the public may petition the EPA to take such action, and the petition shall be based only on issues that were raised with reasonable specificity during the public comment period, unless the petitioner demonstrates that it was impracticable to do so or unless the grounds for objection arose after the close of the comment period. *See also* 40 CFR § 70.8(d). If EPA objects to a permit in response to a petition and the permit has been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue such a permit consistent with the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

Petitioners commented during the public comment period, raising concerns with the draft operating permit. As discussed below, the Petitioners failed to raise certain issues with "reasonable specificity" as required by section 505(b)(2) of the Act and 40 CFR § 70.8(d). Therefore, Petitioners' claims regarding these issues are denied in this Response Order. [1]

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[1] The Petitioners requested that, to the extent their comments were not raised with reasonable specificity, the Agency consider their petition to be a petition to reopen the DRLS permit in accordance with 40 CFR § 70.7(f). This order responds solely to Petitioners' petition for an objection.

ISSUES RAISED BY PETITIONERS

I. Colorado's Response to Comments.

Petitioners' first claim alleges that the Colorado Air Pollution Control Division (APCD) failed to respond to significant comments presented by the Petitioners. According to Petitioners, APCD failed to respond substantively to any part of Petitioners' December 9, 2005 comment letter. Instead, APCD responded in a one page letter that indicated that since none of Petitioners' December 2005 comments related to Conditions 1.7 and 1.10 of Section II of the draft permit, it would not respond in writing, but that it would include Petitioners' comments in the permit file.

Petitioners allege that APCD's failure to respond was illegal and may have resulted in deficiencies in the Title V permit. In support of their claim, Petitioners reference the public participation requirements in Colorado Regulation 3 and the Clean Air Act generally. In particular, the Petitioners claim that APCD could not legally limit public comment to Conditions 1.7 and 1.10 of Section II of the permit when APCD revised these sections and re-noticed the revised draft permit.

Colorado opened the entire draft permit for public comment on June 29, 2005 and, in accordance with the public notice requirements in Colorado's part 70 regulations, provided a 30-day public comment period. EPA has approved Colorado's regulations as being consistent with the Clean Air Act and EPA's part 70 regulations. See 65 FR 49919, Aug. 16, 2000. During the comment period that started June 29, 2005, Petitioners had the opportunity to raise specific issues regarding all aspects of the draft permit.

Following the close of the public comment period on July 29, 2005, Colorado made certain revisions to the draft permit that were not a result of public comments received during the June 29 to July 29, 2005 comment period. Specifically, Colorado removed NSPS requirements that do not apply to DRLS's enclosed flare (prior Condition 1.7 of Section II that described requirements under 40 CFR §60.18), replaced these with SIP opacity limits for flares (Condition 1.7 of Section II), and significantly changed a provision regarding monitoring for Btu content of the flare gas (Condition 1.10 of Section II). These changes could not have been reasonably anticipated based on the original draft permit.[2] As a result of these changes, Colorado initiated a second public comment period on November 9, 2005. At that time, Colorado placed a public notice in the *Farmer and Miner* and on APCD's website. This second public notice clearly stated that Colorado was only accepting comments on revised Conditions 1.7 and 1.10 of Section II of the draft permit.

In response to Colorado's November 9, 2005 public notice, Petitioners submitted a comment letter dated December 9, 2005. The December 9, 2005 letter included

[2] Colorado also revised portions of section 1.5 of Section II of the permit in response to Mr. Nichols' July 29, 2005 comments. These revisions clarified the applicability of certain NSPS requirements, but did not represent a significant deviation from the initial draft permit requiring a second round of public comments.

detailed comments on various aspects of the draft permit **other than** Conditions 1.7 and 1.10 of Section II.

Based on the facts and the applicable regulations, I find that it was not objectionable for Colorado to restrict comments in its November 9, 2005 public notice to the changes to Conditions 1.7 and 1.10 of Section II of the permit, or to decline to respond to Petitioners' December 9, 2005 comments that did not pertain to Conditions 1.7 and 1.10 of Section II. There is nothing in Colorado Regulation 3 or in EPA's part 70 regulations that precludes the State from providing for a second round of public comment on a limited set of permit conditions that differ substantially from the original draft permit. The relevant regulations require a minimum 30-day opportunity for the public to comment. See Regulation 3, Part C, VI.B.8; 40 CFR § 70.7(h). With its June 29, 2005 notice, Colorado provided this opportunity for the entire original draft permit. One of the Petitioners - Mr. Nichols - availed himself of the opportunity to comment on the original draft permit. The State considered Mr. Nichols' comments, responded to his comments in a letter dated August 9, 2005, and revised Condition 1.5 of Section II of the draft permit to address Mr. Nichols' concerns. Separately, Colorado modified two other provisions, and with respect to these substantially new provisions that it included in the draft permit after the initial public comment period, Colorado provided a new 30-day comment period. The Colorado regulations, which were approved as consistent with the CAA and Part 70, do not require the State to re-open the entire permit for comment where it has modified two limited provisions of the permit. Accordingly, I find that Petitioners' December 9, 2005 comments on permit provisions other than Conditions 1.7 and 1.10 of Section were untimely.[3]

For these reasons, I deny Petitioners' claim on this issue. See CAA § 505(b)(2); 40 CFR § 70.8(d).

II. New Source Performance Standards – Subpart WWW.

Petitioners allege that the Title V permit fails to ensure compliance with Subpart WWW of the New Source Performance Standards (NSPS.) Specifically, Petitioners claim the following:

1. While the permit indicates that DRLS must comply with 40 CFR § 60.752(b)(ii), which requires the installation of a collection and control system that effectively captures the gas generated within the landfill, the permit does not ensure compliance with these requirements.

a. The permit does not require the EPA Administrator's approval of the collection and control system design plan and instead substitutes the State's approval.

[3] Significantly, Petitioners make no claim that the issues raised in their December 9, 2005 comments could not have been raised during the initial comment period. Nor do Petitioners claim that the revisions made in response to Mr. Nichols' comments during the initial comment period were inadequate to respond to the issues he raised in those comments. Rather, their claim is solely that the State could not limit the second comment period to a limited number of provisions of the permit.

b. Contrary to the requirements of 42 USC § 7661b(b)(1) and 40 CFR § 70.5(c)(8)(iii)(C), the permit does not include a compliance schedule to require the source to gain EPA approval of the collection and control system design plan, submit an initial design capacity report to the EPA Administrator, and meet other requirements of NSPS Subpart WWW.

c. The permit fails to require DRLS to install and maintain an active collection and control system according to the specifications at 40 CFR § 60.759 and/or ensure DRLS complies with alternative specifications approved by the EPA Administrator.

d. The permit fails to contain monitoring, recordkeeping, and reporting requirements set forth at 40 CFR § 70.6 to ensure that DRLS meets specific, enumerated requirements in 40 CFR § 60.759.

e. Contrary to 40 CFR § 70.6, the permit fails to contain monitoring to ensure proper use of the exemptions set forth at 40 CFR § 60.753.

2. The permit fails to ensure compliance with NSPS flaring standards for municipal solid waste landfills – deficient maintenance, calibration, operation, and monitoring terms.

a. The permit fails to ensure the temperature monitoring device on the flare is calibrated, maintained, and operated properly to ensure continuous compliance with volatile organic compound (VOC) and hazardous air pollutant (HAP) reduction requirements.

i. The permit requires compliance with manufacturer's specifications but "manufacturer's specifications" are not defined, explained, referenced or otherwise set forth in sufficient detail to ensure that the device is properly calibrated, maintained, and operated.

ii. Contrary to 40 CFR § 70.6(c)(1), the permit contains no monitoring requirements to ensure that the temperature monitoring device is calibrated, maintained, and operated in accordance with manufacturer's specifications.

b. Contrary to 40 CFR § 70.6(c)(1), the permit contains no monitoring requirements to ensure the enclosed flare is properly operated and maintained. Without this, the flare may fall into disrepair, malfunction, and/or improper operation and fail to adequately control VOC and HAP emissions in accordance with the applicable requirement.

3. The permit fails to require continuous temperature monitoring. Instead it only requires daily temperature readings. This is contrary to the requirements of 40 CFR § 60.756(b) and the monitoring requirements of 40 CFR § 70.6.

While Mr. Nichols made a general comment regarding the NSPS in his July 29, 2005 comment letter, neither he nor RMCAA raised the specific objections enumerated above at that time. Petitioners only raised these specific concerns in their December 9, 2005 comment letter, well after the close of Colorado's June 29 to July 29, 2005 comment period. As indicated in Section I, above, Petitioners' December 9, 2005 comments regarding their NSPS concerns were untimely.

Mr. Nichols' entire July 29, 2005 comment regarding the NSPS reads as follows:

> "Section II, 1.5 of the proposed permit outlines New Source Performance Standard ("NSPS") requirements for municipal solid waste landfills. However, the permit does not explain whether these requirements actually apply to the Denver Regional Landfill South. The permit needs to specify the applicability of NSPS requirements in relation to the Denver Regional Landfill South to ensure that such requirements are met and can be enforced through the Title V Operating Permit. Furthermore, as NSPS are applicable requirements, they must be fully incorporated into the Title V Permit as they apply to the landfill."

This comment appears to reflect two concerns. One, Section II, Condition 1.5 of the permit should be explicit that NSPS Subpart WWW requirements apply to DRLS. Two, Colorado should fully include the text of the NSPS requirements in the permit rather than rely on incorporation by reference.

At the time Mr. Nichols submitted his July 29, 2005 comments, Section II, Condition 1.5 of the proposed permit contained the following language:

> "MSW Landfills that commenced construction, reconstruction or modification or began accepting waste on or after May 30, 1991 are subject to the New Source Performance Standards ... Subpart WWW, including, but not limited to, the following: ..."

Also, the proposed permit at Section II, Condition 1.5.7, listed 40 CFR §§ 60.753 through 60.758 as applicable requirements without including the text of any of the requirements of these NSPS sections.

Colorado responded to Mr. Nichols' July 29, 2005 comment letter in an August 9, 2005 letter, as follows:

> "The Division will modify the language in Section II, Condition 1.5 to make it clear that NSPS WWW applies to DRLS. In regard to 'fully incorporating' the NSPS requirements, the Division typically uses incorporation by reference or a combination of selected text and incorporation by reference in operating permits for applicable requirements that are too lengthy to reasonably be set forth in the permit itself. This is the case in this instance."

In response to Mr. Nichols' comment, Colorado revised Section II, Condition 1.5 of the permit to read, "This facility is subject to the New Source Performance Standards requirements of Regulation No. 6, Part A, Subpart WWW, Standards of Performance for Municipal Solid Waste Landfills, including, but not limited to, the following: ..." Colorado also revised certain subsections of Condition 1.5 to clarify the applicability of Subpart WWW requirements to DRLS. Colorado's response was consistent with the general nature and scope of Mr. Nichols' July 29, 2005 comment regarding the NSPS provisions.

EPA's regulations, at 40 CFR § 70.8(d) state, "[a]ny petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in 40 CFR § 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."

The objections Petitioners raise in their petition regarding NSPS requirements, which are described in paragraphs 1 through 3 above, were not raised with reasonable specificity during the June 29 to July 29, 2005 public comment period. They were not included within Mr. Nichols' general comments of July 29, 2005, and I am not convinced they represent a limited extension or fleshing out of those general comments. Unlike Mr. Nichols' July 29, 2005 comments, the objections in the petition do not pertain to equivocal language regarding NSPS applicability or to Colorado's use of incorporation by reference in the permit. Instead, the objections are wholly different in scope and level of detail.

In the petition, the Petitioners allege that the permit is deficient because it doesn't include adequate monitoring, recordkeeping, and reporting provisions to ensure compliance with the NSPS requirements listed in the permit. Petitioners repeatedly cite 40 CFR § 70.6 as the basis for many of these objections. Petitioners allege that DRLS' gas collection and control system design plan must be approved by EPA. Petitioners allege that the permit must include compliance schedules for various NSPS Subpart WWW requirements. Petitioners allege that the permit fails to require DRLS to install and maintain an active collection and control system according to the specifications at 40 CFR § 60.759 or alternative specifications approved by EPA. Petitioners allege that the maintenance, calibration, operation, and monitoring requirements for the flare temperature monitoring device are inadequate. Mr. Nichols' July 29, 2005 comments did not mention any of these objections.

Petitioners have not presented any information to demonstrate that it was impracticable to raise the specific objections listed in paragraphs 1 through 3 above during the June 29 to July 29, 2005 comment period, or that the grounds for the objections arose after the initial public comment period. Petitioners have not explained why they were able to submit these detailed objections in their December 9, 2005 comment letter but why they did not or could not do so during the June 29 to July 29, 2005 comment period. As noted, Petitioners' December 9, 2005 comments regarding the NSPS issues were untimely.

For these reasons, and for the reasons discussed in Section I above, I deny Petitioners' claims on these issues. See CAA § 505(b)(2); 40 CFR § 70.8(d).

III. Startup, Shutdown, Malfunction Plan Requirements for Part 63, National Emission Standards for Hazardous Air Pollutants.

Petitioners allege that the Title V permit fails to ensure compliance with startup, shutdown, and malfunction (SSM) plan requirements under 40 CFR part 63, National Emission Standards for Hazardous Air Pollutants (NESHAP). Specifically, Petitioners allege the following:

1. The permit does nothing to ensure compliance with SSM plan requirements referenced in 40 CFR § 63.6(e)(3) through reporting and/or monitoring requirements and nothing in the permit indicates that DRLS will fully comply with 40 CFR § 63.6(e)(3) during landfill operation.

2. The SSM plan has not been incorporated into the title V permit and has not been made available to the public to ensure the plan meets the requirements of 40 CFR § 63(e)(1)(i) and § 63(e)(3)(A)-(C) and/or ensure it is properly revised if it fails to meet these requirements.

3. The permit does not specify whether a plan has been developed and/or approved and there are no monitoring and/or reporting requirements to ensure the requirement is being met, as specified by 40 CFR § 70.6(a).

4. If a plan has not been developed, the operator is violating an applicable requirement, and the Administrator must object to the Title V permit because it fails to include a compliance schedule.

5. By not incorporating the SSM plan and/or strict monitoring, reporting and/or submittal requirements, Condition 1.8 of Section II of the Title V permit is rendered unenforceable as a practical matter. DRLS may be using inappropriate exceptions during SSM periods to avoid compliance with applicable HAP limits.

Mr. Nichols did not raise any issues regarding the SSM plan, much less these specific issues, in his July 29, 2005 comment letter. Instead, Petitioners only raised these issues in their December 9, 2005 comment letter. Petitioners have not presented any information to demonstrate that it was impracticable to raise the specific objections listed above during the initial public comment period, nor have they presented evidence that the grounds for the objections arose after the initial public comment period. Petitioners did not raise these issues with reasonable specificity during the initial comment period, and their December 9, 2005 comments regarding these issues were untimely.

For these reasons, and for the reasons discussed in Section I above, I deny Petitioners' claims on these issues. See CAA § 505(b)(2); 40 CFR § 70.8(d).

IV. Inclusion of SIP Upset Condition Exemption In Title V Permit

Petitioners allege that Colorado's incorporation of the upset condition exemption into the Title V permit (Section IV, Condition 3(d)) renders the emission limits in Section II of the permit unenforceable as a practical matter. According to Petitioners, including this exemption undermines Colorado's determination that emissions from DRLS will not exceed PSD increments and/or ambient air quality standards. Petitioners claim that EPA must therefore object to the title V permit because it violates applicable requirements.

Mr. Nichols did not raise any issues regarding the upset condition exemption, much less these specific issues, in his July 29, 2005 comment letter. Instead Petitioners first raised these issues in their December 9, 2005 comment letter. Petitioners have not presented any information to demonstrate that it was impracticable to raise these specific objections during the initial public comment period, nor have they presented evidence that the grounds for the objections arose after the initial public comment period. Petitioners did not raise these issues with reasonable specificity during the initial comment period, and their December 9, 2005 comments regarding these issues were untimely.

For these reasons, and for the reasons discussed in Section I above, I deny Petitioners' claims on these issues. See CAA § 505(b)(2); 40 CFR § 70.8(d).

CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act, Petitioners' petition is denied.

Dated: DEC 2 2 2006

Stephen L. Johnson
Administrator