

**AIR RESOURCES COUNCIL
MINUTES OF MEETING #198
06/20/11**

- MEMBERS PRESENT:** Chairman Robert Duval, Vice-Chairman David Collins, Raymond Donald, William Smagula, Georgia Murray, Steven Walker, Terry Callum, Ryan Bielagus
- MEMBERS NOT PRESENT:** Debra Hale
- NHDES – ARD PERSONNEL:** Robert Scott, Anne Keach, Peter Demas, Gary Milbury, Michele Roberge, Karla McManus, Todd Moore, Michael Fitzgerald, Joseph Fontaine, Cathy Beahm, Barbara Hoffman
- OTHER INTERESTED PARTIES:** Atty. Anthony Blenkinsop, NHDoJ; Atty. Linda Landis, PSNH; Atty. Barry Needleman, McLane PA

Call to Order:

Chairman Duval called Meeting #198 of the Air Resources Council (ARC) to order at 9:05 a.m. on Monday, June 20, 2011. Chairman Duval announced that a quorum was present.

Approval of Minutes:

Terry Callum entered a motion to accept the minutes of meeting #197. Raymond Donald seconded the motion. All were in favor of accepting the minutes of meeting #197.

Division Activities & Legislative Update:

Chairman Duval introduced Robert Scott, Director of the Air Resources Division (ARD). Director Scott provided members of the ARC with an update regarding the following issues relevant to the Air Resources Division.

Air Resources Council Member Appointed

Director Scott announced that on June 8, 2011, Governor John Lynch confirmed the appointment of Ms. Deborah Chabot, who will succeed Dr. Robert Hickey as the At Large/Health Care Professional on the Air Resources Council. Director Scott added that Ms. Chabot is an asthma specialist with Ashfield Health Care and that the ARC will be well-served by her expertise.

Budget

Director Scott reported that because the Air Resources Division is funded by only 4% General Funds, it has been less impacted by the recent budget cuts. The ARD laid off one support position for the Atmospheric Science and Analysis Unit and Asbestos Program, and eliminated the Radon Program which was managed by one staff member.

Director Scott explained that due to budget constraints and recent staff retirements, the Air Resources Division has been reorganized to ensure that permits, state implementation plans, and compliance work will continue. He added that updated organizational charts will be provided to members of the ARC at the next meeting.

Regional Greenhouse Gas Initiative

Director Scott stated that HB 519, repealing New Hampshire's greenhouse gas initiative cap and trade program for controlling carbon dioxide emissions passed the House. The Senate Committee

on Energy and Natural Resources voted the measure 9-15 Inexpedient to Legislate. Senator Bradley called for a floor amendment which reforms the way revenues from the RGGI are spent concerning core energy efficiency programs. After a Committee of Conference was assigned, the House and Senate do not concur with the amendments providing for RGGI reform. The Governor is expected to veto the trailer bill to the Comprehensive Shoreline Protection legislation (HB 2) and there appears to be enough votes in the Senate Committee to sustain the veto. A Legislative Service Request to repeal RGGI has been filed for the 2012 Legislative Session.

Permitting Activities

On May 9, 2011, the Air Resources Division held a public hearing to receive comments regarding the proposed permit for Mitchell Sand & Gravel hot mix asphalt plant in Winchester. Nearly seventy concerned parties attended the hearing and requested an extension of the public comment period. The NHDES extended the public comment period until May 23, 2011. The ARD is reviewing comments received and expects to issue the permit by the end of June. Director Scott informed members of the ARC that the permit may be appealed due to citizen concerns regarding fugitive emissions, noise and typical construction issues.

Gary Milbury of the Permitting and Environmental Health Bureau added that in 2012, Env-A 1400, *Toxics Rule* will be amended and concerned citizens will have an opportunity to participate in the rulemaking process.

Director Scott stated that the Air Resources Division has received a rulemaking petition regarding rock crushing permitting from a NH State Representative. The ARD is preparing a response requesting data to support the request.

National Ambient Air Quality Standards

Director Scott stated that the Environmental Protection Agency (EPA) intends to issue revised NAAQS by the end of July 2011. Director Scott expects a delay because the new NAAQS have not yet been filed with the Office of Standards and Budget to date.

Georgia Murray asked if the NAAQS were issued in July of 2012, what time frame is expected for NH to implement the Transport Rule (TR).

Director Scott responded that NH is not in TR1, but will be encompassed in TR2 for high altitude areas and rural transport regions such as Pack Monadnock and Mt. Washington; and NH could therefore use these areas as leverage for a 126 Petition.

Env-A 600, Statewide Permit System and Env-A 1700, Permit Application Forms

At the May 16, 2011 ARC meeting, Chairman Duval requested that Ms. McManus present Env-A 600, Statewide Permit System to the ARC at the June meeting of the ARC so members may review the previously requested revisions.

Karla McManus stated that revisions to Env-A 600 and 1700 were previously presented to the ARC in December 2010, and interim rules have been in place and are due to expire, therefore the rules must be submitted to the Joint Legislative Committee on Administrative Rules (JLCAR) by July 1, 2011. Ms. McManus explained that the amendments are currently being reviewed by the NHDES Legal Unit and are not available for distribution to the ARC. Ms. McManus assured members of the ARC that there are no substantive revisions to the rule, only minor changes to formatting.

William Smagula entered a motion to accept the revision to Env-A 600 and 1700 and to begin the fifteen day review period. Terry Callum seconded the motion. All were in favor. Raymond Donald stated that he did not want the members of the ARC to be in this situation again, and instructed Ms. McManus to take into consideration the amount of time the Legal Unit requires for the review

process before presenting rule revisions to the ARC under such deadlines in the future. Chairman Duval agreed with Mr. Donald's request and requested that the ARD allot more time for legal review of rule revisions in preparing rulemaking timelines in the future.

Env-A 2900, Multiple Pollutant Annual Budget Trading and Banking Program

Karla McManus and Joseph Fontaine of the Technical Services Bureau presented members of the ARC with the latest revision from the Legal Unit of the proposed re-adoption of Env-A 2900, *Multiple Pollutant Annual Budget Trading and Banking Program*, for which the interim rule expires in July 2011. Mr. Fontaine provided a summary of the changes as follows:

- Title and applicability changed from multiple pollutants to just sulfur dioxide and nitrogen oxides because the state law was amended to include separate mercury and carbon dioxide provisions.
 - All references to CO₂ in the rule were deleted and are now covered by Env-A 4600 (the RGGI rule).
 - Env-A 3200 covers seasonal NOx budget trading.
 - PSNH is installing a scrubber at Merrimack Station in accordance with the statute to control mercury emissions.
- The reference to the code of federal regulations was updated to the July 1, 2010 edition.
- A few definitions were deleted because they are not used anymore.

This rule was originally adopted after enactment of the NH Clean Power Act in 2002. Mr. Fontaine added that background on the program is posted on the DES website at http://des.nh.gov/organization/divisions/air/tsb/tps/aetp/clean_power_act.htm.

William Smagula entered a motion to accept the rule upon e-mail receipt of the final revisions from the Legal Unit. Georgia Murray seconded the motion. All were in favor. The motion carried. Chairman Duval reminded members of the ARC to contact ARD rulemaking coordinators and Vice-Chairman Collins with any comments related to proposed revisions to rules presented before the ARC within fifteen (15) days of email receipt of the rule by the Council.

Status of Appeals:

Peter Demas of the NHDES Legal Unit stated that he has been designated as the acting appeals clerk until the position is filled on July 1, 2011. Mr. Demas provided members of the ARC with the following status concerning:

Docket No. 10-13 ARC – Kalwall Corporation regarding payment of emission-based fees. Mr. Demas reported that settlement discussions are ongoing. Director Scott added that Atty. Cheney has been out of the country and the NHDES has not received a response to date. Vice-Chairman Collins reminded Mr. Demas that the ARC requested a written status summary at the ARC meeting on May 16, 2011 and expects a summary of settlement discussions at the July 18, 2011 meeting.

Docket No. 09-43 ARC – Public Service of New Hampshire (PSNH) regarding DES' Final Responses to Requests for Bonus Carbon Dioxide (CO₂) Allowances as amended and dated December 3, 2009, relative to the Motion for Reconsideration filed by CLF on April 11, 2011, the ARC deliberated on and voted to deny this motion. A Decision and Order has been finalized and the ARC must vote to approve the draft Order.

Chairman Duval read the following ARC's Findings of Fact and Conclusions of Law concerning the CLF Motion for Reconsideration on Docket No. 09-43 ARC:

1. *The Council finds that the overall purpose of RSA 125-O is to reduce emission of air pollution, and that RSA 125-O:5 III assisted in that purpose by offering incentives, based on actual expenditures, for actions by PSNH to reduce carbon dioxide emissions before RGGI came into effect.*
2. *The Council finds that the actions taken by PSNH and the actual dollar amounts expended are not in dispute. It is DES' selection of "market prices" used to calculate bonus allowances that is the subject of PSNH's appeal.*
3. *The Council therefore finds the subject matter in the appeal before it is whether the selection of market prices used by DES for calculation of bonus allowances was contrary to law, or arbitrary and capricious.*
4. *CLF asserts that its interests in this matter consist of the adverse effects on its members from climate change caused by carbon emissions from PSNH's power plants, and that award of bonus allowances would tend to cause more emissions.*
5. *The Council finds that the legislature did intend that bonus allowances would be awarded to PSNH for qualified projects. Whether the implementation of these projects and the subsequent award of bonus allowances would have a net positive or negative effect on the environment and the health and welfare of the public is not a question before the Council.*
6. *RSA 541-A:32 allows intervention when the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.*
7. *The Council finds that the interests of justice and the prompt, orderly conduct of proceedings require the petitioner to demonstrate that the relationship between the alleged injuries and the subject matter of the appeal is immediate, direct and apparent.*
8. *The Council finds that the injuries alleged by CLF are remote and speculative, not directly related to the method of calculation of bonus allowances, and do not support a petition for intervention.*

DECISION

Based on the foregoing, by unanimous vote of a quorum of the Air Resources Council, it is ordered that the Motion for Reconsideration by the CLF in this matter be DENIED.

Since the Motion for Reconsideration is denied, there are no grounds to Stay the Proceedings or conduct a Rehearing, and these parts of the motion were not taken up by the Council.

Docket No. 09-43 ARC – Public Service of New Hampshire (PSNH) regarding DES' Final Responses to Requests for Bonus Carbon Dioxide (CO₂) Allowances as amended and dated December 3, 2009, relative to the Appeal. On April 11, 2011, the ARC deliberated on the matter. A Decision and Order has been finalized and the ARC must review the draft Order, which includes the PSNH Assented-to Motion Requesting the ARC Retain Jurisdiction granted by the Presiding Officer.

Chairman Duval read the following ARC's Findings of Fact and Conclusions of Law concerning Docket No. 09-43 ARC:

1. *The Council finds that the overall purpose of RSA 125-O is to reduce emission of air pollution, and the particular purpose of RSA 125-O:5, III was to offer incentives (allowances) to PSNH, based on actual expenditures, for actions by PSNH to reduce carbon dioxide emissions before RGGI came into effect.*
2. *The Council finds that the legislature did intend for bonus allowances to be awarded to PSNH for qualified early action projects,*
3. *The eligibility of the projects undertaken and the dollar amounts expended by PSNH are not in dispute. It is DES' selection of "market prices" used to calculate bonus allowances that is the subject of PSNH's appeal.*
4. *The Council therefore finds the subject matter in the appeal before it is whether the selection of market prices used by DES for calculation of bonus allowances was contrary to law, or arbitrary and capricious.*
5. *The Council finds that the plain language of the statute does not require that the market price used for calculating allowances had to be a market price prevailing "at the time of the expenditure." The statute merely requires that a "market price" be used for the calculation.*
6. *The Council finds, as supported by DES' own testimony, that the legislature's intended market for the bonus allowances was the RGGI program.*
7. *The Council finds that appellant has demonstrated that EU-ETS prices varied widely at the time of the PSNH expenditures for reasons that did not bear any relationship to present or anticipated conditions in the RGGI marketplace.*
8. *The Council finds that DES' insistence on using EU-ETS market prices despite its own acknowledgement of serious problems inherent in those prices was unreasonable.*
9. *The DES attempted to cure these inherent EU-ETS price problems by establishing an artificial, composite price. The Council finds that this amounts to the creation of an arbitrary price by DES that no actual, reasonable person would have paid.*
10. *Therefore, the Council finds that the DES decision:*
 - *was based on an erroneous interpretation of the plain language of the statute, and*
 - *was unreasonable in the selection of EU-ETS prices and ignoring RGGI prices, and*
 - *was unreasonable in its manipulation of EU-ETS prices, and*
 - *resulted in the calculation of bonus allowances in an arbitrary and capricious manner.*

DECISION

Based on the foregoing, by unanimous vote of a quorum of the Air Resources Council, the Appeal is GRANTED.

The DES Decision is hereby vacated and the matter remanded to DES for further proceedings consistent with this Order.

Raymond Donald entered a motion to accept the Orders as written. Steven Walker seconded the Motion. Terry Callum and J. Ryan Bielagus were in favor. The motion carried.

Docket No. 10-06 ARC – New Hampshire Sierra Club, et. al. regarding the proposed Title V Operating Permit issued to PSNH. A hearing on the matter was held on April 18, 2011. A Decision and Order has been finalized and the ARC must review the draft Order as the matter is taken up by the sitting members of the ARC regarding this appeal.

Other Business

Chairman Duval set the next meeting of the Air Resources Council to be held on July 18, 2011.

Goergia Murray asserted that because the NHDES decision in Docket 09-43 is vacated and remanded back to the NHDES, the public comment process should be re-opened in the matter.

Atty. Blenkinsop stated that the NHDES will seek advice from Counsel in the matter.

William Smagula stated that the NHDES decision was in dispute, not the process, therefore the public comment process does not need to be re-opened.

Steven Walker invited all recused members in the matter of Docket No. 10-06 ARC to leave at 10:14 a.m. Council members Walker, Callum, Donald, and Bielagus remained to take up the Decision and order on Pending Motions, and the Decision and Order on Appeal.

Raymond Donald entered a motion to accept the Decision and Order as written for the New Hampshire Sierra Club's Motion for Reconsideration Order on Motion to Compel. J. Ryan Bielagus seconded the motion. Terry Callum was in favor. The motion carried.

Raymond Donald entered a motion to accept the Decision and Order as written dismissing the Appeal of New Hampshire Sierra Club et al. J. Ryan Bielagus seconded the motion. Terry Callum abstained. The motion carried.

Adjourn

Having no further business to discuss, Raymond Donald entered a motion to adjourn. Terry Callum seconded the motion. All were in favor. Meeting #198 of the Air Resources Council adjourned at 10:17 a.m. on June 20, 2011.