

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

IN RE: Application of
Invenergy Thermal Development LLC's
Proposal for Clear River Energy Center

Docket No. SB 2015-06

**Motion of Conservation Law Foundation for the EFSB
To Take Administrative Notice of A Massachusetts CO2 Regulation**

Following a request by Energy Facility Siting Board (EFSB) Chairperson Margaret Curran, Conservation Law Foundation (CLF) respectfully submits a hard copy of a Massachusetts regulation entitled "Reducing CO2 Emissions from Electricity Generating Facilities," found at 310 Code of Massachusetts Regulations 7.74. This matter arose on September 18, 2018.

On that date, Invenergy's carbon-emissions expert witness Ryan Hardy testified about the anticipated carbon emission impacts of Invenergy. Mr. Hardy distinguished between generation-based accounting methodology (Transcript, page 32 line 11 – page 33 line 9) and production-based accounting methodology (page 33 line 11 – page 35 line 17). See generally, Transcript page 35 line 19 – page 38 line 1.

Mr. Hardy stated incorrectly that "Massachusetts [has] chosen consumption-based accounting as it relates to carbon – measuring the impact of carbon emissions." Page 40, lines 19 – 21. This was an important misstatement, and CLF's counsel asked the stenographer to mark the transcript for the time Mr. Hardy made the incorrect statement. Page 41, lines 10 – 15.

Later, Mr. Hardy repeated his incorrect assertion that, following the Massachusetts Supreme Judicial Court's decision in Kain v. DEP, 474 Mass. 278 (2016), a case litigated by CLF, Massachusetts uses consumption-based accounting for carbon emissions. Page 60 line 10 – page 61 line 12.

At that point, CLF asked the EFSB to take administrative notice of the Massachusetts Global Warming Solutions Act (GWSA) regulations promulgated in the wake of the Kane decision, and the fact that those regulation use production-based accounting, not consumption-based accounting, as Mr. Hardy had incorrectly testified. Page 61, lines 13 – 16. EFSB Chairperson Curran asked CLF to provide a hard copy of that regulation; CLF is now doing so.

The attached Massachusetts greenhouse gas regulation sets both total CO2 emissions limits for the aggregate of all electricity-generating power plants within the Commonwealth of Massachusetts (Section 5(a)) and for each separate, individual electricity-generating power plants within the Commonwealth of Massachusetts (Section 5(b)). This is the definition of production-based accounting provided by Mr. Hardy. Page 35 line 19 – page 36 line 8 (definition of production-based carbon accounting is that it looks at production within a defined footprint or geographical area).

The attached Massachusetts regulation also provides annually declining CO2 emissions limits – both for the aggregate of all electricity-generating power plants within the Commonwealth of Massachusetts and for each separate plant within the Commonwealth. Section 5(a).

Thus, the Massachusetts GWSA regulation, “Reducing CO2 Emissions from Electricity Generating Facilities,” 310 CMR 7.74, uses production-based accounting methodology; applies only to electricity generators within Massachusetts; and sets annual, declining limits only on in-state generators, exactly as CLF asserted on September 18, 2018.

The accuracy of the foregoing – that “Reducing CO2 Emissions from Electricity Generating Facilities,” 310 CMR 7.74, sets annual, declining limits on in-state power plants using production-based accounting – was reaffirmed by the Massachusetts Supreme Judicial Court on September 4, 2018, in New England Power Generators Assoc., Inc. v. Dep’t of Environ. Prot., 480 Mass. 398 (2018). In that case, the New England Power Generators Association (NEPGA) specifically challenged the regulation that CLF is today providing to the EFSB. Indeed, NEPGA predicated its challenge to this regulation on precisely the same grounds that Mr. Hardy asserted on September 18: the supposed problem of “leakage.”¹ Transcript at page 41 line 16 – page 42 line 16. In NEPGA, the SJC expressly rejected this “leakage” argument. 480 Mass. at 408-409.

¹ “Leakage” occurs when the climate policies of one state (say, Rhode Island or Massachusetts) cause that state not to build a new fossil-fuel power plant and then be forced to rely on electricity from higher-emission plants in other states. Mr. Hardy explains leakage this way: “The net system wide decrease [from Invenergy] is largely driven by highly efficient natural gas-fired combined cycle generators such as [Invenergy] . . . [replacing] less efficient competing generators.” Hardy Pre-Filed Testimony June 30, 2017, page 22 lines 5 - 7. The NEPGA Court, quoting the GWSA defines leakage as “the offset of a reduction in emissions of greenhouse gases within the Commonwealth by an increase in emissions of greenhouse gases outside the Commonwealth.” 480 Mass. at 408.

The short of it is this. The attached Massachusetts GWSA regulation uses production-based accounting.² The regulation was challenged in court by fossil fuel generators (NEPGA), who argued – just as Mr. Hardy does – that production-based accounting is unwise because of leakage. NEPGA lost the argument and the SJC affirmed the regulation.

The Massachusetts regulation that CLF is today providing to the EFSB, which provides for production-based accounting of CO2 emissions from generators within the Commonwealth, was promulgated August 11, 2017, more than a year before Mr. Hardy's testimony. NEPGA was decided September 4, 2018, also before Mr. Hardy's testimony.

CLF has no evidence to show that Mr. Hardy deliberately sought to mislead the EFSB. Nevertheless, Mr. Hardy's testimony was wrong.

CONSERVATION LAW FOUNDATION,
by its Attorney,



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² Invenenergy's October 9, 2018 filing with the EFSB of 310 CMR 7.71(9)(c) is not to the contrary. In addition to production-based accounting for all in-state generators, electricity utilities must also report their in-state sales of out-of-state electricity using consumption-based accounting.

CERTIFICATE OF SERVICE

I certify that the original and seven hard copies of this document were hand delivered to the Energy Facility Siting Board and served electronically on the service list of this docket on November 19, 2018.

A handwritten signature in blue ink is written over a horizontal line. The signature is cursive and appears to read "J. Blum".

Tab A

Code of Massachusetts Regulations Currentness
Title 310: Department of Environmental Protection
Chapter 7.00: Air Pollution Control (Refs & Annos)

310 CMR 7.74

7.74: Reducing CO₂ Emissions from Electricity Generating Facilities

(1) Purpose, Authority and Scope. The purpose of 310 CMR 7.74, promulgated in conjunction with 310 CMR 7.75, is to assist the Commonwealth in achieving the greenhouse gas emissions reduction goals adopted pursuant to M.G.L. c. 21N, § 3(b), by establishing declining annual aggregate CO₂ emissions limits that will reduce CO₂ emissions from electricity generating facilities. To achieve those goals, the Executive Office of Energy and Environmental Affairs (EEA) and the Department pursuant to M.G.L. c. 21A, §§ 2 and 8 and M.G.L. c. 21N, §§ 3(c), 4 and 7 hereby jointly promulgate 310 CMR 7.74, following consultation with the Department of Energy Resources and based on the considerations specified in M.G.L. c. 21N, § 3(c). 310 CMR 7.74 is also promulgated pursuant to M.G.L. c. 21A, § 16, M.G.L. c. 21N, § 3(d), and M.G.L. c. 111, §§ 2C and 142A through 142E. In exercising their broad authority and discretion under M.G.L. c. 21N, §§ 3(c) and 3(d), EEA and MassDEP have determined that additional emissions limits on in-state electricity generating facilities' greenhouse gas emissions, along with other climate policies and programs, will ensure achievement of the greenhouse gas emissions limits as established under M.G.L. c. 21N, and that the 310 CMR 7.74 limits are consistent with, and take account of, regional programs such as the Regional Greenhouse Gas Initiative (RGGI) and the Renewable Portfolio Standard (RPS).

(2) Definitions. The terms used in 310 CMR 7.74 are defined in 310 CMR 7.74(2) and 310 CMR 7.00: *Definitions*. Where a term is defined in 310 CMR 7.00: *Definitions* and 310 CMR 7.74 the definition in 310 CMR 7.74 shall apply.

Allowance means a limited authorization to emit one metric ton of CO₂ in compliance with 310 CMR 7.74.

Allowance Registry means the database that tracks allowances held by electricity generating facilities and used for compliance. The Department shall establish an account in the allowance registry for each electricity generating facility.

Annual CO₂ Emissions means the total amount of CO₂ emissions measurements recorded and reported for a calendar year in accordance with the Massachusetts CO₂ Budget Trading Program at 310 CMR 7.70(8)(c)4., converted from short tons to metric tons and adjusted, as applicable, for the production of useful net thermal energy pursuant to the Massachusetts CO₂ Budget Trading Program at 310 CMR 7.70(8)(i).

Bidder means a party qualified, pursuant to 310 CMR 7.74(6)(h) 4.a., to participate in an auction.

Calendar Year or Year means January 1st through December 31st.

Deduct or Deduction means the permanent removal of allowances from an account in the allowance registry by the Department.

Designated Representative means the person who is authorized by the owner and operator of an electricity generating facility to represent and legally bind the owner and operator in matters pertaining to 310 CMR 7.74.

Electricity Generating Facility means a facility that includes one or more electricity generating units for which the owner or operator is required to report CO₂ emissions pursuant to the Massachusetts CO₂ Budget Trading Program at 310 CMR 7.70(8); provided, however, that the following facilities are not electricity generating facilities for purposes of 310 CMR 7.74: MWRA Deer Island and MBTA South Boston Power.

Emergency means a period during when the regional transmission organization has issued an alert that an abnormal condition affecting the reliability of the power system exists or is anticipated in Massachusetts.

Existing Electricity Generating Facility means an electricity generating facility listed in 310 CMR 7.74(5)(b): Table B.

Existing Facility Aggregate CO₂ Emissions Limit means, with respect to calendar year 2018, the sum of all existing facilities' CO₂ emissions limits, as listed in 310 CMR 7.74(5)(a): *Table A*.

Massachusetts CO₂ Budget Trading Program means the program the Department promulgated at 310 CMR 7.70 to reduce greenhouse gas emissions from CO₂ Budget Sources as defined in 310 CMR 7.70.

New Electricity Generating Facility means, with respect to calendar year 2018, 2019 and 2020, an electricity generating facility that is not an existing electricity generating facility.

New Facility Aggregate CO₂ Emissions Limit means, with respect to calendar year 2018, the sum of all new electricity generating facility CO₂ emissions limits, as listed in 310 CMR 7.74(5)(a): Table A.

Offset means to use allowances to cover CO₂ emissions from an electricity generating facility pursuant 310 CMR 7.74.

Operator means any person or group of persons who operates, controls, or supervises an electricity generating facility including, but not limited to, any holding company, utility system, plant manager, or operations manager of the electricity generating facility.

Owner means any of the following persons or group of persons:

(a) Any holder(s) of any portion of the legal or equitable title in an electricity generating facility; or

(b) Any holder(s) of a leasehold interest in an electricity generating facility.

Reserve Price means the minimum acceptable price for each allowance in a specific auction.

Sealed Bid. Uniform Price Auction means a single or multiple round sealed-bid auction in which bidders may submit multiple bids at different prices; the price paid by all awarded bidders will be uniform.

Serial Number means, when referring to allowances, the unique identification number assigned by the Department to each allowance.

Total Aggregate CO₂ Emissions Limit means, with respect to a particular calendar year, the maximum allowable aggregate limit on CO₂ emissions from all electricity generating facilities subject to 310 CMR 7.74, as listed in 310 CMR 7.74(5)(a): *Table A*.

(3) Applicability. 310 CMR 7.74 applies to all owners and operators of an electricity generating facility.

(4) Compliance with CO₂ Emissions Limits. The owner or operator of an electricity generating facility shall offset annual CO₂ emissions using allowances in its allowance registry account pursuant to 310 CMR 7.74(6) and (7).

(5) CO₂ Emissions Limits.

(a) Total Aggregate CO₂ Emissions Limits. The total aggregate CO₂ emissions limit for 2018 is 9,149,979 metric tons of CO₂. The total aggregate CO₂ emissions limit for 2019 is 8,731,175. The total aggregate CO₂ emissions limit declines by 223,876 metric tons each year thereafter until it reaches 8,507,299 metric tons of CO₂ in 2020 and 1,791,019 metric tons of CO₂ in 2050. For 2018, the existing facility aggregate CO₂ emissions limit and the new facility aggregate CO₂ emissions limit were calculated from the total aggregate CO₂ emissions limit, such that their sum equals the total aggregate CO₂ emissions limit. The existing facility aggregate CO₂ emissions limit, and new facility aggregate CO₂ emissions limit for calendar year 2018 are shown in 310 CMR 7.74(5)(a): *Table A*.

310 CMR 7.74(5)(a): *Table A*

2018 Existing Facility Aggregate and New Facility Aggregate CO₂

Emissions Limits in Metric Tons

Year	Existing Facility Aggregate CO ₂ Emissions Limit	New Facility Aggregate CO ₂ Emissions Limit
2018	7,649,979	1,500,000

(b) Existing Individual Electricity Generating Facility CO₂ Emissions Limits for 2018. The CO₂ emissions limits for existing electricity generating facilities are shown in 310 CMR 7.74(5)(b): *Table B*.

310 CMR 7.74(5)(b): *Table B*

Existing Individual Electricity Generating Facility CO₂ Emissions Limits in Metric Tons

Facility	Limit
ANP Bellingham	860,250
ANP Blackstone	787,429
Bellingham	233,789
Berkshire Power	437,049
Braintree Electric	24,425

Canal Station	101,922
Cleary Flood	50,453
Dartmouth Power	48,348
Dighton	330,396
Fore River Energy	1,433,568
Kendall Square	502,191
MASSPOWER	304,108
Medway Station	1,603
Milford Power, LLC	148,912
Millennium Power	667,082
Mystic	1,516,066
Pittsfield Generating	79,959
Stony Brook	68,844
Tanner Street	36,655
Waters River	1,587
West Springfield	15,343

(c) Apportionment of New Facility Aggregate CO₂ Emissions Limit for 2018. By February 15, 2019, the Department shall apportion the 2018 new facility aggregate CO₂ emissions limit among electricity generating facilities. The apportionment shall be based on CO₂ emissions reported by new electricity generating facilities pursuant to 310 CMR 7.74(7) by February 1, 2019, and shall be completed pursuant to 310 CMR 7.74(5)(c)1. through 3.

1. New Electricity Generating Facilities' CO₂ Emissions Limits for 2018. The Department shall determine whether the sum of CO₂ emissions from new electricity generating facilities reported pursuant to 310 CMR 7.74(7) is less than, equal to, or greater than the new facility aggregate CO₂ emissions limit for 2018.

a. If the sum of new electricity generating facility CO₂ emissions is less than or equal to the new facility aggregate CO₂ emissions limit for 2018, then the Department shall set each new electricity generating facility's 2018 emissions limit equal to its CO₂ emissions for 2018.

b. If the sum of new electricity generating facility CO₂ emissions is greater than the new facility aggregate CO₂ emissions limit for 2018, the Department shall ensure that the sum of all new facility CO₂ emissions limits equals the new facility aggregate CO₂ emissions limit for the year by completing the following calculations:

- i. Calculate a discount factor by dividing the new facility aggregate CO₂ emissions limit by the total amount of CO₂ emitted by all new electricity generating facilities in 2018; and
- ii. Calculate each new electricity generating facility's 2018 limit as the product of the facility's CO₂ emissions and the discount factor.

2. Distribution of Excess New Facility CO₂ Emissions Limit. If the Department determines pursuant to 310 CMR 7.74(5)(c)1. that the sum of CO₂ emissions from new electricity generating facilities is less than the new facility aggregate CO₂ emissions limit for 2018, then the Department shall:

- a. Calculate the difference between the new facility aggregate CO₂ emissions limit and the sum of CO₂ emissions from new electricity generating facilities;
- b. Calculate the product of such difference and each existing electricity generating facility's fraction of the existing facility aggregate CO₂ emissions limit for 2018; and
- c. Deposit allowances equal to the product, minus any allowances distributed pursuant to 310 CMR 7.74(5)(c)3., in the allowance registry account of each existing electricity generating facility.

3. Early Distribution of Excess New Facility CO₂ Emissions Limit. By November 15, 2018, the Department may determine that the sum of CO₂ emissions from new electricity generating facilities will be less than the new facility aggregate CO₂ emissions limit for the year. In making this determination, the Department shall consider CO₂ emissions reported pursuant to the Massachusetts CO₂ Budget Trading Program at 310 CMR 7.70(8)(c)4. for the months of January through September 2018, and any physical or permitted limits on the potential for the facility to emit (e.g., on hourly fuel combustion) during the months of October through December 2018. If the Department determines that the sum of CO₂ emissions from new electricity generating facilities will be less than the new facility aggregate CO₂ emissions limit for 2018, then by December 1, 2018 the Department shall:

- a. Calculate the minimum possible difference between the new facility aggregate CO₂ emissions limit and the sum of CO₂ emissions from new electricity generating facilities for 2018;
- b. Calculate the product of such minimum possible difference and each existing electricity generating facility's fraction of the existing facility aggregate CO₂ emissions limit for 2018; and
- c. Deposit allowances equal to the product in the allowance registry account of each existing electricity generating facility.

(6) Allocation, Transfer, and Use of Allowances.

(a) Allocation of Allowances.

1. Allocation of Allowances for 2018. For 2018, the Department shall allocate allowances to new and existing electricity generating facilities in accordance with the quantities, processes, and schedule for establishing individual facility CO₂ emissions limits specified in 310 CMR 7.74(5)(b) through (c), and deposit them in the allowance registry accounts of the electricity generating facilities.

2. Allocation of Allowances for 2019 and 2020.

a. For 2019 and 2020, the Department shall allocate allowances equal to 25% and 50%, respectively, of the total aggregate CO₂ emissions limit for the year, subject to adjustment pursuant to 310 CMR 7.74(6)(f), using an auction in accordance with 310 CMR 7.74(6)(h). The exact number of allowances allocated using an auction for each year is specified in 310 CMR 7.74(6)(a)2: *Table C* (“Auction” line).

b. For 2019 and 2020, allowances not allocated using an auction shall be allocated in accordance with the processes and schedule for establishing 2018 individual facility CO₂ emissions limits specified in 310 CMR 7.74(6)(a)1. and 7.74(5)(b) through (c), except that:

i. The quantities specified in 310 CMR 7.74(6)(a)2.: *Table C* for the facilities listed by name shall be used in place of quantities specified for establishing 2018 CO₂ emissions limits for existing electricity generating facilities in 310 CMR 7.74(5)(a): *Table A* and (b): *Table B*. Allocations to facilities listed by name in 310 CMR 7.74(6)(a)2: *Table C* shall occur on April 1, 2019 (for 2019), and April 1, 2020 (for 2020).

ii. The quantities specified in 310 CMR 7.74(6)(a)2.: *Table C* (“New Facilities” line) shall be used in place of the quantity specified in 310 CMR 7.74(5)(a): *Table A* for establishing the 2018 the new facility aggregate CO₂ emissions limit. Each process specified for establishing 2018 CO₂ emissions limits for new electricity generating facilities in 310 CMR 7.74(5)(c) shall be repeated one year later than specified in 310 CMR 7.74(5)(c) to complete the 2019 allocation, and two years later to complete the 2020 allocation.

310 CMR 7.74(6)(a) 2: *Table C*

Allowance Allocations for 2019 and 2020

	2019 Allocation	2020 Allocation
Auction	2,182,794	4,253,650
New Facilities	1,125,000	750,000

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ANP Bellingham	609,866	393,990
ANP Blackstone	558,240	360,638
Bellingham	165,743	107,074
Berkshire Power	309,842	200,166
Braintree Electric	17,316	11,187
Canal Station	72,257	46,680
Cleary Flood	35,768	23,107
Dartmouth Power	34,276	22,143
Dighton	234,231	151,320
Fore River Energy	1,016,315	656,566
Kendall Square	356,024	230,001
MASSPOWER	215,595	139,280
Medway Station	1,136	734
Milford Power, LLC	105,570	68,201
Millennium Power	472,922	305,520
Mystic	1,074,800	694,349
Pittsfield Generating	56,686	36,621
Stony Brook	48,806	31,530
Tanner Street	25,986	16,788
Waters River	1,125	727
West Springfield	10,877	7,027
(Total)	8,731,175	8,507,299

3. Allocation of Allowances for 2021 and All Future Years. For 2021 and all future years, the Department shall allocate allowances equal to the total aggregate CO₂ emissions limit for the year, subject to adjustment pursuant to 310 CMR 7.74(6)(f), using an auction in accordance with 310 CMR 7.74(6)(h).

4. Once allocated, allowances may be used or transferred pursuant to 310 CMR 7.74(6)(b) or (c), regardless of the year or method of allocation.)

(b) Use of Allowances.

1. The owner or operator of an electricity generating facility may use allowances to offset CO₂ emissions for a particular year pursuant to 310 CMR 7.74(6)(e), provided that the allowances used are in the electricity generating facility's allowance registry account on March 1st of the year following the year in which the CO₂ emissions occurred.

2. Allowances may be used exclusively by the owners or operators of electricity generating facilities to comply with 310 CMR 7.74 and are not property rights.

(c) Transfer of Allowances.

1. The owner or operator of an electricity generating facility may transfer allowances to the owner or operator of another electricity generating facility by submitting a notice of transfer to the Department at any time except during the month of March.

2. The notice of transfer shall include the electricity generating facility's allowance registry account number, the number of allowances to be transferred, the serial numbers of the allowances to be transferred, the name and account number of the electricity generating facility to which the allowances will be transferred, and the certification statement required by 310 CMR 7.74(7)(c) that has been signed by the designated representative of the transferring electricity generating facility, or his or her designee, allowing the transfer of allowances.

3. The Department may require reporting of a price for transfers of allowances between electricity generating facilities that have different owners or operators through submission of a form as specified by the Department.

(d) Emergency Deferred Compliance. If an electricity generating facility emits CO₂ during an emergency that occurs on or after January 1, 2018, the electricity generating facility owner or operator may choose to defer for one year a portion or the entirety of the electricity generating facility's compliance obligation with respect to CO₂ emissions emitted during such emergency, provided that such CO₂ emissions shall be offset in the following year on a two for one basis pursuant to 310 CMR 7.74(6)(e)2. If an electricity generating facility owner or operator chooses to defer the electricity generating facility's compliance obligation with respect to any CO₂ emissions emitted during an emergency pursuant to 310 CMR 7.74(6)(e), then the owner or operator shall complete the following steps:

1. Identify the quantity of such CO₂ emissions emitted during the emergency, and the hours and dates during which the emergency occurred, in the facility's CO₂ emissions report submitted pursuant to 310 CMR 7.74(7) (a) for the calendar year during which the CO₂ emissions occurred; and

2. Offset such CO₂ emissions on a two for one basis pursuant to 310 CMR 7.74(6)(e)2. by identifying the necessary number of allowances in its compliance certification report submitted pursuant to 310 CMR 7.74(7) (b) for the following calendar year.

(e) Compliance with CO₂ Emissions Limits. On March 1st of each year, each electricity generating facility's allowance registry account shall hold a number of allowances that is equal to or greater than the sum of:

1. The amount of annual CO₂ emissions that the electricity generating facility emitted during the prior calendar year, minus any emissions for which compliance is being deferred pursuant to 310 CMR 7.74(6)(d); and
2. Twice the amount of CO₂ emissions that the electricity generating facility emitted during the year before the prior calendar year (*e.g.*, on March 1, 2020 for 2018 emissions), but was not offset because compliance was deferred pursuant to 310 CMR 7.74(6)(d).

(f) Banking of Allowances. Allowances may be retained for use in future years, provided that the total amount of CO₂ emitted by all electricity generating facilities in any year is less than the total aggregate CO₂ emissions limit for the prior year, before accounting for any emergency deferred compliance. In order to enforce this limitation on banking, the Department shall complete the following steps by April 1st of each year:

1. Determine the total quantity of allowances remaining in all allowance registry accounts after deducting allowances pursuant to 310 CMR 7.74(6)(g).
2. Subtract 223,875 from the quantity determined pursuant to 310 CMR 7.74(6)(f)1. to determine the adjustment required to enforce the limitation on banking.
3. Adjust the number of allowances available for sale by auction for the year pursuant to 310 CMR 7.74(6)(h) by the amount calculated pursuant to 310 CMR 7.74(6)(f)2.

(g) Deduction of Allowances for Compliance. By April 1st of each year, the Department shall deduct allowances from each electricity generating facility's allowance registry account in the following order:

1. To address any emergency deferred compliance obligation accrued during the year before the prior calendar year pursuant to 310 CMR 7.74(6)(e);
2. To offset annual CO₂ emissions that occurred during the prior calendar year; and
3. To ensure that the number of allowances remaining in the allowance registry account is less than the limitation on banking calculated pursuant to 310 CMR 7.74(6)(f)2.

(h) Allowance Auctions. For the years 2019 through 2050, the Department shall conduct a series of auctions pursuant to 310 CMR 7.74(6)(h) to sell allowances to be used by owners or operators of electricity generating facilities to offset annual CO₂ emissions.

1. Allowance Auction Procedures.

- a. Auctions shall be conducted quarterly, but the Department may adjust the frequency of such auctions as it deems necessary to effectuate the objectives 310 CMR 7.74, provided at least one auction is conducted annually.
- b. The implementation of any auction conducted pursuant to 310 CMR 7.74 may be transferred by the Department to an agent deemed qualified by the Department to conduct such auction, provided that such agent shall perform all such duties under the direction and oversight of the Department.
- c. The auction format shall be a Sealed Bid, Uniform Price Auction.
- d. Prior to the end of each calendar year, allowances in a quantity equal to the number specified in 310 CMR 7.74(6)(a)2. and 3., subject to adjustment pursuant to 310 CMR 7.74(6)(f), will be available for sale by auction. Such allowances will be available for sale by auction for each calendar year. The Department may require that allowances are sold in minimum lot sizes. In such event, such lot sizes shall be published in the auction notice pursuant to 310 CMR 7.74(6)(h)2. No more than 50% of the allowances from a calendar year may be available for sale in advance of the respective calendar year, up to four years in advance of such calendar year.
- e. The Department shall post a calendar of proposed auction dates on its web site. The calendar shall include the auction format and the number and years of allowances to be auctioned at each auction. The Department may periodically modify the contents of the calendar, provided that the information relevant to the next scheduled auction shall be fixed in the auction notice no later than 45 calendar days prior to such auction, consistent with 310 CMR 7.74(6)(h)2.a.
- f. Auctions of allowances may be held with a reserve price. The Department is not obligated to sell allowances if the reserve price is not met.
- g. No bidder, including any affiliate or agent of such bidder, shall purchase more than 50% of the allowances offered for sale in any one auction. Such limitation shall be published in the auction notice pursuant to 310 CMR 7.74(6)(h)2., and may be reduced or set equal to zero by the Department for one or more bidders after consultation with a qualified agent or market monitor employed pursuant to 310 CMR 7.74(6)(h)l.b. or 5.a.
- h. The Department may periodically evaluate the auction program performance and may retire any allowances that were offered for sale by auction but were not sold.
- i. Proceeds of such auctions shall be paid to the Department and deposited in a segregated account and administered by a Trustee appointed by EEA and the Department. The funds shall be expended to further the goals of M.G.L. c. 21N by supporting programs or projects to reduce greenhouse gas emissions in order to mitigate the impacts of climate change including, but not limited to, clean energy

and vehicle electrification projects; programs and projects to support adaptation to the impacts of climate change; mitigation or adaptation programs or projects involving communities that are already adversely impacted by air pollution including, but not limited to, environmental justice communities; and for the administration of any such programs or projects. Auction proceeds may also be used for the administration of 310 CMR 7.74. Auction proceeds shall be expended at the direction of the Trustee, in consultation with EEA and the Department. The Trustee, EEA and the Department may consult with and enter into agreements with other agencies within the EEA Secretariat to assist in the administration and expenditure of auction proceeds.

2. Auction Notice.

a. Notice of each auction shall be published no later than 45 calendar days prior to such auction, and may be transmitted electronically to parties requesting such notification.

b. Each notice shall include, but not be limited to, the following information:

i. Date, time and location of the auction, including the internet address or electronic address for auction location, as applicable;

ii. Auction format;

iii. Categories of bidders who will be eligible to bid;

iv. Quantity and years of allowances to be auctioned;

v. Reserve Price;

vii. Instructions for submitting the qualification application;

viii. Instructions for submitting acceptable financial surety;

ix. Procedures for the conduct of the auction;

x. Participation limitations; and

xi. Other pertinent rules or procedures of the auction as may be required to ensure a transparent, fair and competitive auction.

3. Participant Eligibility. Only owners and operators of electricity generating facilities are eligible to participate in auctions.

4. Bid Submittal Requirements.

a. Qualification Application.

i. Only qualified bidders will be permitted to submit bid(s) or otherwise participate in any auction.

ii. Only parties with accounts in the allowance registry may participate in the auction.

iii. Potential bidders shall submit a qualification application to the Department at least 30 calendar days prior to the bid submittal date of such auction or by such deadline as the Department shall stipulate in the auction notice. Qualification applications shall contain the information set forth in 310 CMR 7.74(6)(h) 4.a. and the auction notice.

iv. The applicant shall provide information and documentation relating to its corporate structure, financial ability to participate in the auction and authority to execute bids and honor contractual obligations. Such information may include, but is not limited to the following:

(i) Documentation regarding the corporate identity, ownership, and capital structure of the applicant; identification of any agency relationship between the applicant and any third party related to the auction;

(ii) Audited annual reports and credit reports of the applicant and/or the entity represented by the applicant;

(iii) Corporate background and recent adverse conditions, which may include:

-1. Identification of any indictment or felony conviction of the applicant, or any member, director, principle, partner or officer of the applicant or any affiliate or related entity;

-2. A statement by the applicant as to prior findings of non-responsibility with regard to any state procurement including findings under state law or regulation;

-3. A statement by the applicant as to certification under any state tax registration requirement;

-4. Identification of any previous or pending investigation with respect to any alleged violation any rule, regulation, or law associated with any commodity market or exchange;

-5. Evidence demonstrating that such applicant has an allowance registry account;

-6. Identification of relationships with any other account holder.

v. The Department shall review each qualification application and make determinations as to whether the applicant is qualified to submit bids in the auction. Applicants may be denied eligibility based on the information provided or upon information obtained independent of the application process. Failure to provide the required information may result in the qualification application being declared incomplete or otherwise deficient. The Department shall notify applicants in writing or by electronic mail if the qualification application is complete and meets the requirements for participation in the auction. If the qualification application does not meet such requirements, notification shall include the reasons therefore, and applicants will be given a reasonable opportunity to provide additional information to cure such deficiencies.

vi. Once an application has been approved, that bidder shall be eligible to participate in all subsequent auctions, provided there has been no material change to the information provided in the qualification application, and provided that the applicant meets the eligibility criteria of 310 CMR 7.74(6)(h)3. If there is any material change to the information submitted in the bidder's qualification application, the qualification expires and a new qualification application is required to be submitted.

vii. The Department may suspend or revoke its approval of a qualification application if the bidder fails to comply with 310 CMR 7.74(6)(h) 4. viii. In order to reduce the administrative burden for the Department and electricity generating facilities, the Department may, on a case-by-case basis, consider applicants that have been approved as bidders by DOER pursuant to 225 CMR 13.09(c) to be qualified bidders pursuant to 310 CMR 7.74(6)(h) 4.a.v.

b. Surety Requirement.

i. Bidders shall be required to provide financial surety in the form of a bond, cash, certified funds, or an irrevocable stand-by letter of credit, in a form acceptable to the Department. A bidder's eligibility to bid in any auction shall be limited to the level of financial security provided. Financial surety may be forfeited to and retained by the Department in the event the bidder's offer is accepted in an auction and the bidder fails to tender payment of the full amount when due.

ii. Bidders may request return of their surety at any time prior to or following any auction, and the Department shall return said surety provided that the Commonwealth has no current or pending claim to such surety as a result of a failure of the bidder to comply with 310 CMR 7.74(6)(h)4.b. or to pay the full amount of its accepted bid when due. Return of such surety to the bidder voids the bidder's ability to participate in subsequent auctions unless a new surety is submitted to the Department pursuant to the provisions of 310 CMR 7.74(6)(h)4.

iii. The surety requirements of 310 CMR 7.74(6)(h)4. may be modified by the Department at any time prior to the applicable auction date, and shall be published no later than 45 calendar days prior to such auction.

iv. In the event that the Department modifies the surety requirements, bidders shall meet the new surety requirements before the next auction.

c. Bid Submittal.

- i. Once an application has been approved, and provided there has been no material change to the information provided in the application, bidders seeking to bid in any subsequent auction shall complete and submit an intent to bid on or before the deadline specified in the Auction Notice.
- ii. All bids shall be on a form prescribed by the Department, which shall be made available electronically.
- iii. All bids submitted shall be considered binding offers for the purchase of allowances under the rules of the auction.
- iv. All qualified maximum bids shall be limited to the amount of financial surety provided by the qualified bidder pursuant to 310 CMR 7.74(6)(h)4.b.
- v. Bids shall be submitted on-line and shall conform to the format and protocol of bid submission as set forth in the auction notice pursuant to 310 CMR 7.74(6)(h)2.
- vi. If the Department determines that a bidder has provided false or misleading information, fails to honor an accepted bid, or has withheld pertinent information in its qualification documentation, or has otherwise failed to comply with any material provision of 310 CMR 7.74(6)(h)4, the surety amount may be forfeited to the Commonwealth, and the bidder may be prohibited from participating in any future auctions.

5. Bid Selection.

- a. The Department may employ a market monitor to observe the conduct and outcome of each auction. As a condition to participation in any auction, bidders shall agree to provide, and shall provide on request, any data to the Department that the Department deems necessary to support this function and the proper monitoring of such auctions.
- b. The Department will rank all bids. Allowances will be sold in the quantities specified in the accepted bids until there are no remaining allowances available for the specified auction. In the event that there is more than one winning bidder submitting the same price and the total number of allowances requested in all such winning bids exceeds the number of allowances remaining, the Department may award the remaining allowances randomly, or based on the *pro rata* share of the number of allowances bid on by each winning bidder.
- c. The Department shall approve or disapprove the outcome of the auction following the completion of the auction event.

6. Transfer of Allowances. Following approval of the outcome of the auction and upon payment in full of the amount owed by the successful bidders, the Department shall transfer allowances into the corresponding bidders' allowance registry account, provided that transfers resulting from auctions that occur before April 1st of a calendar year shall occur on April 1st.

7. Return of Unsuccessful Bids. Subject to 310 CMR 7.74(6)(h)4.b.ii. and 310 CMR 7.74 (6)(h)4.c.vi., following each auction the Department will return upon written request all financial securities or payments to unsuccessful bidders and to bidders unwilling to purchase fewer allowances than requested in its bid.

8. Announcement of Results. The Department reserves the right to publish the names of qualified bidders, the closing price, and the total quantity of allowances sold at each auction.

(7) Reporting Requirements.

(a) Annual CO₂ Emissions Report. By February 1, 2019, and February 1st of each year thereafter, the owner or operator of an electricity generating facility shall submit a CO₂ emissions report. The report shall include the following:

1. The name, address, contact person, and phone number of the facility;
2. The facility's annual CO₂ emissions for the previous calendar year as reported pursuant to the Massachusetts CO₂ Budget Trading Program at 310 CMR 7.70(8), in short tons and metric tons;
3. The amount, if any, of CO₂ emissions for which compliance will be deferred pursuant to 310 CMR 7.74(6)(d), in short and metric tons, and the hours during which such CO₂ emissions occurred during the emergency; and
4. The electronic signature of the designated representative submitting the form and certification by the designated representative in accordance with 310 CMR 7.74(7)(c).

(b) Compliance Certification Reporting. By March 1, 2019, and March 1st of each year thereafter, the owner or operator of an electricity generating facility subject to 310 CMR 7.74 shall demonstrate compliance with the electricity generating facility's CO₂ emission limit by submitting a compliance certification report covering the CO₂ emissions from the prior calendar year. The compliance certification report shall include, among other information as requested by the Department, the following:

1. The name, address, contact person, and phone number of the electricity generating facility;
2. The electricity generating facility's assigned CO₂ emissions limit for 2018;
3. The electricity generating facility's annual CO₂ emissions for the prior calendar year as reported pursuant to 310 CMR 7.70(8), in short tons and metric tons;
4. The total number of allowances in the electricity generating facility's allowance registry account on March 1st;

5. The number of allowances in the electricity generating facility's allowance registry account that the owner or operator of the facility is using to offset CO₂ emissions that occurred during the prior calendar year;
6. The number of allowances in the electricity generating facility's allowance registry account that the owner or operator of the electricity generating facility is using to offset CO₂ emissions that occurred during an emergency in the year before the prior calendar year, on a two for one basis pursuant to 310 CMR 7.74(6)(d);
7. The total number of allowances remaining in the electricity generating facility's allowance registry account after offsetting CO₂ emissions pursuant to 310 CMR 7.74(7)(b)5. and 6.; and
8. The electronic signature of the designated representative submitting the form and certification by the designated representative in accordance with 310 CMR 7.74(7)(c).

(c) Certification of Reports and Other Documents. All reports and other documents submitted to the Department under 310 CMR 7.74 must be signed and attested to by the designated representative and shall include the following statement: "I certify that I have personally examined the information that I am submitting and I am familiar with the information submitted and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including possible fines and imprisonment."

(d) Reporting Format and Process. The Department may specify the format and process for any submission required pursuant to 310 CMR 7.74, including electronic submission requirements.

(e) Compliance Verification. The Department may verify compliance with 310 CMR 7.74 by conducting inspections, requesting information and records, and requiring the collection of information. 310 CMR 7.74(7)(e) does not limit the authority of the Department as otherwise provided by law or in an authorization, determination, modification, permit, or other approval, or by the terms of any order or other enforcement document.

1. Access to Information. Where necessary to ascertain compliance with 310 CMR 7.74, including actual or potential CO₂ emissions, the Department may request information or records from any owner or operator of an electricity generating facility. The owner or operator shall, within a reasonable time, furnish the requested information or records and shall permit Department personnel or authorized representatives to have access to and to take images of such records.

2. Requirement to Collect Information. When the Department determines that any electricity generating facility has failed to offset its CO₂ emissions limit or violated any other condition in 310 CMR 7.74, the Department may require the owner or operator of said electricity generating facility to submit the necessary information or records. In doing so, the Department may require the electricity generating facility owner or operator to:

- a. Establish and maintain records;

- b. Perform audits on CO₂ emissions records or monitoring equipment using standard procedures and methods;
- c. Quantify CO₂ emissions in accordance with any procedures and methods that the Department may prescribe;
- d. Keep records on control equipment parameters, production variables, and other indirect data when direct monitoring of CO₂ emissions is not practical;
- e. Perform additional CO₂ emissions monitoring, including conducting stack tests in accordance with 310 CMR 7.13 when continuous CO₂ emissions monitoring equipment information is unavailable;
- f. Make periodic reports to the Department, as necessary, to assure continuous compliance with 310 CMR 7.74; and
- g. Maintain other records and provide any other information the Department requires.

(8) Recordkeeping Requirements. The owner or operator of an electricity generating facility shall keep on-site at the electricity generating facility all records, data, reports and other information required by 310 CMR 7.74 for a period of three years from the date the record is created. The Department may extend this period for cause, in writing, at any time before the end of the three years.

(9) Authorized Designated Representative.

(a) Assigning an Authorized Designated Representative. The owner and operator of an electricity generating facility shall authorize one designated representative to act on behalf of the owner and operator with regard to all matters under 310 CMR 7.74.

(b) Responsibilities of Designated Representative. The designated representative shall be responsible for submitting electronically any or all of the following: a notice of transfer of allowances; a CO₂ emissions report; the Compliance Certification Report, and any other documents requested by the Department.

(c) Delegation by Designated Representative. A designated representative may delegate his or her authority to submit a notice of transfer of allowances by submitting a certificate of representation that includes the information specified at 310 CMR 7.74(9)(d)6.

(d) Certification of Representation. The owner or operator of an electricity generating facility shall submit to the Department a complete certificate of representation that identifies the designated representative acting on behalf of the owner and operator for the electricity generating facility. The submission shall be on a form prescribed by the Department, and shall include, but not be limited to, the following:

1. Identification of the electricity generating facility;

2. The name, address, email address, and telephone number of the designated representative;
3. A list of the owner(s) and operator(s) of the electricity generating facility;
4. The following certification statements by the designated representative
 - a. "I certify I was selected as the designated representative, by an agreement binding on the owner and operator of the facility."
 - b. "I certify that I have all the necessary authority to carry out my duties and responsibilities under 310 CMR 7.74 on behalf of the owner and operator of the facility and that the owner and operator shall be fully bound by my representations, action, inactions, or submissions;"
5. The signature of the designated representative and the date signed; and
6. If applicable, a list of persons authorized to submit Notices of Transfer of allowances pursuant to 310 CMR 7.74(9)(c), and the following:
 - a. The name, address, email address, and telephone number of such persons.
 - b. The following certification statement by the designated representative. "I certify any notice of transfer of allowances submitted by any person identified by me as authorized to submit a notice of transfer of allowances under 310 CMR 7.74 shall be deemed a notice of transfer of allowances submitted by me."

(10) Penalties and Enforcement.

(a) The failure of an owner or operator to offset its CO₂ emissions limit in compliance with 310 CMR 7.74(6)(e) shall be deemed a release of air pollutants into the environment without the approval or authorization of the Department and shall be presumed to constitute a significant impact to public health, welfare, safety, or the environment.

(b) If the owner or operator of an electricity generating facility is not holding sufficient allowances in its allowance registry account by March 1st of each year to offset its C emissions as calculated in accordance with the requirements of 310 CMR 7.74(6)(e), then within 14 calendar days of receipt of notice by the Department, the owner or operator shall transfer into the electricity generating facility's allowance registry account, three additional allowances for every one ton of CO₂ emissions not offset, and then the Department will deduct the allowances from the allowance registry account.

(c) In addition to the requirements of 310 CMR 7.74(10)(a) and (b), the Department may enforce the requirements of 310 CMR 7.74 in accordance with applicable federal and Massachusetts law, including but not limited to M.G.L. c. 21A, § 16 and 310 CMR 5.00: *Administrative Penalty*; M.G.L. c. 111, § 2C; M.G.L. c. 111, §§ 142A through 142E and M.G.L. c. 21N, § 7(d).

(11) Program Review. Not later than December 31, 2021 and every ten years thereafter, the Department shall complete a review, including an opportunity for public comment, of the requirements of 310 CMR 7.74 to determine whether the program should be amended. This review shall evaluate CO₂ emissions, costs, consistency with statewide CO₂ emissions limits established pursuant to M.G.L. c. 21N, and any other information relevant to review of the program.

(12) Declining CO₂ Emissions Limits in Existing Plan Approvals. The requirements in 310 CMR 7.74 supersede the declining annual GHG or CO₂ emissions limits in an electricity generating facility's plan approval issued pursuant to 310 CMR 7.02. All other terms and conditions of such plan approval remain in effect unless a modification of such plan approval is issued by the Department in accordance with 310 CMR 7.02.

(13) Compliance with all Applicable Requirements. An owner or operator of an electricity generating facility subject to 310 CMR 7.74 shall comply with all other state and federal applicable statutes and regulations.

(14) Owner and Operator Responsible for Compliance. Whenever any provision in 310 CMR 7.74 requires an action to be taken by an owner or operator, any owner or operator of an electricity generating facility may take the action; provided that all owners and operators of the electricity generating facility are responsible for ensuring that the proper action is taken, and all owners and operators are jointly and severally liable for compliance with 310 CMR 7.74.

Currency of the Update: The Massachusetts Administrative Code titles are current through Register No. 1377, dated November 2, 2018

Mass. Regs. Code tit. 310, § 7.74, 310 MA ADC 7.74