

Assessment of Public Comments

9 NYCRR Part 7840-63

Introduction: In September 2009, Chapter 433 of the Laws of 2009 became effective and reinstated Article 6 of the Energy Law. The legislation establishes an Energy Planning Board (“Board”), requires the Board to adopt a State Energy Plan (“Plan”) every four years, and outlines the conduct of the state energy planning proceedings. Section 6-102(4) empowers the Board to adopt rules and regulations “as necessary and appropriate” to implement the legislation. Proposed regulations entitled “State Energy Planning Proceeding” were published in the State Register on May 25, 2011. Seventeen entities submitted written comments on the proposed regulations. This document summarizes and responds to the major comments that were submitted to the Board.

Additionally, Chapter 195 of the Laws of 2011 was signed into law by Governor Cuomo on July 21, 2011. Chapter 195 enacted minor amendments to Article 6 in order to change the composition of the Board and streamline its operations. Specifically, as those statutory changes relate to the regulations:

- Section 6-106 was amended to require at least three public hearings on the Draft State Energy Plan in each of the two regions defined in §6-102; section 7848.2 of the regulations has been changed accordingly.
- Section 6-106(3)(e) now allows the Board to require a single comprehensive submission of required information from industry or trade groups of utilities and major energy suppliers, rather than individual submissions from their members; sections 7856.1 and 7856.2 have been revised accordingly.
- Section §6-106(6) was amended to require the Board to hold public comment hearings prior to adopting an amendment to the energy plan, but to make evidentiary hearings, if requested, discretionary, rather than mandatory; section 7852.3 of the regulations has been revised consistent with this amendment.

An agency must provide notice of a revised rulemaking whenever the revised rule constitutes a “substantial revision” of the original proposed rule. State Administrative Procedure Act section 202 (4-a)(a). “Substantial revision” means any addition, deletion or other change in the text of the rule which “materially alters its purpose, meaning or effect,” SAPA section 102(9). Neither the changes made to the regulations in response to public comments, nor those made to conform to the 2011 amendments to the Energy Law, constitute substantial revisions. Consequently, the Board is not required to solicit further public comments on the revised regulations.

- 1. Comment:** Much of the information the Board is empowered to solicit from major energy suppliers and others can be readily obtained from state agencies (Department of Public Service, Department of Environmental Conservation) and federal agencies (Federal Energy Regulatory Commission, Department of Energy), the New York Independent System Operator (NYISO), or the Eastern Interconnection Planning Committee, instead of burdening major energy suppliers with such requests.

Response: In contrast to prior state energy planning regulations, which specified dates by which information set forth in the regulations was required to be submitted to the Board,

these regulations state that the Chair of the Board will establish a schedule for submission of information requested by the Board. Notably, in Section 7856.2, the regulations direct the Board to “seek to obtain relevant information under this Subchapter C from entities that are members of the Board, including the Bulk System Operator, and other public sources before requiring filings from major energy suppliers.” To the extent possible and practicable, the Board will rely on publicly available data in developing the Plan. Examples include the following:

- Annual “Gold Book” Load and Capacity Data, New York Independent System Operator. Provides electricity load and peak demand history and 10-year forecasts at the system level, as well as extensive data for each generating facility in New York, including capacity ratings, generation, location, age, and primary and back-up fuels.
- Annual Energy Outlook, U.S. Energy Information Administration. Provides 25-year forecasts of energy use and prices for all fuels and all sectors for the U.S. and for the Mid-Atlantic region (New York, Pennsylvania, New Jersey, and Delaware), under various scenarios and assumptions, which serve as useful indicators of expectations for New York.
- Five Year Book, New York Department of Public Service. Provides annual data on electricity and gas delivered by each utility, average cost per customer for electricity and gas by utility and customer type, average annual total electricity and gas annual bill by utility and customer type, and cost of electricity and gas to customers by cost components.
- Ambient Air Quality Report, New York State Department of Environmental Conservation, Air Division. Provides annual air quality monitoring data and exceedance data for sulfur dioxide, nitrogen oxides, ozone, carbon monoxide, inhalable particulates, and lead.
- Oil, Gas and Mineral Resources Annual Report, New York State Department of Environmental Conservation, Division of Mineral Resources. Provides data on production and market value of natural gas and oil produced, permits issued, well completions, underground natural gas storage, acreage, reclamation, and enforcement.

Two other documents will be very helpful in developing the Plan. The first is the Reliability Compliance Program Report, issued by the New York State Reliability Council. This report contains extensive recent data on metrics used to measure the reliability of the electric system, including resource adequacy, transmission capability, operating reserves, system protection, system restoration, and compliance with local reliability rules. The second document is the Reliability Needs Assessment, prepared by the New York Independent System Operator. This document provides a long-term reliability assessment of both reserve adequacy and transmission security of the New York Bulk Power System conducted over a 10-year future planning period.

Analysis and information obtained from other State resources and plans, such as the New

York State Emergency Management Plan,¹ transportation planning documents, and others will also be integrated into the State Energy Plan, where appropriate.

Additionally, the Division of Homeland Security and Emergency Services (DHSES) was statutorily created in July 2010² consolidating five agencies, including the Office of Emergency Management (SEMO). As the Board addresses security issues in the Plan, the Board will tap into the various offices of DHSES (Counter Terrorism, Emergency Management, Fire Prevention and Control, Cyber Security, and Interoperable and Emergency Communications).

Thus, every effort will be made to obtain and utilize public data as well as information in the possession of state agencies and other entities on the Board *prior to* requiring submissions by major energy suppliers and other entities under Subchapter C. However, to the extent that the Board determines that it needs information from major energy suppliers, it is doing so to meet its obligations to address the numerous items set forth in the enabling legislation.

- 2. Comment:** Air emissions information (NO_x, SO₂, CO₂, mercury, PM) can be obtained by reviewing major energy supplier filings with DEC.

Response: See response to Comment 1. The Board agrees that this and other relevant information can be obtained from DEC.

- 3. Comment:** Information requirements related to renewable energy and the collection of information for annual capital installation and operation costs (per Part 7863) should be obtained from NYSERDA, or on an aggregate basis from the PSC or the NYISO.

Response: See response to Comment 1. The Board will obtain such information from these entities and/or others to the extent such information is available.

- 4. Comment:** In light of 2011 amendments to the enabling legislation authorizing the Board to request the submission of a single comprehensive submission from industry groups, trade associations or a combination of such groups in place of submission by individual major energy suppliers, the Board should clarify in section 7856.2 whether submissions should be made by the associations instead of from individual members.

Response: The 2011 amendments to the Energy Law state that the Board “may require a single, comprehensive submission from industry groups, trade associations, or combinations of such groups and associations in place of submissions by individual member companies.” (Section 6-106(3)(e)). The Board or Chair will decide on a case-by-case basis whether to require a single comprehensive submission, or to instead request individual major energy suppliers to submit specified information.

¹ http://www.semo.state.ny.us/uploads/2011_01_NYS%20CEMP_Vol_02.pdf

² <http://www.dhSES.ny.gov/about/legislation/documents/Final-Merger-Bill.pdf>

5. Comment: Because the collection of company-specific and even industry-specific information, data, facts, trends, etc is not the primary function of a trade association, it is unreasonable to encumber a trade association with the collection and submittal of such information.

Response: See response to previous Comment. The Board will weigh this comment in deciding how to exercise its authority, and will not require submissions from industry groups, trade associations and the like without first understanding the practicalities or impediments of seeking such information from those entities.

6. Comment: While collective reporting by trade associations is appropriate for renewable energy sources given that they have little or no environmental impacts, reporting should be on an individual basis for other major energy suppliers, since the State needs to have specific information upon which to make energy forecasts and conduct planning.

Response: See responses to Comments 4 and 5.

7. Comment: The draft regulations require reporting that is not (a) authorized by the enabling legislation, and/or (b) germane to the enactment of energy policy. For example, information pertaining to: weighted average fuel type by cost; operating costs by type; revenues by type (Section 7857.2(a)(17)); operating and maintenance expenses (section 7857.2(a)(26)(iv)); and the number of employees (section 7856.6) is not information that is mandated to be collected under the Energy Law. Moreover, the gathering of much of this information is violative of proprietary protections, intrusive and not consistent with policy development. At the very least, there should be a strong mechanism in place to ensure that reporting of confidential business information remains so.

Response: Section 6-102(5) of the Energy Law directs that in its consideration and development of policies, programs and other actions, the Board shall, among other identified goals, be guided by the following:

- insulating consumers from volatility in market prices and
- reducing the overall cost of energy in the State.

Energy Law section 6-104(2) directs that the Plan include the following: “identification and assessment of the costs, risks, benefits, uncertainties and market potential of energy supply source alternatives; emerging trends in supply, price, and demand.”

The legislation empowers the Board to solicit information from major energy suppliers and other entities sufficient to address the goals and specific components of the Plan identified by the Legislature, as referenced above. (Section 6-106(3)) The statute further empowers the Board to seek “such other information from owners and operators of electric generating

power plants as the board may require to carry out the purposes of this article” (Section 6-106(3)(d).

In light of the broad authority granted to the Board by the Legislature, the Board is authorized to request the various items listed by the commenter. Specifically, the Board intends to evaluate future energy and infrastructure requirements and costs, supply options, and system reliability needs. However, the final regulations delete section 7857.2(a)(17), pertaining to fuel costs, operating costs, and revenue for individual units. The Board will determine at a future time whether it needs to obtain such information, or related information, from major energy suppliers and/or other entities in order to address the goals and specific components of the Plan identified by the Legislature; and if so, it will request such information pursuant to the sections of the Energy Law cited above and/or section 7857.3 (electricity); 7858.3 (natural gas); 7859.3 (petroleum); 7860 (coal); 7861.5 (steam); or 7862.3 (biogas, biofuels, biomass).

Finally, to the extent that entities submitting information to the Board contend that such information is confidential (e.g. trade secrets, proprietary information, etc), Part 7842 establishes procedures for requesting and determining the confidential status of information submitted to the Board.

- 8. Comment:** The Board should be authorized to collect information regarding the impact of taxes, fees and other charges levied on energy customer bills, since reducing the overall cost of energy in New York State is one of the stated goals of the state energy planning process.

Response: The Board has the authority to collect such information if necessary. The Board intends to analyze the impact of energy and regulatory policies on energy prices and total energy bills paid by consumers, particularly for low-income consumers, as well as examine the drivers of energy costs for New York’s residential, commercial, industrial, and transportation end-users.

- 9. Comment:** Emissions reporting of carbon dioxide (CO₂) should be detailed separately as biogenic and fossil, consistent with the requirements of the Regional Greenhouse Gas Initiative (RGGI) and the USEPA Mandatory Reporting Rule. As such, section 7857.2(22) should be revised.

Response: As was stated in the comment, units regulated under 6 NYCRR Part 242 will be required to partition CO₂ emissions into biogenic and non-biogenic as required by 40 CFR Part 75. However, units which are not regulated under 6 NYCRR 242 are not required to partition their CO₂ emissions. The Board finds no reason to impose additional costs on those facilities to partition their CO₂ emissions into biogenic and non-biogenic at this time. In addition, while it is extremely important to accurately account for the carbon released as CO₂ emissions from biogenic sources, the science is continuing to evolve and EPA has deferred, for a period of three years, the application of the Prevention of Significant Deterioration (PSD) and Title V permitting requirements. EPA is reviewing approaches to accounting for

the carbon released as greenhouse gas emissions from bioenergy and other biogenic sources. Accordingly, revisions to section 7857.2(22) are not warranted at this time.

- 10. Comment:** To capture a more complete CO₂ emissions picture, text should be added to section 7857.2 to encourage accounting for both up-stream (lifecycle) and avoided emissions. The regulations should also include reporting on any emission reductions and/or carbon offsets, greenhouse gas or otherwise, achieved and/or generated by project.

Response: The Board does not plan to collect data on up-stream (lifecycle) and avoided emissions. The Plan will likely include targeted fuel cycle analyses to support policy development. It is envisioned that the Board will turn to published materials to support such analysis. Where New York State- specific information exists, such will be used to support fuel cycle analysis; to the extent the needed published material will be of regional or national scope, the application of such information to New York-specific circumstances will be applied, as appropriate.

- 11. Comment:** Several commenters opined that workforce utilization information, required by section 7856.6, is not relevant to the development of a state energy plan. Conversely, another commenter suggested the addition of a section evaluating the trends and future needs of the utility industry's workforce, such as educational and training needs.

Response: Given the breadth of the authority conferred by the enabling legislation, the Board is empowered to request such information in order to inform the coordination of energy policy and workforce utilization activities, as well as to ensure that the operation and necessary expansion of the energy sector is not inhibited by a shortage of skilled workers. Specifically, the Board is authorized by section 6-108 of the Energy Law to collect information on workforce utilization, especially as it pertains to the reliability of the State's electric system. Consequently, the regulations have been revised to address future educational and training needs for the workforce. Notably, by including the Department of Labor as a Board member for the first time, the Legislature determined that an assessment of workforce utilization (i.e. jobs) is an important component of the energy planning process. As emphasized in response to Comment 1, the Board will make every effort to obtain public data as well as information in the possession of state agencies (especially DOL) and other entities on the Board prior to requiring submission by major energy suppliers.

- 12. Comment:** The regulations should reflect the existence of Regional Planning Councils, and specify how such Councils will operate.

Response: The Regional Planning Councils are entities created by statute independent from the Energy Planning Board. The legislation states how the Councils will be established and organized, and sets forth their role in the planning process. The Councils themselves, not the Board, will determine how they will operate.

13. Comment: The New York State Reliability Council (NYSRC) is a valuable resource to the Board in evaluating the impact of proposed policies on electric system reliability, and consequently the NYSRC should be referenced in both the definitional section and in section 7857.1, which would authorize the Board to solicit information from the NYSRC.

Response: The Board has revised the regulations to (1) add a definition of the Reliability Council in section 7841, and (2) reference the Reliability Council under section 7857.1, Electric Plans.

14. Comment: The Board's rules should not require submission of critical energy infrastructure location information that is not directly necessary for the State Energy Planning process. For example, Section 7857.2(b)(13) and (17) Electric Assets, Section 7858.2(e) Natural Gas Assets, and Section 7861.3(a) Steam Assets ask for critical energy infrastructure location information that will have limited usefulness to the State Energy Planning process. The regulations should recognize that requests for the location of utility infrastructure facilities information do not require the submission of "spatially referenced data" unless specifically required.

Response: Per the statutory requirements, the Board is authorized to assess both human and natural security threats to the State's energy systems. Information collected on the location of energy infrastructure which is spatially referenced is necessary for the Board to carry out its objectives. Such information may be used as inputs for tasks such as system modeling and GIS mapping in the development of the Energy Plan. In addition, spatially referenced information may be needed to allow the Board to address specific security and emergency planning questions. To the extent that entities submitting information to the Board contend that such information is confidential (e.g. trade secrets, proprietary information, etc), Part 7842 establishes procedures for requesting and determining the confidential status of information submitted to the Board.

15. Comment: The regulations should authorize the Board to obtain information from nuclear generating plants, particularly related to emissions, leaks, regulatory violations and specific exemptions granted by the Nuclear Regulatory Commission, as well as the amount of decommissioning funds set aside by each plant. Nuclear plants are connected to all of the significant issues in Article 6, particularly security issues and environmental justice. For example, the evacuation of New York City in an Indian Point disaster would pose greater difficulties for low income, environmental justice communities.

Response: The Board has the authority to collect much of the referenced information on nuclear plants under Section 7857, Electric Plans, which is "applicable to major electricity suppliers and any other entity from which the board deems appropriate" and all "generation units that are connected to the grid." Per the enabling legislation, the Energy Plan will include an analysis of environmental justice and security issues, considering both natural and human threats to the State's energy systems.

16. Comment: Given that some of the state’s power plants, storage facilities, etc. are potentially vulnerable to severe weather events that may occur as a result of climate change, the regulations should collect appropriate information so that adaptation to climate change and emergency planning related to the energy supply can be better coordinated.

Response: The Board has the authority to collect such information, if it deems necessary, to fulfill the statutory requirements. The Board intends to analyze natural and human security threats to the State’s energy systems. The statute also requires the Energy Plan to analyze public health and environmental impacts related to climate change.

17. Comment: Reporting on the details and effectiveness of energy conservation, efficiency and demand reduction are essential and should be a requirement of these regulations. Similarly, reporting on renewable energy installations should also be a requirement.

Response: The enabling legislation directs the Board to “identify policies and programs designed to maximize cost-effective energy efficiency and conservation activities to meet projected demand growth,” Section 6-102(5), and to identify and assess the “costs, risks, benefits, uncertainties and market potential of energy supply alternatives, including demand-reducing measures, renewable energy resources of electric generation,” etc. Thus, the Board will make every effort to obtain relevant information, as deemed necessary for the development of the Energy Plan, on the details and effectiveness of energy conservation, efficiency, and demand reduction as well as renewable energy installations from entities that are members of the Board, including the NYISO , before requiring filings from major energy suppliers.

18. Comment: If hydrofracking is permitted, the following information should be obtained by the Board: identification of all chemical products used as additives in the drilling process; total fluids and amount and concentration of compounds remaining in the ground after drilling is completed; quantity of methane released from entire drilling process including valves; air monitoring results of drilling process for complete suite of air toxics; all environmental releases, spills and untoward events, such as fires and explosions.

Response: High-volume hydraulic fracturing would occur under well permits issued by the Department of Environmental Conservation (DEC), and the permitting process would dictate the information required from applicants before permit issuance, during operations and after the completion of drilling and high-volume hydraulic fracturing. Decision-making on any such permitting is occurring in the context of a separate public environmental review process that has been ongoing since mid-2008. In September 2011, DEC announced that in addition to a final Supplemental Generic Environmental Impact Statement on High-Volume Hydraulic Fracturing, DEC will also propose new regulations to govern this permitting process. Suggestions for application and reporting requirements will be addressed by DEC in responses to comments on the draft SGEIS and draft regulations. To the extent the Board determines that such information is relevant to development of the State Energy Planning

Board, the Board can obtain the information from DEC, whose Commissioner is a member of the Board.

- 19. Comment:** Regarding Part 7862- Biogas, Biofuel and Biomass Plans- information requirements should include: other fossil fuels are often used and they should be quantified. The nature of the feedstock is very important and should be specified in reporting.

Response: The regulations have specific provisions that address fossil fuels and feedstock used in the production of biogas, biofuel, and biomass. Section 7862 gives the Board the authority to collect information on “the type(s), volume, and prices paid for feedstock used to produce or process the end-product,” as well as the “type and quantities of energy and fuel used to produce or process the end-product.”

- 20. Comment:** Information sought regarding biogas, biofuel and biomass plans (part 7862) should be amended to add that for energy suppliers, the reporting requirements should include, as appropriate, the use(s) of disposal method(s) for biogas, biofuels, and biomass and associated greenhouse gas emissions if not used for energy.

Response: For purposes of addressing energy-related waste management issues, the Board will rely on information collected and used by other agencies and authorities that are involved in waste disposal policy development and implementation.

- 21. Comment:** Documents produced by contractors for the Board should be independently subjected to a public comment period. Without any mechanism to correct bias in the viewpoints of particular authors or industry sectors, as well as to correct errors or misstatements of fact, documents become factual records that cannot be challenged in later policy discussions.

Response: Section 6-106(5) of the Energy Law directs the Board to make publicly available “copies of the draft plan, and all non-confidential information and comments filed” with the Board. In the Plan, the Board will provide citations to publicly available sources.

- 22. Comment:** Any determination by the Board to adopt an amendment or to reject it should include a summary of the issue for amendment, public comments received, an evaluation of potential impacts and the final determination in a Findings Statement.

Response: Section 6-106(6) of the Energy Law, as supplemented by Part 7852 of the regulations, sets forth the procedures that must be followed when the Board proposes to amend a Plan. Specifically, the legislation states as follows: “Prior to adopting a proposed amendment to any element of the plan, the board shall prepare and publish in the state register notice of any draft amendment and reasons therefor and shall solicit public comments thereon. The board shall adopt an amendment to the state energy plan, or aspects

thereof, upon a finding by the board that there has been a material and substantial change in fact or circumstance since the most recent plan was adopted. A decision of the board that no amendment is necessary, together with the reasons supporting such determination, shall be final.”

23. Miscellaneous Revisions (made in response to comments received from the Department of Agriculture and Markets, whose Commissioner is now a member of the Board by virtue of the 2011 amendments to the Energy Law)

Several edits to bioenergy related definitions were made to recognize that biomass can be converted through various pathways for multiple end-uses. Most notably, the term *biomass producers* was replaced with *biomass suppliers*, since in almost all instances the actual biomass producers, i.e., farmers and foresters/loggers, will be providing biomass to a broker or supplier who will then provide biomass to the conversion facility. The term producer in the context of biomass could be unclear; furthermore, the use of the term “supplier” is consistent with terminology found throughout the State Energy Plan in other energy sectors. The threshold for *major* liquid biofuel producer was raised from one million gallons annually to ten million gallons annually since it is recognized that production facilities with less than 10 million gallons of annual production are at the pilot or demonstration scale to prove economic viability and thus are not *major* biofuel producers.

Edits were made to section 7862.2 to make reporting requirements for major biomass suppliers or processors and biofuel producers consistent with changes found in the definitions.