

Written Comments of



Before the Maine Board of Environmental Protection

on

**Maine Department of Environmental Protection Draft Rules
Chapters 156 and 157
Regional Greenhouse Gas Initiative**

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September 20, 2007

I. Environment Northeast

Environment Northeast (ENE) is a Maine-based nonprofit research and advocacy organization focusing on the Northeastern U.S. and Eastern Canada. Our mission is to address large-scale environmental challenges that threaten regional ecosystems, human health, or the management of significant natural resources. From offices in Maine, Massachusetts, Rhode Island and Connecticut, ENE uses policy analysis, collaborative problem solving, and advocacy to advance the region's environmental and economic sustainability.

ENE actively supported the passage of LD 1851, which established the Regional Greenhouse Gas Initiative (RGGI) program in Maine. ENE is also part of the 24 member Stakeholder Group, selected by the RGGI states to represent consumer, electric generator, environmental, and other affected interests in the Northeast and Mid-Atlantic regions.

ENE greatly appreciates the opportunity to provide these written comments on Maine's draft rule to implement RGGI.

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II. Introduction

RGGI is a policy tool that uses market forces to guide an orderly, phased transition away from dirty, inefficient electricity generation and achieves emission reductions in the most cost effective way possible. ENE commends the Governor and Department for committing Maine to participate in RGGI, as this will position Maine's industry and consumers to succeed in an economy that increasingly places a price on carbon.

For this policy tool to work, it is essential that the rules of the game in Maine are not inconsistent with the rules across the region of 10 participating states. Otherwise, the value of a CO₂ allowance in Maine will be different from a CO₂ allowance being used in another state. The result will be a lack of demand for Maine allowances or Maine offsets, or a collapse of the Maine program entirely. Some minor variations among the states can be tolerated, but they must be limited to areas that are not covered by the regional Model Rule and will not significantly change the value of the common CO₂ "currency" from one state to another.

ENE fully supports RGGI and looks forward to working with the State of Maine as it moves forward with the RGGI rulemaking process. We applaud the Department staff for bringing forward the drafts of Chapters 156 and 157 (hereinafter the Draft Rule) and encourage the Board to approve these rules after making the changes and additions suggested in this document.

III. Detailed Comments

A. Eligible Biomass (Ch. 156, Draft Rule Sec. 1.B.(55) and 5.D.2)

Eligible Biomass is defined in the Chapter 156 Draft Rule as it is in the regional Model Rule. We endorse this definition as it allows certain generation plants co-firing biomass with fossil fuels to make CO₂ deductions from their compliance obligation. Draft Rule, Section 5.D(2)(a); Model Rule Subpart XX-6.5(b)(1) (providing that regulated units may deduct from their total CO₂ allowance obligation "any CO₂ emissions attributable to the burning of eligible biomass...").

It is true that units burning biomass emit significant quantities of CO₂ from their smokestacks. In fact wood and biomass are more carbon intensive than coal, which makes this issue of critical importance. Nonetheless, CO₂ deductions for Eligible Biomass are allowed on the premise that the amount of carbon emitted from the combustion of a quantity of biomass is essentially the same as the amount of carbon that will be taken out of the atmosphere in the future and stored during the process of photosynthesis in biomass that regrows on land where the old biomass was harvested. This premise holds true only so long as:

- the land on which the biomass was harvested is not converted to a use that prevents regrowth of a new generation of biomass, and
- the harvest methods ensure future regrowth of an equivalent amount of biomass in a reasonable time period and avoid significant depletion of carbon in the forest soils.

While it is possible to consider neutrality on a landscape level, this is inconsistent with the facility-by-facility approach to quantify fossil fuel emissions from budget units. Furthermore, while biomass levels are currently stable in Maine, there is no assurance that this will remain so in the future. Examples of practices that would prevent sufficient regrowth on a given area of forest land include conversion of the land to development (such as a parking lot, a housing complex, or a road) or employing harvest practices

that significantly inhibit future productivity, such as repeated high-grading, excessive soil compaction, or whole-tree harvesting without replenishing soil nutrients. Soil carbon can be depleted either through direct disturbance during harvesting, or indirectly in the long-term through excessive removal of harvest residues and other woody debris or erosion.

Consistent with the above reasoning, the Draft Rule provides that Eligible Biomass:

means sustainably harvested woody and herbaceous fuel sources that are available on a renewable or recurring basis (excluding old-growth timber), including dedicated energy crops and trees, agricultural food and feed crop residues, aquatic plants, unadulterated wood and wood residues, animal wastes, other clean organic wastes not mixed with other solid wastes, biogas, and other neat liquid biofuels derived from such fuel sources. Sustainably harvested will be determined by the Department.

Draft Rule, Ch. 156, Section 1.B.(55), emphasis added.

This definition tracks the language of the RGGI Model Rule at Subpart XX-1.2(ag).

Under the Draft Rule, old growth is not considered an eligible biomass fuel. ENE concurs that harvesting late-successional forests for biomass should not be eligible for CO₂ deductions, since it could take many decades for the forest to recapture the lost carbon. However, the Department needs to provide more detail on what old growth means, since there is no commonly accepted definition for the region.

For the sole purpose of implementing RGGI, “Eligible Biomass” could be handled in Maine either by adding further specificity to the definition of the terms “Sustainably Harvested” and to the reporting requirements for units co-firing eligible biomass in the Draft Rule, or by providing some type of formal guidance in a companion document from the Department.

Consistent with the criteria regarding land conversion and harvest methods noted above, and without comment on the standards that should apply to non-woody biomass, we recommend incorporating the following elements for a new definition of “sustainably harvested”:

Section 1.B.(xx) Sustainably Harvested Woody Biomass (NEW). “Sustainably Harvested Woody Biomass” means woody biomass that the CO₂ budget source demonstrates has come from forested land that is not being converted to a non-forest land use and is not otherwise harvested in a manner incompatible with the capacity of that forest to regrow at a rate that is not less than the rate of carbon accumulation prior to the harvest, as determined in accordance with Section 4.G. of this Rule.

Section 4.G.(1). ...

(xx) NEW for each shipment of woody biomass received and claimed to be eligible biomass, the following information shall be tracked and entered into a database:

- (i) name of driver and shipping company;
- (ii) quantity of woody biomass being claimed as eligible biomass in this shipment;
- (iii) location of the timberland or industrial source of all woody biomass being claimed as eligible biomass;

- (iv) name of the business or person that owns the timberland or industrial source of the shipment;
- (v) method claimed for demonstrating that eligible biomass was sustainably harvested as provided in subdivision 4.G.5.;
- (vi) whether the harvested land will be converted to another land use, as documented in the harvest notification requirements of the Maine Forest Practices Act.

(yy) NEW the name and business address of all timberland owners or industrial sources from which shipments were received during the quarter, the total quantity of sustainably harvested woody biomass from each owner or source;

(zz) NEW evidence of certification, including certification number, or evidence of tax status, for any timberland that was the source of sustainably harvested woody biomass during the year

Section 4.G.(5). NEW Woody biomass will be deemed sustainably harvested for the purposes of calculating compliance obligation deductions under Section 5.D.2¹ [Model Rule Section XX-6.5(b)] if the CO₂ budget unit claiming to have co-fired eligible biomass provides complete, timely reports for subdivisions 4.G(1)(xx) and (yy) of this subsection and an annual report to the Department indicating the total eligible biomass fuel input (tons) from each timberland or industrial source, by location, with the proper documentation, referred to in subdivisions 4.G(1)(zz), sufficient to demonstrate the following:

(a) wood chips, trees, cord wood, tree limbs, woody debris, or tree tops delivered to the CO₂ budget unit came from timber harvest activities on lands for which there is no notification required or filed under section 8883 (b) of the Maine Forest Practices Act for forest land being converted to another use within two years, and are:

- (i) enrolled in the Maine Tree Growth Tax Law program, prior to the harvest, and harvested under Maine's Master Logger Certification Program, provided that where the landowner owns less than 250 acres, compliance may be satisfied without reference to Maine's Master Logger Certification Program; or,
- (ii) certified, prior to the harvest, in the Forest Stewardship Council (FSC), Sustainable Forestry Institute (SFI), or American Tree Farm System (ATFS) group certification program;

(b) wood residues are unadulterated and have been shipped to the CO₂ budget unit from industrial operations, including lumber or paper mills, provided that

- (i) if mills have chain-of-custody certification from FSC or SFI, residue that results from the production of 100% certified material (SFI Certified Sourcing Label, FSC Pure) will receive 100% deduction and residue that results from the production of mixed certified and non-certified product (SFI Percent Content

¹ Note that this section is not listed in the Maine Draft Rule Table of Contents.

Claim, FSC Mixed) will receive a percent deduction based on the percent certified material produced by the mill;

(ii) if the mill does not have chain-of-custody certification, a default percentage deduction will apply to each ton of biomass CO₂ emissions to reflect the approximate percentage of forestlands under certification in the state of Maine, which percentage shall be adjusted each year as determined by the Maine Forest Service;

(iii) construction and demolition waste shall not be considered unadulterated wood and shall not be eligible biomass.

Note also that the reference to various certification programs in this straw proposal is consistent with other parts of the Maine Draft Rule and the Regional Model Rule where it is clear that afforestation projects seeking to qualify for CO₂ offset credits must demonstrate involvement in a recognized certification scheme. (Maine Draft Rule, Section 9.D.(3)(a)(ii) and (3)(f)(2)(C); Regional Model Rule Subpart XX-10.5(c)(1)(ii) and (c)(5)(ii)(c).

B. Fossil Fuel-Fired Unit (Ch. 156, Draft Rule, Sec. 1.B.(62))

The definition of “Fossil fuel-fired unit” in the Draft Rule at section 1..B(62) is identical with the definition in the Regional RGGI Model Rule (Subpart XX-1.2(aj)) and is the necessary definition for maintaining consistency with other states. The Draft Rule has added a clarifying section to the language of the statute in order to bring the Maine rule into conformity with the Regional Model Rule, this is a typical and appropriate function of the Department to flesh out implementation details in a rulemaking.

Regrettably, the Maine statute is slightly inconsistent with the Regional Model Rule when it attempted to restate the definition of fossil fuel-fired in the form of an exemption for a unit if “Fifty percent or more of its annual heat input comes from the combustion of fuels other than fossil fuels” (38 MRSA Sec. 580-B.1.C.). The statute language failed to fully restate the Regional Model Rule, however, neglecting the necessary clarification that this exemption applies only to units that commence operation prior to January 1, 2005. For units commencing operation on or after that date, the Regional Model Rule limits the exemption to those units that co-firing no more than five percent from fossil fuel. The Department’s Draft Rule reinstates this important language. If such a clarification can be incorporated through rulemaking, such as by adding it to the Chapter 157 major substantive rulemaking, to bring the statute into conformity with other states, we encourage this path. If not, this is a subject that may need to be fixed through legislative amendment.

C. Operation of the CHP Set Aside (Ch. 156, Draft Rule, Sections 1.B.(71) and 2.B.)

The statute is clear and exhaustive in stating that its intent is to provide a very limited set aside of CO₂ allowances for combined heat and power (CHP) units that are located at integrated manufacturing facilities (IMF) and that are existing units at the time of the bill’s passage.

The Act reinforces the legislative intent to limit this to existing units in its language justifying the limited special treatment afforded to the two CHP budget units (at the mills in Bucksport and Jay) presently counted in Maine’s CO₂ budget on the grounds that:

“Because certain CO₂ budget units have substantially reduced CO₂ emissions from their facilities prior to the effective date of this Act and operate as highly efficient resources...” therefore the DEP is directed that its rules “must be designed to recognize that full operation of generating units in existence on the effective date of this Act ...”

LD 1851, Sec. 18.4, emphasis added.

As further evidence of this limitation, the statute defines an “integrated manufacturing facility” as one that makes electricity for export onto the grid and routinely makes other products for sale and “... received an air emission license from the (DEP) prior to the effective date of this subsection.” (Section 580-A.14, emphasis added).

In the description of the operation of the CHP/IMF set aside, the statute reinforces that the set aside, as currently authorized, is for limited use where it provides: “The department shall use these (set aside) allowances for existing CO₂ budget units ...”

38-A MRS 580-B.8, emphasis added.

Nonetheless, in the Draft Rule the DEP has dropped the statute’s date restriction in the definition of an Integrated Manufacturing Facility (indicated in the underline language, above). The remedy is simple. The date restriction must be returned to the definition in the Draft Rule so that it reads the same as the statute, as follows:

“Integrated manufacturing facility” means a facility that:

(a) Has received an air emission license from the Department. prior to the effective date of this subsection.” (Additions in underline) Ch. 156.1.B(71)(a).

In addition to the plain intent and language of the statute, there are good policy reasons to insist that the CHP set aside be limited to only integrated manufacturing units that “existed” or “received an air emission license” prior to RGGI.

First, it would be a shame to adopt rules that would cause a “run on the bank,” causing Maine to lose the projected \$10-25 million year of projected RGGI Trust Funds that many policymakers and stakeholders expect to be invested in new energy efficiency measures across the state. The two existing CHP units at integrated manufacturing facilities that already have air licenses are extremely large units and have “Behind-the-meter” emissions that are projected to use up as much as 1 million of Maine’s nearly 6 million available CO₂ allowances. If many new CHP units at manufacturing sites are allowed to participate, they may soak up all of Maine’s remaining 5 million allowances leaving nothing to be auctioned, and no proceeds for the RGGI Trust to be invested in energy efficiency.

Second, it would be regrettable to adopt rules that would cause a rush to build new CHP units if those units would result in a net increase to the state’s CO₂ emissions. This would effectively lead to an emission leakage problem within Maine and the RGGI region as a whole. CHP units are not all, *per se*, highly efficient or lower emitters of CO₂. There are some CHP units types and some applications under which the net CO₂ emissions would higher than if the facility used local power from the grid and an efficient stand-alone boiler. To the extent the Maine Draft Rules encourage CHP construction or operation in the future, or accommodate existing CHP units

exporting some of their electricity generation to the grid, they should do so only where such CHP is highly efficient and environmentally preferable to the alternatives.

D. Authority to address Cap Level (Draft Rule Section 2.A, p. 17)

ENE is concerned that the base budget for the Maine CO₂ Budget Trading Program is defined in the regulations without any provision for future adjustments. Should such adjustments be deemed important, Maine may need to go back to the legislature or amend these rules unless some provision is made for this eventuality.

New information on energy use, preliminary emissions data, and industry news reports have led ENE to be concerned that the RGGI cap level has been set too high. Since the states have not compiled and released emissions data for the RGGI regulated facilities for 2005 or 2006, ENE is in the process of compiling emissions data for more recent years and our preliminary results indicate that the emissions trajectory was down significantly in 2006.

Based on our review, the regional RGGI cap is significantly above total regional emissions for the 1995 to 2005 time period. Emissions were highest in 2005 when the cap would have been about 3% higher than the regional emissions level. With the decline in emissions that occurred in 2006, the cap level is approximately 15% higher than emissions. The potential impacts of having a starting cap that is so high above actual emissions in the early years of RGGI include:

- no market for RGGI allowances,
- no change in our power plant dispatch,
- delay of any shift in the way we make power away from dirtier, inefficient sources to cleaner, more efficient sources
- failure to position our regional economy to take advantage of expected carbon regulations from the federal government
- loss of \$10-25 million for new efficiency investments

There are several mechanisms which can be utilized to make sure that RGGI is successful, including reducing the initial cap level and/or retiring CO₂ credits if a reservation price has not been met.

Public commitments and modeling done for the RGGI process were designed to establish the cap at a level equivalent to current emissions. The states should review emissions data through 2006 and early 2007 and reassess as needed whether this goal has been achieved in light of any new data or corrections to older data. ENE believes that the states should collectively incorporate 2005 and 2006 emissions data and ensure that the cap is set at a level consistent with recent emissions (such as the 2004 to 2006 average emissions level); this may require the states to reduce the regional cap level and thus state-by-state cap commitments. For this reason, we believe the Draft Rule at Section 2.A. should be amended to provide authority for the Commissioner to reduce the cap level consistent with:

- any future changes to the RGGI Memorandum of Understanding among the participating states, or
- subject to any regionally applied mechanism (such as a reserve price / retirement mechanism, described below) that indicates an adjustment for the emissions budget levels indicated in Section 2.A.

In addition to reviewing the cap level, the states should continue to move forward with the inclusion of a reserve price in any auction design, but should send a clear signal to the market by retiring allowances that are withheld and not holding them for future auctions – this should be a policy to address cap level concerns and not a mechanism to ensure the auction delivers revenue to the states.

We support providing authority in the Draft Rule for the Department to participate in the establishment of a regional reservation price. We believe that all states should have a reservation price and that it should be a regional price. While we support the use of a reserve price in the auction, ENE believes that it should be combined with allowance retirement, especially in the first compliance period if the cap level has been set higher than current emissions.

The reserve price in the first compliance period should be utilized along with allowance retirement and not just allowance banking. Only retirement will lead to environmental benefits if the cap has been set too high. We would suggest a process such as the following for the reserve price in the first compliance period, and potentially subsequent periods:

- The states should agree to this process through an amendment to the MOU;
- The states should agree to a reserve price (potentially at an undisclosed level as recommended in the draft Auction report), but we believe this should be at least \$2-3 per ton CO₂;
- If the reserve price is not met, the auction design should facilitate the retirement of allowances until the minimum price is achieved;
- Allowances retired should be done so proportionally by each state based on their relative cap level;
- It should be clear to market participants that allowances retired in the first compliance period will be permanently retired, as uncertainty about future availability will add some risk to the market.

As a result, we hope that Section 2.A. or 2.B. of the Draft Rule can be modified so that any CO₂ allowances left unsold are permanently retired to help reduce the cap level.

E. Encourage Renewable Energy Development in Maine (Ch. 156, Draft Rule, Sec. 2.B(6))

ENE supports the inclusion of the set-aside for voluntary renewable purchases in the state rulemaking process. (Regional Model Rule section XX-5.3(D)). ENE believes that retiring credits in an amount equal to the avoided CO₂ emissions of voluntary renewable energy power purchases by Maine consumers will provide modest support the voluntary renewable market by ensuring that the marketers can continue to claim in their marketing materials a reduction in carbon emissions.

F. Early Reduction (Ch. 156, Draft Rule, Section 2.C)

ENE does not believe that the Draft Rule should adopt the early Reduction Allowance provisions of the model rule. Since early reduction allowances are not included in the auction, we believe that this provision goes against the state's commitment to auction almost all allowances, especially since the early reduction allowances would be given away for free. Also, the early reduction allowances are in addition to the cap. Since there may be an over allocation of carbon credits, this provision will inflate the cap even more. Finally auctioning of allowances will also increase the incentive companies have to make

plant improvements early as they will have to pay for 100% of their allowance needs during the first year of the program.

G. Increase Flexibility to Adapt the Rule – Offsets (Ch. 156, Draft Rule, Sec. 9)

In Connecticut's draft regulations, the Connecticut Department of Environmental Protection (CT DEP) separated their draft regulations into two components, one for general RGGI rules and one relating to offsets. This way if the category of eligible offsets is expanded, CT DEP will not have to reopen all of their RGGI regulations, only the section that pertains to offsets. ENE suggests that Maine consider separating their RGGI regulations and make the offset section a stand-alone regulation.

H. Good Governance Process for Waivers (Ch. 157)

Chapter 157 as drafted provides authority and a process for the Department to provide RGGI program waivers or suspension. ENE remains extremely concerned that criteria and process spelled out in the Draft Rule are subject to prejudicial, unfair application. If left unchanged, at a minimum this rule could have the perverse impact of bringing uncertainty to the marketplace, where some market players prepare for and make hard investment decisions while others try their luck in getting a reprieve from a political appointee.

We note that there are already numerous mechanisms to bring flexibility and limits on economic impacts to the RGGI program. For example, budget sources may purchase lower cost carbon offsets for a portion of their total compliance obligation. Moreover, if allowance prices should exceed certain pre-set targets (e.g., the "Safety Valve Threshold"), a "trigger event" occurs in which the compliance period may be extended by one year (i.e., to four years total) and the scope and quantity of eligible carbon offset projects is expanded. These flexibility measures should have the effect of dampening CO2 allowance prices.

ENE recommends that the Draft Rule be amended to require that before a suspension is granted, at a minimum, the region must have already triggered the Safety Valve Threshold event, indicating that the regional flexibility and relief mechanisms have been exhausted first.

Additionally, we encourage the Department to enhance the transparency in the process for reviewing and granting waivers or suspensions. Certainly the 30 day review period presently contemplated allows time for interested stakeholders to be given notice and an opportunity to comment and we believe this should be required. Moreover, given that the compliance period is a total of three years, it seems unnecessary to rush these reviews. There is no requirement under the rules that a budget source purchase allowances on any given day. The only situation in which a budget source would, in effect, be under time pressure would be if they had waited much too long to purchase allowances and the end of the compliance period was imminent. We suggest that the process in the Draft Rule be amended to allow 90 days for applications that occur more than three months before the end of a compliance period, and keep it at 30 days for applications that occur in the last three months of a compliance period.