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November 3, 2021

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Asher P. Spiller
Assistant Attorney General
Counsel for the Division of Air Quality

Via email: Aspiller@ncdoj.gov

Re: Optima TH, LLC, Petition for Declaratory Ruling

Dear Counsel:

The above-referenced Petition for Declaratory Ruling ("Petition"), filed on September 29, 2021, Optima TH, LLC ("Optima"), seeks relief as to two issues. Though its Petition, Optima asserts that the "interpretation and application of Rule 15A NCAC 2D .0516 by the North Carolina Department of Environmental Quality, Division of Air Quality ("DAQ"), relative to the supplemental fuel Optima proposes for use in a flare." Specifically, Optima requests the Commission to issue the following rulings:

- (a) 15A NCAC 2D.0516(a) does not prohibit the use of supplemental fuels, including natural gas purchased from a utility, to increase the heating value of flared waste biogas to enhance oxidation and to comply with 2D.0516.
- (b) Optima is allowed to use supplemental fuels, including natural gas purchased from a utility, to increase the heating value of the tail gas in its candlestick flare to enhance oxidation and achieve compliance with 2D.0516.

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(Optima Petition pp 2-3)

On October 18, 2021, counsel for DAQ submitted an initial response regarding the completeness of the Petition. The response outlined DAQ's dispute with various factual assertions contained in the Petition. Counsel for Optima was allowed to submit a reply to DAQ's letter, which was submitted on October 25, 2021. In its reply, Optima reiterated that the Petition is predicated on an asserted material conflict in DAQ's interpretation of the rule at issue.

Based on the information before me, I conclude that Optima's request is complete only as to the issue of whether a conflict exists in DAQ's interpretation and application of the rule at issue. The remaining issue, whether Optima's second request for relief – i.e. that the Commission conclude that Optima is allowed to use supplemental fuel to achieve compliance with Rule 2D. 0516 – is in essence a request to determine the applicability of the rule as to Optima. Petitions seeking to determine the applicability of a rule are required to include a given set of facts (i.e. facts that are not in dispute). N.C.G.S. § 150B-4. Optima did not include in its Petition a given set of facts and it is apparent from DAQ's initial response that material facts are in dispute. In addition, Optima's second request for relief is a matter of permitting, which is not appropriately resolved by the Commission. I conclude, therefore, that Optima's second requested relief is not properly before the Commission.¹

Pursuant to 15A NCAC 02I .0603, the Petition will be placed on the Commission's November 18, 2021 agenda for hearing, but only as to the first issue. In addition, I request that DAQ provide a written response as to its position on the Petition for the Commission's consideration. Optima and DAQ are requested to make oral presentations to the Commission, and will be allowed 15 minutes each for the presentations.

Additionally, based on the information before me, I am currently inclined to recommend that the Commission deny the requested relief because it does not appear that there is an inconsistency in DAQ's interpretation or application of the rule at issue, either among the regional office or with respect to the permitting of other facilities, as asserted by Optima. Moreover, it appears that this matter is in essence a permit dispute and, as noted above, the Commission is not the proper venue for resolving such disputes. The consequence of allowing such disputes to come before the Commission through the guise of petitions for declaratory ruling would risk devoting the Commission's time to matters that are properly resolved through other means; namely through the Administrative Procedure Act's well-defined allocation procedures for contesting permitting decisions in the Office of Administrative Hearing.

¹ While the issue raised in Optima's second requested relief is not properly before the Commission, it is not necessary for Optima to submit a revised Petition.

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I also note that I previously received and reviewed a variance request submitted by Optima on August 23, 2021. While the request was subsequently withdrawn, the variance request sought to exempt Optima's normal operations from the application of Rule 2D .0516, which is the same rule at issue in this Petition. Optima's August 23 request asserted that it should not be required to undertake the very same action it seeks to be allowed to do under the Petition for Declaratory ruling; that is, the burning of supplemental fuel for the sole purpose of complying with 2D .0516. In support of its request, Optima asserted that being required to burn supplemental fuel would not only present an unreasonable compliance cost without any "added benefit to the public or the environment," but that doing so would "actually increase[] SO2 and carbon dioxide ("CO2") emission rates," as compared to avoiding the rule's application and requirements. [Optima Variance Request p 2] It appears that there is a conflict between the position Optima took in its variance request and the position it now takes.

DECISION

Based on the foregoing, I conclude that the Petition for Declaratory Ruling is COMPLETE as to the first issue raised, and the matter will be heard by the Commission at its November 18, 2021 meeting. Should you have any questions or concerns, please contact the Commission's counsel, Mr. Phillip Reynolds.

Sincerely,



Dr. A. Stanley Meiburg, Chairman
Environmental Management Commission

cc: Phillip T. Reynolds, Commission Counsel, Special Deputy AG (electronically)
Michael Abraczinskas, Director, Division of Air Quality (electronically)
Lois Thomas-Spence, Recording Clerk, EMC (electronically)