

Notice of Lodging of Consent Decree Pertaining to New York's Regional Greenhouse Gas Initiative Regulations

Notice is hereby given that, on December 23, 2009, a proposed Consent Decree in *Indeck Corinth, L.P. v. Paterson et al.*, Index No. 5280-09 (Judge McNamara), was lodged with the Supreme Court of the State of New York, County of Albany. The Consent Decree has been approved by all parties to the litigation and has been furnished to the Court pending the public comment period that is being announced today. The Consent Decree has not yet been entered by the Court as an Order.

The RGGI Program. The Consent Decree pertains to a challenge to New York's regulations implementing the Regional Greenhouse Gas Initiative (RGGI), a cap-and-trade program pursuant to which New York and nine other northeast states will reduce the total amount of allowable state- and region-wide carbon dioxide (CO₂) emissions from power plants by 10 percent by the end of 2018. In 2008, after an extensive, multi-year rulemaking process, the Department of Environmental Conservation (DEC) promulgated the CO₂ Budget Trading Program rule, codified at 6 NYCRR Part 242 (DEC Rule), and the New York State Energy Research and Development Authority (NYSERDA) issued the CO₂ Allowance Auction Program, 21 NYCRR Part 507 (collectively, "RGGI Rules").

The RGGI Rules require power plant owners in New York to obtain sufficient allowances to cover their annual CO₂ emissions (one allowance covers one ton of emissions). Power plant owners may purchase the allowances at quarterly regional auctions or on a secondary market. The RGGI Rules direct NYSERDA to spend the proceeds from auctions on developing and implementing programs targeted at energy efficiency, renewable energy, and non-carbon emitting technologies. To date, the sale of these allowances at auctions has generated more than \$180 million for New York.

Under the RGGI Rules, DEC also allocates a limited number of allowances to power generators that have long-term contracts (LTCs) to sell electricity, and that are precluded under such LTCs from passing through the cost of allowances to the purchasing party. The DEC Rule sets aside 1.5 million allowances annually to be distributed for free to LTC applicants that DEC determines meet certain qualification requirements in the DEC Rule. After receiving applications from LTC generators for 2009, DEC determined that the number of allowances requested from the LTC set-aside for 2009 exceeded the 1.5 million available in the LTC set-aside account. As a result, under the DEC Rule, successful LTC applicants received a pro rata portion of the 1.5 million allowances in the LTC set-aside account.

The Lawsuit. On January 29, 2009, Indeck Corinth, L.P. (Indeck) filed a lawsuit against Governor Paterson, DEC, NYSERDA, and the New York Public Service Commission (PSC) challenging the RGGI Rules. Indeck operates a gas-fired, combined-cycle co-generation facility in Corinth, New York that is subject to a LTC with Consolidated Edison Co. (Con Edison) for supply of most of the electricity produced by the Indeck facility. Indeck claims that the terms of its LTC with Con Edison do not permit it, unlike other generators in the State that are not a party to a LTC, to pass on costs associated with the purchase of allowances under the CO₂ Budget Trading Program to its customers. Con Edison has similar contracts with two other generators,

Brooklyn Navy Yard Cogeneration Partners (BNYCP) and Selkirk Cogen Partners, L.P. (Selkirk), each of which operates a gas-fired combined cycle co-generation facility.

In its complaint, Indeck challenges the RGGI Rules on a number of grounds, including that DEC's and NYSERDA's promulgation of the RGGI Rules was *ultra vires*, unconstitutional, arbitrary and capricious, and not supported by a proper record. In defense, the government defendants dispute each of Indeck's claims and have submitted papers arguing, *inter alia*, that in adopting the RGGI Rules, DEC and NYSERDA acted within the broad authority granted to them by the Legislature to address air pollution and to fund programs related to energy conservation and alternative energy, and that DEC and NYSERDA properly exercised their discretion based on their technical expertise and an extensive multi-year rulemaking record.

Terms of the Consent Decree. The parties to the Consent Decree include Governor Paterson, DEC, NYSERDA, PSC and Indeck, as well as Con Edison, BNYCP, Selkirk, and the Department of Public Service (DPS). Under the Consent Decree, Con Edison has agreed to pay the cost of the additional allowances that Indeck and Selkirk will need through the end of their LTCs in or before 2015 to cover their emissions over and above the pro rata allocation of allowances by DEC from the LTC set-aside under the DEC Rule. Con Edison also has agreed to cover the cost of such shortfall in necessary allowances that BNYCP is likely to experience through 2016, when DEC projects that the number of allowances in the LTC set-aside account will be sufficient to cover BNYCP's allowance needs. DEC has committed in the Consent Decree to maintain the LTC set-aside account under the DEC Rule at 1.5 million allowances annually through 2016. The PSC has agreed to consider approval of a tariff amendment allowing Con Edison to pass through the costs of purchasing allowances to its ratepayers. Based on currently available information, the parties estimate the cost of these allowances will be approximately \$2.6 million/year. To offset these costs, NYSERDA has agreed in the Consent Decree to use a portion of the RGGI proceeds to fund energy efficiency programs in Con Edison's rate territory, which such funds will be commensurate with the costs associated with Con Edison's payment of allowance costs to Indeck, BNYCP and Selkirk.

Public Comment Process. The New York Attorney General's Office (NYOAG) will receive comments relating to the Consent Decree for a period of thirty (30) days from the date of this publication. Comments on the Consent Decree should be addressed to Assistant Attorney General Morgan A. Costello, and either (1) e-mailed to her at morgan.costello@ag.ny.gov, or (2) mailed to her at New York State Department of Law, Environmental Protection Bureau, The Capitol, Albany, New York 12224.

During the public comment period, the Consent Decree may be examined on the DEC's website (www.dec.ny.gov), on NYSERDA's website (www.nyserda.org), and on the NYOAG's website (www.ag.ny.gov/bureaus/environmental/legal_documents.html). A copy of the Consent Decree may also be obtained by mail or e-mail from AAG Morgan Costello at the address noted above. The Consent Decree and attachments total 104 pages. Copying costs are 25 cents per page.