

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 Broadway  
Albany, New York 12233-1550

In the Matter

- of the -

PROPOSED AMENDMENT OF  
PARTS 200, 201 AND 231 OF  
TITLE 6 OF THE OFFICIAL COMPILATION OF CODES,  
RULES AND REGULATIONS OF THE STATE OF  
NEW YORK.

HEARING REPORT

by

\_\_\_\_\_/s/\_\_\_\_\_  
Susan J. DuBois

\_\_\_\_\_/s/\_\_\_\_\_  
Maria E. Villa

\_\_\_\_\_/s/\_\_\_\_\_  
Richard R. Wissler  
Administrative Law Judges

December 4, 2007

## PROCEEDINGS

The New York State Department of Environmental Conservation ("Department" or "DEC") scheduled three public hearing sessions to provide an opportunity for comment on proposed changes to the Department's air pollution regulations. These changes pertain to New Source Review (NSR) for new and modified air contamination sources, and associated revisions to the State Implementation Plan (SIP).

The Department proposes to amend part 231 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR part 231"), and to make related amendments to parts 200 (General Provisions) and 201 (Permits and Registrations). Part 231 would be re-titled "New Source Review for New and Modified Facilities." It would contain requirements for proposed new major facilities and major modifications to existing facilities located both in areas of the state that are in attainment of National Ambient Air Quality Standards and in non-attainment areas. Part 200 would be revised to reflect that the Department is no longer delegated responsibility for implementing the federal Prevention of Significant Deterioration (PSD) program, and is adopting a State PSD program. Part 201 would be amended to revise the definition of "major stationary source or major source" and to include thresholds for facilities emitting particulate matter less than 2.5 micrometers in diameter (PM<sub>2.5</sub>).

Under Environmental Conservation Law ("ECL") article 8 (State Environmental Quality Review Act), the Department issued a negative declaration for the proposed amendments, and no environmental impact statement was required. The proposed regulations are subject to approval by the Environmental Board.

Notice of the hearing was published as a legal notice in the following newspapers on September 26, 2007: New York Post, Newsday, Albany Times Union, Syracuse Post-Standard, Rochester Democrat and Chronicle, Buffalo News, and Glens Falls Post-Star. A notice of hearing was also published in the Department's Environmental Notice Bulletin on September 26, 2007.

A notice of proposed rulemaking for amendment of parts 231, 200 and 201 was published in the New York State Register and in the Environmental Notice Bulletin, both on September 26, 2007. The State Register notice included notice of the public hearing.

The deadline for written comments was November 26, 2007.

The hearing on the proposed amendments took place in three sessions: November 13, 2007, at 2:00 P.M. at the DEC Region 8

Office, 6274 East Avon-Lima Road, Avon, New York, before Susan J. DuBois, Administrative Law Judge ("ALJ"); November 15, 2007, at 2:00 P.M. at the DEC central office, 625 Broadway, Albany, New York, before ALJ Maria E. Villa; and November 16, 2007, at the DEC Region 2 Annex, 11-15 47<sup>th</sup> Avenue, Long Island City, New York, before ALJ Richard R. Wissler.

#### Avon hearing

Three members of the public attended the hearing in Avon. In addition to the DEC Staff representative, two persons spoke.

#### Description of the proposed regulations

Thomas Marriott, Regional Air Pollution Control Engineer for DEC Region 8, described the proposed amendments and stated they would be included in the SIP once they were finalized and approved by the United States Environmental Protection Agency (EPA). He described the amendments as combining a revised New Source Review non-attainment area program with a new NSR PSD attainment area program, and establishing a comprehensive set of regulations for the permitting of new major facilities and major modifications to existing major facilities.

Mr. Marriott stated that the part 200 revisions would amend the definition of "potential to emit," add a definition for "routine maintenance and repair" that would codify the current Department practice of reviewing activities on a case-by-case basis, and clarify that the DEC is no longer delegated responsibility for implementing the federal PSD program. He stated the amendments to part 201 would modify the definition of "major stationary source" and would include the new pollutant category of PM<sub>2.5</sub>.

Mr. Marriott stated that the proposed amendments of part 231 are being undertaken to comply with EPA's 2002 NSR Rule, to correct deficiencies that EPA identified regarding New York's existing part 231 NSR regulation, and to include federal attainment area program requirements. Mr. Marriott briefly outlined the structure of the revised part 231, which would contain 13 subparts.

#### Summary of public comments

Christine Elliott, a student from Syracuse, stated that the proposed amendment would allow corporations to modify facilities and increase pollution to meet market demand with no

repercussions, resulting in harm to public health and to ecosystems. She stated it is ironic that New Source Review allowed then-Attorney General Eliot Spitzer to pursue federal clean air litigation but now the Spitzer administration is proposing to weaken NSR with changes Governor Spitzer opposed. Ms. Elliott also noted that Attorney General Cuomo was recently part of a "record-breaking" NSR case settlement. She urged that DEC rescind the proposed amendments, particularly the demand-growth exemption.

Alejandro Fernandez-Lovo, a student from Syracuse, stated that New Source Review has been a very useful regulatory tool to clean up major air polluters, and that the Attorney General's office has used it effectively in recent years. He expressed disappointment at what he described as the DEC proposal to voluntarily incorporate Bush administration-supported changes into New York State's air program. He stated the most dangerous change is to let facilities increase pollution to meet market demand, and that New York State argued in court that this equates to self-policing. He stated this approach would allow pollution to continually increase and is inconsistent with the intent of NSR.

#### Albany hearing

Six persons spoke at the hearing in Albany, which took place at 2:00 p.m. on Thursday, November 15, 2007. After a presentation by Michael Jennings, of Department Staff, Alex Hanson, Jeffrey D. Starr, Andy Mannino, Lynn Radle, Joel Kayser, and Lori Cornell stated their opposition to the adoption of the proposed amendments. According to Ms. Hanson, an exemption for increased pollution as a result of market demand would make it easier for older facilities to increase emissions, and would override the intent of the New Source Review provisions. Ms. Hanson pointed out that the proposed exemption would not provide incentives for industry to invest in other types of energies, and maintained that there is technology available to reduce emissions, and that technology should be employed to protect public health and the future of all New Yorkers.

Mr. Starr stated that the original intent of the Clean Air Act and New Source Review was to protect public health. According to Mr. Starr, the proposed amendments would not be consistent with that intent. Mr. Mannino voiced similar sentiments, and contended that the rule, as proposed, would make it easier for older facilities to continue to pollute without installing state of the art pollution controls. Mr. Mannino went

on to state that the proposed amendments allowing increased pollution to allow for growth in market demand would be a vague, broad generalization used by many polluters to justify an increase in pollution and a decrease in preventative measures. According to Mr. Mannino, this self-policing would definitely lead to more pollution in New York State, and this speaker concluded that the implication of the proposed amendments was that the monetary considerations of a polluter are of more importance than the health of the State's citizens.

Lynn Radle stated that citizens depend upon the government and its agencies to protect their health and environment, and maintained that the amendments would only protect industry and injure public health, the environment, and the future of anyone who lives in New York. Ms. Radle stated that while she commends the Department for its efforts to address air pollution, she encourages the Department not to support the amendments because those amendments fall short of what is necessary. Joel Kayser stated that he was disappointed by the proposal, and urged the Department to continue to protect the health of New York's citizens and their environment. Lori Cornell, the final speaker, stated that for years the Clean Air Act has been a powerful tool to clean up the dirtiest polluters in New York State. Ms. Cornell said that she appreciated the Department's efforts, but wondered why the market should now dictate that pollution is allowable. According to Ms. Cornell, the proposed amendments would allow pollution to steadily increase over the years.

#### Long Island City hearing

The hearing was convened as scheduled on November 16, 2007, and was attended by three members of the public. Before the receipt of public comments, a statement prepared by Department staff explaining the purpose of the proposed amendments was read into the record by Paresh Shah, an environmental engineer with the Department's Division of Air Resources.

One member of the public spoke, Jason Babbie, the senior environmental policy analyst for the New York Public Interest Research Group. Mr. Babbie argued that the proposed amendments would both weaken and complicate New Source Review. He noted several concerns. For example, in determining the emissions baseline for the purpose of future New Source Review, he noted that the amendments would allow a facility to pick the highest consecutive 24 months in an applicable five year period as that baseline. He also expressed concern for the demand growth exception provided in the proposed amendments. The new

regulations will make it difficult to determine whether an increase in pollution was due to a facility change or necessary to meet increased demand, he asserted. Moreover, the new amendments shift the burden to the Department to show that an increase in pollution is not attributable to increased demand, he said.