

**AIR RESOURCES COUNCIL
MINUTES OF MEETING #219
10/21/13**

MEMBERS PRESENT: Chairman Robert Duval, Vice-Chairman David Collins, Deborah Chabot, Raymond Donald, Debra Hale (via conf. call), Carmela Amato-Wierda, Ryan Bielagus, Georgia Murray, William Smagula

MEMBERS NOT PRESENT:

NHDES – ARD PERSONNEL: Craig Wright, Michele Roberge, Gary Milbury, Pamela Monroe, Barbara Hoffman, Kerry Barnsley

OTHERS PRESENT: Anne Keach, Paula Scott

Call to Order:

Chairman Duval called Meeting #219 of the Air Resources Council (ARC) to order at 9:10 a.m. on Monday, October 21, 2013. Chairman Duval announced that a quorum of the ARC was present.

Approval of Minutes:

Ryan Bielagus entered a motion to accept the minutes of meeting #218. Raymond Donald seconded the motion. All were in favor. The motion carried. The minutes of ARC meeting #218 were approved and accepted by the ARC.

Division Activities & Legislative Update:

Chairman Duval introduced Craig Wright, Director of the Air Resources Division (ARD). Mr. Wright briefly updated members of the ARC on legislative and budgetary issues relative to the Air Resources Division.

Legislation

Mr. Wright reported that the Air Resources Division (ARD) is developing potential legislation for the upcoming 2014 session and will provide members with relevant Legislative Service Requests at the November 18, 2013 meeting.

Permitting

Public Service Company of New Hampshire, Schiller Station – Portsmouth

North Country Environmental Services, Inc. (NCES) – Bethlehem

Notice of the public comment period for the Draft Title V Permit opened on October 23 2013. The public comment period closes on November 22, 2013.

Section 111D – Emissions Guidelines

Director Wright reported that the EPA will issue CO₂ standards in June 2014. He added that New Hampshire is providing comments to EPA for the Regional Greenhouse Gas initiative as RGGI will serve as a national model of what states can achieve concerning CO₂ emissions reductions.

Compliance Assurance Response Policy (CARP) Overview

Kerry Barnsley, Compliance Attorney, Legal Unit and Pamela Monroe, Bureau Administrator of the Air Resources Division Compliance Bureau provided members of the ARC with an overview of the CARP, which was adopted on September 27, 2000. The CARP was developed to identify the range of actions available to the DES when addressing violations of environmental laws.

Mr. Barnsley explained that there are two types of department enforcement decisions subject to appeal to the Air Resources Council. The first is the decision to issue an administrative order; the second is the decision to revoke, suspend, or refuse to renew a license. The decision to deny a license or permit, initially, is a department permitting decision under RSA 21-O:14.

Mr. Barnsley outlined the following enforcement decisions for members of the ARC:

Administrative Order (AO) – a legally enforceable document issued unilaterally by the DES that requires the Respondent to act or refrain from acting in response to specifically identified violations of environmental laws. An AO usually includes a compliance schedule. If an AO is not appealed, it can be used as proof that the violations alleged in the AO occurred. As such, the AO must comply with basic concepts of fairness and due process, which require that the Respondent be able to tell exactly what the “charges” are and the corrective actions the DES expects of the Respondent(s).

Administrative Order by Consent (AOC) – a legally enforceable document that the DES issues with the consent of the Respondent. Because the Respondent is agreeing to the AOC, administrative fines, civil penalties, and/or stipulated penalties can be included. The Respondent must sign the AOC and waive any rights of appeal.

License Action – when violations are committed by someone who holds a license from the DES, the DES may take an action directly against the license in addition to or in lieu of a penalty action or compliance action. “License” is broadly defined to include the whole or part, if any agency permit, certificate (including operator certification), approval, registration, charter or similar form of permission required by law.

Administrative Fine (AF) – an action by which a Division asks DES to impose a monetary penalty against the Respondent. Administrative fine actions are sometimes initiated with the intent of seeking a settlement of the case that will also resolve any outstanding compliance issues. The Commissioner of DES is authorized to impose administrative fines for violation under most of the statutes implemented by DES. Administrative fines decisions are subject to the provision of RSA 541-A for purposes of appeal.

Administrative Fine by Consent (AFC) – an administrative fine action is initiated by the Air Resources Division by sending a draft AFC document, approved by the Commissioner to offer to Respondent(s). If the Respondent doesn't accept the proposed settlement and alternate terms can't be worked out, the Division may initiate a formal proceeding by issuing a Notice of Proposed Fine. If the terms are agreed to, the AFC is signed and routed for acceptance by the Commissioner.

Notice of Proposed Fine (NPF) – is a notice that an AF is being proposed; it is not a notice that a fine has been imposed. Pursuant to the statutory authorities for imposing fines, the Respondent has an opportunity for a hearing before a fine is imposed. All DES programs are encouraged to discuss a possible settlement of any AF case. If the Respondent does not contact the program to initiate the discussion,. Program staff may contact the Respondent(s).

Notice of Past Violation (NPV) – DES may issue an NPV when a program discovers a violation; the responsible party returns to compliance prior to the program taking actions; seeking an administrative fine for the violation is not appropriate; but the program wants to have a record that the violation occurred in the event of a future action against the same responsible party. The NPV creates a record that DES believes that the violation occurred and that it has been addressed. An NPV is not proof that a violation occurred, so if DES uses the past violation in a subsequent

proceeding, DES will offer proof of the past violation along with proof of the current violation. An NPV is not a DES enforcement decision subject to appeal.

Letter of Deficiency (LOD) – a letter to the Respondent which identifies observations and finding made by DES and the applicable environmental laws alleged to have been violated. In an LOD, the DES requests the Respondent to come into compliance with the applicable requirements. An LOC constitutes a compliance action, only used if violations have occurred or are on-going.

Notice of Findings (NOF) – a letter to the Respondent that identifies all of the violations that a program, after an investigation (including record reviews and/or inspections as appropriate), believes exists at a facility. In the NOF, the DES also requests a response, and so it serves two purposes: the NOF informs the Respondent of the violations that DES believes exist to allow the Respondent to get an early start on correcting them, and it “invites” the Respondent to inform the DES is the information on which the conclusions are based is incomplete or erroneous. An NOF is not a DES enforcement decision subject to appeal.

Mr. Barnsley stated that the desired outcome in every LOF, AO, and AOC is compliance with applicable laws and rules. In an AF case, the desired outcome is payment of the fine. However, since the fine can only be imposed after notice and opportunity for a hearing, in an NPF, DES can't order or require the Respondent to pay anything. Instead, the Division states in the NPF that it is seeking a fine to be imposed by DES, and informs the Respondent of the subject of the action; the alleged facts forming the basis for the violations, the applicable legal requirements; the violations alleged; and the amount of the proposed fines(s). The process for responding to the notice, being heard, as well as the consequences for failing to appear are set out in the notice.

Chairman Duval asked if there is an advantage for entities to self-report violations.

Ms. Monroe responded that entities who self-report do so because they want to be in compliance. She said that the processes contained in the CARP are all about resolution. She added that the CARP largely includes a list of “tools” (e.g., AO, NPV, NOF, LODs) in order for the parties and the DES to attain compliance.

Chairman Duval thanked Mr. Barnsley and Ms. Monroe for presenting the components of the CARP, and for the information shared during the members' discussion.

Status of Appeals

Paula Scott, Appeals Clerk presented the status of appeals before the ARC as follows:

Docket No. 11-10 ARC – Public Service of New Hampshire (PSNH), regarding the NHDES Final Determination of Baseline Mercury Input. The ARC adopted the draft decision and issued the Final Decision on December 17, 2012. On January 15, 2013, the ARC received the State's Request for Reconsideration and Clarification. On February 1, 2013, the ARC received the Objection to State's Request for Reconsideration and Clarification. The ARC received the State's Assent to PSNH Request to Defer Decision on Reconsideration and State's Motion to Strike. On February 12, 2013, the ARC received PSNH's Objection to State's Motion to Strike. PSNH filed their Status Report on February 27, 2013. On March 4, 2013, a letter was issued to the parties regarding the hearing officer's rulings. The status report was due by April 1, 2013. On March 29, 2013, the ARC received PSNH's status report. On April 1, 2013 the ARC granted the requested relief to submit status report by May 1, 2013. On April 29, 2013, the ARC received PSNH's status report. On May 1, 2013, the ARC granted the request to submit the status report by June 1, 2013. The ARC received PSNH's status report on June 11, 2013. On June 13, 2013, the ARC granted the request to submit the status report by September 1, 2013. The ARC received PSNH's status report on September 5, 2013. On September 12, 2013, the ARC issued a letter granting the request.

Docket No. 12-11 ARC – Katherine Lajoie, Rebecca MacKenzie, et al. regarding the September 11, 2012 granting of the Title V Air Permit to Operate for Wheelabrator Claremont, Application #09-005. A Notice of Appeal was received on October 11, 2012. On October 18, 2012, a notice of insufficient filing was sent to the Appellants. The ARC received an addendum to the Notice of Appeal on November 15, 2012. The ARC sent a receipt of the revised Notice of Appeal. The ARC accepted the Appeal on December 17, 2012, and a Hearing Officer will be appointed by the Office of the Attorney General. The Notice of Appeal Acceptance was sent to the parties on December 17, 2012. On January 8, 2013, Evan Mulholland, Assistant Attorney General, filed an Appearance for the NHDES. On January 11, 2013, the ARC received the Appearance of Gregory Smith, and Jarret Duncan of McLane, Graf, Raulerson and Middleton P.A., for Wheelabrator Claremont Company L.P. On January 23, 2013, a notice was issued of the Pre-Hearing Conference scheduled for February 12, 2013 at 1:00 p.m. On February 7, 2013, the ARC received Objection to Motion to Dismiss and Request to Stay. The ARC issued the Pre-Hearing Order on February 12, 2013 with a hearing scheduled for May 20, 2013, at 10:00 a.m. Wheelabrator's Reply to Appellant's Objection was received on February 19, 2013. On February 25, 2013, the ARC received the Appellant's Response to Wheelabrator's Reply to Appellant's Objection. On March 12, 2013, the ARC received a copy of the Department of Environmental Services' file and fifteen CDs of the file for ARC members. The hearing officer sent a draft decision to the ARC for review on March 22, 2013. On April 2, 2013 the order on the Motion to Dismiss was issued. On April 18, 2013 the ARC received a copy of the request for information from Appellants to Wheelabrator's counsel and to Evan Mulholland, counsel for the NHDES. On April 22, 2013, the ARC received a copy of Atty. Smith's response to the Request for Information. On April 22, 2013, the ARC received the Appellants' Motion to Amend. On April 26, 2013 received the Withdrawal of Appearance for Jarrett Duncan and Appearance for Carol Holahan. On April 25, 2013, the Public Notice of Title V Appeal Hearing was published in the Union Leader newspaper. On April 26, 2013, the ARC received a Joint Objection to Motion to Amend Notice of Appeal. On April 29, 2013, the ARC received the Appellants' Response to Joint Objection to Motion to Amend Notice of Appeal and Appellants; Motion to Compel. On May 2, 2013 the ARC received Wheelabrator's Objection to Motion to Compel and Reply to Appellants' Response to Joint Objection to Motion to Amend Notice of Appeal. On May 3, 2013, the Hearing Officer issued an Order on Motion to Amend; which was granted. On May 3, 2013, the Hearing Officer issued an Order on the Motion to Compel; which was granted. On May 6, the ARC received the NHDES' Objection to Motion to Compel. On May 8, 2013, the ARC received Wheelabrator's Motion for Reconsideration or Clarification of Order Granting Appellants' Motion to Amend Notice of Appeal. On May 10, 2013, the ARC received a Motion to Enforce Hearing Officer's Ruling. On May 13, 2013, the ARC received Wheelabrator's, the NHDES' and Appellants' Witness and Exhibit Lists. On May 15, 2013, the Hearing Officer issued an Order on Appellants' Motion to Enforce Hearing Officer's Ruling and Order on Wheelabrator's Motion for Reconsideration or Clarification of Order Granting Appellants; Motion to Amend Notice of Appeal. On May 20, 2013 a hearing on the matter was held and recessed at 12:15 p.m., to resume on June 17, 2013 at 9:30 a.m. On June 5, 2013 the ARC received the Appellants' Response to Wheelabrator's Request for Information. On June 10, 2013 the ARC received Wheelabrator's Objection and Motion to Strike Exhibit A16 File Out of Order by the Appellants. On June 13, 2013, the ARC issued a ruling on the Objection and Motion to Strike. On June 14, 2013, the ARC received an Objection to Appellants' Request for Information. A continued hearing on the matter was held on August 12, 2013. The hearing will resume on September 11, 2013 at 11:00 a.m. On August 20, 2013, the ARC received the Appellant's Submittal of missing data from Exhibit A4. A hearing on the matter will resume on October 21, 2013 following the regular meeting of the ARC at 10:00 a.m.

Docket No. 13-4 ARC – Winmill Equipment Co., Inc. regarding Administrative Order No. 13-009 ARD issued on May 30, 2013. The ARC received the Notice of Appeal on July 1, 2013. On July 2, 2013, the ARC issued an insufficient appeal letter. On July 15, 2013, the ARC received a revised Notice of Appeal. On July 22, 2013, the ARC issued a receipt of the Revised Appeal. On August 19, 2013, the ARC received a Notice of Appearance from Kerry Barnsley for the NHDES. On September 13,

2013, the ARC issued a Notice of Pre-hearing Conference scheduled for October 8, 2013 at 4:00 p.m. On September 24, 2013, the ARC issued notice of the Pre-Hearing Conference time change from 4:00 p.m. to 8:30 a.m. on October 8, 2013. The Pre-hearing Conference was held on October 8, 2013 and a Pre-Hearing Order was issued. The continued Pre-Hearing Conference is scheduled for January 14, 2014, at 8:30 a.m.

New Business

Chairman Duval reminded members of the ARC whose terms are expiring to contact Jen Kuzma of the Governor's office if they are interested in re-appointment to serve on the ARC. He added that two vacancies remain on the ARC representing the Recreation and Manufacturing sectors. Chairman Duval asked members to refer individual interested in serving on the ARC to contact the Governor's Office as well.

Other Business

Chairman Duval set the next meeting of the Air Resources Council to be held on November 18, 2013.

Public Commentary

No public comments were received by the ARC.

Adjourn

Having no further business to discuss, Raymond Donald entered a motion to adjourn. Deborah Chabot seconded the motion. All were in favor. Meeting #219 of the Air Resources Council adjourned at 9:55 a.m. on October 21, 2013.

Continued Hearing, Docket No. 12-11 ARC Katherine Lajoie, Rebecca Mackenzie, et. al

Continued Hearing from September 11, 2013 started at 10:10 a.m.

Present: Georgia Murray
Camela Amato-Wierda
David Collins
Robert Duval
William Smagula

Hearing Officer: David Conley
Appeals Clerk: Paula Scott

The Hearing closed at 11:40 a.m.

Deliberations began at 11:50 a.m. and recessed at 12:05 p.m. Deliberations will resume on Monday, November 18, 2013, at 10:00 a.m.