

## Meeting Minutes for NSR Workgroup meeting – March 14, 2007

### **Those in attendance:**

Kathleen Anderson, EPA R3  
Ron Amirikian, DNREC  
David Bacher, NRG  
Valerie Csizmadia, DOJ  
Todd Coomes, RLF  
Tap Das, DNREC  
Al Denio, Sierra Club  
Rick Drazich, DuPont  
Paul Jann, DuPont  
Louis Militana, AAQS  
Ali Mirzakhali, DNREC

Deanna Morozowich, DNREC  
Rose Nino, EPA R3  
Steve Ours, DNREC  
John Peronti, GM  
Gene Pettingill, DNREC  
Ravi Rangan, DNREC  
Philip Samuelwicz, AAQS  
Heidi Thear, Astra Zeneca  
April Uhlenburg, Dixon Environmental  
Tom Webster, Daimler Chrysler  
Robert Whetzel, RLF  
Stu Widom, Conectiv

### **OLD BUSINESS:**

The Department asked for comments on the draft 1 minutes of the June 27, 2006 NSR committee meeting that were posted on the NSR website. The Department suggested that all committee members review the minutes and submit changes/comments by Thursday, March 29, 2007 so they can be finalized.

The Department discussed the passage of Regulation 1146 “Electric Generating Unit Multi-Pollutant Regulation” stating that changes are necessary to reduce emissions of SO<sub>x</sub>; NO<sub>x</sub> and Hg from the utilities by 2009. This regulation has been appealed and sent to the Environmental Appeals Board, but at this time no date has been set for a hearing. Based on that regulation, Delaware utilities must make reductions to NO<sub>x</sub> and SO<sub>x</sub> which will result in most of their emissions units being classified as “well-controlled” by the time the revised Regulation 1125 is in effect (including consideration of the 4-year transition period allowed before accepting the FEL). Information on the Regulation 1146 is posted on the website at <http://www.awm.delaware.gov/Info/Regs/AQMPlansRegs.htm> under the heading “Final Regulations”.

In 2005, the Court of Appeals for the DC Circuit in *New York vs. EPA*, remanded the EPA Reforms of 12/31/02 with regard to record keeping requirements. On 3/8/07 EPA proposed a new rule (72 CFR 10445) addressing the “Reasonable Possibility Standard in Recordkeeping”. Under the “reasonable possibility” proposal, sources that estimate that their emissions will be more than 50 percent of the relevant significance level following a modification will be required to keep records. They will not be required to install controls if the significance level is exceeded. Comments are due by May 7, 2007 to the EPA.

Also, since EPA had not codified revisions to NNSR included in the EPA Reforms of 12/31/02, they issued a final rule on 3/8/07 (72 CFR 10367) principally revising appendix S for non attainment NSR. The provisions apply to state NSR programs in non attainment areas from the time of designation on non attainment until states revise their State Implementation Plan (SIP). This documentation will be posted on the NSR website under the Supporting Documentation page.

### **NEW BUSINESS:**

June 27, 2006 was the last NSR Review Committee meeting. The purpose of that meeting was to discuss the recently released draft 4 of the revised Regulation 1125 containing new sections relating to the FEL. The Department gave a thirty (30) days comment period and the last set of comments was received in November 2006. The Department consumed a lot of time reviewing and responding to the comments received. The Department met with stakeholders on an individual basis and there was an extensive internal DNREC review. The responses to all the comments were sent out last Thursday (and posted on the website). The Department would like the committee to respond to the written comments to help put the next draft together.

The purpose of this meeting was to discuss the responses DNREC made on the draft 4 comments submitted by some committee members. The Department started with the first item on the agenda, the comments were listed in the order in which they were received. One committee member asked the Department engineer assigned to Valero to make comments. The engineer stated that it would be more fitting to have open dialogue if a representative from the company was in attendance.

The Department stated that there should also be some concurrence between Regulation 30 and the FEL portion of the revised Regulation 1125. The Department does not want to repeat requirements and suggested making reference to Regulation 30 in section 4 of 1125. Amy Mann, who was not in attendance, has agreed to spearhead an effort to insure the language in section 4 adheres to this requirement.

The purpose of the FEL is to set up the applicability test. Once the numerical FEL is established for a source, changes made mainly will be handled as part of the Regulation 30 permit not the FEL part of Regulation 1125. Regulation 1125 is the Requirements for Preconstruction Review and the FEL is to be part 4.0.

One committee member asked if changes are possible and can be requested in the FEL Section of the rule. The Department responded that section 4.4 of the FEL discusses adjustment of the FEL. There were many comments from committee members concerning some of the provisions of 4.4 and the Department has agreed to make some revisions and to discuss other FEL revision points in committee..

The Department chose to discuss the comments received by Valero on 7/28/06. Another committee member pointed out that the meeting minutes should reflect the actual

company name – Premcor. In the brief discussion, the EPA representative on the committee pointed out that they have made comments that have not been made public and stated that silence on the part of the EPA in the meetings does not constitute approval. The Department encouraged EPA to comment in any way they felt appropriate about any part of the regulation they believed required a comment. The Department wants this regulation to represent the best thinking on the part of all committee members. All comments may not be accepted by DNREC, but, all comments should and will be given a hearing. The EPA is concerned with the definition of “actual emissions”. It is not consistent with federal definitions. It was also pointed out to the committee that the Reforms should be reviewed. The terminology of a PAL pollutant might be useful. The Department pointed out that it had come to the same conclusion about the definition of “actual emissions” and will revise it and develop another definition of “baseline actual emissions” for use in determining the FEL. The Department has also come to the realization that a definition for “FEL Pollutant” may be helpful in reducing verbage.

The committee members believe since the EPA has been attending meetings (since day 1) they should state their position on what is allowed in the regulation. The committee members realize that the EPA representatives in the meeting represent an entire body and believe written comments should be shared since they hold the final cards. Otherwise, time is being wasted. The committee members stated that they could retrieve that information from a FOIA request, but it would not be an efficient use of time. The Committee was informed that the EPA is working with the Department and generally does not make official comments until a ruling is out for final comments. The stakeholders would like a sense of some of the comments made or rather have the EPA point out some “Red Flags and Fatal Flaws”. The stakeholders believe that if comments are not going to be made public then time is being inefficiently used. Through discussion, the point was well taken. The next draft will incorporate what is not included in the first four drafts to address concerns.

“Well-controlled” verses “uncontrolled” status is a major concept in the FEL. The committee members believe that they should be informed if the EPA has any problems with such a fundamental issue. The Department noted that the comments received from the EPA have been advisory comments. The stakeholders wanted to get a sense of the highlights from the EPA. The response was that the FEL is a unique topic and doesn’t follow a template that is similar to existing rules and existing court decisions.

The EPA representative believes that the 2005 EPA Reforms court decision related to clean units made it clear that an allowable PAL cannot exist. DNREC does not share this conclusion and believes that the unique circumstances surrounding the FEL (which is a hybrid of an actuals and allowables determination and is not a PAL as defined in the clean unit section of the EPA Reforms) is one factor in favor of distancing the FEL from the 2005 court decision and another is the fact that EPA has, in the past, allowed certain states to use “allowables” based PAL’s. The only definitive test of the impact of that court decision is to have a fully complete proposed regulation which can then be subject to a legal review.

Another committee member stated there are problems with the concept and there are differences of opinion. The inability to get some type of approval from the EPA is a deal killer. The committee member believes that a severability clause should be included. Facilities are being required to surrender PTE and restricted to actual emissions. Another fundamental issue is an emission cap with growth provisions. A committee member pointed out that there are no provisions in the draft. The Department stated that controls could be put on. The committee believes that will be difficult as a modification will require time and a permit, and that is not clarified in the regulation.

The Department again responded that draft 4 was not meant to be a final draft and that it was just what it was called - a draft, which was to be the basis of committee comments to help frame it in an understandable, complete and generally supportable form that could be taken to a public workshop.

One committee member asked if there was a mechanism to get a formal response from the EPA. The response was yes, the mechanism is called a SIP submittal. The EPA representative reminded the committee that for any program approved before 2005, the EPA would need to do a SIP Call. To date there have been none done but circumstances could change. The courts did not rule on the environmental benefit. Emissions cannot be based on allowables as this was viewed as wrong by the courts. Having BACT and well-controlled status is viewed as subjective. The concept is viewed as positive. The EPA would like all the dust to settle on the reforms and see a final package and a case presented.

One committee member stated that utilities cannot plan for electricity demands, and wanted to know how to address this while a resolution on Regulation 1146 is pending. The member wanted to know if there were options for the utilities with the FEL or even the old program. The Department stated that a separate section or language could be added into the regulation for power plants, but, that 1146 was final unless the EAB ruled differently and all appeals were exhausted. That process would likely be completed before regulation 1125 is approved.

One committee member continued to press for an EPA position. The comments led to much discussion on the installation of BACT/LAER and of offsets. The committee members discussed scenarios that might potentially affect them with having an emissions cap. One committee member strongly believes that facilities would be penalized if they make upgrades to their facilities. The Department believes that upgrading is not a penalty. It is a feature of the FEL program. Facilities without a FEL would have to go through the whole permitting process rather than just get a Regulation 2 permit.

One committee member was interested in the relationship existing between a PAL and a FEL or would facilities with a PAL be exempted from the FEL requirements. The Department stated that the PAL would be translated into a FEL. The limits would be codified and the regulatory basis would be modified. The PAL level will set the FEL.

The stakeholders on the committee stated that they have been operating under regulation 25 for years. They believe that some of the changes would be confusing and are not interested in having requirements that are 10 times as long as existing requirements. They are interested in something that is workable. This sparked a long, somewhat heated discussion of the merits of the FEL. The Department made it clear that the FEL can be made workable and will simplify NSR permitting by removing road blocks and hinderences identified by stakeholders before the EPA developed the EPA Reforms. DNREC believes the Reforms have most of the same style of road blocks and hinderences as the pre-Reforms methodology and propose a simplified applicability test – the FEL. If the FEL is not approvable or finds significant disfavor among Delaware stakeholders, we propose the fall-back position is the current Delaware Regulation 1125 (perhaps with a few minor changes).

In summary, the committee believes that the EPA should determine if the Delaware approach has merit or not. The rest of the meeting was spent discussing various facets of this comment and possible scenarios. The Department is to provide feedback on comments received that adequately address concerns, a list of changes to draft 4, and work on the next draft. Examples and case scenarios would also be beneficial to the committee. The committee members asked when the next draft can be expected. The Department agreed to develop Draft 5 based on the comments and information received from EPA Region 3 and stakeholders in the meeting. The next regularly scheduled NSR Committee meeting will be held 3 weeks after the next draft is posted on the DNREC website. The Department advised the committee to periodically check emails and the website for new information.