



**EDISON ELECTRIC
INSTITUTE**

May 22, 2006

Franz Litz, Esq.
Chair of the Regional Greenhouse Gas
Initiative and Senior Attorney
New York State Department of
Environmental Conservation
625 Broadway, 14th floor
Albany, NY 12233-1500

Attn: RGGI Staff Working Group

E-mail: RGGICOMM@gw.dec.state.ny.us

Re: Comments on Draft RGGI Model Rule and Related Issues Memorandum

Dear Mr. Litz:

On March 23, 2006, pursuant to the December 20, 2005, Memorandum of Understanding signed by the governors of seven states that have agreed to participate in the Regional Greenhouse Gas Initiative (RGGI), the Staff Working Group (SWG) released a "Draft Model Rule" and solicited written comment by stakeholders and the public by May 22, 2006. The notice welcomes general comments, but urges submission of "detailed comments" in order to "allow the SWG to fully evaluate the need for and viability of proposed alternative approaches, and recommend revisions to the draft provisions as appropriate." In addition, in a March 23 memorandum the SWG "identified" a series of "issues related to offsets" for which SWG also "seeks comments." That memorandum states that "[a]ll comments will be posted on the RGGI website."


The Edison Electric Institute (EEI) welcomes this opportunity to respond to the SWG's solicitation for comments. EEI is the association of U.S. shareholder-owned electric companies, international affiliates and industry associates worldwide. EEI's U.S. members serve nearly 97 percent of all customers served by the shareholder-owned segment of the electric utility industry, generate almost 70 percent of all electricity in the country, and serve

more than 70 percent of all ultimate customers in the nation. EEI has been participating stakeholder in the RGGI process since its inception. EEI has also been engaged, domestically and internationally, in global climate matters for nearly two decades, including our continuing participation in the United Nation's Framework Convention on Climate Change and its related protocol, as well as in the development and review of the assessments and other reports of the Intergovernmental Panel on Climate Change.

Accordingly, EEI encloses our comments, both on the Draft Model Rule and on the offsets issues raised by the SWG in its memorandum.

If you have any questions about our comments, please contact me (202-508-5617, bfang@eei.org) or Eric Holdsworth, EEI's Director of Climate Programs (202-508-5103, eholdsworth@eei.org).

Sincerely,



William L. Fang, Esq.
Deputy General Counsel
and Climate Issue Director

Enclosure
WLF:fhm

cc (w/ enc):
State energy and environmental offices

State legislative leaders (majority and minority)

The Honorable James Connaughton, Esq.
Chairman
Council on Environmental Quality

The Honorable Paula Dobriansky
Under Secretary for Democracy
and Global Affairs
Department of State

Dr. Harlan Watson
Senior Climate Negotiator and Special Representative
Department of State

Karen Harbert
Assistant Secretary, Policy and International Affairs
Department of Energy

**COMMENTS OF EDISON ELECTRIC INSTITUTE ON THE
REGIONAL GREENHOUSE GAS INITIATIVE DRAFT MODEL RULE**

May 22, 2006

The Edison Electric Institute (EEI) appreciates this opportunity to respond to the March 23, 2006, solicitation by the Staff Working Group (SWG) of the Regional Greenhouse Gas Initiative (RGGI) for comments on the SWG's "Draft Model Rule" proposed pursuant to the December 20, 2005, Memorandum of Understanding (MOU) signed by seven governors that form RGGI and on the issues memorandum accompanying the Draft.¹ On March 20, 2006, EEI submitted extensive comments on the MOU, which we incorporate by reference herein and to which we will also make reference as part of these comments.²

EEI is the association of U.S. shareholder-owned electric companies, international affiliates and industry associates worldwide. EEI's U.S. members serve nearly 97 percent of all customers served by the shareholder-owned segment of the electric utility industry, generate almost 70 percent of all electricity in the country, and serve more than 70 percent of all ultimate customers in the nation. EEI has been participating stakeholder in the RGGI process since its inception.. EEI has also been engaged, domestically and internationally, in global climate matters for nearly two decades, including our continuing participation in the United Nations Framework Convention on Climate Change (FCCC) and its related protocol, as well as in the development

¹ We understand that Maryland has enacted legislation directing that the governor include the state as a participant in RGGI.

and review of the assessments and other reports of the Intergovernmental Panel on Climate Change.

As we explained in our March 20 comments, EEI has significant substantive, technical and legal concerns with the MOU because it is limited to only some states; singles out only the electric utility generating industry for regulation; applies only to one greenhouse gas (GHG); will be a costly, resource-intensive burden to EEI members (both within the region and those that are interconnected with the region as well as others in the U.S. and Canada) and their customers; and will do little to reduce GHGs, which are recognized by the FCCC, other governments and scientists to be ubiquitous and global – not national or regional – in nature. Most importantly, RGGI will not have any significant effect on global “climate change.” However, it will likely affect fuel diversity and system reliability, increase leakage and imports, and potentially have adverse impacts on attracting capital investment.

In addition, **we remain extremely concerned about the proposed inclusion of provisions calling for a 25 percent (or greater) set-aside of allowances, primarily for consumer benefit or strategic energy purposes.** For the reasons we have cited in our previous comments and raise below, we urge reconsideration of this provision, including its deletion. Such set-asides will increase the costs of compliance and will limit the ability of covered entities to engage in emissions trading.

² We also make reference herein and incorporate by reference EEI’s earlier comments to

We also remain very concerned about limitations on the use of offsets. For the reasons we have cited in our previous comments and raise below, we also urge reconsideration of this provision, including its deletion. Such limits are not economically or otherwise justified, and will only increase the costs of compliance while limiting the ability of covered entities to meet their reduction targets.

As also pointed out in our March 20 comments, FCCC Article 1 – which is being implemented by more than 180 Parties (or countries), including the U.S. – defines the term “climate change” to mean a “change in climate...attributed...to human activity that alters the composition of the global atmosphere and...is in addition to natural variability” (emphasis added). It also defines the term “source” to mean “any process or activity which releases a greenhouse gas...into the atmosphere” (emphasis added). These definitions serve to emphasize the global nature of GHGs and the need to address all sources thereof, not just one GHG in one small region of the world.

Indeed, in providing annual estimates on GHG “emissions,” the U.S. Energy Information Administration (EIA) quite clearly demonstrated that in the case of one GHG – carbon dioxide (CO₂) – as U.S. emissions decline, those of other FCCC Parties, particularly developing country Parties, are growing and will soon surpass those of the U.S.³ In addition, the annual inventory of estimates of GHGs by the U.S. Environmental Protection Agency (EPA) – which reports on GHGs from not only six “economic sectors” (*i.e.*, residential, commercial, industry, transportation, agriculture, and electricity generation), but also on the number and variety of

sources of “U.S. Greenhouse Gas Emissions Allocated” by EPA – demonstrates that focusing only on the electric utility sector in this seven-state region will do little to address this global issue.⁴ Moreover, such a focus is likely to affect adversely the electric utility industry and our customers. In short, we seriously question whether this RGGI effort will serve any meaningful climate change purpose and whether, as discussed in our March 20 comments, it is legally viable from the standpoint of the U.S. Constitution and applicable law. Furthermore, we emphasize again that it likely will increase costs to electric utilities and our customers.

Nevertheless, EEI welcomes the opportunity to submit these comments not only to make the SWG and RGGI aware, in detail, of our “significant concerns,” but also to provide constructive responses to the many issues raised by the Draft and the SWG memorandum. While our comments are extensive, they do not address all of the aspects of the voluminous Draft and issues memorandum.

In making these comments, we reiterate the understanding in our March 20 comments that the “MOU is merely a joint agreement of the seven governors” that “does not have the force of law” and our concern that it never went through any opportunity for review and comment by stakeholders and the public prior to publication. The MOU is no more than a guide to the SWG and to the participating states. **We urge the SWG and the seven governors, states and their**

³ See EEI’s March 20 comments, pp. 2-3 n. 2.

⁴ See U.S. EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2003 42-44 (Apr. 2005) .

legislatures not to be constrained by that agreement in the development of the rules for the RGGI program.

We understand from the SWG issues paper of March 23 that these comments will be “posted on the RGGI website.”

I. Significant Policy Issues Regarding The MOU And Draft Model Rule

A. Allowance Issues

Both the MOU and the Model Rule Draft portray RGGI’s seven signatory states’ regional program as a “CO₂ Budget Trading Program.” However, that is a misnomer because while there exists an emissions “budget,” the existence of “trading,” such as has occurred under title IV of the Clean Air Act for sulfur dioxide (SO₂) and nitrogen oxide (NO_x), is severely constrained, as discussed below.

As noted above, we continue to have significant concerns with the proposed 25 percent (or greater) set-aside of allowances, and repeat our comments of last September, which we believe are still very relevant (pp. 14-15):

Faced with having to meet increased demand for energy, which will likely result increased GHG emissions during the covered period, generators may have to turn in or retire all of the allowances they are given – and then buy more – in order to meet their obligations for energy while simultaneously being in compliance with the RGGI reduction targets. This situation is made all the more likely by the suggested 25 percent set-aside of allowances at the state level. Such a policy virtually guarantees that there will be few, if any, surplus allowances available and unduly constrains the effectiveness of emissions trading. Further, unless a company can reduce its emissions overall, any allowances sold on the market will

have to be purchased back eventually for compliance. If anything, generators will suffer overall economic losses in meeting the cap as a result of the set-asides.

Significantly, the [seven] RGGI states and their utilities have to operate in a deregulated environment, with no hope of government-supported cost recovery, which further exacerbate the impact of leakage by leaving covered generators at a significant competitive disadvantage with generators in neighboring, non-RGGI states and Canada.

By artificially restricting the pool of allowances available for trading, the set-asides would exacerbate distributional inequities by forcing companies that produce most of their power from coal- or oil-fired generation either to buy a relatively large share of whatever allowances are available in the market or shut down plant operations. These same units are critical to maintaining system reliability, load following, ancillary services and fuel diversity in the region. Accordingly, such a situation will potentially create an immediate, negative step-change in available generation resources in the market in a region that has already indicated generation resource availability concerns in the 2008 and beyond timeframe, and will likely create immediate cash and credit management concerns. The end result is that longer-term energy deals will be more difficult to make going forward.

The following additional concerns regarding the proposed set-asides were expressed in our

March 20, 2006, comments on the MOU:

More importantly, the MOU's requirement that a quarter of the state's budgeted allowances be allocated or set-aside for open-ended "consumer benefit or strategic energy purpose[s]" guarantees that all units are likely to be in an allowance-short position and that, coupled with the limits on offsets, will make compliance even more problematic. As to what constitutes "a consumer benefit or strategic energy purpose," we note that with the word "include," the list in section 2.G(1) of the MOU is merely a set of open-ended examples of what could be selected by the states for use of the 25 percent of the allowance. The states apparently are not bound to adopt one or more of them.

As to those examples on the list, there are no criteria for a state to use in selecting one or more, nor is there any indication of how and to what extent a state would administer and implement a selected item. Again, the states are given a free hand to use allowances that are provided regionally. Yet there is no oversight by the region or the RO [Regional Organization].

We note further that the list adds at the end “and/or to fund administration of this Program.” This addition is particularly troubling because section 4.B provides that the state “agree” to fund the RO, “at least in part, through payments from the Signatory States in proportion to the State’s annual base CO₂ Emissions Budget,” which appears to mean that the electric utilities and their consumers are, in essence, going to be taxed, at least indirectly, by each of the RGGI states in the form of the 25 percent set-aside in order to comply with this MOU mandate on the states. We question the legal basis for this tax under each state’s laws. Obviously, the MOU does not provide that basis.

Our review of the Draft Model Rule only reinforces these comments. The Draft provides (p. 39) that each applicable state agency “will determine” – without saying how and without assuring any fair and reasonable public process – the allowance allocations “[b]y January 1, 2009” for 2009-2012 (not in “advance” of the launch date) “in accordance with section XX-5.3.”

Subdivisions (a) and (b) of that section state (p. 40):

[Allocation provisions will vary from state to state, provided at least 25% of the allocations will go to a consumer benefit or strategic energy purpose]
and

[The reference to the consumer benefit or strategic energy account illustrates how this account could be labeled and does not necessarily represent what an individual RGGI State will propose.]

(Emphasis added.)⁵

This 25 percent (or greater) set-aside is an extraordinary effort on the part of the states to reap millions of dollars from the set-aside for vague and open-ended purposes that the Draft declines

⁵ The proposed definition of the term “Consumer benefit or strategic energy purpose account” in the Draft (pp. 9-10) creates a “Fund Administrator” without indicating what source of funds would be used to cover the costs of such a position and related staff. The reference in the definition to a “general account” is apparently not the general account defined in the Draft (p. 12). The definition also states in brackets that it is illustrative “and does not necessarily represent what an individual RGGI State will propose” (emphasis added).

to describe, much less delineate. It is in total contrast to the maximum 3 percent “energy efficiency and renewable energy set aside allocation” authorized by section 204-5.3(f) of the New York State NO_x allowance and trading program budget, which is reasonable and more in line with title IV of the Clean Air Act.⁶ The percentage itself is arbitrary and, according to the first bracketed sentence above, with the words “at least,” could be increased by one or more states to any percentage greater than 25 percent. Any such large set-aside will undoubtedly have an adverse effect on the program, affected utilities and our customers and is likely to threaten system reliability.

In addition, there is no link between this set-aside and the reduction and avoidance of CO₂ emissions by the CO₂ budget sources and their units subject to this program, particularly given the vague nature of how this set-aside revenue will be used. Moreover, the Draft is silent on how the 25 percent set-aside funds are to be raised. **If it is by auction, there should be a provision for the affected CO₂ budget sources and the units thereof to have the option of first refusal in order to give the utilities an opportunity to purchase such allowances in advance of the general public.**

The 25 percent set-aside and the open-ended nature of the purposes of that set-aside, with the likelihood that the allowances in each state’s set-aside will be auctioned, assures that these states will themselves gain an actual dollar windfall of significant proportions. That is

⁶ Under the Clean Air Act, more than 97 percent of the SO₂ allowances are allocated and less than 3 percent are auctioned, with the revenues of the auction flowing back to the affected entities.

because, unlike electric generators, states are not subject to the reduction caps and will not have to turn in any of these set-aside allowances to demonstrate compliance. Thus, they will be free to auction the allowances and use the revenues as they see fit. We understand that some even want to increase the percentage, which could be to the further detriment of electric utility system reliability.

Assuming *arguendo* that the set-aside is retained – contrary to our recommendation – we urge that it be in line with the N.Y. NO_x level referred to above but, in any event, at far less than 25 percent. We also strongly urge that the states be directed to afford the affected utilities and generators the opportunity to have the right of first refusal to acquire such allowances, and that the trading objective be enhanced and encouraged to prevent the hoarding or retirement of allowances by persons, particularly by those not affiliated with the generation and distribution of electricity in the region. The affected utilities are clearly going to need allowances to serve their customers reliably and economically. The MOU's first "Whereas" clause expressly states that each of the seven states "individually have a policy. . .to maintain a safe and reliable electric power supply system." A right of first refusal gives utilities and generators a reasonable opportunity to do so consistent with that policy.

In addition to the proposed 25 percent set-aside, we are concerned with calls to auction all or even a portion of the remaining allowances. We reiterate our earlier recommendation that whatever allowances are not set aside be allocated for free to affected entities. We are also concerned that the RGGI program could result in seven different allocation schemes.

Indeed, the Draft itself states expressly in brackets (p. 40) that such “**Allocation provisions will vary from state to state**” (emphasis in original). Moreover, some stakeholders are advocating that the bulk of the allowances be auctioned to the affected utilities in order to address concerns that if the allowances are allocated free of charge, as they were for SO₂ and NO_x under the Clean Air Act, the utilities would somehow gain “windfall profits.” For the reasons outlined in our September 20, 2005, comments, such concerns are unrealistic. However, the Draft is silent on how allowances are to be provided to the CO₂ budget sources and units thereof. It leaves it to the individual states to make that determination. Given the precedent of the SO₂ and NO_x programs,⁷ we question whether these states have an existing statutory basis for the auctioning of more than a small percentage of the allowances.

We strongly urge that the SO_x and NO_x models be the norm for allowance allocation in all seven states, and that the Draft give direction to the states to distribute the allowances not by auction or other costly schemes, but equitably and without cost to the electric utilities, as has occurred under the Clean Air Act. In addition, for planning purposes, we urge that the frequency of distribution of allowances be monthly or quarterly, not at greater intervals such as annually or semiannually.

Therefore, we recommend that:

- **The Draft expressly provides that the state allocations be determined by a fair and reasonable public process that includes notice and comment.**

⁷ See p. 8 n. 6, *infra*.

- **The allocations be made at least 180 days in “advance” of the launch date, particularly since paragraphs (c)(1) and (3) (pp. 23-24) of section XX-1.5 provide that each CO₂ budget unit and each CO₂ budget unit source “shall hold CO₂ allowances...starting on the later of January 1, 2009 or the date on which the unit commences operation,”⁸ and since the MOU calls for such allocations to be made for the years 2009 through 2014 as provided in the MOU, not just to 2011.**
- **The signatory states reconsider the 25 percent set-aside requirement in the MOU and the Draft and reduce it to a much lesser percentage (preferably closer to 3 percent), at least initially for a three-year period, and certainly in the years after 2014 when the allocations for units are to decline by 2.5 percent per year.**
- **The states be precluded from increasing the set-aside percentage above 25 percent.**
- **Any auction of the covered allowances provide the affected CO₂ budget sources and units thereof the right of first purchase refusal.**
- **The state process for deciding the use of funds raised by the percentage set-aside also be made through a fair and reasonable public process.**

While we are pleased to see – in subdivision (a) (pp. 49-50) of section XX-6.4 and subdivision (b) (p. 50) – some recognition of the need to accommodate new generation sources, we are concerned that there is no indication in the part as to the source of the set-aside. We are concerned that states might view this suggestion as inviting them to “set-aside allocations” from those available for CO₂ budget sources and their units, particularly in light of subdivision (b) (p. 50), which provides that annually the state agency is to “record CO₂ allowances” (allocated under subpart XX-5) “in the allocation set aside for the year after the last year for which CO₂ allowances were previously allocated to an allocation set-aside.” That should not be the result.

⁸ We recommend that after the word “operation” on p. 24, line 10 there be inserted a comma and the words “whichever is later,” because under the current wording, units in

B. Offsets Issues

Another area of significant concern relates to the proposed restrictions on the use of offsets. We again emphasize that CO₂ emissions and all anthropogenic GHGs are an international phenomenon, ubiquitous and well-mixed globally. As we said in our June 17, 2005, comments, “because climate change is a global issue, a ton reduced overseas or outside the RGGI region has the same effect on the atmosphere as a ton reduced in the RGGI region” (p. 8).

Nonetheless, the MOU and the SWG Draft unnecessarily constrain offsets opportunities while giving what appears to be rather reluctant recognition of their significance and importance both from a global climate and an economic standpoint. That reluctance is misplaced, and **we urge reconsideration of the constraints, particularly the percentage limitation, the geographic constraints, the additionality requirements, and the constraint on types of offsets projects. All of these constraints are artificial and arbitrary, lack any basis in science, economics or technology, and tend to be punitive in nature.** Most importantly, they make no practical or global climate sense.

1. Limitations on types of offsets projects and offsets allowances

The Draft has two very significant yet unreasonable and unnecessary provisions that effectively curtail the benefits of offsets projects to project sponsors, affected electric utilities and

operation before January 1, 2009, could inadvertently be construed to be subject to have

particularly the reduction of CO₂ emissions globally. The first is a limitation in subdivision (a) of section XX-10.3 (p. 91) on the types of offset projects that may be eligible for the award of CO₂ emission offsets allowances. It lists only six types of projects for such award, and provides in section XX-10.5 (pp. 99-136) an extensive array of standards for each project type.

The second is the limitation in subdivision (a)(3) of section XX-6.5 (p. 51) on the “number of CO₂ offset allowances that may be deducted” from the CO₂ budget source’s CO₂ emissions for the applicable control period. That limitation is 3.3 percent. There is no rational basis for either limitation. Given the ubiquitous nature of CO₂ emissions, CO₂ offset projects that meet reasonable requirements are beneficial in achieving the reduction or avoidance of CO₂ emissions globally. Moreover, they are cost effective for entities that are called upon to reduce CO₂ emissions.

The RGGI regulatory program is new and untested, and the Draft Model Rule is extensive and complicated. Imposing restrictions of this nature at the onset of the program adds to the complexities and complications and surely will increase costs for affected electric utilities.

Offsets projects and offsets allowances should be viewed by RGGI as providing some relief from the regulatory constraints that may be employed. The control or limits should be through the standards, not on the types of projects or on the quantity of allowances resulting from the projects. **We urge that RGGI provide more flexibility in the types of eligible projects and that it eliminate the percentage limit on allowances from such projects.**

allowances whenever they “commenced operation.”

2. Other limitations on offsets projects

Subdivisions (d) through (h) of section XX-10.3 (pp. 92-94) spell out under the title “*General Additionality Requirements*” various limitations and other requirements for offsets.

Another significant concern regarding offsets use under RGGI is the geographic restriction.

Subdivision (f) (p. 94) provides that the state agency “may award CO₂ allowances under section XX-10.7 only for CO₂ emissions offsets projects that are initially commenced on or after December 20, 2005,” which is the date of the MOU. Section XX-10.7 (pp. 138-41) provides for the award of CO₂ offsets allowances to a project sponsor before and after any “declaration” of the triggers. Unfortunately, such awards are based on whether the project “was undertaken” in a “participating state,” which is defined (p. 15) as one that “established a corresponding regulation as part” of the program. If it is “undertaken” in a non-participating state, the award is only one allowance for two tons of “demonstrated” CO₂ reduction or sequestration of CO₂. **In essence, this is one more penalty imposed on offset projects that will serve to discourage such projects.** It is unnecessary and should be discarded.

In the case of subdivision (g) (p. 94), the Draft requires that the sponsors must provide the state agency “access to the physical location of the project to inspect for compliance” with provisions of subpart XX-10. However, it is our understanding that under subdivision (c) of section XX-

10.4 (p. 96), the sponsor's application for a CO₂ emissions offsets project includes a "completed application agreement" whereby the sponsor agrees that the agency's "right to audit" the project includes "the right to enter the physical location of the project." Thus, it would appear that subdivision (g) is duplicative of that requirement and unnecessary.

3. Offsets allowances award

Subpart XX-10 (p. 84) distinguishes between "CO₂ offset allowances" and "CO₂ emissions credit retirements." While the Draft defines the term "CO₂ offset allowance" to mean "[a] CO₂ allowance that is awarded to the sponsor of a CO₂ emissions offset project pursuant to section XX-10.7" (p. 8), there is no specific definition of the term "CO₂ emissions credit retirements."

The use of the word "may" in subdivisions (a) and (b) regarding the awarding of credits for projects "that have satisfied all the applicable requirements" (emphasis added) of Subpart XX-10 suggests that, even though in both instances there has been satisfaction of "all" such "requirements," the state agency has discretion to withhold the award of some or all the applicable allowances. We do not understand why the Draft uses the word "may" and thus provides such discretion where there is satisfaction as to "all. . .requirements." We recommend replacing the word "may" with the word "shall."

In addition, it appears that, in the case of "CO₂ emissions offset projects," the Draft contemplates that the "sponsor" of such project may not necessarily be the owner and operator of the CO₂ budget source or the units thereof, but could be such owner and operator of some other person

and that, in any case, the sponsor must hire another person to represent the former. While that may be workable, it seems overly complicated and is likely to increase the costs of such projects and possibly make them less attractive. It will certainly add significant overhead costs. In addition, clarification is needed as to whether owners – at least of CO₂ budget sources and units thereof – can be sponsors. Indeed, we question why they should be excluded.

We do not know why this process is separated from the general account provisions of subpart XX-6. Both that subpart and subdivision (a) of section XX-10.4 provide for the establishment of accounts. While subdivision (a) of section XX-6.2 also applies to “compliance accounts,” the remainder of the section relates to general accounts, as does section XX-6.8. There is a need for consolidation.

We also have concerns about subdivision (h) (p. 94). The way that it reads, the state agency can revoke allowances or approvals without notice or an opportunity for the sponsor to respond to the allegation once a “determination” is made of noncompliance. That should not be the case. Other provisions of the subpart require the sponsor to designate a “CO₂ authorized account representative” to act on the sponsor’s behalf on all matters with the state agency. That agency should first be required to give such notice to that representative concerning the basis for the proposed action. Moreover, there should be a process for review and appeal of any such final agency determination. Even if authority or requirement for such process exists under applicable state law, it is unknown whether such authority or rule would apply here. Whether such

authority or rule currently exists, the Model Rule should make it clear that such a process should be provided.

The authority to revoke allowances in the sponsor's general account is based on so-called noncompliance with any of the "Subpart's requirements." There are many so-called "requirements." As we have noted, some are mere "illustrations" for the states to consider. Apparently, they include the provisions of EPA's 40 C.F.R. Part 75. However, there is no definition of the term "requirements," some of which obviously are not on an equal footing with others. Yet this provision seems to treat all requirements the same. Moreover, it makes no distinction between those that are substantive and those that are technical. In addition, there should be an opportunity or process for correcting such problems without deciding to revoke allowances.

As to the revocation itself, it applies to "any" approvals the agency has "issued" to a project. It is unclear what the word "approvals" encompasses regarding projects. As far as we can determine, the term "approvals" is not used in the Draft regarding projects.

Further, it appears to have no relevance to when the approvals were given. Since projects may cover a long period of time, there could be so-called "approvals" over that time that occurred long before the determination, and thus we question whether those approvals should be affected. In addition, we question what the effect of the revocation is: Does it terminate the project or merely delay it?

In the case of subdivision (d) (pp. 92-93), there are several “additionality” requirements. They make offsets allowances ineligible to be “awarded to a project” or retirement credit “that is required” by “any local, state or federal law, regulation, or administrative or judicial order” (emphasis added). This is a very broad prohibition. It would appear to cover renewable portfolio standards’ credits and more. What is involved is an understanding of how the word “required” will be interpreted in its application. At minimum, in the case of projects, such prohibition should clearly provide that the applicable law, rule or order is intended to apply directly and narrowly in the particular situation and not as the result of broad interpretations.

Section XX-6.8 provides (pp. 56-57) for the closing of general accounts. While we understand that there should be some mechanism for closing inactive accounts, it appears that the process, particularly in affording only “20 business days” for a representative to respond and to develop reasons “demonstrating” why the account should not be closed (*i.e.*, “good cause”) is overly restrictive and legalistic. After all, if the agency has waited for six or more years for activity, it seems that a period of at least 90 days would be more reasonable. In addition, the Draft should include criteria indicating what constitutes “good cause.”

C. Overview of State Implementation of Model Rule

As noted in our March 20 comments on the MOU, the use of words such as “substantially” and “framework” in the context of a Model Rule suggests that the seven signatory states potentially

have a great deal of individual flexibility in the development and approval of the Model Rule in each state, which “will not necessarily ensure” uniformity and consistency “within the region.”⁹

Except possibly for the definition in the Draft of the term “CO₂ Budget Trading Program,” which describes the “Program” as being “multi-State” with “corresponding regulations in other States” – and thus appears to acknowledge the regional nature of the Program, as opposed to a state-by-state arrangement – the March 23 Draft and the discussion thereof at the March 28, 2006, regional stakeholder meeting in New York City indicates that significant individual state flexibility is intended by the Draft. For example, in the case of the permit provisions, the Draft expressly states (p. 35) that the “text” merely “illustrates” how the permit requirements “could be drafted and does not necessarily represent what an individual RGGI state will propose.”

However, the 141-page SWG Draft Model Rule that the MOU calls upon the seven states to “approve” – either legislatively or by administrative regulations or both, with its many cross-references not only to various provisions of the Draft itself,¹⁰ but also to numerous provisions of federal regulations of EPA – is extremely complicated, not well organized and difficult to follow.

⁹ We also noted (p. 9): “Such flexibility is contrary to the very nature of the regional concept. . .and most importantly would not bode well for the affected utilities, creating reliability, economic and other concerns for them, their customers and the region.”

¹⁰ As we understand the scheme of the Draft, the reference to “Part” is to the entire “CO₂ Budget Trading Program,” as set forth in the Draft, and that “Part” is subdivided: first, into “Subparts” (*e.g.*, XX-1 through 10), with subpart XX-9 “Reserved” for some unexplained reason; second, into sections (*e.g.*, XX-1.2, 1.3, etc.); third, into subdivisions (*e.g.*, XX-1.1(a), 2.1(b), etc.); fourth, into paragraphs (*e.g.*, (a)(1), (b)(3), etc.); and even further, in some cases, into what appear to be subparagraphs (*e.g.*, XX-8.8(e)(1)(i) and (ii)). However, the scheme is difficult to follow. Moreover, we understand that much of the Draft is derived in significant part, but with changes, from Subchapter A, “Prevention and Control of Air Contamination and Air Pollution,” Part 204, “NO_x Budget Trading Program” of Chapter III of the New York Department of Environmental Conservation’s

Most importantly, for a model¹¹ rule, the Draft seems to be overly prescriptive and detailed, both in substance and procedure. This seems inconsistent with the “flexibility” concept apparently intended for the states. In particular, it was reportedly stated at the March 28, 2006, regional stakeholder group meeting that the SWG’s preference and apparent expectation is for the states to approve the Draft administratively through rulemaking and not to seek legislative authority, even though **there is no indication in the MOU or the Draft that the states have the necessary authority to accomplish all that is set forth in either document, particularly regarding the states setting aside 25 percent (or greater) of the allowances as a means of raising money for vaguely stated purposes.**

Such an administrative rulemaking process presumably would include an opportunity under each state’s rulemaking procedures for public comments, written or through hearings or both. In that process, such prescriptive and detailed provisions could undergo significant changes. Therefore, it would seem that rather than a mixture of flexibility and prescription, the approach taken in the Draft for permits is more consistent with the flexibility concept and should be applied to the entire Draft Model Rule, not just to portions thereof (such as permits – although, as noted below, such illustrations make it difficult for EEI and other commenters to offer meaningful and effective comments because we do not know what will ultimately be each state’s product). In

“Rules and Regulations,” the cited statutory authority of which is that state’s “Environmental Conservation Law.”

¹¹ Funk and Wagnalls Standard Encyclopedia Dictionary (5th ed. 1971), p. 418 defines the word “model” to mean “a pattern, example, or standard that is or may be used for initiation or comparison.”

addition, as far as we can determine, there is nothing in the MOU that suggests that the signatory states have the authority or power to reject a program rule, once approved by a state, which may not conform to the MOU and to the final version of the Model Rule “framework.” Thus, it appears that what the states approve as a rule will apply for the RGGI region, even if inconsistent with the MOU and the Model Rule and possibly from state-to-state within RGGI.

II. Issues Related To Implementation Of The Draft Model Rule

A. Purpose of Draft

According to the MOU, the signatory states have committed to a “CO₂ Budget and Trading Program,” which is “aimed at stabilizing and then reducing CO₂ emissions within” those states. According to the Draft (p. 4), the “Purpose” of the part (*i.e.*, the “Program”) is to establish at the individual state level the named state’s “component” of the program “from CO₂ budget sources,” which “is designed to stabilize and then reduce” CO₂ emissions.¹² However, the “[p]urpose” adds that such establishment is to be done “in an economically efficient manner.” While this phrase is certainly welcome, it is unclear whether it is intended to be applicable to just the regulating states or whether it is intended to also apply to the regulated CO₂ budget sources and their units, or both. Most importantly, this phrase, as far we can tell, only appears in the “Purpose.” There is nothing elsewhere in the Draft that either elaborates on this phrase or explains how it is to be applied in practice by the states or how it should benefit the regulated sources and their customers.

¹² There is no context to the word “stabilize” in that there is no reference to stabilizing at a specified level of emissions, such as the emissions of 1990, or to stabilizing globally, in the U.S., regionally or otherwise.

Principles of economic efficiency should apply to both the regulating states and such regulated sources and their units. There also should be an elaboration of the concept explaining how and to what extent it applies in the Draft. Otherwise, it would appear to be no more than a hortatory phrase that has no real meaning or effect. We hope that that is not the intent.

The definition of the term “CO₂ Budget Trading Program” (p. 7), with its references to both a “multi-state” program “established pursuant to this Part” and the “corresponding regulations in other States,” is helpful in showing, as previously noted, that the program is a regional one and not merely a state-by-state effort. However, the reference therein to “air pollution” is inappropriate and wrong, both technically and scientifically, as CO₂ occurs both naturally and anthropogenically. Indeed, CO₂ is a ubiquitous, naturally occurring substance critical to the existence of life on Earth. It is important to human life. It is exhaled by all humans and animals.¹³ While we understand that some states regulate CO₂ as an “air contaminant” or an “air pollutant,” CO₂ is not recognized as a “regulated air pollutant” in the Code of Federal

¹³ In its December 2005 Report on “Emissions of Greenhouse Gases in the United States 2004,” EIA explains (p. 7): “Carbon is a common element on the planet, and immense quantities can be found in the atmosphere, in soils, in carbonate rocks, and dissolved in ocean water. All life on Earth participates in the ‘carbon cycle,’ by which carbon dioxide is extracted from the air by plants and decomposed into carbon and oxygen, with the carbon being released to the atmosphere. Plant biomass, in turn, ultimately decays (oxidizes), releasing carbon dioxide back into the atmosphere or storing organic carbon in soil or rock. There are vast exchanges of carbon dioxide between the ocean and the atmosphere, with the ocean absorbing carbon from the atmosphere and plant life in the ocean absorbing carbon from water, dying, and spreading organic carbon on the sea

Regulations referenced and relied upon elsewhere in this Draft.¹⁴ Most importantly, CO₂ is not referenced in the MOU as an “air pollutant,” and such a reference is not essential to the Draft.

Therefore, we recommend deletion of the words “air pollution” at p. 7, line 22 of the definitions.¹⁵

B. Applicability of the Program

There is no definition in the Part titled “units” (p. 19) of the term “electricity generator,” which is a term also used in the MOU, nor is there any indication in the Part that such term is limited to an electric utility that “sells electric energy,” either retail or wholesale, or both. The definition of the term “CO₂ budget unit,” as “[a] unit that is subject to the CO₂ Budget Trading Program requirements under section XX-1.4,” is not helpful in this regard. Section 204-1.4(a) of the New York NO_x regulations, from which this provision appears to be derived, includes the words “and

bottom, where it is eventually incorporated into carbonate rocks such as limestone” (emphasis added).

¹⁴ 40 C.F.R. § 70.2, which applies to Part 75 of 40 C.F.R., provides that the term “Regulated air pollutant” means:

- (1) Nitrogen oxides or any volatile organic compounds;
- (2) Any pollutant for which a national ambient air quality standard has been promulgated;
- (3) Any pollutant that is subject to any standard promulgated under section 111 of the Clean Air Act (CAA).

¹⁵ In general, we comment on the definitions applicable to this “Part” in the context of our comments on its various provisions. We use the words “Part” and “Draft” interchangeably to cover the entire document.

As to the definitions in general, there are two sets of definitions in the Draft (*i.e.*, the one beginning at p. 4, line 10 through p. 18, line 26 and the other beginning at p. 84, line 12 through p. 91, line 4). The first appears to apply to the entire Part, while apparently the second set of definitions applies only to subpart XX-10. However, the Draft does not make that clear. We suggest that at p. 4, line 11 these words be inserted: “For purposes of this Part, the following terms mean:”; and at p. 84, line 13 insert “For purposes of this subpart, the following terms mean:”.

sells any amount of electricity.” To the extent that the N.Y. NO_x regulations were relied on by the SWG in proposing the Draft Model Rule, it is unclear why those words are omitted here.

This section also provides that any “source that includes one or more such units shall be a CO₂ budget source” that is subject also to such “requirements” (emphasis added).¹⁶ The word “includes” regarding the term “source” is not limiting, and a “CO₂ budget source” may be construed to cover activities that are not “electricity generators” covered by the term “CO₂ budget units,” which suggests that the “requirements of this Part” could apply to such activities. In short, the definition of “source,” which apparently has more than one application in the Draft, is confusing, at least in the context of subdivision (a).

As to the term “any air pollutant,” it is undefined and is extremely broad, particularly in the case of a “source” that by the above definition “includes” not only applicable CO₂ budget units, but also “governmental, institutional, commercial, or industrial” activities. For the reasons discussed previously, **we recommend deletion of the words “any air pollutant” here as well.**

On p. 7, line 20, and p. 19, line 19 we recommend changing “includes” to “contains.” On p. 15, line 24, delete all after “emits” through the period on line 26 and insert “CO₂. A “source” that is a CO₂ budget source shall be considered a single “facility.””

¹⁶ The term “source” is defined (p. 15) to mean:
any government, institutional, commercial, or industrial structure, installation, plant, building, or facility that emits or has the potential to emit any air pollutant. A “source,” including a “source” with multiple units, shall be considered a single “facility.”

The term “CO₂ budget source” is defined to mean “[a] source that includes one or more CO₂ budget units” (emphasis added). Thus, it would appear that such a source with one unit that burns biomass “for more than 50% of its total fuel” would not be subject to the program.

However, if a “source” contains multiple units, it is unclear – because of the words “a unit” in the definition of the term “fossil fuel fired” – whether a multiple-unit CO₂ budget source would be eligible for the exemption. Presumably, it should be. However, this is confusing at best. In addition, by way of encouraging biomass co-firing, we urge that when a fossil fuel-fired unit converts to 100 percent biomass co-firing, it be awarded allowances based on historic fossil fuel use.

C. Permit Provisions

Subdivision (a) of section XX-1.5, titled “*Permit requirements*,” states in brackets (p. 22):

[Each State’s text for this subdivision will likely be different because the states have unique permitting requirements. The text below illustrates how this subdivision could be drafted and does not necessarily represent what an individual state will propose.]

(Emphasis added.) Given this statement, we are somewhat hesitant to comment on the Draft’s text at pp. 22-23, particularly in light of the fact (as noted above) that many of the other applicable provisions do not offer such flexibility and are quite prescriptive. The permit provisions of subpart XX-3 (pp. 35-36) also begin with the above bracketed statement. Moreover, while we lack any knowledge of the specific “permit requirements” of the seven signatory states, we are concerned about what could result from these bracketed texts state-by-state. In any event, we offer several comments.

First, paragraph (a)(1) (p. 22) provides that the CO₂ authorized account representative¹⁷ is “required” to 1) have an “operating permit” for each “CO₂ budget source” pursuant to this “Title” (not “Part”) and for “each CO₂ budget unit” and 2) submit “a complete CO₂ budget permit” application to the “Regulatory Agency” in accordance with the requirements and deadlines of sections XX-3.2 and -3.3 of this Part.¹⁸ The term “operating permit” is undefined.

Second, paragraph (a)(2) (p. 23) provides that “owners and operators of such source and units” “required” to “have an operating permit” pursuant to this “Title” also “shall have a CO₂ budget permit and operate” such source and unit “in compliance with such CO₂ budget permit.” Like the above representative, they must submit to the state agency a complete “application” in accordance with such sections for a “CO₂ budget permit.”

These multiple permit illustrations are not helpful. Most importantly, there is no need or benefit in having both an operating permit and a CO₂ budget permit applicable to a CO₂ budget source and each unit thereof. As far as we can determine from the illustrations, there is nothing unique

¹⁷ The term “CO₂ authorized account representative,” according to the definition (p. 7), has two meanings, depending on its use in the Draft. In this context, it means: “For a CO₂ budget source and each CO₂ budget unit at the source, the natural person who is authorized by the owners and operators of the source and all CO₂ budget units at source, in accordance with Subpart XX-2, to represent and legally bind each owner in matters pertaining to the CO₂ Budget Trading Program . . .” (emphasis added).

¹⁸ Sometimes the Draft, such as in the definitions and in the above subdivision, refers to the term “Regulatory Agency” only. In other situations, such as paragraph (b)(1) of section XX-6.2 (pp. 43-44), the Draft refers to both the “Regulatory Agency and its agent” (emphasis added). This may be a drafting error, or it may be intended. If the

about or different between the two permits. Further, in light of the directives of subpart XX-2 regarding the CO₂ authorized account representative discussed in the next section, we do not see why the owners and operators, as well as such representative, should both be required to have permits.¹⁹ There should be a resolution of whether the representative or the owners and operators should apply for, and have, the permit. Surely it should not be both.²⁰ The MOU is silent on whether there is need for any permit. At minimum, **we question the need for multiple permits. One permit should be deleted.**

D. CO₂ Authorized Account Representative Requirements

The provisions applicable to a “CO₂ authorized account representative” found in section XX-2.1 (p. 28), section XX-2.4 (p. 33), and section XX-2.4(a)(4) (*id.*) are not only overly broad, but also open-ended and prescriptive in nature. Like other provisions of the Draft, they apparently are copied from Subpart 204-2 of New York State’s regulations for its NO_x budget trading program, which, as noted earlier, is based on that state’s Environmental Conservation Law, the provisions of title IV of the Clean Air Act and the EPA regulations issued thereunder. However, EPA determined in August 2003 that the Clean Air Act does not provide for the regulation of CO₂ to address global climate change (68 *Fed. Reg.* 52922), and presumably these NO_x authorities do not provide the statutory basis in New York or in the other signatory states for these CO₂-related

latter is the case, some explanation of the reasons for the different uses is warranted. For our purposes, we refer to both as the “state agency.”

¹⁹ In this subpart, the reference is to “owners and operators,” while in others, such as subpart XX-8, the reference is to “owners or operators” (emphasis added). We do not understand why there is a difference. Obviously, there is a different meaning.

provisions. In addition, while the N.Y. provisions may have proved generally workable and acceptable in the context of the NO_x program, that is not necessarily a justification for repeating them regarding this new CO₂ budget and trading program. These NO_x program provisions can be improved upon for the purposes of the Model Rule, as our comments below urge.

It is particularly difficult to understand why the Draft requires that there be a “binding agreement” for the selection of the representative, but the agreement not to be submitted to the state agency. The agency would want to obtain the agreement, as presumably that is the document that would spell out the powers, etc. of the representative vis-à-vis the owners and operators. It is unlikely that the representative would or could sign any state agency certification that, directly or indirectly, commits such representative to “duties and responsibilities” that are not sanctioned by that agreement. Further, we question the attempt, through such certification, to bind an owner or operator to the representations, etc. of such representatives, particularly if they abused their authority, committed fraud or otherwise acted in violation of law.

Moreover, it is difficult to comment on, let alone support, such a certification without knowing what, if any, consequences for the owners and operators and such representatives there may be under applicable state law concerning certifications. Further, as to any regulatory order or decision, it must be clear that the owners and operators are only bound to the extent the order or

²⁰ Section 204-3.1 of the New York permit requirements for the state’s NO_x program appears to require only one permit, and only the “authorized account representative” is required to apply for, and have, such permit.

decision has been issued consistent with all substantive provisions of the program and relevant procedural requirements under applicable state law. This is unclear in the Draft.

In addition, the word “inactions” in the certification statement is not only vague and broad, but also highly subjective in application. Furthermore, it is unclear what is intended to be covered by such a word. For example, if it is intended to address missed deadlines, the word “actions” adequately suffices.

We also recommend that the certification that is contained on p. 29, lines 18-27 be modified to read as follows:

“I certify that as the CO₂ authorized account representative or alternative CO₂ authorized account representative, selected through a binding agreement (available to the REGULATORY AGENCY) with the owner and operator of the applicable CO₂ budget source and each CO₂ budget unit at such source, I have the necessary authority to comply with all applicable requirements in effect on the date of such certification of the CO₂ Budget Trading Program of this rule on behalf of the owner and operator of such source and of each such unit. I further certify that 1) pursuant to and consistent with such agreement, each such owner and operator agrees that I have the authority to bind them by my representations, actions or submissions taken by me in furtherance of such compliance and 2) such owner and operator agrees to be bound by any decision or order lawfully issued to me pursuant to such Program by the REGULATORY AGENCY or a court regarding such source or unit.”

Moreover, subdivision (e) of section XX-2.1 requires that for every “submission”²¹ under the program, no matter what its purpose or significance, the applicable representative must sign the

²¹ The term “submissions” is undefined. However, it is frequently used in the draft. The term “submit or serve” is defined (p. 18) to mean “[t]o send or transmit a document, information, or correspondence to the person specified in accordance with the applicable regulation” in person, by mail or “by other means of dispatch or transmission and

submission and include a certification statement (p. 29). The language for that statement is a clear example of the Draft being overly prescriptive.

The first sentence of the certification is duplicative of the one required by paragraph (a)(4) of section XX-2.4, which expressly states that such representatives are authorized to make such “submissions.” There is no need to repeat this certification.

As to the remainder of the proposed second certification, it is unnecessary in light of the above first certification, which makes it clear that the applicable representatives and owners and operators are bound by “submissions,” etc. made by the representatives, regardless of whether the representatives certify that they have “personally examined” and are “familiar with, the statements and information submitted” or that they have made “inquiry” to the “individuals with primary responsibility for obtaining the information.” Indeed, the above certification appears to bind them whether or not they made such examination, etc.

As to the issues of certifying “under penalty of law” and stating that the representatives are “aware” of penalties “for submitting false statements and information or omitting required statements and information,” if such laws and penalties exist in the signatory states and are applicable, they will apply whether or not the representatives certify to their existence. Attempts to paraphrase such laws in the context of a certification are likely to be inaccurate or misleading. Just as importantly, such statements could well make it difficult for owners and operators to

delivery,” all of which has to do with the method or means of delivery, etc. It does not

convince persons to become CO₂ authorized account representatives. We strongly recommend abandonment of subdivision (e) certification and deletion of the words “, and certified” on p. 29, line 16.

The above-referenced certification provision appears again in subpart XX-8 and is repeated *verbatim* (p. 83) regarding the submission of “annual net output reports” by the CO₂ authorized account representative. For the reasons just noted, EEI recommends its deletion beginning on p. 83, lines 15-23.

Furthermore, subdivision (d) of section XX-8.5 (pp. 72-75) requires the submission of several types of quarterly reports, some of which are to be submitted in “electronic format” and include detailed technical information. Paragraph (d)(4) requires that the CO₂ authorized account representative include with each quarterly report a “compliance certification” in support thereof. As we noted earlier, the initial certification by the CO₂ authorized account representative, with our suggested revisions, should be adequate for all submissions under this Part, and there is no reason for an additional “certification,” even in this abbreviated format. **We recommend that p.**

75, lines 15-19 be amended to read as follows:

(4) *Compliance statement.* The CO₂ authorized account representative shall submit to the REGULATORY AGENCY or its agent a compliance statement in support of each quarterly report. The statement shall state that:

E. Recordkeeping and Reporting

explain what substantively is intended to be encompassed by “submissions.”

Subdivision (e) of section XX-1.5 (pp. 25-26) requires that “[u]nless otherwise provided,” the owners and operators of a CO₂ budget source and each CO₂ budget unit thereof “shall keep on site at the source” a list of documents “for a period of 10 years from the date the document is created,” and this period may be extended by the state agency “for cause, at any time prior to the end of 10 years in writing” (emphasis added).

The documents included are “[a]ll emissions monitoring information” and “all reports, compliance certifications, and other submissions and all records made or required under” the program. There apparently are numerous documents covered by this 10-year requirement, including the “account certificate of representation for the CO₂ authorized account representative” (emphasis added), which must be kept beyond 10 years. There is nothing in subdivision (e) to explain what purpose is served by requiring such a comprehensive and lengthy retention, nor does it specify that the state agency could or should have access to them, although in the case of offsets projects, the Draft provides that the sponsors thereof must provide for access to the project and relevant documents through an audit. As to the words “[u]nless otherwise provided,” there is nothing in the subdivision that would explain how, when or under what criteria such an alternative might be exercised.

While it is certainly prudent to retain on-site copies of many of these documents, it is unclear why this requirement is not imposed on the CO₂ authorized account representative rather than the owners and operators, particularly in light of the “binding agreement” referred to above and all of the other obligations of the representative. As far as we can determine, the provisions for

establishing the office of such representative is to have the effect of removing the owners and operators from any direct administrative responsibilities such as this one. Whether that is desirable is debatable and is a concern to us. Nevertheless, it is the scheme of the Draft, and thus should be followed throughout.

In addition, the other requirements regarding the listed documents are far too sweeping. They are likely to be a paperwork and resource burden on owners and operators, and will create unnecessary disputes because of vagueness and uncertainty as to which documents are covered. The list of documents is quite comprehensive and would probably result in keeping more documents than necessary or useful.

Further, the retention requirement of 10 years of all of the listed documents – with a possible indefinite extension for some vague, unexplained “cause” – is unreasonable and unnecessary. According to 40 C.F.R. § 75.73(a), EPA only requires that information be retained “for at least 3 years from the date of each record” (emphasis added). That provision is simple and reasonable. It is difficult to imagine that the RGGI states would have a need for records regarding CO₂-related documents to be retained for a period longer than that of the EPA for its acid rain program.

We recommend that:

- **The provisions of subdivision (e) and section XX-2.4 be reconciled with the Draft’s scheme regarding whether the retention requirements should apply to owners and operators or their representatives.**

- **The overall 10-year retention period be reduced to a minimum of three years from the date of the document/record.**
- **The provision for an indefinite extension of the retention period for so-called “cause” be abandoned, or alternatively there be some indication of what criteria would be used to determine “cause.”**
- **The vague and open-ended nature and scope of the documents/records required to be retained should be revised to be provide more certainty and avoid potential and unnecessary document-related disputes. We reiterate that the retention requirements are far too sweeping.**

The Draft incorporates by reference various EPA acid rain regulations on **monitoring, recordkeeping and reporting requirements** into the Model Rule and proposes to make them applicable to the program,²² including the portion of such regulations that apply to the limited, non-regulatory CO₂ monitoring and reporting provisions of section 821 of Public Law Number 101-549.²³ The effect is to grow the Model Rule exponentially. However, while some portions of the Draft refer to specific sections or provisions of 40 C.F.R. Part 75, many others only refer to Part 75 generally, which leaves those subject to such provisions uncertain as to what portions of Part 75 apply in a given situation. This is not a good situation for them or the applicable state agency. Since this could likely result in disputes, we recommend that if the Model Rule intends

²² There are a number of terms in 40 C.F.R. § 72.2 that are not “replaced” in the “Draft” but probably should be, including: the term “Act,” which refers to the Clean Air Act and is used in Part 75; Acid Rain, Acid Rain Program and Acid Rain Program units, which is also referred to in Part 75; Environmental Appeals Board; EPA trial staff; National Allowances Data Base; owner; pollutant concentration monitor; Clean Air Act Amendments of 1990; Secretary of Energy; etc.

²³ While section 821 is included as a note to 42 U.S.C. § 7651k, it is not a part of the Clean Air Act. See “Compilation of Selected Acts Within the Jurisdiction of the Committee on Energy and Commerce,” which includes the Clean Air Act. Appendix B of the Compilation includes section 821 as one of the “Provisions of the Clean Air Act Amendments of 1990 (Public Law 101-549) that did not amend the Clean Air Act.” Committee Print No. 13, 103^d Cong., 1st Sess. 431, 488 (1993).

to incorporate the EPA regulations by reference, it should specifically identify the Part 75 provisions that apply and not subject regulated entities to uncertainty.

The various recordkeeping and reporting provisions of the Draft (*i.e.*, in sections XX-1.5 and subpart XX-8) are duplicative, and we urge that they be reconsidered, revised and consolidated.

F. Independent Certifiers and Accreditation of Such Certifiers

The portion of the Draft concerning “Independent Certifiers and Accreditation Thereof” (pp. 97 and 136-38) – and in particular subdivision (c) of section XX-10.4 – should not mandate the use of so-called “independent certifiers” regarding preparation of project applications for CO₂ offsets projects. What subsection (c) requires is that the certifier sign “a statement and certification report” that he or she “has reviewed the entire application and evaluated” the applicable eligibility requirements of section XX-10.5 regarding offset projects “and any applicable guidance” issued by the state agency as to the “adequacy and validity” of certain “information supplied by the project sponsor.” It is difficult to believe that such a review and evaluation of information from the sponsor could be meaningful, recognizing that the certifier will be compensated for this review and evaluation by the sponsor. This review and application will add to the cost of preparing the application. Indeed, the mandate could be a boon to certifiers, as there is no limit as to what can be charged. Moreover, there does not appear to be an obvious benefit to the sponsor, as subdivision (c) of section XX-10.4 does not even refer to such

certifier's statement in approving an application. Further, there does not appear to be any obvious benefit to the states.

On April 17, 2006, the U.S. Department of Energy (DOE) published revised guidelines under section 1605(b) of the Energy Policy Act of 1992 for the voluntary reporting of GHG emissions and reductions. Section 300.11 of those guidelines encourages entities to have their "reports reviewed by independent and qualified auditors" who are "professional verifiers" "accredited by one or more independent and nationally-recognized accreditation programs." They do not mandate such certification or verification. The Model Rule should not do more.

As to the states performing accreditation of "individuals," we seriously question whether the states are authorized by statute to do so. In addition, the accreditation program proposed in the Draft is not robust and may not be satisfactory to potential sponsors, particularly in light of conflict of interest provisions in the Draft Model Rule that could subsequently affect a sponsor adversely.

We urge abandonment of this mandate and the related accreditation program.