

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

In the Matter

- of the -

PROPOSED ADOPTION OF PART 246 AND 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/_____
Molly T. McBride

_____/s/_____
Daniel P. O'Connell
Administrative Law Judges

November 1, 2006

PROCEEDINGS

The New York State Department of Environmental Conservation ("Department" or "DEC") scheduled three public hearing sessions to provide an opportunity for comment on two proposed changes to the Department's air pollution regulations. These changes pertain to new source review for new and modified air contamination sources, and to mercury emissions from coal-fired power plants. The hearings were for comment on both proposals.

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 in areas of the state that are or are not in attainment of National Ambient Air Quality Standards.

The Department also proposed to adopt new part 246 of 6 NYCRR, which would govern reduction of mercury emissions from the burning of coal in electric utility steam generating units. This proposal also includes related amendments to part 200.

Under Environmental Conservation Law ("ECL") article 8 (State Environmental Quality Review Act), the Department issued a negative declaration for each regulation, 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 6, 2006: 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 6, 2006.

A notice of proposed rulemaking for adoption of part 246 and a notice of proposed rulemaking for amendment of part 231 were published in the New York State Register and in the Environmental Notice Bulletin, all on September 6, 2006. The State Register notices included notice of the public hearing.

The deadline for written comments, as stated in the notices of hearing and notices of rulemaking, was October 20, 2006 for both proposals. On October 4, 2006, a notice was published in the New York State Register extending the comment period on proposed revisions of part 231 to November 6, 2006. A similar notice was published in the Environmental Notice Bulletin on

October 18, 2006. The October 20, 2006 deadline for comments on part 246 was not extended.

The hearing on the proposed amendments took place in three sessions: October 11, 2006, at 1:00 P.M. at the DEC central office, 625 Broadway, Albany, New York, before Susan J. DuBois, Administrative Law Judge ("ALJ"); October 12, 2006, at 9:00 A.M. at the DEC Region 8 Office, 6274 East Avon-Lima Road, Avon, New York, before ALJ Molly T. McBride; and October 13, 2006 at 9:00 A.M. at the DEC Region 2 Annex, 11-15 47th Avenue, Long Island City, New York, before ALJ Daniel P. O'Connell.

Albany Hearing

Approximately 40 persons attended this hearing. In addition to the DEC Staff representatives, nine persons spoke.

Description of the proposed regulations

Kenneth Newkirk, Environmental Engineer II, Division of Air Resources, described the proposed amendments to parts 231, 201 and 200 concerning New Source Review. He stated that the amended regulation would include both a revised program for nonattainment areas (areas of the state that do not meet a National Ambient Air Quality Standard for a specific air contaminant) and a new prevention of significant deterioration (PSD) program for attainment areas. The Department would implement PSD requirements under part 231 once the rule is adopted, rather than under a delegation agreement with the United States Environmental Protection Agency (EPA) as DEC had done in the past.

Mr. Newkirk stated that existing subparts 231-1 and 231-2 would be retained, although permit applications received on or after the effective date of the revised regulation would be processed under subparts 231-3 through 231-13, as applicable. He stated that the major facility size thresholds would include a new category of particulate matter (PM_{2.5}), and the proposed definition of "routine maintenance, repair and replacement" would codify the current DEC practice of reviewing activities on a case by case basis, taking into account the nature and extent of the activity and its frequency and cost. He briefly summarized what the new individual subparts would require.

Steven DeSantis, Research Scientist II, Division of Air Resources, described the proposed new part 246, entitled Mercury Reduction Program for Coal-Fired Electric Utility Steam Generating Units. He stated that EPA had promulgated a

regulation known as the Clean Air Mercury Rule (CAMR) and that New York State has the option to adopt the federal cap-and-trade rule or to identify another means to satisfy the requirements contained in that rule. Mr. DeSantis stated that New York State has opted not to accept the model cap-and-trade rule, but instead to submit a state plan containing a state-specific strategy to reduce mercury emissions from coal-fired power plants. He described DEC's proposed rule as incorporating the state-wide emission cap imposed by the federal CAMR and as including a traditional emission limit based program that would be implemented in two phases.

Mr. DeSantis stated that Phase I of the DEC's mercury reduction program would establish facility-wide emission limits that would be in effect from 2010 to 2014, and that Phase II would begin in 2015, establishing unit-based emission limits of 0.6 pounds of mercury per trillion Btu heat input on a 30-day rolling average basis. Mr. DeSantis stated this rule would meet or exceed the minimum federal requirements for limiting mercury emissions, and that DEC would submit part 246 to EPA for approval in lieu of the CAMR model rule requirements. He summarized the provisions of the individual sections of proposed part 246.

Lisa Wilkinson, Esq., Division of Legal Affairs, announced that the comment period for the proposed amendments to part 231 had been extended to November 6, 2006.

Summary of public comments

Several subjects were discussed by most of the persons who commented at the hearing, and are summarized here by subject, followed by further description of particular comments. The great majority of the public comments focused on the mercury rule, rather than the New Source Review rule.

Representatives of several environmental organizations, and one individual, criticized the cap-and-trade concept used by the federal government in its mercury rule and commended DEC for taking a different approach to reducing mercury emissions. Several also expressed support for DEC's opposition to the EPA's Clean Air Mercury Rule (CAMR). The persons and organizations that stated these views were: Scott Lorey, Legislative Director, Adirondack Council; Marisa Tedesco, Conservation and Legislative Director, Adirondack Mountain Club; David Gahl, Air and Energy Program Director, Environmental Advocates of New York ("Environmental Advocates"); Catherine Bowes, National Wildlife

Federation; Jason Babbie, New York Public Interest Research Group ("NYPIRG"); and Alexandra Hanson, an Albany County resident.

Despite supporting the general concept of the DEC mercury regulation, most of the above comments also urged that the mercury emission reductions be implemented more quickly and that the regulation's Phase II reduction target of 90 percent be met in 2010 rather than in 2015. The 2010 date was supported by the Adirondack Council, Environmental Advocates, National Wildlife Federation, NYPIRG, Ms. Hanson, and two persons who are students at the State University of New York at Albany, Andy Mannino and Jackie Hayes. Most of the comments that supported accelerated timing of the requirement noted that certain other states in the Northeast propose to reduce mercury emissions by large percentages as of 2008 or 2010. States whose requirements were mentioned in this regard included Massachusetts, New Jersey, Connecticut, Maryland, Pennsylvania and Illinois. Environmental Advocates stated the federal Clean Air Act regulates hazardous air pollutants such as mercury under a Maximum Achievable Control Technology (MACT) standard, which would "require 90 percent reductions at every plant within three years." NYPIRG, the Adirondack Council and the National Wildlife Federation made similar comments regarding MACT.

Ms. Hanson and Ms. Hayes stated they had worked with children who had learning disabilities or neurological disorders, and that such health problems have been linked to mercury contamination. They and Mr. Mannino urged that mercury emissions be strictly limited as an effort to reduce the personal and economic costs of neurological damage.

In addition to the comments summarized above, the Adirondack Council stated that the Adirondack Mountains have been adversely affected by a combination of mercury deposition and acid rain, that have led the New York State Health Department to issue advisories not to consume various species of fish caught in the Adirondacks. The Adirondack Council also stated that mercury harms wildlife including common loons and Bicknell's thrush, both of which are listed as species of special concern in New York State. The National Wildlife Federation stated it released a report in September 2006 concerning elevated levels of mercury in a variety of animals, and noted the economic importance of fishing in New York State.

The Adirondack Mountain Club questioned the mercury emission quantities identified by DEC for two power plants and recommended that significant fines be imposed for violations of the proposed mercury regulation.

Environmental Advocates stated that, if DEC chooses to use the "facility cap" provisions in Phase I of the proposed mercury regulation, the method of allocating mercury emissions should be changed so that a facility's emission allocations do not exceed its actual emissions as reported in EPA's data for 1999. NYPIRG made similar comments.

With respect to the proposed amendments to part 231, NYPIRG supported DEC's continued use of case-by-case analysis and stated that NYPIRG would comment further on this. With respect to proposed part 246, NYPIRG noted it had sought a 90 percent reduction in mercury emissions since 1998. NYPIRG mentioned several studies indicating that state-level controls of mercury emissions can reduce mercury pollution within a state. NYPIRG suggested that DEC next consider expanding part 246 to include oil-fired facilities, and identifying mercury emission limits on a megawatt basis rather than a heat input basis.

John Holsapple, Director of the Environmental Energy Alliance of New York, presented comments on behalf of AES New York, Dynegy Northeast Generation, Mirant New York, NRG Energy and Rochester Gas & Electric. He stated that four other entities also endorsed the statement. The Environmental Energy Alliance noted that more extensive written comments would be submitted. The Environmental Energy Alliance recommended that coal sampling and analysis be used in place of inlet sampling (sampling upstream of all add-on air pollution control equipment) due to the greater cost of inlet sampling and difficulties in getting accurate inlet data. The Environmental Energy Alliance stated that the stack testing requirements in sections 246.3 and 246.7 are unnecessarily duplicative and the requirements' specifications are inconsistent with each other.

The Albany hearing session concluded at 2:40 P.M.

Avon Hearing

Four people, including Thomas Marriott, DEC Region 8 air pollution control engineer attended this hearing. After Mr. Marriott gave a presentation on behalf of the Department regarding the proposed part 246, two people spoke, Jessica Ottney legislative aide from the Adirondack Council and Brian Smith from Citizens Campaign for the Environment, or C.C.E. Ms. Ottney's comments were in support of proposed part 246. However, the Adirondack Council asks that the changes take place sooner than the new rule calls for since they believe that implementing it sooner will not result in any power outages. She notes that the

Department previously sent a letter to the EPA criticizing its failure to act sooner on mercury emissions and wants the Department to follow its own words to EPA and act quickly to reduce mercury emissions in New York State.

Mr. Smith, a soon to be father, spoke in favor of the regulations but indicated that his group would like to see the changes made sooner due to the threat that mercury poses to human health as well as the damage it does to wildlife. He reported that controlling mercury emissions has proven to be very successful in significantly reducing the mercury levels found in fish in Massachusetts so it will be successful in New York as well. C.C.E. demands that the changes be made by 2010 and not 2015, thereby saving three thousand pounds of mercury pollution from entering the environment.

The hearing concluded at 9:25 a.m.

Long Island City Hearing

Three people, including the DEC Staff representative, attended this hearing session. The speakers were David Gardner, P.E., from the Department's Division of Air Resources; Emmett Pepper, Program Coordinator, from the Citizens Campaign for the Environment; and Jason Babbie, Senior Environmental Policy Analyst, from the New York Public Interest Research Group.

Mr. Gardner explained that the proposed amendments to part 231, as well as provisions from parts 200 and 201 related to New Source Review (NSR), would establish a comprehensive set of permitting regulations for new major facilities and major modification to existing major facilities that would also implement the federal Prevention of Significant Deterioration (PSD) requirements. The proposed amendments would retain subparts 231-1 and 231-2, and would add new subparts 231-3 through 231-13. Mr. Gardner explained further that the proposed new subparts would: (1) change the basis of applicability for modifications and emission reduction credits from an emission-unit basis to an emission-source basis; (2) incorporate various federal requirements; (3) provide clarification of existing requirements; and (4) require comprehensive reporting, monitoring and recordkeeping that would conform to the requirements of the federal Title V program. Mr. Gardner's comments included a brief summary of the requirements proposed in subparts 231-3 through 231-13. Mr. Gardner announced that the Department would continue to accept written public comments until November 6, 2006 concerning the proposed amendments to part 231, as well as parts 200 and 201, as they relate to New Source Review (NSR).

Mr. Gardner also described the newly proposed regulations identified as part 246 and entitled, "Mercury Reduction Program for Coal-Fired Electric Utility Steam Generating Units." Mr. Gardner explained that EPA recently promulgated what is referred to as the Clean Air Mercury Rule or CAMR, which provides the states with the option of either adopting the federal model "cap-and-trade" rule, or implementing other means to comply with the CAMR requirements. New York State has elected not to adopt the federal cap-and-trade rule. Rather, proposed part 246 incorporates a Statewide emission cap imposed by the federal CAMR and includes a traditional program to limit mercury emissions from coal-fired power plants over two phases. Phase I would begin in 2010, and Phase II would begin in 2015. The remainder of Mr. Gardner's comments included a brief summary of the requirements outlined in the various provisions of the proposed part 246.

Emmett Pepper is the Program Coordinator from the Citizens Campaign for the Environment (White Plains, NY). According to Mr. Pepper, the Citizens Campaign for the Environment is a not-for-profit, non-partisan advocacy organization with 80,000 members that operates five regional offices in New York State. Mr. Pepper's comments related to the proposed part 246 regulations.

Mr. Pepper explained that New York State is a leader in reducing mercury emissions because the proposed part 246 rule rejects EPA's model cap-and-trade rule, and would require a 90 % reduction from current levels of mercury emissions in the electric generating sector. Mr. Pepper stated, however, that the emission reductions should be implemented sooner than as proposed in the new regulation. According to Mr. Pepper, if the proposed emission reductions were in place by 2010 rather than 2015, over 3,000 pounds of mercury pollution would be removed from the environment. Mr. Pepper said there is broad support from New York State residents for reducing mercury emissions as soon as possible. The Citizens Campaign for the Environment has collected 5,000 signatures on a petition, and received 1,000 letters that call for quicker implementation of the emission reductions.

Jason Babbie is a Senior Environmental Policy Analyst with the New York Public Interest Research Group (NYPIRG). Mr. Babbie commented at the legislative hearing session on October 11, 2006 in Albany. During the October 13, 2006 legislative hearing session, Mr. Babbie explained that NYPIRG supports the proposed rule that would reduce mercury emissions by 90 %. NYPIRG would prefer, however, to shorten the time frames in Phase I and II

from 2015 to 2010. According to Mr. Babbie, New Jersey, Massachusetts and Connecticut require similar emission reductions before 2012, under certain conditions, and that Illinois requires 90 % emission reductions by July 1, 2009.

The Long Island City hearing session concluded at 10:00 a.m.