BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Petition No. I-2024-4

In the Matter of

Waste Management of New Hampshire, INC., Turnkey Recycling and Environmental Enterprises

Permit No. TV-0062

Issued by the New Hampshire Department of Environmental Services

ORDER DENYING A PETITION FOR OBJECTION TO A TITLE V OPERATING PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated February 9, 2024 (the Petition) from D. Ball, Rep. T. Caplan, D. Carpinone, J. Contois, J. Elliott, J. Hurley, M. Hurley, K. Lajoie, R. MacKenzie, S. Richman, N. Sargent, M. Schissel, J. Swan, J. Tuthill, C. Walter, and J. 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-0062 (the Permit) issued by the New Hampshire Department of Environmental Services (NHDES) to the Turnkey Recycling and Environmental Enterprises Facility (the Facility) in Rochester, New Hampshire. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and N.H. Code Admin. 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 known 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 in Section IV of this Order, the EPA denies the Petition requesting that the EPA Administrator object to the Permit.

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 Hampshire submitted a 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. 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. 40 C.F.R. § 70.1(b); 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. 32250, 32251 (July 21, 1992). 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

State and local permitting authorities issue title V permits pursuant to their EPA-approved title V programs. Under CAA § 505(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. 42 U.S.C. § 7661d(a). 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. 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. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

Each petition must identify the proposed permit on which the petition is based and identify the petition claims. 40 C.F.R. § 70.12(a). Any issue raised in the petition as grounds for an objection must be based on a claim that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements under part 70. 40 C.F.R. § 70.12(a)(2). Any arguments or claims the petitioner wishes the EPA to consider in support of each issue raised must generally be contained within the body of the petition.[1] *Id.*

The petition 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). 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); *see also* 40 C.F.R. § 70.12(a)(2)(v).

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[1] If reference is made to an attached document, the body of the petition must provide a specific citation to the referenced information, along with a description of how that information supports the claim. In determining whether to object, the Administrator will not consider arguments, assertions, claims, or other information incorporated into the petition by reference. *Id*.

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. 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 petitioner to make the required demonstration to the EPA.[3] The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator's part to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)).[4] When courts have reviewed the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g.*, *MacClarence*, 596 F.3d at 1130–31.[5] Certain aspects of the petitioner's demonstration burden are discussed in the following paragraph. A more detailed discussion can be found in the preamble to the EPA's proposed petitions rule. *See* 81 Fed. Reg. 57822, 57829–31 (Aug. 24, 2016); *see also 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. *See generally Nucor II Order* at 7. For example, one such criterion is whether a petitioner has provided the relevant analyses and citations to support its claims. For each claim, the petitioner must identify (1) the specific grounds for an objection, citing to a specific permit term or condition where applicable; (2) the applicable requirement as defined in 40 C.F.R. § 70.2, or requirement under part 70, that is not met; and (3) an explanation of how the term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under part 70. 40 C.F.R. § 70.12(a)(2)(i)–(iii). If a petitioner does not identify these elements, the EPA is left to work out the basis for the petitioner's objection, contrary to Congress's express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("[T]he Administrator's requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and

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[2] *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (*NYPIRG*).
[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 also Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word 'shall' . . . plainly mandates an objection *whenever* a petitioner demonstrates noncompliance." (emphasis added)).
[5] *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

persuasive.").[6] Relatedly, the EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard. *See, e.g.*, *In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (Jan. 15, 2013).[7] 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. *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).[8]

Another factor the EPA examines is whether the petitioner has addressed the state or local permitting authority's decision and reasoning contained in the permit record. 81 Fed. Reg. at 57832; *see Voigt v. EPA*, 46 F.4th 895, 901–02 (8th Cir. 2022); *MacClarence*, 596 F.3d at 1132–33.[9] This includes a requirement that petitioners address the permitting authority's final decision and final reasoning (including the state's response to comments) where these documents were available during the timeframe for filing the petition. 40 C.F.R. § 70.12(a)(2)(vi). Specifically, the petition must identify where the permitting authority responded to the public comment and explain how the permitting authority's response is inadequate to address (or does not address) the issue raised in the public comment. *Id*.

The information that the EPA considers in determining whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. 40 C.F.R. § 70.13. 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 required by § 70.7(a)(5) (sometimes referred to as the "statement of basis"); any comments the permitting authority received during the public participation process on the draft permit; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; and all 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). *Id.* If a final permit and a statement of basis for the final permit are available

[6] *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (Sept. 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) (*Portland Generating Station Order*).

[7] *See also Portland Generating Station Order* at 7 ("[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 (Apr. 20, 2007); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (Jan. 8, 2007) (*Georgia Power Plants Order*); *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (Mar. 15, 2005).

[8] *See also In the Matter of Hu Honua Bioenergy*, Order on Petition No. IX-2011-1 at 19–20 (Feb. 7, 2014); *Georgia Power Plants Order* at 10.

[9] *See also, e.g.*, *Finger Lakes Zero Waste Coalition v. EPA*, 734 Fed. App'x *11, *15 (2d Cir. 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (Dec. 14, 2012) (denying a title V petition issue where petitioners did not respond to the state's explanation in response to comments or explain why the state erred or why the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying a title V petition issue where petitioners did not acknowledge or reply to the state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *Georgia Power Plants Order* at 9–13 (denying a title V petition issue where petitioners did not address a potential defense that the state had pointed out in the response to comments).

during the agency's review of a petition on a proposed permit, those documents may also be considered when determining whether to grant or deny the petition. *Id*.

III. BACKGROUND

A. The Turnkey Facility

Turnkey Recycling and Environmental Enterprises, a subsidiary of Waste Management of New Hampshire, Inc. (WMNH), is an integrated solid waste management facility located at 176 Rochester Neck Road, in Rochester, New Hampshire. The Facility has three landfills: TLR-I and TLR-II are capped landfills, which closed in 1992 and 1997, respectively; TLR-III commenced operation in December 1995 and continues as an active landfill. The Facility collects landfill gas (LFG) from all three landfills and operates several combustion and electrical generating devices to control, and produce energy from, the collected gas. The Facility is a major source for nitrous oxides, carbon monoxide, and sulfur dioxide.

B. Permitting History

WMNH first obtained a title V permit for the Facility on January 3, 2012, which was most recently renewed on February 26, 2020. On December 27, 2022, WMNH applied for a significant modification to the title V permit. NHDES published notice of a draft permit on May 12, 2023, subject to a public comment period that originally ran until June 12, 2023. NHDES received a request for a public hearing during the public comment period on the draft permit. A public hearing was held on September 6, 2023, and the public comment period was extended until September 13, 2023.

On October 25, 2023, NHDES submitted the Proposed Permit, along with its *Findings of Fact and Director's Decision* to the EPA for its 45-day review. The EPA's 45-day review period ended on December 11, 2023, during which time the EPA did not object to the Proposed Permit. NHDES issued the final title V renewal permit for the Facility on January 19, 2024.

C. Timeliness of Petition

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 December 11, 2023. Thus, any petition seeking the EPA's objection to the Proposed Permit was due on or before February 9, 2024. The Petition was received February 9, 2024, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

D. Environmental Justice

The EPA conducted an analysis using EPA's EJScreen[10] to assess key demographic and environmental indicators within a five-kilometer radius of the Facility. This analysis showed a total population of approximately 13,904 residents within a five-kilometer radius of the Facility, of which approximately nine percent are people of color and 17 percent are low income. In addition, the EPA reviewed the

[10] EJScreen is an environmental justice mapping and screening tool that provides EPA with a nationally consistent dataset and approach for combining environmental and demographic indicators. *See https://www.epa.gov/ejscreen/what-ejscreen*.

EJScreen Environmental Justice Indices, which combine certain demographic indicators with 13 environmental indicators. The following table identifies the Environmental Justice Indices for the five-kilometer radius surrounding the Facility and their associated percentiles when compared to the rest of the State of New Hampshire.

EJ Index	Percentile in State
Particulate Matter 2.5	73
Ozone	51
Diesel Particulate Matter	59
Air Toxics Cancer Risk	52
Air Toxics Respiratory Hazard	46
Toxic Releases to Air	57
Traffic Proximity	62
Lead Paint	38
Superfund Proximity	73
RMP Facility Proximity	48
Hazardous Waste Proximity	61
Underground Storage Tanks	52
Wastewater Discharge	64

IV. EPA DETERMINATION ON PETITION CLAIM

The Petitioners Claim That "[NHDES] Has Violated the United States Code Title 42, Section 7661a(b)(6) by Failing to Provide an Adequate, Streamlined, and Reasonable Title V Review for the Turnkey Landfill" and That "[NHDES] Has Also Violated the Clean Air Act § 70.8(c)(3)(ii) by Failing to "Submit Any Information Necessary to Review Adequately the Proposed Permit."

Petition Claim: The Petitioners claim that "[NHDES] has violated the *United States Code Title 42, Section 7661a(b)(6)* by failing to provide an adequate, streamlined, and reasonable Title V review for the Turnkey landfill." Petition at 2. The Petitioners note that 42 U.S.C. § 7661a(b)(6) states there must be "adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including 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." *Id*. (quoting 42 U.S.C. § 7661a(b)(6)).

The Petitioners explain that in New Hampshire, "appealing an administrative decision to the Air Resources Council and subsequent appeal to the New Hampshire Supreme Court are 'the exclusive means for obtaining judicial review of Title V permit decisions.'" Petition at 3 (citing *Attorney General's Certification, Clean Air Act Amendments, Title V Operating Permits Program* at 21). The Petitioners argue that NHDES "failed to provide an adequate and reasonable process due to a decision to categorize some public comments as germane and some as non-germane." *Id*. The Petitioners explain that this decision resulted in two sets of comments—those comments that are part of NHDES's official *Findings of Fact and Director's Decision* and the remaining comments, which are addressed in an

unofficial *Response to Comments.* The Petitioners describe the decision to bifurcate responses as a "problematic strategy that undermines the appeal process by making the majority of public comments outside the purview of the *Findings of Fact and Director's Decision* that [NHDES] released on October 25, 2023." *Id*. The Petitioners claim the distinction is important because "the *Findings of Fact and Director's Decision* is a 'department decision' under NH law and includes the option to appeal," whereas the *Response to Comments* "is unsigned and does not provide an appeal option." *Id*.

The Petitioners assert that they are seeking to have "ALL public comments addressed within the *Findings of Fact and Director's Decision*," which they claim "would ensure an inclusive opportunity for appeal and judicial review and not eliminate those options for the majority of public comments that [NHDES] received." *Id*.

Additionally, the Petitioners claim that "[NHDES] has also violated the Clean Air Act § 70.8(c)(3)(ii) by failing to 'submit any information necessary to review adequately the proposed permit.'" *Id*. (quoting 40 C.F.R. § 70.8(c)(3)(ii)).[11] The Petitioners note that 40 C.F.R. § 70.7(h)(5) states:

> [T]he permitting authority shall keep a record of the commenters and of the issues raised during the public participation process, as well as records of the written comments submitted during that process, so that the Administrator may fulfill his obligation under section 505(b)(2) of the Act to determine whether a citizen petition may be granted, and such records shall be available to the public.

Id.

The Petitioners contend that, to their knowledge, "[NHDES] did not provide a complete record to EPA regarding comments received during the public comment period because [NHDES] chose to bifurcate the responses" and that "the bifurcation resulted in two sets of documents: the official *Findings of Fact and Director's Decision* and the unofficial *Response to Comments*." *Id*. at 4.

The Petitioners reference the *Electronic Permit System Summary* and note that "[NHDES] sent to EPA the proposed *Title V Permit*, the *Permit Application Review Summary*, the *Findings of Fact and Director's Decision*, and *a Letter to Waste Management of New Hampshire, Inc*." *Id*. The Petitioners state: "The list does not include the *Combined Public Comments*, [NHDES]' *Response to Comments*, and the link to the *Recorded Public Hearing* on September 6, 2023." *Id*. The Petitioners state that the EPA did not receive this information. *Id*. (citing EPA Region 1's title V permit database website).[12]

The Petitioners state that "[NHDES] claims the *Response to Comment* addresses non-germane comments from the public, but petitioners object to the process and [NHDES]' conclusion." *Id*. The Petitioners assert that they seek to have all comments included in the *Findings of Fact and Director's Decision*.

EPA Response: For the following reasons, the EPA denies the Petitioners' request for an objection on this claim.

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[11] The Petitioners' reference to "Clean Air Act § 70.8(c)(3)(ii)" likely intended to refer to 40 C.F.R. § 70.8(c)(3)(ii). The cited provision comes from the EPA's regulations, not the Clean Air Act.

[12] *See* https://www.epa.gov/caa-permitting/new-hampshire-proposed-title-v-permits.

CAA section 502(b)(6) requires the EPA to promulgate regulations that include:

> [A]dequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including 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.

42 U.S.C. § 7661a(b)(6). The EPA promulgated such regulations at 40 C.F.R. part 70. More specifically, 40 C.F.R. § 70.7(h)(6) requires only that a permitting authority "respond in writing to all significant comments raised during the public participation process." Relatedly, 40 C.F.R. § 70.8(a)(1) requires that, in transmitting the permit to the EPA, the permitting authority must include this "written response to all significant comments raised during the public participation process on the draft permit." In the rulemaking associated with the promulgation of 40 C.F.R. § 70.7(h)(6) and this part of § 70.8(a)(1), the EPA explained that significant comments "include, but are not limited to, comments that concern whether the title V permit includes terms and conditions addressing federal applicable requirements and requirements under part 70, including adequate monitoring and related recordkeeping and reporting requirements."[13] Additionally, the EPA indicated that "[i]t is the responsibility of the permitting authority to determine, in the first instance, if a comment submitted during the public comment period on a draft permit is significant."[14] New Hampshire regulations state: "The department shall consider all written comments received during the public comment period provided pursuant to Env-A 622.02, as well as the applicant's written response thereto, and any testimony presented at the public hearing, if one was held." N.H. Code Admin. R. Env-A 622.08(c).

In its *Finding of Facts and Director's Decision*, NHDES explained its consideration of comments, noting that "NHDES considered all comments in arriving at its final decision." *See Finding of Facts and Director's Decision* at 2. NHDES also provided a written response to "germane" comments, as required under 40 C.F.R. § 70.7(h)(6), and submitted such written response to EPA, as required under 40 C.F.R. § 70.8(a)(1). *See Finding of Facts and Director's Decision* at 2–6. It appears that NHDES satisfied its obligations to consider comments under N.H. Code Admin. R. Env-A 622.08(c) and exercised its discretion under 40 C.F.R. §70.7(h)(6) to bifurcate and provide written response to significant comments in the *Findings of Facts and Director's Decision*. By providing no citation to or analysis of these requirements and how NHDES failed to consider the comments, or how NHDES failed to respond to significant comments, the Petitioners have failed to demonstrate that NHDES has violated N.H. Code Admin. R. Env-A 622.08(c) or 40 C.F.R. §70.7(h)(6) and 70.8(a)(1). The Petitioners do not provide analysis of the comments that NHDES characterized as non-germane; nor do the Petitioners explain why the comments that the state characterized as non-germane may be significant. The Petitioners do identify one comment related to Environmental Justice that Petitioners claim should have been characterized as germane or significant but do not explain how addressing that comment should have or would have changed the title V permit.

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[13] 85 Fed. Reg. 6431, 6436 (February 5, 2020). *See also* 85 Fed. Reg. at 6439-40 (discussing the EPA's historical implementation of this principle, its regulations codifying this requirement, and providing guidance on what constitutes a "significant comment").

[14] *Id*. at 3436.

Additionally, NHDES explained its decision to bifurcate public comments into germane and non-germane categories, stating that some comments received—regarding new or different requirements than current regulations or statutes— "are not germane to this project as NHDES cannot change rules or statutes via processing an application for a permit." *Finding of Facts and Director's Decision* at 3. NHDES noted that "a comment's status as 'non-germane' does not mean that the comment is not important in some context. The status of non-germane is used solely to identify comments for which the topic would not impact the decision regarding the application of the project." See NHDES's *Response to Comments* at 1. NHDES further noted that non-germane comments were those outside the scope of review of the application for the modification to the Permit. NHDES considered and responded to comments it labeled non-germane in a separate 14-page document. *See Response to Comments*. The Petitioners do not acknowledge or rebut NHDES's justification for its decision to bifurcate the public comments, nor do they identify non-germane comments that would impact the permit application review.[15]

In regard to the Petitioners' claim that the decision to bifurcate responses to public comments undermines the appeal and judicial review process, the Petitioners' alleged inability to appeal the comments designated non-germane does not clearly present an issue with this title V permit action nor the public participation process for this permit action.[16] While CAA § 502(b)(6) does require that the permit program provide an opportunity for judicial review of the final permit action in state court, the decision to bifurcate comments does not necessarily preclude this opportunity. Rather, the issue of the record for review in state court is a concern related to the New Hampshire state appeal process. The Petitioners do not explain why bifurcating comments precludes the public's opportunity to review the final permit action and have not demonstrated that NHDES violated EPA or New Hampshire regulations on this basis.

Next, the Petitioners broadly claim that NHDES violated the requirement of 40 C.F.R. § 70.8(c)(3)(ii) to "submit any information necessary to review adequately the proposed permit," but do not specify which of the non-germane comments are necessary to be included or should have been included as a germane comment in the *Findings of Fact and Director's Decision*. Petition at 3. They only allege that NHDES did not "provide a complete record to EPA regarding comments received." *Id* at 4. Again, the Petitioners do not identify any particular comments that might have been improperly designated non-germane, nor do they provide any analysis or supporting evidence for why those comments should instead be deemed germane. The Petitioners state generally that their comments "show the depth of understanding and concern regarding the dangers of persistent substances such as lead, mercury, cadmium, and PFAS and their cumulative impacts and environmental justice." *Id* at 5. The Petitioners also indicate, in discussing what was raised in public comments, that certain comments related to cumulative health impacts should have been included in the *Findings of Fact and Director's Decision*. However, the Petitioners do not offer any supporting discussion of why their concerns about these pollutants and cumulative health impacts should have been deemed by NHDES as germane comments in the scope of this title V permit action.

[15] *See* supra note 9 and accompanying text.

[16] Petitioners have submitted an appeal to the New Hampshire Air Resources Council, that does raise the issue of bifurcating the comment response. The EPA understands that the appeal is still pending at the time of this Order's signature. *See Docket No. 23-17 ARC – Appeal of Katie Lajoie et al.*

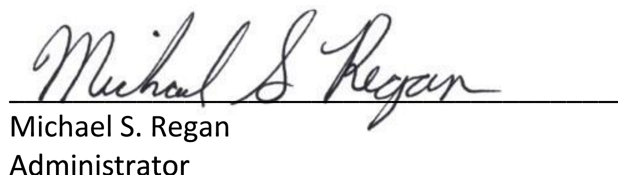
Furthermore, the Petitioners have incorrectly claimed that NHDES violated 40 C.F.R. § 70.8(c)(3)(ii) by failing to "submit any information necessary to review adequately the proposed permit." Petition at 3. Grounds for objection are limited to claims that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements under part 70. 40 C.F.R. § 70.12(a)(2). In the event that EPA finds, or a petitioner demonstrates, a potential flaw in a permit, permit record, or permit process, and the information submitted by the permitting authority is inadequate for EPA to review whether the permit complies with the CAA or part 70, the EPA will generally invoke 40 C.F.R § 70.8(c)(3)(ii) to object to the issuance of the permit. However, 40 C.F.R § 70.8(c)(3)(ii) does not impose a requirement on the permitting authority to submit any particular information to the EPA. Other part 70 regulations contain such requirements, including the requirement to provide various information to the public and/or the EPA, including a statement of basis and written response to significant comments. *See, e.g.*, 40 C.F.R. §§ (h)(5)–(6), 70.8(a)(1). The preceding paragraphs address these requirements and explain why the Petitioners have not demonstrated that they were not satisfied.[17] As previously discussed by the EPA, 40 C.F.R § 70.8(c)(3)(ii) does not impose a requirement on the permitting authority to submit any particular information to the EPA. The Petitioners' claims about NHDES's responses to public comments are insufficient to demonstrate a basis for the EPA's objection under 40 C.F.R § 70.8(c)(3)(ii). *See In the Matter of Plains Marketing et al.*, Order on Petition Nos. IV-2023-1 & IV-2023-3 (Sept. 18, 2023) at 18.

Because of the reasons outlined above, the Petitioners have failed to demonstrate any violations of the applicable federal or state requirements by NHDES, and the EPA denies the Petitioners' request for objection on these claims.

V. CONCLUSION

For the reasons set forth in this Order and pursuant to CAA § 505(b)(2) and 40 C.F.R. § 70.8(d), I hereby deny the Petition as described in this Order.

Dated: August 16, 2024



Michael S. Regan
Administrator

[17] Additionally, although the Petitioners include a quotation from 40 C.F.R. § 70.7(h)(5), the Petitioners do not allege that NHDES failed to satisfy this regulation in any specific way.