

March 19, 2013

Scott E. Walters, Chief
Permits Section
Division of Municipal and Residual Waste
Bureau of Waste Management
P. O. Box 69170
Harrisburg, PA 17106-9170

Re: **General Permit Application No. WMGM047**
Delta Thermo Energy, A, LLC

Dear Mr. Walters:

The Pennsylvania Waste Industries Association ("PWIA") appreciates this opportunity to provide comment on General Permit Application No. WMGM047, submitted by Delta Thermo Energy, A, LLC, located at One Northbrook Drive, 1210 Northbrook Corporate Center, Suite 100, Trevoise, PA 19053 for its proposed Allentown Energy Production Facility, to be located at 112 West Union Street, Allentown, PA 18102.

At the most fundamental level, this application seeks to improperly characterize a complex waste incineration facility as a simple beneficial use project in an effort to avoid the permitting requirements set forth in 25 Pa. Code Chapter 283. Many, if not all, of the omissions, inaccuracies, and other problems contained in the application flow directly from the applicant's convolutions in attempting this transmutation.

PWIA strongly recommends that this application be denied for the following reasons:

1. Application Incomplete and Inaccurate
2. Sham "Processing" Permit Application for an Incineration Unit
3. Significant Environmental Impact Precludes Approval as a General Permit

This application for a general permit purports to be for a facility that will "process" predominantly municipal solid waste, along with smaller amounts of sewage sludge, to produce a fuel for electricity generation. Despite the fact that the application is essentially devoid of any technical information, it is clear that the contemplated facility is nothing more than a waste incinerator, and that the "processed" waste fails to qualify as fuel under Federal law.

PWIA is the Pennsylvania chapter of the National Solid Wastes Management Association, a non-profit organization that represents the interests of the North American waste service industry. PWIA members include both privately-held and publically-traded companies that own and operate numerous commercial solid waste facilities throughout the Commonwealth. In addition to solid waste landfills, our members operate resource recovery facilities, recycling facilities, transfer stations and collection operations. PWIA's primary missions are to advance the safe, efficient and environmentally responsible management of solid waste, and to promote sound public policy in rulemaking that affects the management of solid waste.

PWIA members are intimately involved in a wide array of Department permit programs and have developed considerable experience in working cooperatively with the Department's regional offices and staff. Long ago, our members adopted and incorporated the procedures for applicants recently suggested by the Department when issuing its Policy for Implementing the Department of Environmental Protection Permit Review Process and Permit Decision Guarantee. Our members routinely request pre-application meetings with the Department, engage local governments and affected parties early in the project planning process, and take great effort to ensure that submitted applications are complete, technically-adequate and meet all applicable statutory and regulatory requirements.

PWIA's members take the Department's application process seriously, and it is frustrating when we see applicants that do not share our members' diligence. Our members frequently submit applications to the Department for projects that have significantly lower environmental profiles and much higher environmental benefits than the project contemplated in this application, and our members' collective experiences drive our conclusion that a general permit is not appropriate for this type of project, and further that this specific project should not be approved for any type of permit by the Department.

1. Application Incomplete and Inaccurate

The public has a strong interest in reviewing applications submitted to the Department, and withholding portions of applications from the public is only allowed in those rare instances where the applicant can affirmatively demonstrate that it has maintained the information as confidential, that the information's release would adversely impact its competitive position, and that the information is not necessary to allow informed review by the public.

The version of the application available to the public includes no meaningful technical information or description of the proposed operations. This is surprising, given that Delta Thermo:

1. Was specifically warned by legal counsel for the Department that its previous application improperly claimed non-confidential information as confidential (See November 16, 2012 pre-application meeting minutes);

2. Has not maintained this information as confidential because Delta Thermo has released this information during public meeting(s); and
3. Much of the Delta Thermo specific information is available on the internet.

At the most fundamental level, the application fails to identify any of the equipment or processes that will be used to process or incinerate the waste. The application fails to identify a single piece of process or combustion equipment, as well as any monitoring equipment (other than radiation monitoring equipment). It is not simply that the technical details and specifications have been omitted or redacted, but literally no equipment is identified whatsoever. Similarly, the application does not contain any facility layouts, diagrams, or other meaningful information; and the application includes no description or quantification or qualification of wastewater generation, ash generation or air emissions, nor does it include any discussion of any potential steps or equipment that may be used to handle or minimize their generation, emission or impact. This is particularly troubling given the potential impact this facility could have on the environment, the experimental nature of the technology, and the implications to the taxpayer for the applicant's bond guarantees.

Although it is possible that some of the information believed to be missing was withheld from the public as confidential information, pursuant to the Department's regulations, most of the missing items discussed herein must be disclosed and cannot be withheld from the public as part of the application process.

We further note that the applicant's confidentiality request appears fundamentally flawed. In the applicant's cover letter, the applicant invokes 25 Pa. Code 127.12(d), which pertains solely to Plan Approval Applications submitted under authority of the Air Pollution Control Act. This is not an application for a Plan Approval. In regards to the applicant's remaining claim for confidentiality (under 25 Pa. Code 271.5(b)), we note that the applicant fails to include the information necessary to justify that claim of confidentiality as set forth in Section E of the General Permit Application Form 20.

Because the Department has a mandatory obligation under 25 Pa. Code 271.5(f)(2) to disclose all information necessary during the comment period for the general permit to obtain informed public comment on the general permit, and because this application includes no meaningful technical information pertaining to its processing operations, its incineration operations, its emissions and other purposeful environmental releases, as well as other pertinent information, it is our assessment that, under the Department's regulations, this application cannot be approved.

Additionally, we note that the version of the application provided to the public does not include information that must be included in the application and cannot be maintained as confidential. As an example of this ubiquitous issue, please review the applicant's responses to Section B. General Information Regarding "Related Parties" of the Form HW-C portion of the application. For example, the applicant is required to answer 9 questions pertaining to, among other things,

detailed information regarding its major shareholders, related parties, adjoining landowners, as well as any party or person exercising control over any aspect of the facility, including associates, agents, contractors, subcontractors, and property owners. The applicant fails to answer seven of the nine Section B questions, and the remaining two questions appear to have been answered inaccurately (Question 6.a. asks for information regarding other entities the applicant controls, and the applicant simply lists itself as an answer; Question 6.b. requires an explanation of the relationship to the company listed in 6.a., and the applicant incorrectly references a “partnership” with the City of Allentown).

Our member companies, which include large publicly traded companies and/or companies with decades of experience (and public scrutiny) owning and operating solid waste operations, must and do comply with the requirements of Form HW-C. Our members often submit binders of information, often hundreds of pages of information, to fulfill this requirement in their applications. The only information provided by the applicant is its address and tax ID, a one page certificate of formation, and an inaccurate response indicating that the City of Allentown is in a “partnership” with the applicant. It is incongruous that large business with decades of experience operating municipal solid waste facilities, many of which file public disclosures through the federal Securities Exchange Commission, must continue to spend hundreds of hours and tens of thousands of dollars to update these submissions, in comparison to this applicant, which has not supplied any of the most basic required information such as ownership information, has no experience building or operating a commercial solid waste facility, and is relying on governmental funding and/or guarantees to finance its project. Failure to submit virtually any of the required information deprives the Department and the public the ability to meaningfully evaluate the application, which is particularly troublesome given the fact that the applicant is a limited liability company with no meaningful operational history.

As another example of incomplete or inaccurate information, Question 12.0 on the General Information Form indicates that air emissions are reported in Attachment 13. No emission data is reported in that (or any) attachment. Please note that air emission data is not subject to protection from disclosure under any Commonwealth law or regulation, and although the applicant (incorrectly) sought to invoke the protections of 25 Pa. Code 127.12(d), that regulation explicitly forbids claims of confidentiality for emission data¹ (as does 25 Pa. Code 271.5(b)(2)). The “staged” permitting of the facility, first as a research and development facility under the air program, then application for a general permit under the waste program, with at least one more future application for the same project, could be construed as an attempt to circumvent certain air

¹ We also note omissions and potentially misleading information in the application regarding the air permitting status of the facility. The facility’s RFD was approved under a special “research and development” exemption which explicitly forbids it to sell electricity. The RFD was appealed by the applicant and remains in litigation over two full years later. Based on official court filings, Delta Thermo agreed in or before April 2012 to submit a Plan Approval Application for its facility, but no application is on file with the Department. We find Delta Thermo’s representations memorialized in the November 16, 2012 pre-application meeting notes to be particularly disturbing, “...currently have a RFD permit, yet are waiting on a full commercial permit from the DEP. They will be able to function with the RFD...” The applicant is not “waiting” on a permit from the Department, as no application has been submitted.

permitting requirements, including but not limited to those triggered by under the federal Resource Conservation and Recovery Act (discussed more fully herein)².

As two final examples of inaccuracies in the application, we reference the previous discussion regarding the failed confidentiality claims by the applicant, as well as an error in the Form E-GP, Contractual Consent of Landowner for a General Permit. Form E-GP lists "Delta Thermo Energy, Inc." as the applicant, whereas the rest of the application lists Delta Thermo Energy A, LLC as the applicant. Delta Thermo Energy, Inc. appears to be either the applicant's parent company or the operator of the Atlantic City pilot project obliquely referenced in the pre-application meeting minutes. Normally, a minor error such as this could be easily puzzled out by referring to the table of related parties in the Form HW-C, but as previously noted, none of the required Section B information was included in that form.

The number of errors and omissions in the application deprives the public of the opportunity to perform an informed review of the application (see 271.5(f)(5), which places the Department's right to perform an informed review of the application above the applicant's interest in preventing disclosure of confidential information). In addition, the applicant has failed to meet its mandatory regulatory obligation to "affirmatively demonstrate" that the application is "accurate and complete". This application must be rejected under 25 Pa Code 271.824, which states:

§ 271.824. Approval or denial of an application.

The Department will not issue a general permit for a category of beneficial use or processing of municipal waste unless the applicant has affirmatively demonstrated the following:

- (1) The application for the general permit is accurate and complete and the requirements of § § 271.811, 271.812, 271.821—271.826, 271.831, 271.832, 271.841—271.843, 271.851 and 271.852 have been complied with.

Before considering even the limited substance included in the application, the Department should reject it on procedural grounds as it fails, in numerous aspects, to meet the minimum standards established in the regulations for general permit applications.

² Question 5.0 of the General Information Form also indicates that the project does not "involve placement of a structure "located in, along, across or projecting into a watercourse, floodway or body of water (including wetlands)." Although news reports regarding the proposed facility indicate that it will be constructed alongside the Little Lehigh River, the poor quality (due to photocopying) of the Site Location Map included in the application prevented our evaluation of this issue.

2. Sham Processing Permit for an Incineration Unit

When (non-hazardous) solid wastes, such as wastewater treatment sludge and municipal waste, are processed for use as a fuel, they become classified as non-hazardous secondary materials subject to the federal non-hazardous secondary material (NHSM) regulations, issued under the federal Resource Conservation and Recovery Act (RCRA). The NHSM regulations identify which non-hazardous secondary materials are solid wastes when burned in combustion units, as well as which are deemed as not being solid wastes when combusted.

Regardless of the classification, significant Clean Air Act requirements are triggered. For those combustion units that burn those non-hazardous secondary materials that are not classified as solid waste, section 112 Clean Air Act requirements apply. For combustion units that burn those non-hazardous secondary materials that are classified as solid waste, the section 129 Clean Air Act requirements apply.

All non-hazardous secondary materials used as fuels are presumed to be solid wastes, unless listed by US EPA as categorical non-solid wastes in 40 CFR 241.4(a), or meeting the criteria set forth in either 40 CFR 241.3(b)(1) or (2). Neither municipal solid waste nor wastewater treatment sludge are listed as one of the four categorical non-solid wastes set forth in 40 CFR 241.4(a); the applicant does not qualify under this provision. The 40 CFR 241.3(b)(1) exclusion applies only to entities that both generate and combust the waste; the applicant does not qualify under this provision. The exclusion set forth in 40 CFR 241.3(b)(2) requires meeting the multi-pronged legitimacy criteria set forth in 40 CFR 241.3(d)(1). The application does not include a demonstration that the legitimacy criteria have been (or ever can be) satisfied, particularly the comparison of fuels required under 40 CFR 241.3(d)(1)(iii). PWIA notes that US EPA will, on an applicant's request, provide a project-specific written analysis applying the legitimacy criteria.

The applicant's proposed project includes acceptance of waste deliveries equal to its ability to incinerate the waste. Clearly, the applicant does not intend to enter into the fuel marketing business and does not see the fuel as having resale value. Although not determinative, this is yet another sign that the purpose of the project is waste disposal/destruction, and that the applicant will never be able to meet the requirements of US EPA's legitimacy criteria.

It is our understanding that on Tuesday, September 11, 2012, that the applicant's President, Mr. Robert Van Naarden, was personally and directly alerted by at least one PWIA member to the applicability of the federal NHSM solid waste regulations to this project, as well as the potential applicability of the federal air regulations through operation of RCRA. We are disappointed that the application fails to address this important environmental protection program.

The applicant's proposed "Energy Production Facility" will incinerate solid waste, as defined under applicable federal law. As a result, this facility will be subject to a variety of regulations,

not addressed or referenced in this application³; regulations that include specifically mandated and complex control technologies to reduce emissions of hazardous air pollutants. Approval of this general permit application would allow circumvention of the appropriate permitting procedures required for facilities that have major environmental impacts (see 25 Pa. Code 271.811(g)(2)), the directly applicable requirements of Chapter 283 in Title 25 of the Pa. Code, and would result in approval of a facility that is possibly non-compliant with RCRA and the Clean Air Act.

3. Significant Environmental Impact Precludes Approval as a General Permit

PWIA's members have had the opportunity to utilize general permits in the past, and we recognize the efficiencies that they offer for both the Department and the applicant. Although PWIA supports greater utilization of general permits, we recognize that there are, and rightfully so, limits to the Department's authority to issue general permits relating to solid waste. Based on our review of this application, a general permit is not appropriate for this project.

As the Radiation Protection Action and Monitoring Plan submitted as part of the application notes, the project will use a "particular type of technology [that] has not yet been deployed in the United States". Unfortunately, the public version of the application does not include any description, whatsoever, of the technology. Nonetheless, experimental first-in-the-country use of technology is precisely the type of project that should never be approved under a general permit.

Even ignoring the experimental and secretive nature of the project, this is clearly a large project. The facility intends to incinerate 167 tons of municipal solid waste and wastewater treatment sludge per day, which includes the entire output of the City of Allentown's wastewater treatment plant. It has been well over a decade since a new waste incinerator has been built in the Commonwealth, and these types of facilities have a significant potential to affect the environment, as well as having significant implications for municipal waste management plans. Managing these types of projects requires significant technical expertise and management acumen. Unfortunately, as recent experiences with the Harrisburg Incinerator have shown, when these projects struggle, the effects on local communities and taxpayers can be devastating.

None of the waste incinerators currently operating in the Commonwealth were permitted using a general permit or as a beneficial use project; Chapter 283 of Title 25 of the Pa. Code applies to waste incinerators. This project is exactly the type of general permit application that the Department must reject under 25 Pa Code 271.811(g)(2), which states:

- (g) The Department will not issue a general permit under this subchapter for the following:

³ Without additional information omitted from the application, additionally applicable regulations likely include 40 CFR Part 60, Subparts AAAA, Subpart CCCC, Subpart EEEE and/or 40 CFR Part 63, Subpart EEE.

...

(2) A facility or activity which should be covered under the individual permitting process required in this article because of its size and potential to affect the environment adversely or because of its relationship to municipal waste management plans.

In addition, because the application will be utilizing the waste directly in its operations, the Department may have an independent obligation to reject the application under 271.811(g)(5), which states:

(g) The Department will not issue a general permit under this subchapter for the following:

...

(5) The use of a waste for construction or operations at a resource recovery facility or disposal facility.

It is our understanding that prior to making a decision to approve or disapprove the general permit application, that the Department could decide to hold a public meeting or public hearing per 25 Pa. Code 127.823(c). PWIA believes that until a complete and accurate copy of the application is submitted to the Department (and made available to the public sufficiently in advance of the meeting to allow for informed participation), that any such public meeting or public hearing would be ineffectual.

While PWIA and its members support the Department's general permit program, this specific general permit application should not be approved. PWIA appreciates the Department's willingness to consider our concerns.

Very truly yours,



Mark Pederson
President