**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION**

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| JAMES AND NANCY OLIVER dba SAFETY WASTE INCINERATION, INC.<br><br>Requester,<br><br>v.<br><br>ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF AIR QUALITY,<br><br>Respondent. | ) | OAH No. 25-0438-DEC |

**RECOMMENDED RULING ON REQUEST FOR ADJUDICATORY HEARING**

## I. Introduction

James and Nancy Oliver dba Safety Waste Incineration, Inc. operate a waste incineration business in Wasilla, Alaska. Seeking exemption from Title V air quality permitting requirements under the Clean Air Act, SWI proposed three owner-requested limits ("ORLs") on the operation of its waste incinerator. The Division of Air Quality denied all three ORLs on the basis that, even if all three proposed limits were in place, SWI would still be subject to Title V permitting requirements.

SWI now requests an adjudicatory hearing – through briefing, not an evidentiary hearing – to contest those denials on the basis that the Division has misapplied the language of the permitting regulations. The request for a hearing on this legal issue is granted.

## II. Background and Procedural History

### A. Title V Permitting and Owner-Requested Limits

The federal Clean Air Act requires implementing states to regulate major stationary sources of air pollution through a pollution control permitting process. In Alaska, the Division of Air Quality administers these permits, known as "Title V" permits.

Under the Clean Air Act and the Alaska laws that implement it here, smaller stationary sources of environmental pollution can seek exemptions from the requirement to obtain such permits as long as they do not exceed certain measurable thresholds for combustion or emissions activities. An owner/operator seeking such an exemption may request an Owner-requested limit

(ORL) – an enforceable limit on emissions.[1] An owner/operator requesting an ORL must submit, among other requirements,

- "a description of each proposed limit, including for each air pollutant a calculation of the effect the limit will have on the stationary source's potential to emit and the allowable emissions;"
- "a description of a verifiable method to attain and maintain each limit, including monitoring and recordkeeping requirements;" and
- "citation to each requirement that the person seeks to avoid, including an explanation of why the requirement would apply in the absence of the limit and how the limit allows the person to avoid the requirement."[2]

If approved, the ORL is used to determine the stationary source's allowable and potential emissions. These limits enable a stationary source to avoid the Title V permitting obligations to which it would otherwise be subject.[3]

B. Owner-Requested Limits proposed by SWI

The stationary source in this matter consists of SWI's two emissions units – a new (in 2023) waste incinerator and a 1983 steam boiler – for its waste incineration business.[4] In the five years prior to this permitting process, SWI combusted roughly even amounts of hospital/medical/infectious waste and municipal/commercial solid waste.[5] At issue now are three Owner-requested limits (ORLs) involving the proposed operation of its new incinerator.[6]

*1. ORL #1: HCl emissions*

ORL #1 seeks to avoid characterization of SWI as a "major source" of air pollution under Title V by keeping HCl emissions below a regulatory threshold of 10 tons per year.[7] A Title V permit is required if a stationary source exceeds more than 10 tons per year of hydrochloric acid emissions.[8] SWI's first ORL would limit hydrochloric acid (HCl) emissions from its incinerator

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1 18 AAC 50.225.

2 18 AAC 50.225(b)(4) - (6).

3 18 AAC 50.225(a).

4 ADEC 0024, 0033. The incinerator was purchased in 2023, and replaces SWI's former incinerator, but has not been put into service, pending resolution of these permitting process issues. *See* ADEC 0011.

5 *See* ADEC 0005. The parties offer differing versions of the events leading up to the proposed ORLs. While an incomplete record leaves some gaps in the factual history giving rise to this matter, these differences are not material to whether SWI is entitled to an adjudicatory hearing.

6 The record does not appear to include SWI's original ORL application, but it appears to have been submitted in 2023. The August 30, 2024 date attributed to it in ADEC 0001 may be in error. Supplementation of the application continued through late 2023 and 2024, culminating in December 2024. See ADEC 0005-12, 0024-30.

7 ADEC 0026.

8 18 AAC 50.326(a); 40 C.F.R. 71.3(a)(1) (requiring any "major source" to obtain and operate under a Title V permit); 40 C.F.R. 71.2 (defining "major source" as including "any stationary source … that emits or has the potential to emit, in aggregate, 10 tpy or more any hazardous air pollutant").

by "combusting no more than 145 tons of hospital waste and medical/infectious waste per calendar quarter."[9]

*2. ORL #2: Hospital and medical/infectious waste combustion*

ORL #2 was intended to allow classification of SWI's incinerator as a "co-fired combustor" exempt from Title V's performance standards for hospital/medical/infectious waste incinerators.[10]

Subpart Ec of the stationary sources permitting regulations governs devices that combust hospital waste or medical/infectious waste.[11] But a source can be exempted from Subpart Ec as a "co-fired combustor" if it combusts such waste with other fuels or waste, and does so in a fuel feed stream in which no more than ten percent of the weight is hospital/medical/infectious waste.[12] Accordingly, SWI proposed a second ORL to limit the incinerator "to combusting a fuel feed stream, 10 percent or less of the weight of which is comprised, in aggregate, of hospital waste and medical/infectious waste as measured on a calendar quarter basis."[13]

*3. ORL #3: Municipal solid waste combustion*

SWI's third proposed ORL was requested after the EPA issued a "technical correction" to the incinerator permitting process regulations – specifically, to Subpart EEEE of the New Source Performance Standards, 40 C.F.R. 60.2880 - 60.2977. Subpart EEEE sets "standards of performance for other solid waste incineration units" built or modified after 2004. The November 14, 2024 technical correction provides that incinerators subject to subpart EEEE (as would be the case under ORL #2) still required a Title V permit, unless otherwise exempt.[14]

Like ORL #2, ORL #3 also seeks to qualify the incinerator for exemption as a "co-fired combustor," but the subject of ORL #3 is the combustion of municipal solid waste.[15] One of the exemptions identified in the technical correction is an exemption for "a very small municipal

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[9] ADEC 0024. The Division's denial letter says the proposed limit is 93.5 tons per quarter, which is the amount listed in the May 2024 and July 2024 application materials. (ADEC 0002, 0006, 0008). But SWI's December 2024 ORL application supplement says 145 tons per quarter. ADEC 00024.

[10] ADEC 0026 .

[11] 40 C.F.R. 60.50c(l).

[12] 40 C.F.R. 60.51c (defining "co-fired combustor" as "a unit combusting hospital waste and/or medical/infectious waste with other fuels or wastes (e.g., coal, municipal solid waste) and subject to an enforceable requirement limiting the unit to combusting a fuel feed stream, 10 percent or less of the weight of which is comprised, in aggregate, of hospital waste and medical/infectious waste as measured on a calendar quarter basis").

[13] ADEC 0010, 0024.

[14] 40 C.F.R. 60.2966 ("Am I required to apply for and obtain a title V permit for my unit?").

[15] ADEC 0027, citing 40 C.F.R. 60.2887.

waste combustion unit,"[16] defined elsewhere as "any municipal waste combustion unit that has the capacity to combust less than 35 tons per day of municipal solid waste or refuse-derived fuel[.]"[17] Very small municipal waste combustion units are excluded if they have "a federally enforceable permit limiting the combustion of municipal solid waste to 30 percent of the total fuel input by weight."[18] Accordingly, SWI proposed limiting the incinerator "to combusting a fuel feed stream, 30 percent or less of the weight of which is comprised, in aggregate, of municipal solid waste as measured on a calendar quarter basis."[19]

C. Division Denial of ORLs

The Division denied the proposed ORLs on December 4, 2024 on the basis that approval of all three proposed ORLs would not exempt SWI from Title V permitting requirements. The Division reasoned that, given the limits proposed in ORLs 2 and 3 – no more than ten percent medical/hospital waste, and no more than 30 percent municipal solid waste – the majority of waste combusted by SWI would be "industrial process waste." If that waste was non-hazardous, SWI's stationary source would still be subject to Title V permitting regulations under 40 CFR 60.2010, Subpart CCCC, regulating commercial and industrial solid waste incineration units. If the wastes included hazardous waste, permitting requirements under 40 C.F.R. 63.1200, Subpart EEE, would apply.[20] Concluding that the incinerator would be subject to Title V permitting under either scenario, the Division denied SWI's ORL application.[21]

D. Informal review and request for hearing

SWI requested informal review two days after the December 4 decision. Division Director Jason Olds appears to have granted informal review and requested additional information from SWI.[22] After that information was received, on January 17, 2025, he issued a "final decision after granting informal review" as provided in 18 AAC 15.185(d), addressing the new information and affirming the decision to deny the three ORLs.[23] The Director's decision is not in the record filed by the Division, but its general contents do not appear to be in dispute.

16 40 C.F.R. 60.2887(b).
17 40 C.F.R. 60.2977.
18 40 C.F.R. 60.2887(b)(1).
19 ADEC 0024.
20 ADEC 0003.
21 ADEC 0004.
22 Response to Adj. Hearing Req., p. 5.
23 *See* Response to Adj. Hearing Req., p. 6.

On February 17, 2025, SWI submitted a request for adjudicatory hearing to challenge the denial. SWI's request for adjudicatory hearing was conditionally referred to the Office of Administrative Hearings on February 25, 2025 for a proposed determination of whether it meets the requirements of 18 AAC 15.200, and whether the requester has demonstrated that an evidentiary hearing should be held. Pursuant to the regulatory timeframes in that regulation and identified in the Department's public notice, the Division submitted an opposition to the request, and SWI timely submitted a response. Pursuant to the conditional referral and 18 AAC 15.220(b), this recommended decision follows.

## III. Discussion

### A. Applicable law

The present phase of the review process requires OAH to evaluate, and the Commissioner to determine whether the request complies with the strict regulatory requirements governing such requests. Specifically relevant to this matter, 18 AAC 15.200(c)(4) requires that a hearing request must include

> [A] clear and concise statement of the contested issues proposed for hearing, identifying for each contested issue (i) the disputed issues of material fact and law proposed for review; (ii) the relevance to the decision of those disputed issues of material fact and law identified under (i) of this subparagraph; (iii) a detailed explanation of how the decision was in error with respect to the contested issue; and (iv) the hearing time estimated to be necessary for the adjudication[.]

No other prerequisites for obtaining a hearing are disputed in the present case.

### B. Division arguments against granting an adjudicatory hearing

The Division argues that SWI's request:

- "Does not state any issue of material fact or law that it wishes to be adjudicated."
- "Fail[s] to explain how such material issues are relevant to the decision."
- "[F]ails to provide a detailed explanation, or any explanation, as to why the final decision at issue was in error."
- In stating that no evidentiary hearing is required, but rather, an opportunity to submit further information, the request "shows that SWI misunderstands the purpose of a request for adjudicatory hearing."

Each of these critiques will be addressed below.

*1. Identification of legal issues for adjudication*

The Division's first argument is that the hearing request fails to identify any legal issues SWI wishes to be adjudicated. But SWI's hearing request specifically identifies two material legal issues. It asks,

- Whether, "[i]f exempted from Subpart Ec, SWI would be subject to NSPS Subpart EEEE."
- Whether, "without any enforceable limits limiting the amount of hospital waste and medical/infectious waste being combusted in SWI's incinerator, it would be subject to NSPS Subpart Ec requirements, including but not limited to, Title V permitting required under 40 CFR 60.50c(l)."

This is sufficient to identify the issues in dispute here. At this preliminary stage, it is too soon to evaluate them on the merits.

*2. Relevance to the underlying decision*

As to the relevance or materiality of the issues identified by Requester, both issues come directly from the Division's denial letter – specifically, from its discussion of ORLs 2 and 3. Both issues implicate Subpart Ec, "Standards of Performance for New Stationary Sources: Hospital/Medical/Infectious Waste Incinerators," and in turn implicate Section 60.50c(c), the provision exempting co-fired combustors of hospital and medical/infectious waste.

SWI's first issue concerns the validity of the Division's conclusion that, "if exempted under Subpart Ec, SWI would be subject to NSPS Subpart EEEE."[24] SWI's challenge to this finding appears to be a challenge to the necessity of ORL #3 – i.e. an apparent suggestion by SWI that it is not required to obtain this ORL because it is not subject to Subpart EEEE (which regulates "Other Solid Waste Incineration" units).

Its second issue challenges the Division's conclusion that,

> "without any enforceable limits limiting the amount of hospital waste and medical/infectious waste being combusted in SWI's incinerator, it would be subject to NSPS Subpart Ec requirements, including but not limited to, Title V permitting required under 40 CFR 60.50c(l)."

SWI's challenge to this conclusion seems to challenge the necessity of ORL #2, which is again a suggestion that the Subpart Ec requirements do not apply to SWI's stationary source in the first instance. (As to the suggestion that its ORLs are mutually incompatible, SWI states in its hearing

[24] See ADEC 0002.

request and in its response that it has multiple divergent operating plans, which it says was done "to address the possible outcome of these determinations. There may be no need for ORL #2, no need for ORL #3, or no need for both."[25])

Returning to the threshold issue of whether Requester is entitled to an adjudicatory hearing, the question here is whether Requester has identified material factual or legal issues in dispute. Plainly, the applicability of Subparts Ec and EEEE to SWI's stationary source is material to the ORLs sought and denied here. SWI contends that it is not subject to these Subparts and/or, in the alternative, can remove itself from such coverage through the ORLs. The Division contends that the subparts apply and that the ORLs are insufficient to remove SWI from their coverage. Given that the challenged legal conclusions derive directly from the Division's denial of the ORLs, they are sufficiently relevant to satisfy the threshold of 18 AAC 15.200.

*3. Explanation of why the requester contends the decision was erroneous*

The Division's next argument against granting an adjudicatory hearing is that SWI "fails to provide a detailed explanation, or any explanation, as to why the final decision at issue was in error."

While it is self-evident that SWI has not provided an expansive explanation regarding the purported errors in the Division's analysis, at this early stage of the administrative proceedings the key question is whether SWI's hearing request adequately demonstrates the existence of disputed questions of fact or law. The requester does not have to show, yet, that it is correct about the law. In this regard, it is worth noting that the Department's hearing request form only requires "an explanation of how the decision was in error with respect to the contested issue," without specifying the amount of the detail the party seeking a hearing must provide.

SWI's hearing request satisfies the threshold since it provides enough explanation to discern the basis for its disagreement with the Division on the identified issues.

SWI's hearing request states that the Division's conclusion "is not supported by the language of" the relevant regulatory provision cited in the denial. While this clearly implicates questions of law, it does not suggest the existence of factual questions that would require an evidentiary hearing to resolve.

Thus, as to the Division's conclusion that, "if exempted from Subpart Ec, SWI would be subject to NSPS Subpart EEEE," SWI's hearing request asserts that, "this statement is not

[25] Hearing request supplemental page.

supported by the language of NSPS Subparts Ec and EEEE."[26] Likewise, as to the decision's conclusion that, "without any enforceable limits limiting the amount of hospital waste and medical/infectious waste being combusted in SWI's incinerator, it would be subject to NSPS Subpart Ec requirements," SWI's hearing request responds that "this statement is not supported by the language of NSPS Subpart Ec."[27]

While to ultimately *prevail* in an adjudicatory hearing SWI would need to provide a far more detailed explanation and analysis of its position, its statement on these two legal questions – that the Division's interpretation conflicts with the language of the applicable regulations – meets the basic threshold of identifying the nature of the errors the Requester alleges.

*4. Nature of the hearing requested*

The Division's final critique of the sufficiency of SWI's hearing request concerns the description of the adjudicatory proceeding being proposed. SWI's concededly vague description of its request states:

- We are requesting an evidentiary hearing to allow the offering of additional documents or other evidence not already in the existing agency record.
- We anticipate there will be additional documentation or other evidence not already in the existing agency record pertaining to Federal rule language interpretation.
- We anticipate only the need for subm[i]ttal of additional documentation with no need for an actual hearing.

The Division contends that this request is improper to the extent that it references submitting additional documentation beyond the existing record. The Division further contends that SWI misapprehends the nature of the adjudicatory hearing process, and is not entitled to an adjudicatory hearing.

Certainly, SWI could have better identified the nature of the "additional documentation or other evidence" at issue. But its middle paragraph – referencing documentation "pertaining to Federal rule language interpretation" – indicates that the documents SWI is referencing are legal documents specific to the regulatory language interpretation issues it has raised. When read this way, the hearing request is suggesting that the Division misapprehends the interplay of the various Title V provisions at issue, and that SWI seeks a proceeding narrowly focused on the

[26] Hearing request supplemental page.
[27] Hearing request supplemental page.

correct interpretation of those provisions. Either party would be able to attach to its brief legislative and regulatory history and interpretative authority in support of an argument on such a legal issue. SWI, which is unrepresented by an attorney, may not have understood that such materials are not factual evidence that goes into the agency record.

C. Proceedings to follow

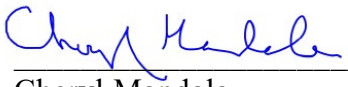
SWI's request for an adjudicatory hearing will be granted as to the legal questions raised in its request – whether the Division is correct about SWI's ineligibility for an exemption from Title V under the constraints proposed in the ORLs.

That question will be decided on the written record of SWI's application materials and correspondence with the Division and whatever other records may comprise the full agency record. Supplemental legal materials relevant to interpretation of the federal rule will be considered as part of the briefing process, but no further expansion of the factual record will be permitted apart from supplementation of an incomplete record, if appropriate, under the third-to-last sentence of 18 AAC 15.237(b).

## IV. Conclusion

SWI's request for a hearing on the two issues identified in its hearing request is granted. A "hearing on the briefs" will be conducted under 18 AAC 15.220(c)(1). Upon adoption of this recommended decision, the Division will supplement the agency decision record as provided in 18 AAC 15.237(c), and the ALJ will set briefing deadlines. If the Requesters' brief does not present a plausible legal position, the ALJ is not precluded from issuing a summary ruling without a responsive brief.

Dated: April 4, 2025



Cheryl Mandala
Administrative Law Judge

## Adoption

The undersigned, in accordance with 18 AAC 15.220(c)(1), GRANTS the request(s) for adjudicatory hearing and returns the matter to the Office of Administrative Hearings to schedule and hold appropriate proceedings.

DATED this 7.00 day of April, 2025.

By: DocuSigned by: 43FB79DD997A4BA...
Christina Carpenter
Acting Commissioner

**Non-Adoption Options**

The undersigned, in accordance with 18 AAC 15.220(c)(2), DENIES the request(s) for adjudicatory hearing as not satisfying the requirements of 18 AAC 15.200, as follows:

Under AS 44.64.060(b), judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this _____ day of April 2025.

By: _____
Christina Carpenter
Acting Commissioner

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The undersigned, in accordance with 18 AAC 15.220(c)(3), VACATES the underlying decision and remands this matter to the Division for further action, as follows:

DATED this _____ day of April 2025.

By: _____
Christina Carpenter
Acting Commissioner