

COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

February 1, 2023

In the Matters of
Wheelabrator Saugus, Inc.,
Wheelabrator North Andover, Inc.,
Wheelabrator Millbury, Inc.

OADR Docket Nos. 2020-011, 2020-012
and 2020-013
Saugus, MA
North Andover, MA
Millbury, MA

RECOMMENDED FINAL DECISION

I. Introduction

In 2020, Wheelabrator Saugus, Inc., Wheelabrator North Andover, Inc. and Wheelabrator Millbury, Inc. (collectively “the Petitioners”), brought these consolidated appeals challenging Emission Control Plans (“ECPs”) issued by the Massachusetts Department of Environmental Protection (“MassDEP”) concerning the real properties at 100 Salem Turnpike, Saugus, Massachusetts, 285 Holt Road, North Andover, Massachusetts, and 331 Southwest Cutoff Road, Millbury, Massachusetts (“the Properties”). At the outset of the appeals, the prior Presiding Officer consolidated the appeals with the Parties’ agreement and scheduled a Pre-Hearing Conference to determine the appeals’ potential amenability to settlement, to identify issues to be adjudicated and to establish a schedule for resolution of the appeals in the event no settlement of the appeals was reached.¹ However, prior to the Pre-Hearing Conference the Parties jointly requested that the prior

¹ The prior Presiding Officer left MassDEP’s Office of Appeals and Dispute Resolution (“OADR”) in 2022 and thereafter I was assigned to adjudicate these appeals.

Presiding Officer stay adjudication of the appeals because they had commenced settlement discussions and believed the discussions could lead to resolution of the appeals without the need for further litigation. The prior Presiding Officer allowed the stay.

The Parties continued their settlement discussions over the next two years and seven months, filing twenty-seven (27) Joint Status Reports reporting on the progress of their settlement discussions. The Parties' settlement efforts were fruitful; on November 3, 2022 the Parties filed a Joint Settlement Agreement for consideration and approval by MassDEP's Commissioner pursuant to the Adjudicatory Proceeding Rules at 310 CMR 1.01(8)(c) to resolve the appeals. 310 CMR 1.01(8)(c) requires that the Commissioner approve, modify, or reject a proposed settlement agreement in an administrative appeal, based upon whether the settlement agreement is consistent with law and other factors appropriately considered in the exercise of agency regulatory discretion.

After reviewing the Parties' proposed Settlement Agreement and the Administrative Record of the appeals and taking into account the Parties' explanation of the Settlement Agreement at the Status Conference I conducted with the Parties on January 26, 2023, I recommend that MassDEP's Acting Commissioner issue a Final Decision approving the Settlement Agreement and Proposed ECP Modifications. I have made this recommendation because the Settlement Agreement and Proposed EPC Modifications are consistent with or proper under the governing environmental statute and regulations, advancing the interests of reducing air emissions and serving the public interest.

II. Applicable Law

The Municipal Waste Combustor Rule ("MWC Rule"), as set forth in MassDEP's Air Pollution Control Regulations at 310 CMR 7.08(2), provides operating procedures, emission limitations and compliance schedules for the control of certain designated pollutants emitted from Municipal Waste Combustors ("MWCs"), in accordance with Section 111(d) and 129 of the federal Clean Air Act. In 2018 MassDEP promulgated new and amended applicable requirements in the

MWC Rule for Large MWCs as required under the Clean Air Act to make the MWC Rule as stringent as the most current federal Emission Guidelines (“EG”)² by establishing more stringent emission limits for particulate matter (“PM”), Cadmium (“Cd”), Lead (“Pb”) and Dioxin/Furan; allowing owners of MWCs more options for monitoring emissions; and creating new requirements for operating MWCs. The 2018 MWC Rule amendments also incorporated revised NOx³ emission standards as Reasonably Available Control Technology (“RACT”) that are more stringent than the EG.

In accordance with 310 CMR 7.08(2)(e)2., a plan approval is not required in order to implement the requirements of MWC Rule unless construction, substantial reconstruction or alterations are planned at the Facility which are not required under the MWC Rule. In accordance with 310 CMR 7.08(2)(e)1., applicable requirements and limitations contained in 310 CMR 7.08(2) shall not supersede, relax or eliminate any more stringent conditions or requirements established by regulation or contained in a facility’s previously issued source specific plan approval(s) or emission control plan(s).

As previously noted above, the Adjudicatory Proceeding Rules at 310 CMR 1.01(8)(c), require that MassDEP’s Commissioner approve, modify, or reject a proposed settlement agreement in an administrative appeal, based upon whether the settlement agreement is consistent with law and other factors appropriately considered in the exercise of agency regulatory discretion. 310 CMR 1.01(8)(c) also provides that “Each agreement shall include a provision that if the agreement is approved, the parties waive whatever rights they have to further administrative review before the Department as well as an appeal to court.”

² 40 CMR 60, Subpart Cb.

³ NOx are atmospheric pollutants known as oxides of nitrogen.

III. The Facilities

1. Saugus

Since September 2007, Wheelabrator Saugus has operated under a Final Modified Saugus Emission Control Plan (“ECP”) Approval. MassDEP modified the ECP Final Approval on March 14, 2012 in response to a request from Wheelabrator Saugus. A Final Operating Permit was issued by MassDEP on October 19, 2007 and that permit has been administratively continued through the present. The regulations require Wheelabrator Saugus to amend its Application to include the approved ECP. 310 CMR 7.08(2)(e)2.

On or about September 10, 2018, Wheelabrator Saugus filed its Municipal Waste Combustor (“MWC”) ECP Application with MassDEP. MassDEP published public notice of ECP Application and held a public hearing and took public comments through December 7, 2018. Based upon comments, Wheelabrator Saugus requested an extension to supplement the ECP Application, which was submitted on June 5, 2019. The supplement requested source specific alternative nitrogen oxides (“NO_x”) emission limits. The Wheelabrator Saugus Application requested a source specific alternative NO_x emission limit not to exceed a 24-hour daily arithmetic average of 185 ppm by volume, dry basis, corrected to 7 % oxygen. MassDEP issued the Draft Modified ECP after determining that NO_x emission rate of 150 ppm by volume, dry basis, corrected to 7% oxygen, was Reasonably Available Control Technology (“RACT”) by the implementation of NO_x emission reduction credits. 310 CMR 7.08(2)(f)3. After public comment on the Draft Modified ECP, MassDEP issued the ECP Modified Approval on February 11, 2020.

The Wheelabrator Saugus appealed the ECP Modified Approval asserting that it was not consistent with applicable laws and regulations and challenged the requirements to install and operate Continuous Emissions Monitors (“CEMS”) for ammonia and MassDEP’s references to Selective Catalytic Reduction (SCR) technology.

2. North Andover

Wheelabrator North Andover has operated the Facility under a Final Modified North Andover ECP Approval since September 2007. A Final Operating Permit was issued by MassDEP on October 19, 2007 and that permit has been administratively continued through the present.

On or about September 10, 2018, Wheelabrator North Andover filed its MWC ECP Application. MassDEP published public notice of the ECP Application, held a public hearing, and took public comments through May 10, 2019. MassDEP prepared a Response to Comments document including the comments and responses. MassDEP issued the Wheelabrator North Andover ECP Approval on February 11, 2020 and Wheelabrator North Andover appealed.

Wheelabrator North Andover's appeal asserted the ECP Approval was not consistent with applicable laws and regulations and challenged the requirements to install and operate Continuous Emissions Monitors ("CEMS") for ammonia.

3. Millbury

Wheelabrator Millbury operated the Facility under a Plan Approval issued September 17, 1987. On July 2002, MassDEP issued a Final Modified ECP Approval Transmittal. On December 4, 2003, MassDEP issued a Final Operating Permit for the Facility, and that permit has been administratively continued through the present.

On or about September 10, 2018, Wheelabrator Millbury filed its MWC ECP Application. MassDEP published public notice, held a public hearing, and allowed public comment until November 27, 2018. No comments were received. MassDEP issued the Draft Modified ECP Approval on February 11, 2020 and Wheelabrator Millbury appealed.

Wheelabrator Millbury's appeal asserted the ECP Approval was not consistent with applicable laws and regulations and challenged the requirements to install and operate Continuous Emissions Monitors ("CEMS") for ammonia.

IV. The Settlement

The Parties' Settlement Agreement addresses the three Wheelabrator Facilities and incorporates the Interim Final ECP Modified Approvals ("Modified Approvals"), issued by MassDEP for each facility on October 25, 2022. According to the terms of the Settlement Agreement and each Modified Approval, the Effective Date of the Modified Approvals is the date that the Final Decision on the Settlement Agreement is issued by MassDEP's Commissioner or his designee.

The Modified Approvals include: (1) optimization of the NO_x controls in each Facility in order to establish a lower NO_x emission limit than the NO_x emission limit required in the MWC Rule and the February 11, 2020 ECPs; (2) reduction in pollutant (air toxics) emission limits to lower levels than those required in the MWC Rule; and (3) installation of ammonia (NH₃) process monitors (PM) at each facility and optimization testing for the purpose of proposing ammonia emissions limit.

V. Discussion

The proceedings prior to MassDEP's issuance of the Modified ECPs included public notice, public hearings and public comment and response to those comments. With respect to ammonia, the Modified ECPs include optimization testing which will be conducted over a year and which will result in the submittal of a report to MassDEP correlating NO_x emissions and ammonia slip and proposing an ammonia emissions limit, consistent with the requirements of 310 CMR 7.08(2)(f)5.b. MassDEP will review that report and establish a new ammonia slip emissions limit consistent with 310 CMR 7.08(2)(f)(5)(c). MassDEP will issue a modification that will be subject to public comment as a Final ECP, consistent with the regulations.

As required by 310 CMR 1.01(8)(c), when Parties resolve an administrative appeal through settlement, the Parties agree to waive their rights for further appeal. The Parties' Settlement Agreement here provides that, "[t]he parties agree that the foregoing waiver does not apply to the new ammonia slip limits to be established by MassDEP for each of the Wheelabrator Facilities." During

the Status Conference that I recently conducted with them, the Parties clarified that this language is not intended to limit the required waiver of 310 CMR 1.01(8)(c), which applies to the Modified ECPs incorporated into the Settlement Agreement. Rather, it is intended to apply only to a potential future appeal of an ammonia slip emission limit, not yet determined, which will be issued in a Final ECP. Following a year of optimization testing, the Wheelabrator Facilities will submit a report to MassDEP correlating the NOx emissions and ammonia slip and proposing an ammonia emissions limit, consistent with the regulations. If, after its review of the report, MassDEP establishes a new final ammonia slip limit that differs from that proposed by the Wheelabrator Facilities, the latter reserve the right to appeal that emission limit. Because the emission limit will be included in a Final ECP that will be subject to public comment and regulatory proceedings, any appeal related to it is not yet ripe, and therefore is not part of the present waiver.

VI. Conclusion

The Settlement Agreement and Modified ECPs further the interests of the MWC Rule because they reduce emissions proposed in the appealed ECPs, which mirrored the regulatory requirements, and implement continuous monitoring. The Modified ECPs have been subject to public comment and response and are consistent and proper with the statute and regulations and advance the interests of reducing air emissions and serve the public interest. Accordingly, I recommend that MassDEP's Acting Commissioner issue a Final Decision approving the Settlement Agreement and Modified Approvals.

Date: February 1, 2023



Margaret R. Stolf
Presiding Officer

SERVICE LIST

In The Matter Of:

**Wheelabrator Saugus Inc., Wheelabrator
Millbury, Inc., Wheelabrator North Andover,
Inc.**

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