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11 June 2008

Greer Tidwell, Jr
Vice-Chair
State Air Pollution Control Board

via hand delivery

RE: Metropolitan Nashville 'Certificate of Exemption'

Requested Actions--Require the parties and TDEC to meet to discuss allegations

--Require TDEC , following meetings above, to report to the Board on each allegation

--Suspend Metro's 'Certificate of Exemption', place Metro air permitting, regulating, and Board operations under State supervision with appropriate sanctions

Dear Chair Tidwell:

We appreciate this opportunity to address allegations concerning the Metropolitan Nashville Board of Health which acts as the Air Board for Nashville and operates under a "Certificate of Exemption" issued by the State.

The State Air Board can only hear and consider these allegations at the time of renewal of the Certificate of Exemption. "The certificate of exemption shall be granted if the board determines that the municipality or county has enacted provisions for the control of air pollution not less stringent than the provisions of this part and that such enactments are being, or will be, adequately enforced;" TCA 68-201-115(b)(3)

We ask for a detailed assessment of EACH allegation rather than a broad sweep approval by the Department before the Board makes its decision. .

The Certificate of Exemption is in error because it requires Metro to enforce regulations as stringent as the State regulations. T.C.A. 68-211-115(b)(3) requires Metro to enforce the

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regulations it has, **NOT** to enforce the regulations as stringent as the State Standing is not an issue. The only issue is if Metro has enforced the regulations it has.

Metropolitan Nashville and Davidson County Government

- violated Conflict of Interest laws as defined by the Federal Clean Air Act
- a major permittee burned down in a fire following years of non-compliance
- has not enforced provisions regulating mobile sources
- violated requirements for Public Hearings and appeals
- inappropriate legal representation of the Board led to direct violations of due process

These violations have had direct impacts on citizens and air quality in Nashville.

Past and pending court decisions were based on different criteria including standing which are not relevant to the sole question for the State Air Pollution Control Board: has Metropolitan Nashville enforced its air quality regulations.

I. Violation of Conflict of Interest as defined by the Federal Clean Air Act

A. *Federal Clean Air Act, Section 7429*—(enclosed) “No permit for a solid waste incineration unit may be issued under this chapter by an agency, instrumentality, or person that is also responsible in whole or part for the design and construction or operation of the unit.”

The Metropolitan Board of Health issued permits and regulated the downtown incinerator. The downtown Nashville Thermal Transfer Plant had

- a majority of Board named by Metro
- all annual debt was paid by Metro
- the Metro Public Works Director was an automatic board member
- all final decisions on expansion and construction and design were made by Metro

Decisions were made in the course of enforcement procedures to lessen penalties and to not prosecute NTTC because, Metro would in effect pay the fines to itself.

II. Nashville Thermal Allowed To Operate Under Very Dangerous Operations [due

to conflict of interest?]

A. According to a 'Compliance History for Nashville Transfer Corporation', "NTTC was unable to complete required annual compliance tests for Particulate Matter, Hydrogen Chloride, and Dioxin/Furan due to **inability to keep two or more of the of the Municipal Waste Combustors operating long enough for the tests to be performed.**" **[emphasis added]**

B. Nashville Thermal Plant burned down in a calamitous \$200 million fire due to defective storage of trash and unpermitted construction of storage facilities

Very few public power plants burn down. The Metropolitan government controlled the Thermal corporation board, owned the property, and absorbed all the annual debt.

III. Expert Opinion, Karl B. Schnelle, Jr. PhD, PE (enclosed)

A. The expert opinion of Karl B. Schnelle, Jr. PhD, PE (included) is very explicit

1. "I believe that this indicates there is no one properly trained and available to care for the plant instrumentation." (1st paragraph)

2. "[T]here is evidence of very poor maintenance of the plant over a period of several years."

3. "Whereas this problem may stem from the Thermal Transfer Corporation lack of funds to maintain the plant...[i]t is right and proper, therefore, for the Health department of the same government organization to call governing bodies to task to protect the health of its citizens."

Dr. Schnelle makes clear the unity between Metropolitan government, the Health Department, and NTTC budget and maintenance decisions.

III. Calamitous Fire at NTTC Caused by Poor Enforcement and Subsequent Cover Up

--Fire Marshall Report (pg. 4, 31 January 2006 Allegations)

--The permitting agency--the Metropolitan Air Pollution Control District and Health Board did not investigate this fire

--Please see the enclosed Front cover and except from the DRAFT Metro Regional Board Solid Waste Plan which refers to "closure" of Thermal without reference to the fire.

IV. Violated requirements for Public Hearings and allowed Illegal Appeals

A. Illegal Appeal

1. All public hearings require “public notice” (*Metro Code 10.56.110(B)(1)*)
2. The director reopened NTTC permit under *Regulation 13-5(f)(ii) &(iii)*. This decision specifically required under *Regulation 13-5(f)(2)* that a reopened permit be treated like an initial permit issuance.
 - a. NTTC appealed this decision—the only action was public comment on the NTTC Compliance Plan (Pg. 8, #7 “Allegations...”)
3. Issuance of two (2) Notices of Violations with approximately 150 separate violations was appealed with no public hearing, public notice, or written resolution. (Pg. 7, V-A-1--Allegations...”)
4. Metropolitan Government and the Air Pollution Control Board amended Metro Code 2.36.140 governing Citizen Appeals of decisions of the Director with no hearing or public notice
 - a. Metro Code 2.36.140 is integral to citizen participation in the ‘Metropolitan Department of Law–Legal Opinion’ describing relationship of federal, state, and Metro laws
 - b. The Board of Health has no expertise in determining ‘standing’ and made a key error in this in a 2005 appeal of the director’s decision.

B. The Board did Not Follow Metro Codes Involving Civil Penalties ((pg. 13–15, “Allegations...”)

1. Civil penalties against NTTC were waived in violation of the law (pg. 14, C, D)
2. Reduction in civil penalties against NTTC did not follow UAPA as required by *Metro Code 10.56.090(C)(4)*. (P. 14, #4)
3. Failure to have required public hearings demonstrated by absence of required Public Notice

V. Board Excluded All Factors Except The ‘Minor Source’ in an Appeal

- A. Appeals process defined by *Metro Code 10.56.040(A)*

1. *Metro Code 10.56.040(A)*, upheld by *Laidlaw Env. V. Metro Bd. Of Health* (934 S.W. 2d 40, 51 Tenn App 1996) determined that in an appeal the Board must consider two things

- a. does the applicant violate national ambient air standards?
- b. does the applicant violate the Chapter 10.56?

2. Metro Health Board determined that only national ambient air standards were relevant even though heavy diesel fumes from trucks needed to service the expanded applicant were unhealthy for the residential neighborhood

B. *Metro Code 10.56.100*

1. Stipulates what the Board must consider in an air pollution decision yet the Board would only consider air pollution from this minor source

2. The Board stripped citizens of the right of appeal and to be heard

VI. Mobile Sources

A. The Board decided *Metro Code Chapter 10.56* did not regulate mobile sources

a. *Metro Code 10.56.050(B)* does regulate mobile sources as testified to by Health Department expert Spencer Hissam

b. Definitions of “sources” under Metro Code Chapter 10.56 does not exclude mobile sources

B. The Board approved a ‘Mosquito Control Policy’ which allows trucks to spray pedestrians with pesticides despite danger, pending claims, and pesticide manufacturer statements to avoid this.

VII. Illegal Legal Representation of Board [pg. 20–21, ‘Amended Request...’ 28 July 2008]

A. A single attorney has represented the Board and the Director in contested case appeals of the director’s decision to the Board

B. Conflict of Interest involving NTTC drove legal negotiations

1. “Exhibit J”—27 February 2002 letter from Metro Attorney to NTTC

a. "I believe I said something to the effect that I saw no reason to argue about how much the Metropolitan Government was going to fine itself, the issue isn't the money but the shut down of the polluting boilers." (Ex. J, pg. 2, par. 3)

b. "(2) the appeal is in hiatu while we negotiate, and you only saw a need for ALJ Randy Lefevor to sign off on an agreed order, ratifying our settlement" *Id*

c. "If Thermal in good faith submits a compliance plan..., *we will get this easily and happily at minimal legal costs to the Metropolitan government (who ultimately pays Thermal's legal bills.*" (*Emphasis added*) Ex. J, pg. 2-3, par. 6)

C. "Exhibit T" demonstrates a single attorney represented the Board and the Director during the NTTC inside resolution

D. North American Galvanizing

1. A single attorney represented the board and director during 2 years of hearings and pre-trial briefs on North American Galvanizing

C. Policy

1. Metro Department of Law, not the Board, determined policy in North American Galvanizing (Exhibit Y)

a. Court reporter transcript of 14 September 2004 meeting of Health board demonstrates the Health board Chair, an attorney, "...never heard of this compnay until last week" despite being on the Board for two years.

VIII. Metro Code 2.36.140–Appeals policy

A. The Board changed procedures for determining standing for an appeal of a decision of the Director with no notice or public hearing.

B. The Board used the "changed" Appeals Policy to not allow an appeal of the Director's decision based on an inaccurate and wrong misinterpretation of the appeal.

C. Metro Code 2.36.140 is integral to "PUBLIC PARTICIPATION" described in "Legal Opinion–Metro Department of Law" which establishes Metro compliance with State and Federal laws.

QUESTIONS

Federal Clean Air Act, Section 7429—(enclosed) “No permit for a solid waste incineration unit may be issued under this chapter by an agency, instrumentality, or person that is also responsible in whole or part for the design and construction or operation of the unit.”

—did the NTTC burn down while regulated by Metro?

--Was a majority of the NTTC Board named by Metro and approved by the Metro council?

--Was all annual debt paid by Metro?

--Was the Metro Public Works Director an automatic NTTC board member?

--Were all final decisions on expansion and construction and design made by Metro?

---Did the Metro Board of Health and Metropolitan government allow the Nashville Thermal Plant to operate under very dangerous and exceptional circumstances

---Was NTTC unable to complete required annual compliance tests for Particulate Matter, Hydrogen Chloride, and Dioxin/Furan due to **inability to keep two or more of the of the Municipal Waste Combustors operating long enough for the tests to be performed?** [emphasis added]

---Did the expert opinion of Karl B. Schnelle, Jr. PhD, PE (included) explicitly criticize operations permitted by the Health Board?

A. “I believe that this indicates there is no one properly trained and available to care for the plant instrumentation.” (1st paragraph)

B. “[T]here is evidence of very poor maintenance of the plant over a period of several years.”

C. “Whereas this problem may stem from the Thermal Transfer Corporation lack of funds to maintain the plant...[i]t is right and proper, therefore, for the Health department of the same government organization to call governing bodies to task to protect the health of its citizens.”

---Did the Metropolitan government control the Nashville Thermal Transfer Corporation board, own the property, absorbed all the annual debt, and make all decisions about design and construction?

II. Thermal Fire

--Fire Marshall Report (pg. 4, 31 January 2006 Allegations)

--Does the DRAFT Metro Regional Board Solid Waste Plan characterize that NTTC "closed" rather than "burned down"?

III. Violated requirements for Public Hearings and allowed Illegal Appeals

A. Illegal Appeal

1. Was the NTTC appeal of reopening a permit under *Regulation 13-5(f)(ii) &(iii)*. Illegal? Was the only action allowed a public comment on the NTTC Compliance Plan? (Pg. 8, #7 "Allegations...")

2. Was two (2) Notices of Violations with approximately 150 separate violations appealed with no public hearing, public notice, or written resolution? (Pg. 7, V-A-1-- Allegations...")

3. Is there any record of any public notice as required for a Public Hearing?

B. The Board did Not Follow Metro Codes Involving Civil Penalties ((pg. 13–15, "Allegations...")

1. Were civil penalties against NTTC were waived without observing time limits? (pg. 14, C, D)

2. Did reduction in civil penalties against NTTC did follow UAPA as required by *Metro Code 10.56.090(C)(4)*. (P. 14, #4)

IV. North American Galvanizing–Violation of Chapter 10.56

A. Metro Code 10.56.100

1. Stipulates what the Board must consider in an air pollution decision yet the Board stripped it down to only air pollution

B. *Metro Code 10.56.040(A)*

1. States, as approved by *Laidlaw v. Metro Board of Health* that an appeal heard by the Board encompasses two things

- a. does the applicant violate national ambient air standards?
- b. does the applicant violate the Chapter 10.56?

2. Metro Health Board determined only national ambient air standards were relevant

3. This stripped citizens of right of appeal and to be heard

C. Mobile Sources

1. The Board decided Metro Code Chapter 10.,56 did not regulate mobile sources

- a. Metro Code 10.56.050(B) clearly regulates mobile sources
- b. Definitions –sources,

V. Illegal Representation of Board

A. NTTC

- 1. Single attorney represent Director and Board?
- 2. Did Metro legal negotiate inappropriately with NTTC?

B. North American Galvanizing

- 1. Single attorney represent board and director

C. Policy

VI. Metro Code 2.36.140–Appeals policy

A. Did the Board change definition of standing listed under Federal and State with no notice or public hearing?

From a burned down public power plant to abuse of lawyer-client relationships, the

Metro Health Board and Metropolitan Government have not demonstrated compliance with their own air statutes. We ask the Board to overrule the recommendation of the Technical Secretary. We ask for a detailed assessment of EACH allegation rather than a broad sweep approval by the Department before the Board makes its decision. .

Thank you

Bruce Wood
President

ATTACHMENTS

--*Federal Clean Air Act, Section 7429*

–Expert Opinion of Karl B. Schnelle, Jr. PhD, PE

–Metro Code 10.56.100–“Board–Consideration of Facts and Circumstances”

–Metro Code 10.56.050(B)–mobile sources