

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	PETITION NO. II-2016-3
)	
HYLAND FACILITY ASSOCIATES)	ORDER RESPONDING TO
HYLAND LANDFILL)	PETITIONS ON A
ALLEGANY COUNTY, NEW YORK)	TITLE V OPERATING PERMIT
PERMIT NO. 9-0232-00003/00012)	
)	
ISSUED BY THE NEW YORK STATE DEPARTMENT OF)	
ENVIRONMENTAL CONSERVATION)	

ORDER DENYING PETITIONS

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received two petitions¹ on March 21, 2016, relating to an operating permit issued by the New York State Department of Environmental Conservation (NYSDEC) to Hyland Facility Associates for the Hyland Landfill, Permit No. 9-0232-00003/00012 (the Permit). This operating permit was issued pursuant to title V of the Clean Air Act (CAA), CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and 6 New York Codes, Rules, and Regulations (NYCRR) § 201-6. *See also* 40 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 Petitions and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further below, the EPA denies the Petitions.

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. The state of New York first submitted a

¹ One petition was submitted by Gudrun Scott for herself and ostensibly on behalf of Concerned Citizens of Allegany County (CCAC) (although Scott gives no indication that she is expressly or implicitly authorized to petition on behalf of CCAC) (the Scott Petition). The Scott Petition requests that the EPA object to the Permit pursuant to CAA § 505(b)(2). The other petition was submitted by Frederick Sinclair, identified as the Chairman of CCAC, on behalf of CCAC (the CCAC Petition). As described further in Section V of this Order, the CCAC Petition does not appear to be a petition submitted under CAA § 505(b)(2) asking the EPA to object to the Permit. Nonetheless, without waiving any claim that the CCAC Petition was not properly filed, the EPA is responding to the CCAC Petition in this Order as if it were a petition to object under CAA § 505(b)(2).

title V program governing the issuance of operating permits in 1993, and the EPA granted interim approval of the state's program in 1996. 61 Fed. Reg. 57589 (November 7, 1996). Following subsequent submissions, the EPA granted full approval of New York's title V operating permit program in 2002. 67 Fed. Reg. 5216 (February 5, 2002). This program, which became effective on January 31, 2002, is codified in 6 NYCRR § 201-6.

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 and permit terms. 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).² Under section 505(b)(2) of the Act, the burden is on the

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

petitioner to make the required demonstration to the EPA.³ The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). Certain aspects of the petitioner's 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) (*Nucor II Order*).

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.⁴ Another factor the EPA examines is whether a petitioner has provided adequate analyses and citations to support its claims.⁵ Relatedly, the EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard.⁶ 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.⁷

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 *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.

⁴ *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).

⁵ *See MacClarence*, 596 F.3d at 1131; *see also In the Matter of Portland Generating Station*, Order on Petition at 7 (June 20, 2007).

⁶ *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) (*Luminant Sandow Order*).

⁷ *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 Hyland Landfill Facility

Hyland Facility Associates owns and operates a municipal solid waste landfill in Angelica, Allegany County, NY. The facility accepts waste from various sources, including cuttings and other wastes associated with natural gas drillings from the Marcellus Shale region in Pennsylvania. Hyland Facility Associates seeks to increase the annual waste disposal limits at the Hyland Landfill from 312,000 tons per year to 465,000 tons per year.

B. Permitting History

NYSDEC first published public notice of a draft title V permit modification, relating to the proposed increase in the waste disposal limits, on May 6, 2013, subject to a public comment period that was extended multiple times and ended on January 30, 2015. NYSDEC transmitted the proposed title V permit modification, along with a document containing its response to public comments (RTC), to the EPA on December 7, 2015. The EPA's 45-day review of the proposed permit ended on January 21, 2016, during which time the EPA did not object to the permit. NYSDEC issued the final permit for the Hyland Landfill on January 27, 2016.

C. Timeliness of Petitions

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). The EPA's 45-day review period expired on January 21, 2016. Thus, any petitions seeking the EPA's objection to the Proposed Permit were due on or before March 21, 2016. The Scott Petition was timely filed on March 21, 2016.⁸

IV. THE SCOTT PETITION

Scott's Claims: The Scott Petition expresses various concerns related to Hyland Landfill's acceptance of drill cuttings and other drilling wastes from natural gas drilling operations in Pennsylvania, and the possibility that the deposition of these wastes will ultimately result in air emissions of radon from the Hyland Landfill. Under a section titled "Basis of Objection," the Scott Petition claims that the EPA "has failed to require landfills to either monitor or control radon emissions," although it has established radon standards from mining operations. Scott Petition at 3. The Scott Petition asserts that prior efforts to require NYSDEC to monitor or control radon from landfills have been unavailing because the EPA does not regulate radon from landfills. *Id.* The Scott Petition argues that in failing to monitor or control radon from landfills, both the EPA and NYSDEC are evading the requirements of the CAA. *Id.* The Scott Petition also directs the EPA's attention to an article concerning radon emissions from landfills receiving waste from gas drilling operations. *Id.*

⁸ Assuming for the purposes of this decision that the CCAC Petition may be deemed to be a CAA § 505(b)(2) petition to object, it was timely submitted on the same date. *See supra* note 1.

EPA's Response: For the following reasons, the EPA denies Scott's request for an objection.

As discussed in Section II.A above, title V operating permits do not generally add new substantive requirements, but rather serve as a vehicle for compiling all existing requirements that apply to a source. *See* 40 C.F.R. § 70.1(b); 57 Fed. Reg. 32250, 32251 (July 21, 1992). Additionally, title V permits must include adequate monitoring, recordkeeping, and reporting provisions to assure compliance with applicable requirements and permit terms. 42 U.S.C. §7661c(c). In order to demonstrate grounds for an EPA objection to a title V permit, a petitioner must demonstrate to the EPA that the permit does not comply with the requirements of the CAA or the applicable implementation plan. 42 U.S.C. § 7661d(b)(2).

The Scott Petition does not allege (much less demonstrate) that the Hyland Landfill Permit does not include or comply with any such applicable requirements. Notably, the Scott Petition does not cite a single CAA requirement with which the Permit arguably does not comply. Instead, the Scott Petition acknowledges that the EPA has not promulgated specific standards requiring the control or monitoring of radon air emissions from landfills. In other words, there are no “applicable requirements” governing radon emissions from the Hyland Landfill that must be included in the Permit. Because there are no such substantive standards, there is also no requirement to monitor radon emissions at the landfill in order to assure compliance with any such standards.

Any implication that the EPA should establish such standards governing radon from landfills—whether through the current title V permit or through some other authority related to the EPA's hazardous air pollutant program under Section 112 of the CAA—is beyond the scope of the current title V permit action. *See In the Matter of Waupaca Foundry, Inc. Plant 1*, Order on Petition No. V-2015-02 at 8 (July 14, 2016); *see also 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).

V. THE CCAC PETITION

On behalf of CCAC, Frederick Sinclair, the CCAC Chairman, transmitted a letter to the EPA via email on March 21, 2016, with the letter heading: “Petition to Reconsider Issuance of the Hyland Facility Associates Article 19 Air Pollution Control—Title V Permit” (the CCAC Petition). The first sentence of the CCAC Petition states that CCAC “does hereby submit this comment and request for reconsideration of issuance and further, reopening of the permit submission for cause under 6 NYCRR 201-6.4(i).” The CCAC Petition contains no reference to the EPA⁹ or any requested action by the EPA (such as an EPA objection). It does not refer to CAA § 505(b)(2), or, indeed, to any federal authority as the basis for its petition or for any relief CCAC may be seeking. It is not clear what relief, if any, the CCAC Petition requests from the EPA. Nonetheless, without waiving any claim that the CCAC Petition was not properly filed, the EPA is responding to the CCAC Petition as if it were a petition to object under CAA § 505(b)(2).

⁹ Although Mr. Sinclair transmitted the petition to the EPA via email, the CCAC Petition document itself was addressed to NYSDEC, not the EPA. However, in an email dated April 8, 2016, Mr. Sinclair subsequently stated that the CCAC Petition was intended to be addressed to the EPA Administrator, rather than NYSDEC.


CCAC's Claims: The CCAC Petition asserts that “the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit.” CCAC Petition at 1 (citing 6 NYCRR 201-6.4). In support of this allegation, CCAC first contends that the Hyland Landfill has accepted certain types of waste that NYSDEC has stated are not allowed for disposal and which contain elevated levels of radioactivity. *Id.* CCAC claims that “[i]t is a material mistake, backed by inaccurate assumption and statement, to exclude radioactive stack releases from regulation and monitoring under this discharge permit.” *Id.* at 1–2. Second, CCAC discusses the possibility that radon will be concentrated in the landfill gas collection system and ultimately emitted through the flare or generator stacks. CCAC asserts that NYSDEC has presented no data regarding the potential radon emissions from such stacks or the effect of such emissions and argues that a stack and ground point monitoring or testing program be included as a permit requirement. *Id.* at 2. Third, CCAC notes that while the permit includes requirements for monitoring certain emissions from the generating engines, it does not include radon emissions. *Id.* CCAC suggests that eliminating additional sources of radioactive waste from deposition at the landfill or testing to characterize waste streams and their ultimate air emissions would mitigate the risk of radioactive air emissions. *Id.* Fourth, CCAC discusses the potential for radioactive scale buildup within the landfill infrastructure. *See id.* at 2–3. CCAC references an attached report relating to radon emissions from landfills. *See id.* at 3.

EPA's Response: Although the CCAC Petition expresses various concerns regarding the potential for radon emissions from the Hyland Landfill and a desire for NYSDEC to more fully characterize these potential emissions, it does not explain how these concerns are relevant to the current title V permit action. The CCAC Petition does not identify any applicable CAA requirements that are not included in the Hyland Landfill Permit, or with which the Permit arguably does not comply or assure compliance. In fact, as described above in relation to the Scott Petition, at this time, there are no applicable CAA requirements governing the control or monitoring of radon emissions from landfills. In sum, the CCAC Petition simply does not identify any relevant deficiency with the Permit. For the foregoing reasons, to the extent the CCAC Petition could be considered a petition to object under CAA § 505(b)(2), the CCAC Petition is denied.

VI. CONCLUSION

For the reasons set forth above, I hereby deny the Scott Petition and CCAC Petition.

Dated:  APR 10 2019



Andrew R. Wheeler
Administrator