

May 30, 2012

Regional Administrator Judith Enck  
U.S. Environmental Protection Agency  
290 Broadway  
New York, NY 10007-1866

Dear Regional Administrator Enck:

I am writing to bring an important issue to your attention regarding policy and practice in New Jersey Department of Environmental Protection's (DEP) federally delegated Clean Air Act program.

This State policy and practice appears to violate federal Clean Air Act requirements and therefore warrants immediate federal oversight and investigation.

The State policy is not limited to the clean air program and applies to all other federally delegated programs in New Jersey.

Specifically, I am writing in reference to DEP Commissioner Martin's final decision in an air pollution control permit enforcement case (see: *NJDEP v. Parsipanny-Troy Hills Township* - OAL DKT NOS EEQ 03009-04 and EEQ 03010-04 (combined) (link here:

[http://lawlibrary.rutgers.edu/collections/oal/final/eeq01443-06\\_1.html](http://lawlibrary.rutgers.edu/collections/oal/final/eeq01443-06_1.html)

Commissioner Martin's final decision involves DEP permitting and enforcement of EPA regulations at 40 C.F.R. § 60.155. Specifically:

*In 1988, the United States Environmental Protection Agency (EPA) included within its Standards of Performance for sewage incinerators, the requirement that operators conduct periodic performance tests which show compliance with EPA's particulate emission rate, and which identify and set new operating parameters for each incinerator's sludge flow, pressure drop, temperature, fuel flow, and, most relevant here, oxygen content of incinerator exhaust gas. 53 FR 39412 (October 6, 1988); 40 CFR § 60.154.*

*The purpose of setting these operating parameters was to address EPA's findings that "[p]articulate emission rates are affected by the design of the incinerator, the type and design of the control device used, the characteristics of the sludge being burned, as well as the method of operation of the incinerator and control device." 51 FR 13424 (April 18, 1986).*

*In order to avoid costly continuous monitoring of particulate emissions, EPA instead imposed continuous monitoring of the operating parameters which, if met, would indicate that emission standards were also being met because operating conditions were the same as during the performance test. 53 FR 39412 (October 6, 1988); 40 CFR §60.150 – 155.*

*Oxygen content of incinerator exhaust gas was included as an operating parameter by EPA “to ensure that incinerators and associated control devices continue to be operated and maintained in a manner consistent with the method of operation at the time when compliance was initially established . . . [to] aid in reducing consumption of auxiliary fuel . . . [and to] establish incinerator and control device operating conditions that are consistent with minimizing particulate emissions.” 53 FR 39412 (October 6, 1988).*

Martin's decision reversed prior DEP enforcement policy and practice. Martin concluded:

*The AONOCAPAs at issue here charge the Township with exceeding its operating parameter for oxygen content of incinerator exhaust gas on multiple occasions. There is no question of fact regarding whether or when the parameter was exceeded as the charges are based on reports generated by the Township. The issue is whether exceeding this particular operating parameter is a basis for the assessment of penalties. The ALJ held that it is not because there is no explicit statement in the permit or the regulations which sets this operating parameter as a limit. While I agree, I also find that there is enough in the regulations to infer that the enforcing authority might require corrective action when the operating parameter is exceeded. Nevertheless, **I cannot uphold a penalty in excess of \$400,000 for only exceeding the operating parameter when the regulations do not explicitly set it as a limit.** (emphases mine)*

Martin's decision clearly erred by failing to enforce a very specific EPA established and approved air pollution control permit condition.

Martin's decision is inconsistent with EPA regulations and enforcement policies and would require explicit provisions in all state regulations that explicitly set forth all permit conditions before any state permits could be enforced.

As you know, very few State regulations "explicitly set limits" required to implement and enforce individual permits and permit conditions. That is an impossible standard to meet, and it frustrates the implementation and enforcement of federally delegated clean air - and a all other program requirements.

I urge your immediate attention to this matter.

Sincerely,

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