

**ENVIRONMENTAL PROTECTION AGENCY**

[EPA-HQ-OGC-2019-0667; FRL-10004-89-OGC]

**Proposed Consent Decree, Clean Water Act and Administrative Procedures Act Claims****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice of proposed consent decree; request for public comment.

**SUMMARY:** In accordance with the Environmental Protection Agency (EPA) Administrator's, October 16, 2017, Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements, notice is hereby given of a proposed consent decree to address claims in a lawsuit filed by the Natural Resources Defense Council, Clean Water Action, and the Environmental Justice Health Alliance for Chemical Policy Reform (collectively, "Plaintiffs") in the United States District Court for the Southern District of New York. On March 21, 2019, Plaintiffs filed a complaint alleging, inter alia, that the United States Environmental Protection Agency ("EPA") had a duty under Clean Water Act ("CWA") section 311(j)(5)(A)(i), to issue regulations that require an owner or operator of a non-transportation-related onshore "facility described in subparagraph (C) to prepare and submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of . . . a hazardous substance" (the "Hazardous Substance Worst Case Discharge Planning Regulations") by August 18, 1992. The proposed consent decree would set deadlines for EPA to complete a notice of proposed rulemaking pertaining to the issuance of the Hazardous Substance Worst Case Discharge Planning Regulations, and for publication of a notice taking final action following notice and comment rulemaking pertaining to the issuance of Hazardous Substance Worst Case Discharge Planning Regulations.

**DATES:** Written comments on the proposed consent decree must be received by *March 4, 2020*.

**ADDRESSES:** Submit your comments, identified by Docket ID number EPA-HQ-OGC-2019-0667, online at [www.regulations.gov](http://www.regulations.gov) (EPA's preferred method). For comments submitted at [www.regulations.gov](http://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from

[www.regulations.gov](http://www.regulations.gov). The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA generally will not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the "For Further Information Contact" section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Richard L. Albores, Solid Waste and Emergency Response Law Office (7013D), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone: (202) 564-7102; email address: [Albores.Richard@epa.gov](mailto:Albores.Richard@epa.gov).

**SUPPLEMENTARY INFORMATION:****I. Additional Information About the Proposed Consent Decree**

On March 21, 2019, Plaintiffs filed suit in the Federal district court for the Southern District of New York: *Natural Resources Defense Council, et. al v. United States Environmental Protection Agency, et. al*, No. 1:19-cv-02516 (S.D.N.Y., filed Mar. 21, 2019). Plaintiffs' Complaint brought two claims alleging violations of CWA section 311(j)(5)(A)(i), and the Administrative Procedures Act ("APA"). Plaintiffs' first claim alleged that EPA failed to issue "regulations mandated by the [CWA] requiring non-transportation-related substantial-harm facilities to plan, prevent, mitigate and respond to worst-case spills of hazardous substances . . . constitutes a failure to perform a non-discretionary duty or act in violation of the [CWA]." (Compl. Para. 34). Plaintiffs also claimed, "EPA's failure to issue these regulations constitute[d] agency action unlawfully withheld contrary to and in violation of the [APA] and the [CWA]." (Compl. Para. 45). Plaintiffs requested an order from the Court to compel EPA to promulgate Hazardous Substance Worst Case Discharge Planning Regulations (Compl. at 12). Following EPA's Answer, filed on June

4, 2019, Plaintiffs and EPA entered into discussions regarding a potential resolution of the lawsuit.

The proposed consent decree announced here would resolve the claims of the suit. As described in paragraph 3 of the proposed consent decree, within two years (24 months) of entry of the proposed consent decree, EPA will sign a notice of proposed rulemaking pertaining to the issuance of the Hazardous Substance Worst Case Discharge Planning Regulations. Under paragraph 4 of the proposed consent decree, EPA will sign a notice taking final action following notice and comment rulemaking pertaining to the issuance of Hazardous Substance Worst Case Discharge Planning Regulations. See the proposed consent decree for specific details.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the resolution of the claims contained in the proposed consent decree from the public. If so requested, EPA will also consider holding a public hearing on whether to enter into the proposed consent decree. EPA, the Department of Justice, and the United States Attorney for the Southern District of New York may withdraw or withhold consent to the proposed consent decree if the public comments disclose facts or considerations that indicate that such consent decree is inappropriate, improper, inadequate, or inconsistent with the requirements of the CWA. Unless EPA, the Department of Justice, or the United States Attorney for the Southern District of New York determines that this proposed consent decree should be withdrawn, the terms of the proposed consent decree will be affirmed and entered with the Court.

**II. Additional Information About Commenting on the Proposed Consent Decree****A. How can I get a copy of the proposed consent decree?**

The official public docket for this action (identified by EPA-HQ-OGC-2019-0667) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744.

and the telephone number for the OEI Docket is (202) 566-1752.

An electronic version of the public docket is available on EPA's website at <https://www.epa.gov/ogc/proposed-consent-decrees-and-draft-settlement-agreements#NRDCetalv.epa> and through [www.regulations.gov](http://www.regulations.gov). You may use [www.regulations.gov](http://www.regulations.gov) to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select "search." It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at [www.regulations.gov](http://www.regulations.gov) without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket.

EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

#### *B. How and to whom do I submit comments?*

You may submit comments as provided in the **ADDRESSES** section, above. Please ensure that your comments are submitted within the specified comment period.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties

and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the [www.regulations.gov](http://www.regulations.gov) website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an "anonymous access" system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an "anonymous access" system. If you send an email comment directly to the Docket without going through [www.regulations.gov](http://www.regulations.gov), your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: January 23, 2020.

**John R. Michaud,**

*Associate General Counsel.*

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**BILLING CODE 6560-50-P**

## **ENVIRONMENTAL PROTECTION AGENCY**

**[Petition I-2019-3; FRL-10004-45-Region 1]**

### **Clean Air Act Operating Permit Program; Petition for Objection to State Operating Permit for Wheelabrator Environmental System Inc., Wheelabrator Concord Company, L.P., Concord, New Hampshire**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of final order on petition to object to state operating permits.

**SUMMARY:** The EPA Administrator signed an Order, dated October 30, 2019, denying a petition dated March 14, 2019, filed by Anthony Caplan, Katherine Lajoie, Rebecca MacKenzie, and Janet Ward (the Petitioners). The Petitioners requested that the EPA object to a proposed Clean Air Act (CAA) title V operating permit (Permit No. TV-0032) issued by the New Hampshire Department of Environmental Services (NHDES) to Wheelabrator Environmental System, Inc., Wheelabrator Concord Company, L.P. (Wheelabrator), a large municipal waste incinerator located in Concord, New Hampshire.

**ADDRESSES:** Copies of the Order, the petition, and all pertinent information relating thereto are on file at the following location: EPA Region 1; Air

and Radiation Division; 5 Post Office Square—Suite 100, (Mail code 05-2), Boston, MA 02109-3912. The Order is also available electronically at the following address: [https://www.epa.gov/sites/production/files/2019-11/documents/wheelabrator\\_response2019.pdf](https://www.epa.gov/sites/production/files/2019-11/documents/wheelabrator_response2019.pdf).

#### **FOR FURTHER INFORMATION CONTACT:**

Jessica Kilpatrick, Air Permits, Toxics, and Indoor Programs Branch, U.S. Environmental Protection Agency, EPA Region 1, 5 Post Office Square—Suite 100, (Mail code 05-2), Boston, MA 02109-3912, tel. (617) 918-1652, email [kilpatrick.jessica@epa.gov](mailto:kilpatrick.jessica@epa.gov).

**SUPPLEMENTARY INFORMATION:** The CAA affords the EPA a 45-day period to review and, as appropriate, the authority to object to operating permits proposed by state permitting authorities under title V of the CAA, 42 U.S.C. 7661-7661f. Section 505(b)(2) of the CAA and 40 CFR 70.8(d) authorizes any person to petition the EPA Administrator to object to a title V operating permit within 60 days after the expiration of the EPA's 45-day review period if the EPA has not objected on its own initiative. Petitions must be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the state, unless the petitioner demonstrates that it was impracticable to raise these issues during the comment period or the grounds for the issues arose after this period.

The Petitioners submitted a petition on March 14, 2019, requesting that the EPA object to the proposed CAA title V operating permit issued by NHDES to Wheelabrator (Permit No. TV-0032). The Petitioners alleged that (1) the operation of the Wheelabrator incinerator violates New Hampshire's Revised Statutes Annotated (RSA) 125-C, Title 10 Public Health, Chapter 125-C Air Pollution Control, Section 125-C:1 and releases persistent toxic substances, such as lead, mercury, cadmium, and dioxin, that "accumulate in our bodies (known as body burden) and in our environment (known as toxic loading) and cause harm in low doses;" (2) that "[s]napshot testing of smokestack emissions can neither determine nor ensure continuous compliance with air standards that are themselves not health based;" and that NHDES "has discretionary authority to either deny or approve a Title V permit and is not constrained by a requirement to only consider whether Wheelabrator's stack test results comply with emission standards;" (3) Wheelabrator violated state and federal law by incinerating