

In the Matter of	:	
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Allco Renewable Energy Limited and	:	April 6, 2021
Windham Solar LLC, Petitioners	:	

Response to Petition for Declaratory Ruling filed by Allco Renewable Energy Limited and Windham Solar LLC

Allco Renewable Energy Limited and Windham Solar LLC, collectively referred to as the Petitioners, filed a petition for a declaratory ruling (the “Petition”) dated February 5, 2021, regarding Air Permit 089-1-0107 (the “Permit”) that the Department of Energy and Environmental Protection (“DEEP” or “Department”) issued to NTE Connecticut LLC (the “Permittee”). The Petition includes five “questions” for my consideration. These questions, in all cases presented as statements, are:

1. DEEP has erred by not re-reviewing Permit No. 089-0107 as required by Conn. Gen. Stat. § 22a-174-3a(f);
2. NTE Connecticut LLC (“NTE”) has breached Part VIII, Paragraph G of Permit No. 089-0107;
3. Permit Applications for Stationary Sources of Air Pollution New Source Review, Application Nos. 201605089, 201605092, 201605093, 201605094, 201605095, and 201605097 failed to comply with Regs. Conn. State Agencies § 22a-174-3a(l)(2);
4. DEEP erred when it issued Permit No. 089-0107; and
5. DEEP should revoke Permit No. 089-0107 in accordance with Conn. Gen. Stat. § 22a-174-3a(f).

The Petition was filed on February 5, 2021, and included a certification that it was served on the Permittee.¹

¹ The Petition also indicates it was provided by the Petitioners to: members of the Connecticut General Assembly’s (CGA) Energy and Technology, Environment, and Public Health Committees, members of the CGA that were Signatories to the Letter to Governor Lamont of 9/25/2019, Martha Klein of Sierra Club Connecticut, and Lori Brown, Executive Director of CT League of Conservation Voters. The Department published the Petition on its website.

Applicable Procedural Status

Connecticut General Statutes (“Conn. Gen. Stat.”) § 4-176(a) permits the filing of a petition “for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency.” Within sixty days of a petition’s filing, Conn. Gen. Stat. § 4-176(e) requires issuance of a response to the petition. In that response, a recipient of a petition must: (1) issue a ruling declaring the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances, (2) order the matter set for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) decide not to issue a declaratory ruling and initiate regulation-making proceedings, under section 4-168, on the subject, or (5) decide not to issue a declaratory ruling, stating the reasons for its action. This response is intended to meet the obligation of Conn. Gen. Stat. § 4-176(e).

Background

The Permittee filed an application for a New Source Review permit on April 20, 2016. A notice of application was published in the Norwich Bulletin on April 11, 2016. After its technical review was complete, the Department published a notice of tentative determination (“NTD”) to approve the permit and also provided notice of a public informational hearing. This public informational hearing notice was published in the Norwich Bulletin on March 13, 2017. The public informational hearing was held on April 19, 2017. The final permit was issued on June 30, 2017, after all comments received, both after the publication of the NTD and as part of the informational hearing, were reviewed and addressed. After permit issuance, the permit was modified on two occasions. The Department issued a minor modification for a change in the turbine vendor on March 16, 2018, and issued a second minor modification on December 10, 2018.

Analysis

The Petitioners have presented five statements for consideration that essentially seek to mandate the revocation of the Permit. As explained in this response to each of the statements, no declaratory ruling shall be issued in response to the Petition. In general, the statements seek additional review of a concluded permit application review process in which the Petitioners failed to participate. Further, the ultimate result that the Petition seeks cannot be achieved by the issuance of a declaratory ruling. A more expansive explanation is provided in the response to each statement.

Petition Statement 1 – DEEP has erred by not re-reviewing Permit No. 089-0107 as required by Conn. Gen. Stat. § 22a-174-3a(f).

Response:

In response to this statement, no ruling will be issued because a review of the permit did occur and satisfied requirements in Regs. Conn. State Agencies § 22a-174-3a(f)(2)(A). At the time it was conducted, the review was limited in scope to the Best Available Control Technology (BACT) analysis. The Permittee submitted a timely BACT re-analysis for consideration on June 5, 2020. Department staff reviewed the re-analysis and issued its approval of the BACT analysis on November 24, 2020, and did not

require any further modification of the permit as a result of that analysis and its review. As the assumption in the Petition that no review was conducted is incorrect, no ruling will be issued in response to this statement.

Petition Statement 2 – NTE Connecticut LLC (“NTE”) has breached Part VIII, Paragraph G of Permit No. 089-0107.

This statement involves a condition of the permit that requires:

“Within 15 days of the date the Permittee becomes aware of a change in any information submitted to the commissioner under this permit, or that any such information was inaccurate or misleading or that any relevant information was omitted, the Permittee shall submit the correct or omitted information to the commissioner.”

As support for the statement’s claim, the Petitioners offered information regarding the unfortunate impacts that greenhouse gases have had cumulatively on the environment. This permit condition, however, applies to information required to be submitted by other conditions within the Permit. It does not mandate that the Permittee submit some larger category of generally available information related to any source of greenhouse gases. When reviewed in the context of the entire permit, it is clear that there are certain pieces of information that the Permittee is required to submit. Some are to be maintained by the Permittee and submitted upon request and some are required to be submitted directly to the Department. For example, a Permittee is required to submit stack test results, a standby plan for the combustion turbine generator, and the BACT re-analysis referenced above. This permit condition is intended to focus on the construction and operation of the particular facility and the air emissions sources that were permitted. It presents an obligation to correct any information submitted under a permit requirement. There was no requirement to submit the information noted in the Petition.

In addition, the declaratory ruling statute does not provide the commissioner with the authority to unilaterally determine a Permittee is out of compliance with a permit condition. That authority is subject to certain due process rights enjoyed by the Permittee. Therefore, no ruling will be issued in response to this statement.

Petition Statement 3 – Permit Applications for Stationary Sources of Air Pollution New Source Review Application Nos. 201605089, 201605092, 201605093, 201605094, 201605095, and 201605097 failed to comply with Regs. Conn. State Agencies § 22a-174-3a(l)(2).

No declaratory ruling will be issued in response to this statement. The application and its technical review were conducted in accordance with all applicable requirements and in a similar manner to any other application for a New Source Review Permit. The Bureau of Air Management reviewed material submitted by the applicant related to alternatives.

The time to examine the technical merits of the application and the decision of the department to issue a permit based on its review of that application and the additional information provided by the applicant to DEEP at its request has passed. The Petition takes issue with what might have been addressed in the permit proceeding – and attempts to raise these issues in a wholly different proceeding. This attempt

ignores, and has the effect of rendering irrelevant, the public participation process outlined in the applicable statutes and regulations.

Since the administrative permitting process is available to any person with concerns about the proposed activity under permitting review, there was an adequate forum in which the Petitioners should have raised their concern about whether the Permittee satisfied the requirements of Regs. Conn. State Agencies § 22a-147-3a(2)(l). DEEP's review standards include public comment as an integral means to ensure that there are meaningful opportunities for public involvement by any person that may be impacted by the application for permitting an activity that is a major source. The Petitioners did not avail themselves of the opportunity for participation from the time the application was filed and through the public informational hearing process.

The Petitioners will not be provided an additional opportunity to challenge an administrative permitting process through the declaratory ruling process absent appropriate questions concerning the applicability of a statute, regulation, or final decision of the Department to the application, its review, and the Permit as issued.² A permit decision carries with it some level of finality from a factual and technical perspective and once such a decision is reached and the permit is issued, the Permittee is vested with certain rights as the Permit holder.

Petition Statement 4 – DEEP erred when it issued Permit No. 089-0107.

For the same reasons stated in response to Petition Statement 3, the commissioner will not issue a declaratory ruling on this statement and reiterates that the permit was issued in accordance with the applicable statutes and regulations.

The Petitioners' concerns about additional greenhouse gas emissions do not mandate that the commissioner issue a declaratory ruling on this petition. To do so would provide additional process on the technical merits of the application outside the process provided within the applicable permitting statutes enacted by the legislature and duly adopted regulations.

² The language regarding the scope of a declaratory ruling within Conn. Gen. Stat. § 4-176 is identical to language governing the scope of the court's declaratory judgment authority under Conn. Gen. Stat. § 4-175. Although the courts may not have clearly discussed any topical limitations on declaratory rulings, there is a long-standing history of case law regarding the court's authority to answer certain inquiries with a declaratory judgment. What is most clear is that declaratory judgment jurisdiction is not open-ended and is not intended to serve as an end around other administrative processes. "General Statutes § 4-175 does not authorize the plaintiff to bring an action. The plaintiff's requested relief demonstrated her lack of standing. She did not ask the court to decide whether a regulation is valid or whether a regulation, statute or decision applied to the facts of this case. Rather, she asked that the court overrule the determination by the department's subsurface sewage experts that the Friedlaenders' septic system may be installed provided they meet five modifications set out in the recommended approval. We conclude, therefore, that the court properly determined that such relief was not available under § 4-175." Pinchbeck v. Dep't of Pub. Health, 65 Conn. App. 201, 206-07, cert. denied, 258 Conn. 928 (2001).

Petition Statement 5 – DEEP should revoke Permit No. 089-0107 in accordance with Conn. Gen. Stat. § 22a-174-3a(f).

Response:

Based on the review conducted in accordance with Regs. Conn. State Agencies § 22a-174-3a(f) as explained above, no additional action authorized by Regs., Conn. State Agencies § 22a-174-3a(f)(2) on the permit was taken. Such authorized actions lie solely within the commissioner’s discretion. The assertions in the petition do not present cause to conduct further review at this time or somehow justify that the Commissioner act in a manner that would infringe unilaterally on the rights of the Permittee in violation of law. Even if the commissioner decided to use the discretion to revoke a permit, the requested action cannot be accommodated as the direct result of a declaratory ruling process. Conn. Gen. Stat. § 22a-174c provides, “[t]he Commissioner of Energy and Environmental Protection may, upon a showing of cause, modify, revoke or suspend any permit issued under this chapter in accordance with the provisions of chapter 54.” Chapter 54 is the Uniform Administrative Procedure Act (“UAPA”) to which state agency administrative actions are subject. The UAPA provides that:

“[n]o revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action and the specific provisions of the general statutes or of regulations adopted by the agency that authorize such intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.”

Conn. Gen. Stat. § 4-182(c).

The authority under Regs. Conn. State Agencies § 22a-174-3a(f) to take action on a permit after its review would be subject to these generally applicable requirements for due process and any proceedings would be subject to the Department’s Rules of Practice in accordance with Regs. Conn. State Agencies § 22a-3a-5(d)³. The declaratory ruling statute authorizes the commissioner to issue a ruling declaring “the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances.” Conn. Gen. Stat. § 4-176(e). This authority does not permit the commissioner to disregard the other administrative requirements associated with taking the requested action on an issued permit. The commissioner will not issue a declaratory ruling on this statement and will only revoke or modify an issued permit in

³ “Unless otherwise provided by law, any Department proceeding to revoke, suspend or modify a license shall commence with issuance of notice to the licensee. Such notice shall be delivered personally or by certified mail, return receipt requested, and shall describe the basis for the revocation, suspension or modification and inform the licensee that he may within thirty days of issuance of the notice file a request for hearing. A request for hearing under this subdivision shall conform with the provisions of subsection 22a-3a-6 (i) of these Rules of Practice. Department delicensing proceedings shall be governed by section 22a-3a-6 of these Rules of Practice. Regs. Conn. State Agencies, § 22a-3a-5(d)(1).

accordance with applicable statutes and regulations that provide the necessary due process for doing so.

Conclusion

For the reasons discussed above and in accordance with Conn. Gen. Stat, § 4-176(e)(5), the commissioner has decided not to issue a declaratory ruling in response to the Petition.



Katherine S. Dykes, Commissioner

April 6, 2021

Date