

BEFORE THE ENVIRONMENTAL APPEALS BOARD

STATEMENT OF APPEAL OF FINAL REGULATION NO. 1147

The Premcor Refining Group Inc. (“Premcor”), by and through its counsel, submits the instant appeal of an action of the Secretary of the Delaware Department of Natural Resources and Environmental Control (“DNREC”) and avers in support thereof as follows:

I. BACKGROUND TO APPEAL

1. The action from which this appeal is taken consists of the issuance of Secretary’s Order No. 2008-A-0055 (the “Order”) approving final Regulation No. 1147 of the Delaware Regulations Governing the Control of Air Pollution (“Regulation 1147”). The Order was published in the Delaware Registrar of Regulations on November 1, 2008.

2. In April 2007, the Secretary of DNREC issued a “Start Action Notice” to announce the intended development of regulations governing Delaware’s portion of a multi-state carbon dioxide (“CO₂”) cap-and-trade program developed by the Regional Greenhouse Gas Initiative (“RGGI”), a cooperative effort among ten Northeast and Mid-Atlantic states. According to the Start Action Notice, the purpose of the proposed regulation is to reduce CO₂ emissions from fossil fuel fired “electric generating units.” The “Model Rule” issued by RGGI prior to commencement of the Regulation 1147 stakeholder process stated that the “units” subject to the rule include fossil fuel-fired stationary boilers, combustion turbines or combined cycle systems that served an electricity generator with a nameplate capacity equal to or greater than 25 megawatts. Premcor owns six units to which this regulatory program would potentially apply.

3. In general, Regulation 1147 requires each unit subject to the regulation to possess a CO₂ allowance for every ton of CO₂ emitted by a unit during the control period. Regulation

1147 includes a limited exemption for units that obtain a permit that contains a practically enforceable condition restricting the unit's annual electric output to the grid to less than or equal to 10 percent of the annual gross generation of the unit. Units that qualify for the limited exemption are not required to obtain CO₂ allowances. The exemption is effective as of the January 1 that is on or after the date on which the aforementioned permit restriction becomes final. As of the date of this appeal, the amount of electricity generated at the Delaware City Refinery ("the Refinery") that is supplied to the grid is substantially less than 10 percent of the gross amount of electricity generated at the Refinery on an annual basis, meaning that Premcor could potentially qualify for the exemption starting on January 1, 2009, if DNREC issues to Premcor an operating permit with the appropriate restriction. It is Premcor's understanding that Premcor is the only entity in the State of Delaware that owns units that can potentially qualify for the limited exemption.

4. Beginning in February 2008, DNREC's Air Quality Management Section ("AQM") held a series of committee meetings to provide a forum for stakeholders to comment upon proposed Regulation 1147 in the context of DNREC's formulation of the rule. The committee consisted of representatives from AQM, various environmental and community groups, and affected industry representatives, including Premcor. As the owner and operator of the Refinery—a facility potentially affected by the proposed regulation—Premcor actively participated the committee meetings.

5. AQM held a public workshop concerning Regulation 1147 on August 7, 2008. Premcor submitted materials in advance of the public workshop concerning Regulation 1147.

6. On September 22, 2008, DNREC held a public hearing on proposed Regulation 1147. Premcor submitted comments in advance of the public hearing.

7. As set forth more fully below, Premcor's interests have been substantially affected by the issuance of the Order.

8. This Statement of Appeal is timely filed in accordance with 7 Del. C. §6008(a) and Section 1.1 of the Regulations of the Environmental Appeals Board.

9. In accordance with Section 2.1 of the Regulations of the Environmental Appeals Board, a \$50 deposit for costs accompanies this Statement of Appeal.

II. BASIS FOR APPEAL

Paragraphs 1 through 9 above are incorporated by reference as if fully set forth herein. In accordance with Section 102(a) of the Regulations of the Environmental Appeals Board, Premcor avers the following in support of the instant appeal:

A. The Interest Which Has Been Substantially Affected

10. As noted above, Premcor owns units potentially subject to obligations under Regulation 1147. As such, Regulation 1147 imposes obligations upon Premcor and subjects Premcor to the potential for significant penalties if Premcor is unable to satisfy such obligations.

11. For the reasons set forth below, Regulation 1147 imposes requirements upon the Refinery that are improper and invalid. These requirements are invalid because they are arbitrary and capricious, more stringent than required under and/or inconsistent with applicable law, and not supported by sufficient evidence on the record.

12. The imposition of the appealed requirements will cause adverse operational, financial and other impacts on Refinery operations. Without limitation to the foregoing, requiring Premcor to obtain CO₂ emission allowances under Regulation 1147 could require Premcor to incur significant capital, operating and business interruption expenses.

B. Allegation That The Decision Is Improper

13. For the reasons set forth herein, Premcor alleges that the Order and Regulation 1147 are improper.

C. Reasons Why The Decision Is Improper

14. Premcor appeals the Order and Regulation 1147 because the requirements of Regulation 1147 are arbitrary, capricious, unreasonable, constitute an abuse of the Secretary's discretion, are contrary to fact, are not supported by sufficient evidence, are not in accordance with applicable law, are procedurally deficient, and are otherwise contrary to the Secretary's authority under the provisions of the Delaware Environmental Control Statute, 7 Del. C. Ch. 60, and the Regulations Governing the Control of Air Pollution for, including but not limited to, the following reasons:

15. As noted previously, Regulation 1147 includes a limited exemption for units that restrict electric output to the grid to less than or equal to 10 percent of the annual gross generation of the unit. Section 1.2.2.1 of Regulation 1147 states that for any unit to qualify for this exemption, the operator must obtain a Regulation 1102 or Regulation 1130 permit that includes a practically enforceable condition restricting the supply of the units electrical output to the electric grid consistent with this 10 percent threshold.

16. The limited exemption described above, however, is not immediately effective upon submitting an administratively complete permit application requesting a new condition satisfying the 10 percent restriction, or even upon DNREC's issuance of a final permit containing the 10 percent restriction. Instead, Section 1.2.2.2 provides that the exemption is effective "the January 1 that is on or after the date on which the ... provisions in the ... permit ...become final." Thus, if a permit containing the appropriate restriction is issued on January 2,

2009, the units covered by the permit would not qualify for the limited exemption until January 1, 2010, and therefore would be required to purchase CO₂ allowances for the tons of CO₂ emitted in 2009, despite being subject to the 10 percent restriction for almost all of 2009 as a result of the permit issuance. In other words, Condition 1.2.2.2 raises the possibility that a unit will be subject to a permit restriction added specifically for purposes of qualifying for the limited exemption to Regulation 1147, but the unit will not be able to take advantage of the limited exemption for potentially many months, despite otherwise qualifying for the limited exemption. Thus, Condition 1.2.2.2 of Regulation 1147 is unduly stringent and burdensome and infeasible, arbitrary and capricious, contrary to the Secretary's authority under the provisions of the Delaware Environmental Control Statute, and constitutes an abuse of the Secretary's discretion.

17. The effective date of Regulation 1147 is November 11, 2008. This timetable leaves the Department only 45 days to issue a permit containing an appropriate permit condition for purposes of qualifying for the limited exemption for purposes of the 2009 calendar year. Accordingly, there is a risk that the Department would not be in a position to issue a final operating permit with the necessary restriction within this timeframe. If the Department does not issue a permit with the appropriate restriction within the 45 day window created by Section 1.2.2.2, then the earliest Premcor would be able to take advantage of the exemption is January 1, 2010. Premcor has little, if any, ability to affect DNREC's timetable for issuing permits, and thus, for reasons outside of its control, Premcor may be forced to obtain CO₂ offset allowances for all the tons of CO₂ emitted during 2009 by the six subject units, despite otherwise qualifying for the limited exemption. Premcor would also be required to incur significant additional costs to establish systems for monitoring and reporting of CO₂ emissions. Accordingly, Condition 1.2.2.2 of Regulation 1147 is unduly stringent and burdensome and infeasible, arbitrary and

capricious, contrary to the Secretary's authority under the provisions of the Delaware Environmental Control Statute, and constitutes an abuse of the Secretary's discretion.

18. During the regulatory development process, there were discussions as to whether a limited exemption should be included as part of Regulation 1147.¹ Nevertheless, DNREC suggested that if Premcor wished to increase the chances that DNREC would issue a permit that would allow Premcor to qualify for the limited exemption for calendar year 2009, then Premcor should submit a permit amendment application requesting a condition restricting electrical output to the grid before the Secretary's issuance of an Order approving the final language of the limited exemption of Regulation 1147. To the extent DNREC has interpreted Condition 1.2.2.2 as forcing Premcor to submit a permit application to amend the appropriate permits before the language of the limited exemption was finalized in order to qualify for the limited exemption for purposes of 2009, then the Order and Regulation 1147 are unduly stringent and burdensome and infeasible, arbitrary and capricious, contrary to the Secretary's authority under the provisions of the Delaware Environmental Control Statute, and constitute an abuse of the Secretary's discretion.²

19. In an effort to address the aforementioned timing issues, Premcor in its comments to DNREC as part of the public workshop and the public hearing suggested regulatory language that allowed sources to qualify for the limited exemption, so long as a substantially complete permit application requesting the appropriate restriction was submitted within a reasonable time after the effective date of Regulation 1147. Specifically, Premcor suggested that Condition 1.2.2.2 read as follows:

¹ The Model Rule agreed to and published by the RGGI states characterized the limited exemption as optional.

² Ultimately, Premcor submitted on October 21, 2008 a permit application requesting an appropriate condition for purposes of qualifying for the limited exemption. While this application was submitted before the Order was issued, it was submitted after the Department has issued a proposed Regulation 1147 containing the limited exemption for purposes of the September 22, 2008 public hearing. There was no testimony at the public hearing concerning the limited exemption.

If a complete application requesting permit revisions consistent with the restriction required by 1.2.2.1 of this regulation is received within sixty days of the effective date of this regulation, and a permit is issued containing such a restriction, then the effective date of the exemption under 1.2.2.1 of this regulation shall be deemed to be the effective date of this regulation.

The Order, however, rejected this suggested change to Section 1.2.2.2. The Secretary's rejection of Premcor's suggested language is, in light of the timing issues with respect to permit issuance described previously, arbitrary and capricious, contrary to the Secretary's authority under the provisions of the Delaware Environmental Control Statute, and constitutes an abuse of the Secretary's discretion.

20. For the reasons set forth herein, the Order and Regulation 1147 are: (i) inconsistent with applicable statutory and regulatory standards; (ii) not supported by substantial evidence on the record; (iii) contrary to fact; (iv) unduly stringent, burdensome and infeasible; (v) procedurally deficient; (vi) arbitrary and capricious; and (vii) otherwise contrary to the Secretary's authority under the provisions of the Delaware Environmental Control Statute and the Regulations Governing the Control of Air Pollution, and constitute an abuse of the Secretary's discretion.

21. Premcor reserves the right to assert additional grounds for appeal and reserves the right to amend this Statement of Appeal after an opportunity for further discussions with DNREC or following the clarifications of any conditions or statements in the Order, including without limitation because of their ambiguity, vagueness and/or lack of sufficient notice to Premcor.

Premcor has authorized the following attorney to represent it in this matter before the Environmental Appeals Board:

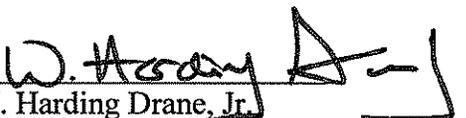
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D. Estimate of the Number of Witnesses and Time for Hearing

Premcor estimates that it will call five witnesses and that the presentation of its testimony will extend for one day.

Respectfully Submitted,

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