

DUPONT 08/09/06 COMMENTS & DNREC RESPONSE

RE: Draft 4 (061906) Revised Regulation 1125

1/18/07

1) Draft Alternate NSR regulation does not resemble New Source Review and its intended purpose.

The draft regulation does not focus on the construction of significant new emission units nor major modifications to existing units. In reality it is a permitting scheme to avoid NSR by capping all criteria pollutants to a source's actual baseline emissions without any modification or new source construction.

This approach is not consistent with federal major NSR intent and will restrict existing sources from using the growth potential currently allowed by their valid Title V operating permits.

The Draft NSR alternative regulation is similar to the federal PAL program but is only attractive to sources and facilities that routinely are modifying and improving their operations. This type of facility needs the modification flexibility offered by a PAL or FEL program. However, many sources do not modify or change very often and the FEL concept would be very restrictive to their operations without some amount of capital investment to create compliance headspace (eg. institutional and commercial boilers).

DNREC RESPONSE – DNREC does not entirely agree with the comment.

DNREC agrees that the Draft FEL regulation does not resemble the current federal New Source Review regulations nor Regulation 1125, relative to major modifications. This is by design as discussed below. However, we do believe that the FEL concept is consistent with the intended purpose of NSR (i.e., to aid in the attainment of, and to prevent the significant deterioration of air quality relative to any NAAQS).

The traditional NSR permitting process, as explained by the EPA and some members of this Review Committee, is perceived as very complex, and to act as a disincentive to industry in making modifications that may offer other positive impacts (cost reduction, energy efficiency, reduction of other emissions, etc. A purpose of the FEL is to avoid this perceived complexity of the NSR applicability determination and permitting process, provide for industry flexibility, and at the same time retain the current level of environmental protection.

We agree that the FEL sets a cap for all criteria pollutants to a source's, but not to the actual baseline emissions. We agree that the setting of the FEL value for each facility is of major importance. In setting the FEL DNREC agrees that the FEL should not be set at a level that puts sources immediately in noncompliance, or at a level that does not allow them to operate as they had been before the FEL was set. We have attempted to address this by defining a look-back period to provide the opportunity to capture a "representative period of normal operation" in establishing what constitutes "actual emissions." The inclusion of a well-controlled emission unit also was done to provide a level of reasonableness in this area. One also expects that capacity that has not been used for 10 years is likely never to be used or that it will be found that operating changes to actually utilize the capacity requires the addition of equipment that in a non-FEL situation requires

NSR permitting. Therefore, utilization of the capacity equivalent to the emissions allowed in the Title V permit may require NSR permitting with or without the FEL rule.

DNREC recommends each concerned facility use the provisions of the FEL proposal contained in Draft 4 (or the new Draft 5) of Regulation 1125 to calculate their own FEL (DNREC personnel will provide assistance if desired) and see for themselves what difficulties may or may not exist in operating or expanding their facilities under a FEL.

DNREC does not agree that the FEL program is only attractive to sources and facilities that routinely modify and improve their operations. A major complaint of traditional NSR has been the vagueness around the term “physical change.” It has been stated that sources which even replace a pump or piping at a unit may be in reality making a physical change which triggers NSR requirements. The FEL takes this confusion away. In addition, such sources will be able to freely make energy efficiency, pollution prevention, etc. changes which have been argued to be discouraged under traditional NSR, so the FEL is also attractive to those interested in environmental benefit at low cost (and presumably a cost savings).

2.) Draft Alternate NSR regulation has a fatal flaw that will prevent EPA approval.

EPA federal NSR reform provides for an optional emission capping PAL permit that is based on actual emissions baseline, which allows a ten year lookback for a facility's representative baseline. The Draft Alternate NSR regulation provides for a combination of allowable and actual emissions from the various emission units at a facility in order to set the FEL cap. The use of allowable emissions is contrary to EPA federal regulations. Recent Court decisions have remanded portions of federal NSR Reform that were based on potential or allowable emissions, i.e. Clean Unit exemption and Pollution Control Project exclusion. It is extremely doubtful that EPA will approve the Draft FEL regulation as long as allowable emissions are part of the FEL calculus.

Unfortunately, without the allowable emissions for controlled units, the FEL cap would have no compliance headspace above actual emissions. FEL caps must have some amount of compliance headspace built in so that a source can operate comfortably without imminent danger of non-compliance. Facilities need to have a small amount of "room to grow" under the FEL caps before being required to install controls to create headspace.

DNREC Response – DNREC does not agree there is a “fatal flaw” in the FEL.

The concept of a well-controlled emissions unit is a key feature of the FEL. It was included in the original FEL proposal presented by the FEL sub-committee. In essence, it provides an incentive for sources to add controls to insure they get the highest FEL consistent with their goals of required “headspace” and capacity utilization. We agree that the FEL approach could be inoperable if the concept of a well-controlled emissions unit linked to using allowable emissions in the FEL calculus was not permitted by the EPA. However, we have no evidence that EPA is prepared to disallow the use of allowable emissions. There are other examples of allowable emissions being used in establishing PAL's (the Michigan Excellence program) or using allowable emissions in establishing programs similar (but not exactly the same as) the FEL (the Oregon PSEL program). Also, to be strictly legal in our interpretation, the FEL is composed of limits assigned to well-controlled emissions units and uncontrolled emissions units; the former using allowable emissions for the limit and the latter using actual emissions to establish the limit. The FEL is then determined by adding up the actual emissions contribution and the allowable emissions contribution. This then provides a FEL that is neither all allowable nor all actual. It is a hybrid of the two.

Secondly, EPA Region 3 has been represented all along on the Review Committee and, if there was a powerful and clear objection to our approach, it would have surfaced by now.

Finally, the concept is too good to be abandoned at this point, for a perceived flaw that may not exist.

3.) Draft Alternate NSR regulation must be optional and not a mandatory program.

The Draft FEL regulation will place extreme production restrictions on many Delaware businesses whose emission units are not well controlled for each and every criteria pollutant. An emission unit may be well controlled for non-attainment pollutants such as NO_x or VOC, but will be classified as not well controlled for other pollutants such as PM, CO, or other NSR regulated compounds. Thus normal increased demand for production will not be allowed without installation of additional controls under FEL permitting scheme but are currently allowed under DNREC Reg #1125 and Title V operating permits.

The FEL permitting approach must be an option for sources who choose to have the restrictive emission caps in exchange for greater NSR flexibility. The federal NSR PAL approach is optional and a few sources in DE have selected this option. If DNREC continues to require the FEL approach to be mandatory, it will force many businesses to leave the state because of this overly restrictive permitting scheme.

DNREC RESPONSE – DNREC does not agree with this comment. It is not the intent of the FEL program to place extreme production restrictions on Delaware businesses or to force businesses to leave the state because of an overly restrictive permitting scheme. The purpose of the FEL is to benefit both industry and the environment, as discussed above.

The FEL program must be mandatory, as it is a wholesale replacement of major NSR as it applies to modified sources. If it were developed as a voluntary program, with other applicability mechanisms remaining, it would be required to be comparable to the federal PAL, and not evaluated as a program distinct from traditional NSR. However, as an applicability option, since it would be compared to the federal PAL, DNREC believes it would not be a feasible approach. As a distinct program DNREC believes the FEL can be designed to ensure environmental protection equivalent to the current NSR program. A mandatory FEL will insure regulators also receive the benefits of a simple and certain applicability mechanism, and other benefits of the FEL program are improved certainty for industry as to what is and is not regulated under NSR which means industry will pursue more projects with collateral positive environmental impacts favorable to Delaware air quality. Also, a voluntary approach may allow sources to switch between the FEL and some specified non-FEL system depending upon which approach provides the greatest benefit to the source at that time, thus providing an opportunity for “gaming” the system.

While we share the belief of many stakeholders that the NSR permitting process is complex and has some inadequacies, we do not believe the process offered by the EPA (the Reforms) achieves the stated ends – in fact, we believe the Reforms may tend to increase emissions through the many “loopholes” established in trying (but not succeeding) to reduce the overall complexity of NSR permitting. At this time DNREC believes the only feasible alternative to the mandatory FEL approach is, in general, the continuance of current Regulation 1125, requirements, and not the EPA reforms. We would not sanction using the EPA Reforms for those electing not to adopt the FEL.

Regarding “extreme production restrictions” resulting when a source has a paucity of uncontrolled emissions units, or emission units that are not well controlled for each and every criteria pollutant (i.e., an emission unit may be well controlled for non-attainment pollutants such as NOx or VOC, but will be classified as not well controlled for other pollutants such as PM, CO, or other NSR regulated compounds) and “normal increased demand for production will not be allowed without installation of additional controls,” which they could avoid, you assert, under Regulation 1125. We understand this comment, and believe that is not the intent of the FEL. This comment is discussed under the response to comment (1) above. In addition, DNREC agrees that we need to further discuss how to cover how the FEL will be set relative to units that emit multiple pollutants.

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