# NRG 11/8/06 COMMENTS & DNREC RESPONSE

## Re: Draft 4 (061906) Revised Regulation 1125

1/19/07

1) Chamber of Commerce Comments
NRG is a member of the Delaware Chamber of Commerce and has endorsed the Chamber's comments submitted to the Department on August 8, 2006. To facilitate committee review, most of these comments will not be restated in this comment letter; however the Chamber's comments are to be considered as supplemental comments to this document. NRG adopts the Chamber's comments by reference with one exception. We request Delaware continue to resolve all rulemaking issues and promulgate one final rule, rather than implement interim measures as suggested by the Chamber.

***DNREC Response – All of the chamber of commerce comments are responded to in a separate document, including DNRECs thoughts on interim measures.***

2) Intent of the Rule
New Source Review is intended to assure existing emission sources, currently not subject to NSPS, would be required to meet the same standards of a new plant if the source undergoes a major modification or replaced. This is clearly stated in the Preamble of proposed Regulation 1125. Further, the intent of EPA's reform was designed to simplify a very complicated determination on what is routine maintenance, replacement in kind, or a significant modification and eliminate misunderstandings and potential litigation over interpretation of the law that is unclear.

The FEL as proposed does not support this overarching intent; rather is designed to act as a surrogate emissions reduction program. During the stakeholder process, it was made clear by the Department that revision of Regulation 1125 should not only address EPA reform targets, but act to support Delaware's National Ambient Air Quality Standards planning and act to lower emission where possible. With this intent, the FEL concept can not meet the equivalency determination and far exceeds the intent of this rulemaking purpose. NSR programs are not intended to reduce emissions; there are many other programs on the federal and state level that are designed to do this. Therefore our FEL must allow sources to operate without restriction until significant modifications are made, and then be consistent in treatment with the intent of EPA's NSR regulations.

***DNREC Response –We agree that further revisions to draft 4 of our FEL regulation are needed to improve clarity, and to make the regulatory language match the intent.***

***We do not agree that "New Source Review is intended to assure existing emission sources, currently not subject to NSPS, would be required to meet the same standards of a new plant if the source undergoes a major modification or replaced." NSR applicability is separate from NSPS applicability and a source may be subject to NSR regardless of whether an NSPS applies.***

***We agree that the original "intent of EPA's reform was designed to simplify a very complicated determination on what is routine maintenance, replacement in kind, or a significant modification and eliminate misunderstandings and potential litigation over interpretation of the law that is unclear." However, we believe EPA failed at this, and made an already complex procedure more complex instead of simpler. A goal of the FEL is to***

***achieve a simple, predictable, and flexible approach that provides for the same level of environmental protection as the current Reg. 1125 requirements.***

***Although the concept of emissions control in the event of widespread non-attainment problems through lowering FEL's was mentioned in Committee discussions, this concept was quickly abandoned as it strayed from the perceived intent of the FEL. We agree there are we can achieve emissions control beyond current levels through the regulatory development process. The example of Regulation 1146 clearly shows separate rule makings are the way to achieve needed emissions reductions.***

***Draft 4 does not advocate or provide language to allow wholesale emissions control. One may interpret Section 4.4.1.8 to do this, but that was not the intent, and to avoid problems DNREC will replace this provision with clearer and more detailed language (see response to Valero comments).***

***We also agree the FEL should allow sources to operate without undue restriction within the confines of the FEL and chose to add controls when they believe it is the right time to do so for operating or other reasons and only be required to add controls when expansion beyond the FEL makes such action necessary, or when new source controls are required under major or minor NSR provisions. We believe the language in Draft 4 provides this but will discuss any of these issues further. Our intent is to explore and resolve all issues so Delaware can have a well-designed, well-balanced NSR regulation that will fill the needs of industry (including utilities), regulators and the general public.***

3) Regulation 1146 Impact

Proposed Regulation 1125, Section 2.0 provides a definition for a well controlled source. As discussed in committee, the regulation needs to address the association with proposed Regulation 1146 and the classification for the affected generation sources. An additional category should be included in this section.

NRG supports the concept that any source in compliance with Regulation 1146 will be deemed a "Well Controlled Source" however because compliance of this regulation as proposed is not feasible, the Department must consider alternative adaptation of this regulation.

***DNREC Response – We agree that NRG actions to be in compliance with Regulation 1146 will insure the NRG facilities will have a preponderance of well-controlled emissions units and will therefore have a FEL established equivalent to the potential to emit of the source pursuant to Regulation 1125. We believe the current language in Draft 4 of the revised 1125 covers the situation and no further "wordsmithing" is required on this issue, however, DNREC will gladly discuss this in Committee and insert requisite language if deemed required.***

4) EPA Equivalency

The FEL as proposed most likely will not meet EPA's equivalency determination. The regulation is problematic because it is not optional, places historical production caps on facilities, requires back end controls to increase or use current permitted capacity, and constrains sources that have not made any modifications. We suggest DNREC amend the FEL limitations to align with EPA reform objectives by adopting EPA's current reform or providing options to adopt the FEL as an option rather than be mandatory for all Title V sources.

***DNREC Response – DNREC does not agree with these comments.***

***DNREC believes it is not appropriate to second guess the EPA on how "equivalency" will be determined. It will likely be a difficult and lengthy process done on a case-by-case basis. As such, EPA will likely want to make an equivalency determination on a finished***

***rule and not on a concept. It is up to Delaware to decide if a proposed rule is or is not ready for an equivalency determination. We see no impediment to a successful judgment.***

***The FEL must be mandatory to achieve the goals proposed in the white paper prepared jointly by DNREC and industry (see response to Dupont comments for more discussion).***

***You mention "places historical production caps on facilities" in reference to the FEL. A similar comment also was responded to in the Dupont comment/response letter. Actually, there have been no "production caps" per se used in Delaware nor do we propose any. We do propose using the level of control of a sources emissions units as a way of determining how to characterize their degree of pollution abatement, which then helps set the emissions level of the FEL for that source. An emissions unit can be termed either "well-controlled," based on the requirements of the definition in Section 2.0 of Draft 4 of the revised Regulation 1125 or uncontrolled. From this, the source determines the emissions limit the source will operate under, the FEL. Source owners are free to determine, based upon their operating methods and goals, how much "headspace"or operating room under the FEL they desire. Addition of some form of controls may (or may not) be needed to attain their goals. They may also elect to add controls with some expansion or improvement projects to avoid complications if a rapid response to increased production demands may be required at a later date. The permutations and combinations are practically endless and DNREC believes the FEL allows a source to arrange the playing field to best advantage. In addition, the FEL concept allows for an increase in the FEL level is all major units at a facility are well controlled.***

***"Back-end" controls are not required to increase capacity. Production and project planning must include recognition of the requirements of the FEL such that any required modifications or new construction will be done at the appropriate time. One signature advantage of the FEL is that "headspace or operating room" may allow modification or new construction without exceeding the FEL and thus without triggering the addition of controls and, obviously, without triggering NSR permitting.***

***We do not believe the FEL and the EPA Reforms can be melded in any way as they are diametrically opposed and mutually incompatible approaches to NSR.***

5) <u>Generation Production Cap</u>

The FEL by design will impose historical based production caps on facilities that otherwise would not exist within EPA's NSR reform. These caps would occur with no increase in emission rate (lbs./hr) or any modification to the unit. While many industrial and manufacturing businesses are designed to operate at full capacity, electric power generation facilities are design to respond to system load demands and retain reserve capacity to meet anticipated system requirements. For this reason, plants typically operate well below design capacity. During the stakeholder review process, NRG presented data to the committee to verify Indian River's traditional capacity factor in relation to installed capacity and annual increases in operating hours as a result of increasing system demand. As proposed, regulation 1125 would place a production cap on these facilities based on historical operations which is already less than current generation. As a result, these units would not be able to meet their system reliability obligations to provide power whenever and where ever it is needed.

***DNREC Response - We recognize the situation under which utilities operate, but also recognize the need to insure that modifications to facilities existing prior to Congress imposing the provisions of the Clean Air Act (which essentially "grandfathered" such facilities) add controls when modified as Congress intended.***

***However, Delaware recently passed Regulation 1146 which requires the addition of controls for a number of pollutants which will essentially result in classification of utility emissions units as well-controlled which effectively removes the concern expressed in***

***this comment. This is consistent with discussion in the committee, where DNREC stated it will not finalize a FEL regulation before Regulation 1146 is finalized.***

***Despite the above, DNREC agrees that the emission levels established under the FEL regulation must make sense, and we are very willing to discuss changes to the regulatory language necessary to ensure this.***

6) Section 2.0 – Definitions
Actual Emissions – Please amend the criteria to permit individual 12 month durations to assure facilities can use data that is representative of normal operations and operations potential.

Begin Construction – Please amend the definition to permit preparatory work which would include site development, foundations and piping so that this definition is consistent with Regulation 2.

***DNREC Response – For Actual Emissions if you mean to allow two separate 12-month periods to qualify in determining Actual Emissions, we can not agree. This allows a further break down of the concept of establishing a firm, consistent basis for a period of time that represents normal operations and can be expected to be reproduced at a later time. One can almost see a future where individual 24-hour days are selected.***

***The definition of Begin Construction is identical to the current definition in Reg. 1125***
7) Section 4.1 – FEL Compliance
Facilities should not be subject to 12 month rolling averages, rather annual in tons per year or emissions rates in lbs./hr. Further, if a rolling average is applied and a facility exceeds its annual limitation, a facility should be given an opportunity to get into compliance without penalty. Similar to the development of the FEL baseline, a facility should have at a minimum 12 months to 24 months to achieve compliance without penalty. Further, if a facility is challenged by an annual tons per year limitation, compliance could be based on not exceeding a lbs./hr limitation.

***DNREC Response – We do not agree with this comment.***

***A rolling 12-month average allows a facility to determine when their FEL has or will be exceeded and prompt action can be taken to come back into compliance or at least to establish a program that will ultimately lead to compliance. Basing compliance on an annual determination of performance allows a source to operate out of compliance (spewing unregulated pollutants into Delaware's air for an excessive period with no attempt to quell these emissions). That is too unsatisfactory a situation to allow continuance.***

***You will note that Section 4.1.2 says"…if a FEL is exceeded then the facility is in violation of this regulation, that facility shall correct the violation, and State and/or Federal enforcement may ensue". In the past, we believe we have applied some reasonable enforcement discretion in non-compliance situations, which we intend to continue under the FEL as the "may ensue" in Section 4.1.2 implies. You will also note 4.1.2 does not specify how long correction of the non-compliance situation must take to be acceptable or how the timing will impact enforcement. Attempting to codify particulars of enforcement actions would be complex and likely result in a "one size fits all" approach which would not be satisfactory to anyone.***

***We do not agree that a lbs. per hour approach should be considered. NSR has always used annual performance and we think this is best for all.***

8) Section 4.2 – Establishment of FEL's
The baseline for the FEL should be developed on a unit by unit basis to assure a facility will be granted its units specific potential. All unit baselines would then be aggregated to develop one facility baseline. Further, each pollutant should be addressed on an individual basis.

***DNREC Response – We agree, and that was the intent of the language in Draft 4 of Regulation 1125. Perhaps you could explain this comment more fully in our next Review Committee meeting and we can clarify the regulatory language.***

9) Section 4.3 – FEL Permit Provisions
We request the FEL provide an option to meet either a tons per year limitation or a lbs./hr limitation.

***DNREC Response – See last paragraph to DNREC Response under item 7 above.***

10) Section 4.4 – FEL Review and Revision
The proposed regulation makes provisions for the FEL to be raised or lowered as required. We agree a facility FEL should be adjusted to correct calculation errors or address more stringent rulemaking efforts. However, we do not agree that the FEL should be revised downward in the event a facility improves operations or emission reduction efficiency, or retires units as a compliance strategy. The only real benefit of an FEL is that any modifications or changes can be made without NSR. That benefit should not be removed because if the FEL can be amended downward, this then acts similar to the original form NSR that EPA has attempted to reform. Further, while this rule needs to encourage emissions reduction, readjusting a FEL downward may act as a disincentive for continued environmental improvements.

***DNREC Response – We agree (see third paragraph in DNREC's response to comment 2) above. The only offending section appears to be 4.4.1.8 which will be replaced.***

11) Section 4.5 – FEL Monitoring Requirements
NRG agrees with the monitoring provisions defined in the rule. However, all options must be made available for all emissions. For example in the event a CEMS is out of service, the facility must have the option to utilize other methods that reflect true operations. This is critical because CEMS are designed for other programs such as Acid Rain and NOx Budget where monitor availability is critical and monitor downtime penalties are built into the system. As a result, required data substitution can report a facility out of compliance when actual emissions are not. If CEMS are used, representative data substitution must be allowed or other monitoring methods must be permitted.

In regard to Re-validation, performance testing should not be required in addition to any current Title V requirements and a facility should not have to re-validate data if a change has not been made at the facility. This is an unnecessary expense to the facility.

***DNREC Response – We would like to discuss the proposal in the first paragraph of this comment before any revision is made. In fact, it may be appropriate for you and or a special sub-committee to develop a proposal for the language NRG and others may wish to see included in our FEL.***

***Regarding re-validation, we concur the requirements spelled out in Regulation 30 (the Title V rule) should be sufficient.***

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