<u>Public comments and DNREC responses to other issues</u>

Comments proposing to raise the SO2 Delaware Reportable Quantity (DRQ)

Change the DRQ for Sulfur dioxide to mirror the Federal Reportable Quantity.

DNREC proposed changing the DRQ for sulfur dioxide from 100 pound to 500 pounds in 2003. The public response against this proposal was so strong that it was not included in the regulatory amendments. One of the main reasons is that if Delaware increases the reportable limit, the releases below 500 pounds will continue to occur. These releases require flaring, so they are visible to the public. The public looks to our electronic reporting to know what is going on. If the DRQ is changed, the refinery will still need to immediately inform DNREC in compliance with permit conditions, but the public will need to call DNREC to find out what is going on. This reduces service to the public.

Comments on Underground Storage Tank Management

Consider the creation of a Tank Fund to facilitate assessment and remediation of potential leaking underground storage tank (USTs).

The Delaware Regulations Governing Underground Storage Tank (UST) Systems require tank owners and operators to comply with financial responsibility regulations. In essence these regulations require that owners and operators of USTs show documentation proving they can finance the cost of remediation should there be a release from a UST. Several financial mechanisms are available to comply with these requirements the most utilized being commercial pollution liability insurance and self-insurance. The financial responsibility requirements have been in effect since the late 1990's.

In 1994 a committee of DNREC and stakeholders looked at the issue and found that (a) insurance was available and affordable (b) there is not a need for a state fund (c) there would be a problem creating a funding mechanism to establish a state fund program; and (d) a fund may eliminate the incentive for tank owners and operators to comply with release detection requirements. In the 19 years since the report of the Financial Responsibility Ad Hoc Committee, the compliance rate of UST owners and operators with the financial responsibility requirements has been favorable and as such DNREC does not support the creation of a fund.

The Small Business Assistance Fund should be funded per its requirements to allow this existing fund to be utilized.

The Small Retail Gasoline Station Assistance Program (SRGSAP) was established to provide a loan assistance program, the purpose of which is to provide loans to small retail gasoline station

owners and operators to carry out the following activities necessary to comply with State and federal environmental laws:

(1) Installation of air quality protection devices; and /or
(2) Replacement of existing underground storage tank systems; and/or
(3) Removal and abandonment of underground storage tank systems; and/or
(4) Installation of water quality protection devices.

The SRGSAP was funded by the DelDOT Transportation Trust Fund to provide loans for small retail gasoline stations to install required air quality protection devices (vapor recovery). The regulatory deadline for installation of these devices on existing stations is long past, therefore funding for these activities is no longer necessary and many of the activities are eligible under other financial assistance programs.

Consider an amnesty program for unregistered tanks to facilitate proper abandonment of old USTs that are presenting an unknown threat to the environment.

The DNREC provides state funding assistance through the FIRST Fund program for UST sites where there is no identifiable tank owner or the current owner is qualified as unable to finance the required tank removal and/or remediation. In instances where the tank owner can be identified and is financially sound, the burden remains with this responsible entity to comply with the UST statute and regulations. An amnesty program designed to eradicate the liability of these entities would not be fair to the thousands of tank owners and operators who have complied with the tank regulations over the past 28 years without state funding. It would also be unfair to the taxpayers who would foot the bill to pay for activities that are the responsibility of the tank owner or operator. The DNREC is planning to establish a UST home heating fuel financial assistance program in 2014 to provide homeowners up to $5,000 to remove underground storage tanks on their properties, resulting in fewer releases to the environment from older home heating fuel tanks that are typically bare steel and therefore subject to corrosion.

Evaluate removal of requirement that the DNREC LUST-managed projects utilize the DNREC laboratory.

DNREC is working to coordinate all aspects of laboratory work across the different laboratories in the State and is considering which functions to continue performing and which ones are better served in another manner. The DNREC requirement to use our Water Resources Laboratory for state lead LUST projects is a policy decision that DNREC can re-evaluate as part of re-issuing state lead contracts in 2014.

Consider adding requirement for all reports relating to environmental investigations monitoring or remedial activities to be signed by a Professional Geologist or Professional Engineer (PE). This provision will aid in minimizing DNREC time and expense in reviewing reports.

The Delaware Regulations Governing Underground Storage Tank Systems, Part E, Sections 4.2.3 and 5.2.7., already require that a PG or a PE is required to sign hydro investigation reports and remedial action work plans.

Comments on Site Investigation and Restoration

Develop a payment system that facilitates use of the program by small businesses. Currently, the Brownfield grant program is a reimbursement program. Many small business owners cannot afford the tens of thousands of dollars in cash flow to participate in the program, discouraging the redevelopment of smaller sight that may be a blight to a neighborhood. Direct payment to contractors or a dual signature check system, currently utilized by NJDEP's LUST Fund program, would facilitate activity for the small business owner.

The Site Investigation and Restoration Section (SIRS) is open to this opportunity of direct payment. However, this action would require a change in statute.

Electronic payment could be requested [in New Jersey's Program] to minimize check cost to the State while controlling payment to contractors.

Electronic payment is already an option for payment and is the State's preferred method of payment. However, due to restraints on the vendor's side, the State may need to write paper checks. The SIRS will continue to support the use of electronic payment.

Evaluate a procedure to allow HSCA-certified contractors to conduct remedial actions without on-site oversight. The final site data could then be evaluated by DNREC to ensure the state criteria is achieved for the respective land use. This would expedite environmental activities, reduce report preparation costs, minimize burden on DNREC personnel, and ultimately achieve the program's objectives. This approach also follows the model in New Jersey, Connecticut, and other states to some degree.

The Site Investigation and Restoration Section (SIRS) has been working for the past few years with interested parties to expedite our remedial process through methods such as value stream mapping. SIRS has decreased the time it takes to complete our remedial process from 20 months to 13 months. This time reduction was completed by creating a steam-lined process that allows consultants to follow draft templates, standard operating procedures and participating in active meeting with the Department when creating working documents. This process has increased efficiencies throughout SIRS and has reduced costs by limited the number of draft documents that are completed by consultants. The proposal, even though it would not mandate a legislative charge, would require a regulatory change. However, the public notification requirements are statutory and take up a substantial period of time (one month) of the 13 month remedial process. The SIRS does not see a substantial cost or time efficiency in this proposal and actually believes that this task may produce the opposite effect. By disengaging the SIRS until the

remedial action report is completed limits public input by taking the Remedial Action work plan out of public access (currently they are posted on our web page and available to the public either via the internet or FOIA request). If the public has significant concerns about the investigation and the Department concurs, or if the Department has its own concerns, the Department would require the consultant to remobilize in the field in order to address them. The SIRS believes by our past and current efforts in streamlining the remedial process we have already achieved the objectives of this proposal.

Comment regarding Above Ground Storage Tanks

Comments regarding the potential for the brittle fracture ASTs and increasing the required amount of secondary containment due to acts of terrorism

The General Assembly passed *The Jeffrey Davis Aboveground Storage Tank Act*, 7 Del. C. Chapter 74A, in 2002 in response to an aboveground storage tank incident at Motiva, which resulted in destruction of several tanks and loss of human life. **Chapter 74A, §7401A. Purpose**, outlined the criteria that the Department (DNREC) should consider when adopting regulations pursuant to Chapter 74A. Neither protection from acts of terrorism nor facility security was listed as criteria to consider.

Chapter 74A, §7403A. Referenced standards, lists industry standards that the Department shall study and consider when developing regulations required by this chapter. None of the listed standards has design criteria for acts of terrorism.

The Department formed the Aboveground Storage Tank Technical Advisory Committee (ASTTAC) as a work group to draft the AST Regulations. It was composed of members of the Department, tank owners and operators, and environmental groups.. The ASTTAC considered this issue and reviewed industry standards, but did not include a standard.

Comments Regarding Air Regulations

Comments regarding the adding of a requirement to require the offsetting of the entire contemporaneous period emission increases under 7 DE Admin Code 1125, Requirements for Preconstruction Review.

DNREC does not support making these changes because they would impose an increased burden on smaller sources and well controlled sources. This is because this change would increase the quantity of emission offsets needed in permitting action's, and smaller and well controlled sources do not have the ability to generate their own offsets, and must therefore purchase offsets from other sources.

Comments to revise 7 DE Admin. Code 1125 to remove the "dual-source" definition, and add the ability of a source to use the "actual to future actual" emission increase test for calculating post-

construction emissions for NSR purposes. DNREC does not agree these changes should be made as they are inconsistent with good air quality management policy.

A. Dual Source Definition

On August 7, 1980, EPA published a rule which defined a stationary source, for NSR purposes, as a "building, structure, facility or installation." The rule split this definition of source into two levels, 1) the entire plant, and 2) a smaller portion of the plant; hence the term "dual source definition." This was executed in the regulatory language by defining, separate from the terms "building, structure, facility," the term "installation" as "an identifiable piece of process, combustion or incineration equipment."

On October 14, 1981 EPA amended the 1980 rule to allow states to either maintain the dual source definition of a stationary source, or to revise their programs to use only the plant-wide definition. EPA required states intending to relax their programs by using only the plant-wide definition demonstrate continued protection of the environment.

DNREC agrees with the commenter that other states have modified their New Source Review regulatory definitions to accommodate the opportunity to "net out" of NSR in nonattainment areas. However, we do not agree with the commenter that this suggested revision "will allow for greater regulatory flexibility for affected sources without sacrificing environmental concerns." DNREC hereby confirms that the dual source definition is still as relevant and effective today as it was when it was first adopted in 1980. In fact, DNREC has revised and considered revising its NSR regulations in the past, including the holding of a comprehensive stakeholder group NSR review in 2005, and has not deleted the dual source definition from its regulations because doing so is bad air quality management policy.

The dual source definition only impacts the largest equipment at the largest sources in the State. It applies only to existing major sources, and only when such sources are installing/modifying their large emission units. The dual source definition does not impact:

- Any new source, regardless of size.
- Any existing source that is not an existing major stationary source for either volatile organic compounds (VOC) or nitrogen oxides (NOx).
- Any existing major stationary source that could not otherwise net out.
- Pollutants other than ozone, and ozone precursors. Note that DNREC did not apply the dual source definition to PM2.5 and its precursors when developing the PM2.5 NSR revisions in 2011 in response to comments from the Chamber of Commerce.

For the units the dual source definition does impact, it only impacts the control technology required to be installed on the new/modified source – it requires the best controls that have been demonstrated in the U.S. on another similar source. And since our air quality is unhealthy to breathe for the pollutants covered, it makes much sense for the largest emission units at the largest emission sources in the state to be well controlled. In contrast, to allow the largest sources to not install the best controls at the time they are constructing/modifying is not good air quality policy. Further, the dual source definition applies only while Delaware's air quality does not meet the health based air quality standards for ozone; once the standard is attained the current regulations already provide that the dual source definition will no longer apply once we reach attainment for ozone.

This change is not the modernizing or streamlining of regulations that have become outdated or unnecessarily burdensome. Rather, it is a request to remove a necessary requirement that continues to work as originally intended, and that represents environmentally sound policy. This change should not be incorporated.

B. Actual to Potential Emission Increase Test

The actual-to-potential emission increase test is part of Delaware's New Source Review (NSR) regulations; 7 DE Admin. Code 1125, Requirements for Preconstruction Review. NSR applies only to the largest sources in Delaware, and only when the largest sources are being constructed or modified. The goals of NSR are to ensure these large sources do not create air quality nonattainment/ maintenance problems, do not significantly deteriorate air quality, and that the emission controls on these largest sources are periodically reviewed and updated based on current technology.

Delaware NSR regulations have employed the actual-to-potential emission increase test since their adoption in 1980. The actual-to-future-actual emission increase test was an optional test adopted by the EPA in 2001 as part of their New Source Review (NSR) reforms. DNREC considered and rejected the EPA reforms when they were adopted in 2001, and later discussed and rejected them again during a comprehensive stakeholder process in 2005. The NSR reforms were rejected because they are a significant weakening of an environmentally necessary and sound program, and because they would unnecessarily add significant complexity to the process. The NSR reforms, to include the actual-to-future actual emission test, deal solely with NSR applicability and do nothing but exempt from review major projects that would otherwise trigger consideration under NSR."

This comment deals with the calculus used to determine if the physical change or change in method of operation at an existing major stationary source is or is not subject to review

(i.e., to determine if a modification is or is not a major modification). The current regulation uses the "actual-to-potential" test, and the comment recommends use of the "actual-to-projected-actual" test. In both cases the actual emissions are calculated the same; the difference is how post-modification emissions are calculated.

- Under the actual—to-potential test, post-modification emissions are determined based on the allowable emissions from the source. The presumption is that that the future actual emissions of the new unit cannot be presumed to be the same as the past actual emissions, so the post-change emissions are simply set at the sources allowable emission level (i.e., the source can emit up to its allowable emissions after it is modified).

- Under the actual-to-future actual test, post-modification emissions are determined based on the source owner's projection of what the sources future emissions will be for a five or ten year period into the future, considering relevant information, such as historical operational data, expected business activity, filings with the State or Federal regulatory authorities, etc. The source can exclude from its projection 'demand' growth from projected-actual emissions, if such growth represents emissions that could have been accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth. If the emissions increase using this test is greater than 50% of the significant emissions threshold for a given pollutant, monitoring and recordkeeping of emissions to demonstrate that the project did not result in a significant emissions increase is required; if less than 50% there is no required monitoring and recordkeeping. This is very complex, and there is much opportunity to make mistakes, or even "game the system."

Compared to the recommended actual-to-future actual test, the current actual-to-potential test is a very streamlined, transparent, repeatable, and understandable approach that is less prone to error. The current test establishes a "bright line" applicability test. DNREC agrees that the current test is more conservative, and will therefore trigger NSR applicability more often than the test the commenter is recommending. However, because NSR deals solely with the largest emission units at the largest sources, and is the primary means to ensure emission controls employed on these sources is reviewed periodically, and such review is least burdensome on industry when it is done at the time the sources are being construed/modified, the periodic triggering of NSR requirement's is desired, and represents good air quality management policy.

In addition, the current regulation provides that if the source believes the actual-to-potential test is overly conservative (i.e., is based on only a "paper increase"), then the source can limit its future emissions through permit restrictions; which is a streamlined, transparent, and understandable process. Then, if the source later decides it needs relief

from these restrictions it can do so by subjecting itself to NSR review at that time, with the caveat that at that time the review would be conducted "as if the source had not constructed."

This change is not the modernizing or streamlining of regulations that have become outdated or unnecessarily burdensome. Rather, it adds signification complexity and uncertainty to the process, and substantially removes the transparency and ability to enforce the process. The current requirements continue to work as originally intended, and represent environmentally sound policy. This change should not be incorporated.

Comment to eliminate all "paper" notifications and utilize electronic notifications. This would impact regulatory language in 7 DE Admin. Codes 1102, 1125, and 1130. 7 DE Code, Chapter 60 precludes from making this change (*§ 6004(b) … upon receipt of an application in proper form, the Secretary shall advertise in a newspaper of general circulation in the county in which the activity is proposed and in a daily newspaper of general circulation throughout the State…).*

Comment on Final 7 DE Admin Code 1102 and 1130 permits be added to the environmental navigator. This is not a recommend change to regulatory language, however, the posting of permits is one of the items Division of Air Quality is now looking at in the development of its strategic plan.

Comment recommends the Department review and update the administrative principles set forth in Delaware Air Regulation 1101. Following is the requested DAQ review of Section 3.0 of 1101.

3.1 In certain regulations, air quality standards will be established. These standards shall not be interpreted to allow significant deterioration of existing air quality in any portion of the State; otherwise; they shall be paramount in matters pertaining to the control of air pollution throughout the State. *DAQ review: 3.1 provides principles on the interpretation and application of air quality standards in Delaware's air regulations – that they are to be paramount in air pollution control matters, and that they shall not be interpreted to allow the air quality to deteriorate. The principles in 3.1 are current and appropriate.*

3.2 In addition to or supplemental to these air quality standards, certain emission requirements will be specified. Such emission requirements are selected as minimum controls necessary to ensure a reasonable quality of air throughout the State. Where it is established that these emission requirements are inadequate to attain or maintain the applicable air quality standard, the Department shall exercise its authority to require additional control measures. *DAQ review: 3.2 provides principles on the interpretation of emission control requirements in Delaware's air regulations – that they are minimum*

controls, and if they are inadequate additional control measures will be required. The principles in 3.2 are current and appropriate.

3.3 The Department intends to have regulations adopted governing the control of air pollution as rapidly as practicable. The lack of Regulation governing an air contaminant or combination of air contaminants will not prevent the Department from taking any and all actions necessary to maintain a reasonable quality of air throughout the State. *DAQ review: 3.3 provides principles that the lack of a specific Regulation governing an air contaminant(s) does not prevent the Department from taking actions necessary to maintain clean air. The principles in 3.3 are current and appropriate.*

3.5 The Department may enter into agreement or agreements on a regional basis for the purpose of attaining air quality goals. Such interstate agreements shall facilitate the attainment and maintenance of air quality standards. *DAQ review: 3.5 correctly provides that air pollution does not start and stop at state boarders, and that regional cooperation is needed. The principles in 3.5 are current and appropriate.*

Comment to amend Section 1.4.3 of 7 DE Admin Code 1120 regarding agency observation of performance testing. Also requests flexibility around rescheduling required tests as needed to align with maintaining the facility's scheduled and planned operations.

DNREC does not agree that 7 DE Admin. Code 1120 should be amended by adding "*Upon the 30-day notice, the Department may or may not be present to observe the test*" to the end of 1.4.3. DNREC does not agree because this would not clarify the language, as the commenter indicted, but would rather substantially change the intent of the provision. In essence this comment is playing semantics with the language in 1.4.3, *"…afford the Secretary the opportunity to have an observer present…"* 1.4.3 states:

> *1.4.3 Performance tests shall be conducted on representative performance of the applicable source. The Secretary may specify additional operating conditions to be tested. The person responsible for the applicable source shall make available to the Department a record of those operating parameters, which the Secretary determines appropriate to establish representative performance of the source. Operations during period of startup, shutdown, and malfunction shall not constitute representative conditions of performance tests unless otherwise specified in the applicable standard. The person responsible for an applicable source shall provide the Secretary 30 days prior notice of the performance test to afford the Secretary the opportunity to have an observer present.*

The existing regulatory language requires that the person responsible for the applicable source, *"…shall provide the Secretary 30 days prior notice of the performance test to afford the*

Secretary the opportunity to have an observer present." DNREC staff is limited, and in order to be afforded the opportunity to observe a test, the test must be scheduled with DNREC staff to ensure that DNREC staff is actually afforded the opportunity to be present. Accordingly, the existing provision is not simply a 30-day notice, but a 30-day notice of a date and time that affords the opportunity to have an observer present.

DNREC has a longstanding policy to observe all stack testing that will be used for compliance demonstrations, emissions inventories, permit applications, etc. DNREC staff observing source testing is a value added service to both the facilities and the citizens of the State. DNREC staff is well trained and familiar with the various testing methods and procedures, as well as the testing contractors, and their presence during testing directly improves the certainty and quality of the testing results. For example, DNREC staff has discovered and prevented errors and deviations in applying test protocols, and deficient testing equipment that if not corrected would have changed testing results by orders of magnitude. DAQ observation of testing has directly prevented permitting errors and events that would otherwise have led to enforcement actions due to reliance on faulty test data.

Note that the existing regulatory language does not mandate that DNREC staff observe the testing; it requires only that DNREC staff be afforded the opportunity to have an observer present. DNREC does not support revising 1.4.3 to clarify the existing language and longstanding policy by adding language such as, "*Unobserved testing will not be considered valid by the Department*." While this would add clarity it would also reduce flexibility if unforeseen events preclude the DAQ from observing one or more test runs (e.g., flat tires, etc.).

The commenter has stated that it is understood the Department will not accept any testing that is not observed, the existing regulatory language supports this, and the Department is currently implementing accordingly. Amending Section 1.4.3 such that it is a simple notification of testing is not consistent with the intent or the longstanding interpretation of this provision. This is necessary requirement, and DNREC recommends that no change be made as a result of this comment. DNREC does commit to continue to accommodate facility's stack test schedules, and to provide flexibility around rescheduling required tests as needed and requested by the facility.

Comments on Water Regulations

A stormwater permit should not include requirements for sampling in instances where stormwater is not being discharged through an outfall pipe.

If a site actually has "no discharge" or if the site is completely bermed and all precipitation was managed through infiltration or evaporation, then no permit would be required.

In regards to the number of samples, we find two (2) a year for benchmark sampling to be minimal. However, if a site is clean and sampling shows four (4) consecutive samples all below the benchmark limits then you can apply for a waiver and be exempted from sampling .

There should be a statewide type approval for de-watering projects rather than individual permits

A normal (non-emergency) dewatering permit requires some amount of investigation and planning for the proper design of a dewatering system. The knowledge they gain helps them choose between well points, deep wells or sumps as their method of dewatering, helps them choose the correct pump size and decide whether sheet piling is needed. Lack of information can be very costly to contractors (collapse of excavations) or neighboring property owners (dry wells, or intrusion of saltwater or poor quality water into their wells). In these circumstances, the WSS would not be protecting the public if we issued blanket authorizations to any contractor. If there is a sewage leak that requires dewatering during pipeline repair, we issue emergency dewatering permits under the same conditions as emergency well permits. We have also added language to the new regulations to make this practice legal.

Consider streamlining well permitting and underground injection control approvals to eliminate redundancy in association with site remediation.

The Underground Injection Control program needs to continue to review remediation injection wells to assure compliance with our delegation of the program from EPA. In addition, the remediation programs rely on the UIC review of the proposal to ensure proper construction of the injections wells. After discussions with the remediation programs, the well permitting program needs to continue to review the construction and drilling methods used for wells placed on remediation sites. The other programs rely on the well permitting programs expertise in this area and do not review the construction and drilling specifications for their remediation sites.