

Alan B. Levin, Chairman
James A. Wolfe, President & CEO

August 8, 2006

Gene Pettingill
DNREC Air Quality Management
715 Grantham Lane
New Castle, DE 19720

**RE: Comments on Draft FEL Regulation,
Revision of DE Air Regulation 1125**

Dear Gene,

We are writing on behalf of the Delaware State Chamber of Commerce Environmental Committee regarding the proposed revision to DE Air Regulation 1125 to implement a facility-wide emission limit ("FEL") program (the "draft FEL regulation").

The Delaware State Chamber of Commerce includes businesses that operate under Delaware's air regulations and who will be affected by the proposed regulation. The State Chamber supports the efforts of DNREC to maintain a high-level of air quality in Delaware. The State Chamber recognizes that these efforts, undertaken appropriately, coincide with the State Chamber's mission to provide an economic climate in which Delaware businesses are competitive and to further the best interests of the citizens of the State.

As currently proposed, the draft FEL regulation will require many of the manufacturing and business facilities in the State to operate under annual emission caps that may be set well below current permitted emission levels. The State Chamber is concerned that the FEL regulation will act to cap a facility's ability to operate, especially one which may place the cap below the current permit limits. This creates an economic disincentive for businesses to continue or expand operations in Delaware, where potential to grow will be limited. Accordingly, the State Chamber does not believe that a mandatory FEL program is appropriate for Delaware and, based upon the reasons listed below, does not believe that Delaware industries will support such a rule.

1. *Production Cap in Delaware*

In many cases, the FEL will be set based on historical actual emissions - which are much lower than permitted allowable emissions. As such, the proposed FEL regulation will

establish a production cap on many facilities in Delaware. A facility could violate its FEL by increasing production in response to economic demand for its product(s) without making any changes or modifications. This effectively places a cap on the production of Delaware businesses, which could not be increased without significant delays and/or expenditure.

During the early discussions on the FEL regulation, DNREC suggested undertaking an analysis of all potentially affected sources to determine how they would be affected by FELs. That effort was not undertaken for cost/timing reasons. The State Chamber invites DNREC to perform an analysis of a representative sample (10-15) of the affected sources to evaluate the impact of the FEL regulation.

2. Regulatory Uncertainty in Delaware

Delaware industries have been operating under the current version of DE Air Reg. 1125 since 1999, and have worked with DNREC since its inception to construct and modify facilities. The current Delaware program retains a similarity to the federal program that allows businesses to evaluate its regulatory impact. The FEL regulation does not focus on the NSR (New Source Review) concepts of construction of new units nor modifications to existing units, but instead creates a permitting scheme to avoid NSR applicability. This departure from familiar NSR concepts creates uncertainty, and lack of predictability - - and in turn creates a disincentive to economic investment.

In addition, a number of the proposed regulatory provisions and definitions contain language that make it difficult or impossible to determine the intent of DNREC or how DNREC will implement the regulation after promulgation. For example, one provision of the draft FEL regulation allows DNREC to unilaterally reduce a FEL at any time if it determines that the reduction is necessary to avoid an air quality violation. This concept is foreign to the both the State's current NSR program and the federal program and it is unclear if DNREC would use this provision to attain non-NSR goals. This further leads to the regulatory uncertainty created by the draft FEL regulation.

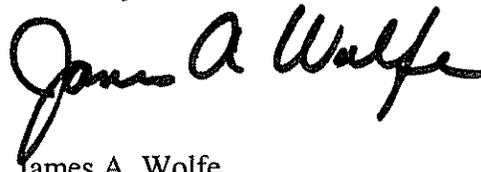
3. Uncertainty Regarding Implementation Based Upon Difference with Federal New Source Review

The draft FEL regulation is proposed as the New Source Review program in the State for major sources and DNREC will be required to get EPA approval of the FEL program. For EPA to approve a program that differs from the promulgated federal regulations, especially a program that is so dramatically different from the federal program, the State will need to make a showing that its program is environmentally equivalent to the federal program. This showing will involve complicated and difficult issues regarding the FEL program's use of actual and potential historic and future emissions. EPA has not considered these issues before and has stated an intent to consider them in future rulemaking. As such, the equivalency determination will be lengthy and complex and may include a full EPA rulemaking review. In order for Delaware businesses to consider

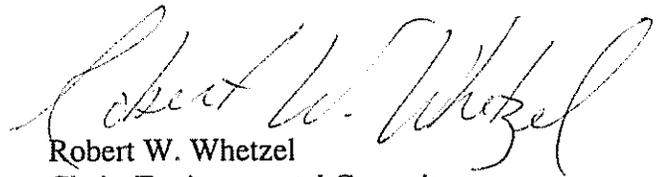
the regulation as a whole, however, an equivalency determination is essential so that the full regulatory impact of the regulation may be understood.

Based upon these concerns, the State Chamber does not believe that the draft FEL regulation should be implemented as a replacement for a NSR program. Instead, DNREC should revise Reg. 1125 by adopting the core applicability tests promulgated by EPA in 2002 (with the exception of the Clean Unit and Pollution Control Project provisions) in order to be equivalent with the federal requirements. Should DNREC decide to continue pursuing the FEL regulation, the State Chamber recommends that it be on a voluntary basis by which market forces drive whether Delaware businesses join the program to get greater permitting flexibility. Furthermore, the State Chamber requests that DNREC provide a draft or outline of the equivalency determination that will be sent to EPA for the FEL regulation.

Sincerely,

A handwritten signature in black ink that reads "James A. Wolfe". The signature is written in a cursive style with a large, prominent initial "J".

James A. Wolfe
President and CEO

A handwritten signature in black ink that reads "Robert W. Whetzel". The signature is written in a cursive style with a large, prominent initial "R".

Robert W. Whetzel
Chair, Environmental Committee
Delaware State Chamber of Commerce

DSCC Comments regarding DNREC's proposed revision of
Delaware Air Regulation 1125: Requirements for Preconstruction Review

I. Introduction and Summary

- a. The State Chamber appreciates the opportunity to provide comments on the proposed revision to DE Air Regulation 1125, which implements a facility-wide emission limit ("FEL") program (the "draft FEL regulation").
- b. In summary, the draft FEL regulation would require existing manufacturing facilities and other businesses in the State to adopt FELs for criteria and certain other pollutants (including VOCs, PM, SO_x, NO_x, lead and mercury), based upon a combination of each facility's potential, actual and fugitive emissions. This raises a number of concerns for the affected regulated community. Of particular concern is that, under some circumstances, the facility-wide emissions limits could be set well below current permitted emission levels.
- c. The State Chamber does not believe that a mandatory FEL program is appropriate for Delaware and does not believe that Delaware industries will support such a rule. The draft FEL regulation is flawed in a number of ways, including (i) creating a production cap on Delaware businesses, (ii) requiring inconsistent regulation of the same source, and (iii) being difficult or impossible to determine the overall impact of the regulation or how DNREC will implement it. While several of the comments below provide suggestions on how the draft FEL regulation could be clarified or provisions that should be added, the State Chamber recommends that should DNREC decide to continue pursuing the regulation, it be on an alternative, voluntary basis by which market forces drive whether Delaware businesses join the program to get greater permitting flexibility.
- d. The deadline for DNREC to submit SIP revisions to EPA regarding these reforms was January 1, 2006. Regardless of whether one agrees with the FEL approach, EPA will need to make an equivalency determination for the Delaware regulation that will likely take a significant amount of time. During this time, Delaware will be implementing outdated new source review rules. While DNREC continues to study the FEL program, DNREC should adopt by reference the core applicability tests promulgated by EPA in 2002 for new source review with the exception of the Clean Unit and Pollution Control Project provisions.

II. Intent of Revising Delaware NSR Regulation:

The draft FEL regulation is a marked departure from traditional New Source Review. At the inception of this regulatory initiative, DNREC stated that its intent was to consider revisions to Reg. 1125 in order to address EPA NSR reforms. The EPA NSR reforms included a revised method to determine baseline emissions, a Clean Unit exclusion, and a new provision for a Plant Applicability Limit ("PAL") program. While DNREC expressed disdain for many of the EPA

revisions, there was no suggestion that DNREC would abandon its NSR program and replace it with a FEL program. From the outset, DNREC also confirmed that NSR is not intended to force new technology requirements or emission limits on an existing facility.

Unfortunately, as the FEL regulation has developed, it bears no resemblance to NSR, and it does in fact act to force new emission limits and technology requirements on existing facilities. For these reasons alone, the State Chamber cannot support the FEL regulation in the form that has been proposed. More specifically, the proposed regulation does not focus on the NSR concepts of construction of significant new emission units or major modifications to existing units, but instead creates a permitting scheme to avoid NSR applicability. Furthermore, the proposed regulation will create a production cap for many facilities. This approach is not consistent with the intent of EPA's NSR reforms and will seriously restrict existing sources from using the growth potential currently allowed by their valid SIP based permits and Title V operating permits. While industry generally supports the concept of FELs, it is only when the program is voluntary and properly structured to avoid inappropriate reductions to facility emission operating margins.

III. Comments

- a. Production cap on affected sources: In many cases, the FEL will be set based on historical actual emissions - which are much lower than permitted allowable emissions. As such, the proposed FEL regulation will establish a production cap on many facilities in Delaware. A facility could violate its FEL by increasing production in response to economic demand for its product(s) without making any changes or modifications. This effectively places a cap on the production of Delaware businesses, which could not be increased without significant delays and/or expenditure.
- b. Equivalency determination problematic: The draft FEL regulation is proposed as the New Source Review program in the State and DNREC will be required to get EPA approval of the FEL program. For EPA to approve a program that differs from the promulgated federal regulations, especially a program that is so dramatically different from the federal program (e.g., a mandatory FEL program replacing rather than augmenting the new source review program), the State will need to make a showing that its program is environmentally equivalent to the federal program. This showing will involve complicated and difficult issues regarding the FEL program's use of actual and potential historic and future emissions. EPA has not considered these issues before and has stated an intent to consider them in future rulemaking. As such, the equivalency determination will be lengthy and complex and may include a full EPA rulemaking review. The showing is more likely to be successful if the FEL program is designed as a voluntary option to the core new source review program, rather than a wholesale replacement of the program.

- c. Increased and inconsistent regulation of affected sources:
 - i. Within the draft FEL regulation, there are a number of conservative assumptions and adjustments incorporated into emissions tracking that will require facilities to monitor emissions in a manner inconsistent with the setting of the FEL levels, likely eliminating any FEL margins or compliance headspace. It is a basic tenet of administrative law that the basis for setting an emission standard and determining compliance with that standard need to be consistent. Therefore, the FEL regulation must allow that the setting of the FEL levels and the tracking of compliance with them be done on exactly the same basis.
 - 1. For instance, if the emissions tracking system has penalties built in or the emissions factors can be adjusted without a consistent adjustment of the FEL itself, sources would be penalized and have their compliance margins eliminated simply through conservative and inconsistent emissions tracking policy rather than a true increase in emissions. Also, under the draft FEL regulation, emission penalties are built into FEL tracking, so that each plant will have two sets of emissions books, one for the FELs and one for reporting actual emissions under Title V, TRI, and other compliance requirements. To avoid this, emissions past and current need to be determined based on the best estimate and the methods used in setting the FEL need to be reflected in the compliance tracking. Further the methods of tracking should be spelled out in the permit, whenever possible. Otherwise, how will DNREC assure that sources are not subject to enforcement action in a situation where the FEL is set using one method and compliance is determined using another method?
 - ii. DNREC is currently developing a multi-pollutant regulation that will affect facilities included within the scope of the FEL program. How will DNREC coordinate these two regulatory efforts? An emission unit that complies with the multi-pollutant regulation should be included in those units deemed “well-controlled.”
 - iii. Many of the provisions suggested for the FEL program are duplicative in nature of other Delaware air control programs. These provisions will increase the regulatory burden on Delaware facilities without providing new information to DNREC and are unnecessary.
- d. Implementation of Draft FEL Regulation May Be Uncertain and Uneven:
 - i. A number of the definitions in the draft FEL regulation are so general as to make it difficult or impossible to determine the overall impact of the regulation. These include:

1. "Actual emissions" -

- a. Unclear about time periods and how they will be required by DNREC. In the last sentence of Section (2) of the definition, is it DNREC's intent to require the same time period be used for each pollutant or all pollutants?
- b. The definition states that DNREC shall allow the use of a period up to 10-years before the particular date upon a determination that the period is more representative of "normal source operation." "Normal source operation" is not defined and facilities should not be burdened to demonstrate that operations in the representative time frame are "normal."

2. "Well-controlled emission unit" -

- a. Given the vagueness of BACT/LAER requirements for many sources, and the reality that BACT/LAER controls are often the subject of negotiation between a facility and the applicable agencies, a facility cannot predict with certainty if its units will meet the definition. More objective criteria are needed.
- b. For Part 2 of the definition, it is unclear whether the 85% requirement is more stringent or less stringent than BACT/LAER.
- c. For Part 5 of the definition, clearer criteria are needed for how a unit will be determined to be "well-controlled" other than DNREC's opinion. In this regard, an index should be included that lists what will be considered well-controlled under this Part. In addition, it unclear whether this provision, or any other, includes units that are overcontrolled by a source and have not undergone a BACT/LAER determination.

ii. A number of the specific provisions in the draft FEL regulation also contain language that make it difficult or impossible to determine the effect of the regulation. These include:

- 1. The intent of Section 1.5 is unclear.
- 2. Section 4.2.2.1.4 establishes that a 24-month operating period will be used in determining the actual emissions, but is unclear as to whether the same period must be used for all pollutants or for all units for one pollutant. This should be clarified to establish that each pollutant can have a separate 24-month period.

3. Section 4.3.9.2 establishes a violation of some type but based upon the language it is unclear what circumstance would cause the violation and what criteria DNREC will apply. In addition, if the monitoring provisions are included in the permit, how could this violation arise?
4. Section 4.4.1.4 addresses an adjustment to the FEL based upon the FEL exceeding the allowable emissions but the purpose, method and mechanics are unclear.
5. Section 4.4.1.5 addresses an upward adjustment to the FEL but the requirements, standards and mechanism for this adjustment are not clear. For example, why does “less than” appear in the first sentence. In addition, the economically feasible criteria that DNREC will apply should be stated.
6. Section 4.4.1.6 addresses increasing a FEL when a new emission unit is added to the facility and complies with NSR. Why is the FEL being increased “less than” the allowable emissions included in the section and when would this apply?
7. Section 4.4.1.7 addresses adjustments of the FELs each time the Title V permit is renewed. Why is this needed and what is the intent? Need clear criteria, methods and procedures for any adjustments.
8. Section 4.4.1.8 appears to give the agency unilateral authority to adjust the FEL. Need clear criteria, methods and procedures for doing so.
9. Section 4.5 presents monitoring requirements but does not provide clear guidance as to when the general monitoring approaches (i.e., emissions factors and mass balances) will be allowed. Given that monitoring is already embedded in the Title V permit, the intent or reason for many of the provisions of this section is unclear. If the section is needed, it needs clarity on when each method will be required or allowed.
10. Section 4.5.3.1 addresses validation of pollutant content of materials but provides no criteria for what will satisfy the requirement.
11. Section 4.5.7 calls for “revalidation” at least every five years. Need more clarity on what will be required, DNREC would consider to be the elements of that review, and whether sources would be at risk of further confiscation of their emission compliance margin.

12. Section 4.7 sets forth the FEL reporting and notification requirements for the proposed regulation. This section states that semi-annual monitoring reports and deviation reports shall be submitted to DNREC in accordance with DE Air Regulation 30, but then provides requirements for what appears to be a separate semi-annual report in Section 4.7.1. It would be beneficial to coordinate reporting time frames with Title V reporting.

e. Revisions/additions needed to draft FEL language

- i. FEL programs are not appropriate for every source. Any program considered by DNREC should be an optional provision of Delaware's NSR regulation and not a mandatory requirement. This would allow the FEL permitting approach to be an option for sources who choose to have the restrictive emission caps in exchange for greater NSR flexibility, while not imposing the production cap on all affected sources. The federal NSR PAL approach is optional and a few sources in DE have selected this option. If DNREC requires a FEL approach to be mandatory, it will discourage new or expanded business operations in the State because of this overly restrictive permitting scheme.
- ii. Any FEL program must ensure that it does not limit the use of existing production capacity of any affected source; cause any undue hardship or expense to any affected source who wishes to use existing unused productive capacity; or create inequity within any class of affected sources subject to specific industrial standards that are based on emissions related to production.
- iii. The draft FEL regulation lacks any provision for production growth, nor does it allow the de minimis increase afforded under the current NSR program. Similar to the current Regulation 1125, the draft FEL regulation needs to allow increases to the FEL that are less than NSR significant emission increases and provide that these increases will be added into the FEL. The addition of this allowance will provide for small growth and compliance headspace. This is particularly important for facilities that have few or no well-controlled emission units and would be forced to operate right at the edge of compliance since their FEL would be extremely close to, if not the same as, their actual emissions.
- iv. Need to add non-severability clause. For Delaware businesses to consider the regulation, it is essential that the full regulatory impact of the regulation be understood. In order to do so, there must be an assurance that no provisions of the regulation may be severed in the future and the regulation still be applicable.
- v. Section 4.2 sets forth a procedure to establish the FEL in which DNREC unilaterally either accepts or modifies the facility-recommended FEL.

Under Section 4.2.2.2, if DNREC modifies the recommended FEL, the only revision allowed by the facility is to change the transitional period. This procedure must be revised to allow the facility an opportunity to review and discuss with DNREC the proposed modification and also to establish an appeal process for DNREC's final decision.

- vi. There are many additional comments on provisions contained in the current draft FEL regulation. Although some of them are noted below, DSSC suggests that it does not make sense to address these in detail pending review of the threshold issues identified above (such as ensuring that the FEL program is a voluntary option to the core federal program).
 1. Section 4.3.8 should say that when the monitor is out, a best estimate of actual emissions should be used.
 2. Section 4.3.9.1 should have a "reasonable estimate" default and not the "highest potential" default.
 3. Section 4.5.3.3 should call for the use of the best estimate rather than the highest value. Importantly, whatever approach that is used in setting the FELs should be used in tracking compliance.
 4. Section 4.5.6.1 should not include an adjustment for uncertainty unless the same adjustment is made in setting the FEL so that we have consistency.
 5. A "hybrid" FEL setting procedure may be more appropriate. The FEL is set at allowables for each unit that is well controlled and all other units are added in at actual levels. Another option should be provided wherein the source can propose to control a unit to the well controlled level before the FEL goes into effect and it is then counted in setting the FEL at the well controlled allowables level.
 6. Because controls may need to be added before the FELs go into effect and this can involve many units, sources need four years from the date the FELs are set rather than four years from the date the rule is final. If work stays on course, there will be less than 3 years to design, install and debug controls. That is too little time. If there is any delay in setting the FELs, the schedule for adding controls will be impossible. In addition the NSR review of controls will need to be integrated into the setting of the FELs.
 7. There is too little time provided under Section 4.2.2.2 (for evaluating a different FEL level and the transition plan) and Section 4.7.3 (for the delivery of test results).
 8. The regulation must not contain cross references to other federal and/or state regulations, but instead must include all requirements.