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**Presiding Hearing Officer's Ruling
on Motion to Extend Public Comment Period**

October 12, 2006

TO: Proposed Regulation No. 1146 Participants

RE: Motion to Extend the Time Period for Public Comments on Proposed Regulation No. 1146
Rulemaking Proceeding

Dear Participants:

As the presiding Hearing Officer acting on behalf of Secretary of the Department of Natural Resources and Environmental Control, ("Department") John A. Hughes, I deferred ruling on a motion ("Motion") made by Conectiv Energy, NRG, and the Delaware Chamber of Commerce ("Movants"). The Motion requested that the Department to keep the public comment period open beyond the October, 2, 2006, deadline, as established by the notice in the September 1, 2006, Delaware Register of Regulations ("Register") and newspapers. The Movants requested an extension of the public comment period to allow additional written public comments to be submitted until October 16, 2006, as a minimum, or until October 25, 2006, as the maximum requested extension.

This ruling is made after consulting with the Secretary Hughes and is consistent with his direction, although he has delegated to me the authority to rule on procedural matters such as the Motion. The Department recognizes the Movants' concerns. Nevertheless, this ruling explains why the Motion is denied. The public comment period closed October 2, 2006 based upon the Register notice, and it will not be re-opened in response to the Motion. The Department's reasons for this decision are set forth below.

1. The Motion was opposed and the opposition raised valid public policy concerns.

First, the Motion was not granted at the hearing because it was opposed by others in attendance at the hearing. My normal practice is to grant a motion to extend a public comment period if the motion is not opposed and the Department's decision is not subject to time constraints. My rulings on unopposed motions are a matter of courtesy, and similar to the practice on motions made in Delaware courts. I do not lightly deny such motions.

The Motion was opposed by persons who want the proposed regulation to go into effect as soon as possible. The opponents cited the potential delay any extension would cause in the effective date of a final rule, if approved by the Secretary. The delay in the effective date means that there could be a delay in the achievement of cleaner air in Delaware. The public hearing record is replete with concerns about the severe adverse consequences the current poor air quality and its adverse health consequences on Delaware's citizens, particularly its most vulnerable ones, namely, young children and the elderly. Thus, the opponents cite important time considerations and public health concerns, and these are valid factors to weigh in ruling on the Motion.

I find that the proposed regulation is designed to improve the air quality in Delaware in time to allow Delaware to comply with federal air quality standards, assuming owners of the affected generating units take prompt actions as soon as possible after the final regulation goes into effect. Any extension in the public comment period will delay issuance of a final rule, if one is approved. Of note, the Movants' comments already claim that the proposed regulation's time table for compliance is not achievable, and I assume their position is based upon an effective date of a final rule as soon as possible. The delay that would be caused if the Motion was granted would mean that the ability to comply with the proposed regulation would be shortened, which would bolster Movants' argument that the compliance deadlines are too short even though they are not until 2009 at the earliest.

The Motion's opponents have raised valid public policy and public health issues that I find outweigh any procedural issues that the Movants have raised. The Department is subject to federal compliance deadlines, and meeting these deadlines will result in cleaner air quality and improved public health, which are goals consistent with the Department's statutory purposes. Thus, the opponents of the Motion provided a reasonable ground for not granting the extension based upon the important concern in meeting the federal standards and improving air quality as soon as possible.

2. Granting the Motion would result in an undue time delay for issuance of a final rule.

The second ground for denying the Motion is based upon Delaware's laws on promulgating a regulation, which is governed by the *Administrative Procedures Act, 29 Del. C. §§10101 et seq.* ("APA"). This law supports denying an admittedly modest requested delay of even fifteen days because even a small extension will result in a much longer delay in the effective date of a final regulation, if one is approved. The final rule only becomes effective 10 days after its publication in the Register, which is published on the first of each month. The deadline for submitting a final regulation to the register is the fifteen of each month, or first work day thereafter. Based upon the close of the public hearing record on October 2, 2006, the Department could issue a final regulation on October 16, 2006, which would be published November 1, 2006 and go into effect on November 11, 2006. A fifteen day extension would mean public comments still would be received on October 17, 2006, or after the Register's November publication deadline. The result of the fifteen day extension would result in a final

regulation issued November 15, 2006, which means it would go into effect on December 11, 2007 at the earliest. In other words, a fifteen day extension really equates to a one month extension. Similarly, a 30 day extension would result in the issuance of a final regulation on before November 15, 2006, but would allow little time for the Department to consider public comments submitted on October 25, 2006. Realistically a thirty day extension would mean a final regulation going into effect on February 11, 2007, at the earliest. Thus, I find that even the proposed modest extension of 15 days would result in an unacceptable delay in the issuance of a final regulation. I find the requested extensions are not reasonable or appropriate to grant based upon the sound public policies supporting the possibility of issuance of a final regulation as soon as reasonably possible after the close of the public comment period in order that the effective date will allow the owners of the generating units to comply with the final regulation and allow Delaware to meet the federal air quality compliance deadlines.

3. The Technical Support Document does not justify extending the public comment period

The third reason for denying the Motion is that the Movants cite the Department's introduction into the public hearing record of a document marked as DNREC Ex. 8, which was described as the "Technical Support Document on Proposed Regulation No 1146 Electric Generating Unit Multi-Pollutant Rule." ("TSD") As I indicated at the hearing, the preparation and introduction of that document into the public hearing record was to assist me. I was assigned as the hearing officer in August 2006, which was well after the development of the proposed regulation. The Department's technical experts drafted the proposed regulation after a lengthy regulatory development process that began informally in 2003 with the owners of the generating units and then formally with the Start Action Notice published in 2005. During this process the Department relied on numerous documents, which were available to the Movants as participants in the regulatory development process. In contrast, I had little background information on the proposed regulation. Consequently, I requested the experts from the Division of Air and Waste Management's Air Quality Management Section provide me with an executive summary type document to explain the support for the proposed regulation in order to help me get up to speed quickly for the public hearings. The TSD, in effect, is similar to judges relying on bench memos from their law clerks.

The Motion apparently is based upon an argument that the TSD violates the APA or fundamental due process. First, my review of the APA finds no support for the Movants' argument that an extension must be granted in order to allow an opportunity to comment on the TSD. The APA provides for the opportunity to hear public comments through a public hearing, which must be held at least 20 days after the proposed regulation's publication in the Register. The APA also requires for the Department's opportunity to receive written comments, which may be submitted at least 30 days after the proposed regulation's publication in the Register. The two possible ways of receiving comments may not be sequential. Public comments may be received in advance of a public hearing or after a public hearing, so long as they are received 30 days after publication of the proposed regulation in the Register.

I find that the Department's admission of the TSD's admission into the public hearing record does not violate the APA. The Department, as the proponent of the proposed regulation, used the public hearing record to allow the public to see what the Department's experts had relied on in developing the proposed regulation. The Department also included in the public hearing record positions that are contrary to the Department's, such as Movants' written presentations made during the informal regulatory development process. The Department submitted the TSD into the record, but the same information could have prepared and submitted the same document as part of public comments. Indeed, a member of the public wanted to introduce the TSD into the public hearing record since the TSD was posted on the Department's web page prior to the hearing. I find that the public participants, including the Movants, were allowed the opportunity to develop the public hearing record and the Movants' position would essentially seek to handcuff the Department's development of the public hearing record.

When the Motion was made, I had not completely read the TSD, but after I have reviewed it I find that the TSD is appropriate for the public hearing record. Moreover, the TSD does not justify an extension of the public comment period. The TSD is merely a summary of the supporting material, which will assist my technical understanding of the supporting source materials and the proposed regulation. The Movants claim of 'surprise' based upon the TSD as a reason for the Motion is not a valid ground under the APA, which does not require any discovery or advance disclosure of all supporting materials in the public hearing record. Moreover, there was nothing new in the TSD, but a review of the existing source materials compiled into an executive summary for my and the Secretary's benefit. Finally, the TSD does not justify an extension when weighed against the considerable considerations in meeting the federal air quality standards and improving public health through the issuance of a timely final rule, as discussed earlier.

I find and conclude that the preparation and submission of the TSD, including all its supporting source materials, into the public hearing record does not support the requested extension of the public comment period because sound policy considerations support the closure of the public comment period on October 2, 2006, as discussed above, and such closure is consistent with the APA and provides fundamental due process since there was an adequate opportunity to be heard..

4. The Department complied with the APA in the notice and public hearing process, and did not abuse its discretion in not extending the public comment period.

The APA requires that the proposed regulation be published in the Register, and notices in the newspapers. The APA states in Section 10115 that "whenever an agency proposes to formulate, adopt, or repeal a regulation, **it shall file notice and full text of such proposals**, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication, in full or as a summary, in the Register of Regulations..." *29 Del. C. §10115*. I find that the Department's notices complied with Section 10115 of the APA, and that the public had an adequate time and opportunity under the APA to provide comments. Indeed,

the Department held three public hearings on September 25, 27, and 28, 2006, which is an extraordinary procedure to enhance the public's opportunity to comment. The public also had until October 2, 2006 to submit written comments. The proposed regulation also was available on the Department's web site and elsewhere since early July 2006.

The Motion seeks the Department exercise of its discretion to extend the otherwise sufficiently long public comment period for written comments. After careful consideration, as set forth in this ruling, the Department declines to exercise such discretion to extend the deadline before it ended or to re-open the public comment period once it closed on October 2, 2006.

The significance of the public hearing record in the Department's decision-making process also is a factor. The Department's decision-making is not adjudicatory, but in this rulemaking proceeding is similar to legislative hearings where public comments are received, but legislators are able to consider information outside of the public hearing process. Agency rulemaking such as this proceeding are undertaken under the General Assembly's delegation of its lawmaking function to an agency.

The delegation to the Department allows the Department to exercise its expert technical judgment in a manner consistent with the underlying statutory purposes. The Department's proposed regulation is undertaken with the purpose of vastly improving Delaware's air quality and the public health of its citizens. The impact is significant and necessary in order to meet federal air quality standards and deadlines. To the extent that Movants argue that the Department's denial of the Motion is an abuse of discretion, then they should explain how the Department will meet the burdens imposed by the federal air quality standards and their deadlines. Thus, the Department really has no option other than moving forward as quickly as possible to satisfy federal laws and regulations and to protect the health and welfare of its citizens from harmful air pollutants. I find and conclude that the Department complied with the APA and its notice and due process provisions and it is not an abuse of discretion to deny the Motion.

5. The public had an adequate opportunity to be heard, including on the Technical Response Document and the public hearing record.

The Movants claim that an extension is necessary to respond to the TSD. As noted above, there is no APA right to respond to anything in the public hearing record. Nevertheless, the timing of the public hearings prior to the close of the written public comment period did provide the public and Movants with an opportunity to respond to the public hearing record, including the TSD. I have reviewed the Movants' written public comments submitted by the October 2, 2006, closure of the public comment period. These comments address the TSD, which means that they were able to comment on the TSD. While the Movants may have wanted more time to comment, the fact is they were able to comment and there is no right to comment beyond the comment deadline. Furthermore, the Department had sound reasons to close the public comment

period consistent with the Register notice in order to proceed to issuance of a final rule, if that is the Secretary's decision.

I find and conclude that the Department provided an adequate opportunity to be heard in a manner consistent with the APA and fundamental due process. The Department will consider the written comments submitted, which include comments on the TSD. I may also consider information from the Department's technical experts as I review the public hearing record and develop a recommendation for the Secretary. This consideration is consistent with this agency's decision-making, which is not subject to the ex parte communication rules that apply to some agency's decisions. The Department's experts provide me with technical advice and often prepare post-hearing documents upon request to assist in the recommendations. This expert technical advice is similar to the TSD, which also could have been provided post-hearing to be considered by me and ultimately the Secretary. I do not have any technical training or expert technical knowledge and rely on the Department's experts for such technical advice. I find that the Department's development of the public hearing record is consistent with the APA, due process and a more transparent Department decision-making process than otherwise required by the APA for DNREC's rulemaking proceedings.

I further find that the public had an ample opportunity under the APA to be heard on the proposed regulation. I am not aware of any court decision requiring an executive agency's legislative hearing on a proposed rule to require, absent the agency's rules, an opportunity to comment on everything included in the public hearing record, or even on the information the agency includes in the record other than the proposed regulation. Nevertheless, the timing of the public hearing and the written public comments after the hearings provided the public with an opportunity to comment on the public hearing record.

The Movants' apparent position is that they are entitled, as a matter of law, to comment on everything in the public hearing record or on everything considered by the Secretary. The Department allowed comment on the proposed regulation, and developed a public hearing record to support the proposed regulation as the exercise of its reasoned decision-making consistent with the law, sound public policies, and the Department's statutory purposes. Should the Secretary decide to issue the proposed regulation as a final regulation, then the Department's administrative record will be available for review and appellate scrutiny. The Movants seek to require a further public comment period based upon the public hearing record. If that right was in the law, then the regulation promulgation process would become require a cycle of hearings and then comment on the hearing record, which may in turn trigger a right to comment on the comments. This would result in a procedural nightmare.

The Secretary has discretion over the conduct of the rulemaking process, which should not be disturbed so long as the Department complies with the APA. The APA only requires an opportunity to comment on **the proposed regulation**. The public hearing process is not to allow comment on all other information in the public hearing record, but nevertheless the timing of the public hearing before the close of the public comment period allowed such an opportunity.

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Similarly, the APA for regulations does not provide a right to cross-examine, to conduct discovery or to undertake other procedures often employed in adjudicatory style hearings. The final regulation, if approved, is the exercise of delegated legislative authority to create rules, which have the force and effect of laws.

In sum, the specific Motion is denied and the public hearing record closed on October 2, 2006, consistent with the September 1, 2006 Register notice. The public comment period will not be re-opened in response to the Motion, and this is consistent with the exercise of sound discretion, the APA, important public policy and public health concerns, and fundamental due process.

Sincerely,

s/ *Robert P. Haynes*

Robert P. Haynes, Esquire
Senior Hearing Officer