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Sent: Monday, August 21, 2006 11:50 AM

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Subject: Draft "Multi Pollutant" regulation for Delaware generating units

[Letterhead of Green Delaware]

August 20, 2006

Ali Mirzakhali
Ron Amerikian
Bob Clausen
Air Quality Management
DNREC

Regarding: Draft "Multi-Pollutant" regulation for Delaware generating units

Gentlemen:

Several weeks ago we (Green Delaware) requested detailed information on the costs estimates underlying the draft regulation. I understood you undertook to provide this but to my knowledge we have not received it.

At two "workshops" held by the Department--in New Castle and Georgetown--we requested information on the health effects--projected deaths, hospitalizations, etc-- associated with the *status quo* v the Department's draft v more extensive cleanup to lower emission levels as widely sought by the public. The Department agreed to provide such information and/or cooperate in developing it, but to my knowledge we have received no further information as of this time.

At the Georgetown workshop Green Delaware proposed that the units subject to this regulation be required to post real-time "continuous emission monitor" (CEM) information on the "web." We have seen no indication that this proposal has been added to the draft regulation. We again ask that you do so.

Further, we propose that all units subject to this regulation, within a brief period of time, be required to burn the lowest sulfur coal used by any of them. For example, according to information from the Department, Unit 4 at Indian River, the largest coal consumer of the 8, burns 0.75 percent sulfur coal. All the other coal burning units are burning 1.0 percent or higher coal. An immediate switch to 0.75 percent coal would produce immediate sulfur oxide emissions reductions and be a step towards responding to the public unhappiness with the proposed schedule.

With regard to an upcoming public hearing:

We (Green Delaware) requested hearings in all three counties. Your response was that only one such request had been received--from us.

The Department, Senator Bunting, and others are encouraging the public to rely on a public hearing to be held in Dover on September 25th as their opportunity for further public input on this regulation. However, I consider this highly unsatisfactory because:

(1) The Department has unilaterally "reinterpreted" its manner of holding public hearings to deny members of the public "party status." This means that, contrary to previous practice, members of the public are denied access to pre and post hearing correspondence, denied the opportunity to question representatives under oath, denied the opportunity to review draft orders for factual errors, and generally denied any substantial role in the proceedings.

(2) For the past several years the Department has tended to conduct its public hearings in an obstructive and discourteous manner, and has systematically ignored public testimony.

(3) The Department, contrary to law, continues to obstruct access to transcripts.

For example, Hearing Officer Lisa Vest wrote to us on May 5, 2006, responding to a request for a transcript of a hearing: "... *copyright infringement laws regarding such transcripts make it impossible for the Department to provide you with your own physical copy of this document.*" We knew this was not true, and did get the transcript by email as requested. But only, I presume, because we knew we were entitled to it. We discussed this with Deputy Secretary David Small and suggested the Department needed to inform its staff how to respond appropriately to such requests.

Nevertheless, on August 15, 2006, in response to another request, I received from Ting Guo this:

"We have a copy of the transcript in the office and you are welcome to review it here. You can get a copy of the transcript from Wilfox & Fetzer, Ltd. 1330 King Street, Wilmington, DE 19801, phone 302-655-0477, fax 302-655-0497, www.wilfet.com, email lhertzog@wilfet.org."

In this case, also, Green Delaware's request was eventually honored because we knew our rights and said *"this response is unacceptable."* But the transcript came with this comment: *"For your info. we may not be getting electronic transcripts anymore as a cost reduction measure."*

I could cite another example where a citizen--not a wealthy one--paid several hundred dollars for a transcript he was entitled to receive without charge from the Department.

(4) Perhaps most crucially, **the Department commonly bases its decisions not on the record as defined by law but on improper *ex parte* post-hearing communications with "the Department's technical experts."**

DNREC public hearings are defined in the Delaware Code at Title 7, Section 6006: [<http://www.delcode.state.de.us/title7/c060/sc02/index.htm>]

"Any public hearing held by the Secretary concerning any regulation or plan, permit application, alleged violation or variance request shall be conducted as follows:

...

(4) A record from which a verbatim transcript can be prepared shall be made of all hearings and shall, also with the exhibits and other documents introduced by the Secretary or other party, constitute the record. ... The Secretary shall make findings of fact based on the record. The Secretary shall then enter an order that will best further the purpose of this chapter, and the order shall include reasons. The Secretary shall promptly give written notice to the persons affected by such order."

In both of the examples given above, in which I testified, numerous substantial objections and suggestions for improvement were given. Nonetheless, the drafts were adopted by the Secretary without changing a single word. In the transfer station case the Hearing Officer's report states:

"This report of recommendations is based upon the record of decision, which contains: 1) a sixty-nine page verbatim transcript of the public hearing, 2) documents, marked as Exhibits ("Ex."), which were admitted into the record as hearing exhibits, and 3) information I reviewed or obtained during discussions or review of Department files, records and other post-hearing communications, including SHWMB's technical response memorandum attached hereto as Appendix A." (
<http://www.dnrec.delaware.gov/NR/rdonlyres/C6D478F3-B799-4346-B9F8-AD559E72070F/927/SecOrder2006A0036.pdf>)

In other words, under current DNREC practice, the law is ignored, and any testimony from members of the public is likely to be refuted behind closed doors, notwithstanding that the record is supposed to be closed.

Under these circumstances, as I stated before, it seems dishonest to represent that testimony at a DNREC public hearing is likely to be effective or meaningful except as public theater. Perhaps it is comparable in honesty to the labelling of the Bush administration's attacks on the Clean Air Act as "Clear Skies."

I think the Department has generated some good will by the relatively open manner in which it appeared to approach this regulation.

A question now is whether that good will will be dissipated by a bogus "workshop"/"public hearing" process.

The "workshops" were held with the stated purpose of obtaining input from the public so

the draft regulation could be refined prior to "public notice" of same. The input received seemed clear and consistent: the public wants greater reductions based on consideration of the health damage done by power plant pollution.

Green Delaware has taken the position that all units should be brought up to the level of environmental performance that would be required were they to be built new at this time. ("Lowest Achievable Emission Rate.")

As I understand it, the Citizens for Clean Power organization has formulated its positions differently but the "bottom line" is similar.

Many "letters to the editor" have also appeared in Delaware publications calling for a more effective cleanup.

We hope the Department will not go to public notice without making the improvements requested at the "workshops." Similarly, we hope the Department will come to its senses and conduct public hearings in good faith and in accord with Delaware law.

If this letter should raise any questions please feel free to contact us.

Yours very truly,

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Director

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