

Federal requirements. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997); is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**.

This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by *October 4, 2010*. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today’s **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2)).

#### List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Particulate matter, Wilderness areas.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: July 21, 2010.

**Keith Takata,**

*Acting Regional Administrator, EPA Region IX.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 272

[EPA–R02–RCRA–2010–0249; FRL–9178–8]

#### New York: Incorporation by Reference of State Hazardous Waste Management Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** The Solid Waste Disposal Act, as amended, commonly referred to as the Resource Conservation and Recovery Act (RCRA), allows the Environmental Protection Agency (EPA) to authorize States to operate their hazardous waste management programs in lieu of the Federal program. EPA uses the regulations entitled “Approved State Hazardous Waste Management Programs” to provide notice of the

authorization status of State programs and to incorporate by reference those provisions of the State regulations that will be subject to EPA’s inspection and enforcement. This rule does not incorporate by reference the New York hazardous waste statutes. The rule codifies in the regulations the prior approval of New York’s hazardous waste management program and incorporates by reference authorized provisions of the State’s regulations.

**DATES:** This regulation is effective October 4, 2010, unless EPA receives adverse written comment on this regulation by the close of business September 2, 2010. If EPA receives such comments, it will publish a timely withdrawal of this direct final rule in the **Federal Register** informing the public that this rule will not take effect. The Director of the Federal Register approves this incorporation by reference as of October 4, 2010 in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R02–RCRA–2010–0249, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- *E-mail:* [infurna.michael@epa.gov](mailto:infurna.michael@epa.gov).
- *Fax:* (212) 637–4437.
- *Mail:* Send written comments to Michael Infurna, Division of Environmental Planning and Protection, EPA, Region 2, 290 Broadway, 22nd Floor, New York, NY 10007.

- *Hand Delivery or Courier:* Deliver your comments to Michael Infurna, Division of Environmental Planning and Protection, EPA, Region 2, 290 Broadway, 22nd Floor, New York, NY 10007. Such deliveries are only accepted during the Regional Office’s normal hours of operation. The public is advised to call in advance to verify the business hours. Special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID. No. EPA–R02–RCRA–2010–0249. EPA’s policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov>, or e-mail. The Federal <http://www.regulations.gov> Web site is an “anonymous access” system, which means EPA will not know your

identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties, and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters or any form of encryption, and be free of any defects or viruses. (For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/dockets/>).

**Docket:** All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy. You can inspect the records related to this codification effort in the EPA Region 2 Library by appointment only. To make an appointment please call (212) 637-3185.

**FOR FURTHER INFORMATION CONTACT:** Michael Infurna, Division of Environmental Planning and Protection, EPA Region 2, 290 Broadway, 22nd Floor, New York, NY 10007; telephone number: (212) 637-4177; fax number: (212) 637-4377; e-mail address: [infurna.michael@epa.gov](mailto:infurna.michael@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Incorporation By Reference

###### A. What is codification?

Codification is the process of including the statutes and regulations that comprise the State's authorized hazardous waste management program into the CFR. Section 3006(b) of RCRA, as amended, allows the Environmental Protection Agency (EPA) to authorize State hazardous waste management programs. The State regulations authorized by EPA supplant the federal regulations concerning the same matter with the result that after authorization EPA enforces the authorized

regulations. Infrequently, State statutory language which acts to regulate a matter is also authorized by EPA with the consequence that EPA enforces the authorized statutory provision. EPA does not authorize State enforcement authorities and does not authorize State procedural requirements. EPA codifies the authorized State program in 40 CFR part 272 and incorporates by reference State statutes and regulations that make up the approved program which is federally enforceable. EPA retains the authority to exercise its inspection and enforcement authorities in accordance with sections 3007, 3008, 3013 and 7003 of RCRA, 42 U.S.C. 6927, 6928, 6934 and 6973, and any other applicable statutory and regulatory provisions.

###### B. What is the history of the authorization and codification of New York's hazardous waste management program?

New York initially received final authorization for its hazardous waste management program, effective on May 29, 1986 (51 FR 17737) to implement its base hazardous waste management program. Subsequently, EPA authorized revisions to the State's program effective July 3, 1989 (54 FR 19184), May 7, 1990 (55 FR 7896), October 29, 1991 (56 FR 42944), May 22, 1992 (57 FR 9978), August 28, 1995 (60 FR 33753), October 14, 1997 (62 FR 43111), January 15, 2002 (66 FR 57679), March 14, 2005 (70 FR 1825, as corrected on April 5, 2005 (70 FR 17286)) and August 31, 2009 (74 FR 31380). EPA codified New York's authorized hazardous waste program effective September 30, 2002 (67 FR 49864) and May 25, 2007 (72 FR 14044). In this action, EPA is revising Subpart HH of 40 CFR part 272 to include the recent authorization revision actions effective August 31, 2009. (Note: Both the Federal and State requirements for the NY State Public Utilities Project XL, which were authorized effective August 31, 2009, will, unless extended, expire on May 24, 2011.)

###### C. What decisions have we made in this action?

This action codifies EPA's authorization of revisions to New York's hazardous waste management program. This codification reflects the State program in effect at the time EPA authorized revisions to the New York hazardous waste program in a final rule dated July 1, 2009 (74 FR 31380). The rule incorporates by reference the most recent version of the State's authorized hazardous waste management regulations. This action does not reopen any decision EPA previously made concerning the authorization of the

State's hazardous waste management program. EPA is not requesting comments on its decisions published in the **Federal Register** notices referenced in section B of this document concerning revisions to the authorized program in New York.

EPA is incorporating by reference the authorized revisions to the New York hazardous waste program by revising Subpart HH to 40 CFR part 272. 40 CFR 272.1651 previously incorporated by reference New York's authorized hazardous waste regulations, as amended effective September 5, 2006, as well as selected provisions as found in the New York regulations dated January 31, 1992. Section 272.1651 also references the demonstration of adequate enforcement authority, including procedural and enforcement provisions, which provide the legal basis for the State's implementation of the hazardous waste management program. In addition, § 272.1651 references the Memorandum of Agreement, the Attorney General's Statements and the Program Description, which were evaluated as part of the approval process of the hazardous waste management program under Subtitle C of RCRA.

###### D. What is the effect of New York's codification on enforcement?

EPA retains the authority under statutory provisions, including but not limited to, RCRA sections 3007, 3008, 3013 and 7003, and other applicable statutory and regulatory provisions to undertake inspections and enforcement actions and to issue orders in all authorized States. With respect to enforcement actions, EPA will rely on Federal sanctions, Federal inspection authorities, and Federal procedures rather than the State analogs to these provisions. Therefore, the EPA is not incorporating by reference New York's inspection and enforcement authorities nor are those authorities part of New York's approved State program which operates in lieu of the Federal program. 40 CFR 272.1651(c)(2) lists these authorities for informational purposes, and because EPA also considered them in determining the adequacy of New York's procedural and enforcement authorities. New York's authority to inspect and enforce the State's hazardous waste management program requirements continues to operate independently under State law.

###### E. What State provisions are not part of the codification?

The public is reminded that some provisions of New York's hazardous waste management program are not part

of the federally authorized State program. These non-authorized provisions include:

(1) Provisions that are not part of the RCRA subtitle C program because they are “broader in scope” than RCRA subtitle C (see 40 CFR 271.1(i));

(2) Unauthorized amendments to authorized State provisions;

(3) New unauthorized State requirements; and

(4) State procedural and enforcement authorities which are necessary to establish the ability of the State’s program to enforce compliance but which do not supplant the Federal statutory enforcement and procedural authorities.

State provisions that are “broader in scope” than the Federal program are not incorporated by reference in 40 CFR part 272. For reference and clarity, 40 CFR 272.1651(c)(3) lists the New York statutory and regulatory provisions which are “broader in scope” than the Federal program and which are not part of the authorized program being incorporated by reference. This action updates that list of “broader in scope” provisions. While “broader in scope” provisions are not part of the authorized program and cannot be enforced by EPA; the State may enforce such provisions under State law.

Additionally, New York’s hazardous waste regulations include amendments which have not been authorized by EPA. Since EPA cannot enforce a State’s requirements which have not been reviewed and authorized in accordance with RCRA section 3006 and 40 CFR part 271, it is important to be precise in delineating the scope of a State’s authorized hazardous waste program. Regulatory provisions that have not been authorized by EPA include amendments to previously authorized State regulations as well as new State requirements.

State regulations that are not incorporated by reference in this rule at 40 CFR 272.1651(c)(1), or that are not listed in 40 CFR 272.1651(c)(3) (“broader in scope”) or 40 CFR 272.1651(c)(2) (“procedural and enforcement authorities”), are considered new unauthorized State requirements. These requirements are not Federally enforceable.

#### *F. What will be the effect of Federal HSWA requirements on the codification?*

With respect to any requirement(s) pursuant to the Hazardous and Solid Waste Amendments of 1984 (HSWA) for which the State has not yet been authorized and which EPA has identified as taking effect immediately

in States with authorized hazardous waste management programs, EPA will enforce those Federal HSWA standards until the State is authorized for those provisions.

The codification does not affect Federal HSWA requirements for which the State is not authorized. EPA has authority to implement HSWA requirements in all States, including States with authorized hazardous waste management programs, until the States become authorized for such requirements or prohibitions, unless EPA has identified the HSWA requirement(s) as an optional or as a less stringent requirement of the Federal program. A HSWA requirement or prohibition, unless identified by EPA as optional or as less stringent, supersedes any less stringent or inconsistent State provision which may have been previously authorized by EPA (50 FR 28702, July 15, 1985).

Some existing State requirements may be similar to the HSWA requirement implemented by EPA. However, until EPA authorizes those State requirements, EPA enforces the HSWA requirements and not the State analogs.

## **II. Statutory and Executive Order Reviews**

This rule codifies EPA-authorized hazardous waste requirements pursuant to RCRA 3006 and imposes no requirements other than those imposed by State law. Therefore, this rule complies with applicable executive orders and statutory provisions as follows.

1. *Executive Order 12866: Regulatory Planning Review*—The Office of Management and Budget (OMB) has exempted this rule from its review under Executive Order 12866 (58 FR 51735, October 4, 1993).

2. *Paperwork Reduction Act*—This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

3. *Regulatory Flexibility Act*—This rule codifies New York’s authorized hazardous waste management regulations in the CFR and does not impose new burdens on small entities. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

4. *Unfunded Mandates Reform Act*—Because this rule codifies pre-existing State hazardous waste management program requirements which EPA already approved under 40 CFR part 271, and with which regulated entities must already comply, it does not

contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

5. *Executive Order 13132: Federalism*—Executive Order 13132 (64 FR 43255, August 10, 1999) does not apply to this rule because it will not have federalism implications (*i.e.*, substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government). This action codifies existing authorized State hazardous waste management program requirements without altering the relationship or the distribution of power and responsibilities established by RCRA.

6. *Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*—Executive Order 13175 (65 FR 67249, November 6, 2000) does not apply to this rule because it will not have tribal implications (*i.e.*, substantial direct effects on one or more Indian tribes, or on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes).

7. *Executive Order 13045: Protection of Children from Environmental Health & Safety Risks*—This rule is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it is not based on environmental health or safety risks.

8. *Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use*—This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

9. *National Technology Transfer Advancement Act*—The requirements being codified are the result of New York’s voluntary participation in EPA’s State program authorization process under RCRA Subtitle C. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

10. *Executive Order 12988*—As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), EPA has taken the necessary steps in this action to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

11. *Congressional Review Act*—EPA will submit a report containing this rule and other information required by the Congressional Review Act (5 U.S.C. 801 *et seq.*, as amended) to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This action will be effective October 4, 2010.

#### List of Subjects in 40 CFR Part 272

Environmental Protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Incorporation by reference, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

**Authority:** This action is issued under the authority of Sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: April 27, 2010.

**Judith A. Enck,**

*Regional Administrator, EPA Region 2.*

■ For the reasons set forth in the preamble, 40 CFR part 272 is amended as follows:

#### PART 272—APPROVED STATE HAZARDOUS WASTE MANAGEMENT PROGRAMS

■ 1. The authority citation for part 272 continues to read as follows:

**Authority:** Secs. 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

■ 2. Revise § 272.1651 to read as follows:

##### § 272.1651 New York State-Administered Program: final authorization.

(a) Pursuant to section 3006(b) of RCRA, 42 U.S.C. 6926(b), New York has final authorization for the following elements as submitted to EPA in New York’s base program application for final authorization which was approved by EPA effective on May 29, 1986. Subsequent program revision applications were approved effective on July 3, 1989, May 7, 1990, October 29, 1991, May 22, 1992, August 28, 1995, October 14, 1997, January 15, 2002, March 14, 2005, and August 31, 2009. (**Note:** Both the Federal and State requirements for the NY State Public Utilities Project XL, which were

authorized effective August 31, 2009, will, unless extended, expire on May 24, 2011.)

(b) The State of New York has primary responsibility for enforcing its hazardous waste management program. However, EPA retains the authority to exercise its inspection and enforcement authorities in accordance with sections 3007, 3008, 3013, 7003 of RCRA, 42 U.S.C. 6927, 6928, 6934, 6973, and any other applicable statutory and regulatory provisions, regardless of whether the State has taken its own actions, as well as in accordance with other statutory and regulatory provisions.

##### (c) State Statutes and Regulations.

(1) The New York regulations cited in paragraph (c)(1)(i) of this section are incorporated by reference as part of the hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.* The Director of Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain copies of the New York regulations that are incorporated by reference in this paragraph from West Group, 610 Opperman Drive, Eagan, MN 55123, Attention: D3-10 (Phone #: 1-800-328-9352). You may inspect a copy at EPA Region 2 Library, 290 Broadway, 16th Floor, New York, NY 10007 (Phone number: (212) 637-3185), or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

(i) The Binder entitled “EPA Approved New York Regulatory Requirements Applicable to the Hazardous Waste Management Program”, dated July 2009.

##### (ii) [Reserved]

(2) EPA considered the following statutes and regulations in evaluating the State program but is not incorporating them herein for enforcement purposes:

(i) Environmental Conservation Laws (ECL), 1997 Replacement Volume, as revised by the 2004 Cumulative Pocket Part: sections 1-0303(18), 3-0301(1) (introductory paragraph); 3-0301(1)(a) and (b); 3-0301(1)(m); 3-0301(1)(o); 3-0301(1)(w); 3-0301(1)(x); 3-0301(1)(cc); 3-0301(2) introductory paragraph; 3-0301(2)(a), (b), (d) through (j), (l), (m) and (q); 3-0301(2)(z); 3-0301(4); 19-0301(1) (except 19-0301(c), (e) and (f)); 19-0303(1) through (3); 19-0304; 27-0105; 27-0701; 27-0703; 27-0705; 27-0707 (except 27-0707(2-c)); 27-0711; 27-0900 through 27-0908; 27-0909 (except 27-0909(5)); 27-0910 through

27-0922; 27-1105; 70-0101; 70-0103; 70-0105 (except 70-0105(3) and 70-0105(6)); 70-0107(1) and (2); 70-0107(3) introductory paragraph; 70-0107(3)(l); 70-0109; 70-0113; 70-0115 (except (2)(c) and (d)); 70-0117 (except 70-0117(5)-(7); 70-0119; 70-0121; 71-0301; 71-1719; 71-2705; 71-2707; 71-2709 through 71-2715; 71-2717; 71-2720; and 71-2727.

(iii) McKinney’s Consolidated Laws of New York, Book 1, Executive Law (EL), Article 6: Section 102.

(iv) McKinney’s Consolidated Laws of New York, Book 46, Public Officers Law (POL), as amended through 2004: Sections 87 and 89.

(v) McKinney’s Consolidated Laws of New York, Book 7B, Civil Practice Law and Rules (CPLR), as amended through 2004: Sections 1013, 6301; 6311; and 6313.

(vi) Title 6, New York Codes, Rules and Regulations (6 NYCRR), Volume A-2A, Hazardous Waste Management System, as amended through September 5, 2006: Sections 372.1(f); 373-1.1(f) and (g); 373-1.4(b); 373-1.4(d) through (f); 373-1.6(c); 621.1 through 621.4; 621.5 (except (d)(5), (d)(6)(i), (d)(7)(i)(a), (d)(7)(i)(c) and (d)(9)); 621.6 (except (b), (d)(4) and (d)(5)); 621.7; 621.8; 621.9 (except (a)(5), (c)(2) and (e)(2)); 621.10; 621.11 (except (d)); 621.12 through 621.15; and 621.16 (except (b), (d) and (e)).

(3) The following statutory and regulatory provisions are broader in scope than the Federal program, are not part of the authorized program, are not incorporated by reference and are not federally enforceable:

(i) Environmental Conservation Laws (ECL), 1997 Replacement Volume, as revised by the 2004 Cumulative Pocket Part: Sections 27-0301; 27-0303; 27-0305; 27-0307; 27-0909(5); 27-0923; 27-0925 and 27-0926.

(ii) Environmental Conservation Laws (ECL), 1997 Replacement Volume, as revised by the 2006 Cumulative Pocket Part: Section 27-1109(6).

(iii) Title 6, New York Codes, Rules and Regulations (6 NYCRR), Volume A-2A, Hazardous Waste Management System, as amended through September 5, 2006: Sections 370.2(b)(92) “Household hazardous waste”; 370.2(b)(93) “Household collection facility”; 371.4(e); 372.1(e)(9); 372.2(b)(5)(ii); 372.3(a)(1); 372.3(a)(4); 372.3(b)(6)(iv); 372.3(d)(3); 373-1.1(d)(1)(x); 373-1.4(c); 373-2.5(b)(3)(ii)(d); 373-2.5(b)(3)(ii)(e); 373-2.15(a)(2); 373-3.5(b)(3)(ii)(d); 373-3.5(b)(3)(ii)(e); 374-3.4(a)(2); and 376.4(f).

(iv) At 371.4(c), New York retains K064, K065, K066, K090 and K091 as

hazardous wastes while EPA has removed them from the table at 40 CFR 261.32 and no longer regulates them as hazardous wastes (64 FR 56469; October 20, 1999).

(v) Throughout New York's hazardous waste regulations, the State cross-references Part 364, which sets forth additional transporter requirements including permit and liability requirements (for examples, see 6 NYCRR sections 372.2(b)(8), 373-1.7(h)(3), 374-3.3(i)(1) and (2), 374-3.4(a), 374-3.6(a)(1) and Appendix 30 Instructions for Generators/Item 8). The transporter permit and liability requirements are broader in scope than the Federal program.

(vi) New York did not adopt an analog to 40 CFR 261.4(g) that excludes certain dredged materials from the State definition of hazardous waste. Instead, the State subjects these materials to full regulation as hazardous wastes.

(vii) New York State regulations do not incorporate the Mineral Processing Secondary Materials Exclusion at 40 CFR 261.4(a)(17) and the related changes affecting 40 CFR 261.2(c)(3) and (c)(4)/Table, and 40 CFR 261.2(e)(1)(iii). Since New York did not adopt the exclusion at 40 CFR 261.4(a)(17) the State has a broader in scope program because the effect is to include materials that are not considered solid waste by EPA.

(viii) At 373-4, New York implements a Household Hazardous Waste program, whereas the Federal program excludes household waste from regulation as hazardous waste at 261.4(b)(1).

(ix) The following New York provisions are broader in scope because they include requirements associated with the regulation of PCB waste as a state-only hazardous waste: 372.1(e)(9) and 376.1(g)(1)(i), 376.4(f). PCB wastes are regulated under the Federal Toxic Substances Control Act (TSCA) at 40 CFR part 761 rather than under the Federal RCRA program.

(4) *Memorandum of Agreement.* The Memorandum of Agreement between EPA Region 2 and the State of New York, signed by the Commissioner of the State of New York Department of Environmental Conservation on July 20, 2001, and by the EPA Regional Administrator on January 16, 2002, although not incorporated by reference, is referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(5) *Statement of Legal Authority.* "Attorney General's Statement for Final Authorization", signed by the Attorney General of New York in 1985 and revisions, supplements and addenda to

that Statement dated August 18, 1988, July 26, 1989, August 15, 1991, October 11, 1991, July 28, 1994, May 30, 1997, February 5, 2001, April 2, 2004 and June 13, 2008 (including three certifications), although not incorporated by reference, are referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(6) *Program Description.* The Program Description and any other materials submitted as supplements thereto, although not incorporated by reference, are referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

■ 3. Appendix A to part 272, State Requirements, is amended by revising the listing for "New York" to read as follows:

#### Appendix A to Part 272—State Requirements

\* \* \* \* \*

##### New York

The regulatory provisions include: Title 6, New York Codes, Rules and Regulations (6 NYCRR), Volume A-2A, Hazardous Waste Management System, as amended through September 5, 2006.

**Please Note:** For a few regulations, the authorized regulation is an earlier version of the New York State regulation. For these regulations, EPA authorized the version of the regulations that appear in the Official Compilation of Code, Rules and Regulations dated January 31, 1992. New York State made later changes to these regulations but these changes have not been authorized by EPA. The regulations where the authorized regulation is an earlier version of the regulation are noted below by inclusion in parentheses of January 31, 1992 after the regulatory citations.

Part 370—Hazardous Waste Management System—General: Sections 370.1(a) (except (a)(3)); 370.1(b) through (d); 370.1(e) (except (e)(9)); 370.1(f); 370.2(a); 370.2(b)(1) through (b)(15) "battery"; 370.2(b)(15) "bedrock" (January 31, 1992); 370.2(b)(17) through (b)(91); 370.2(b)(94) through (b)(125); 370.2(b)(127) through (b)(137); 370.2(b)(139) through (b)(213); 370.2(b)(215); 370.2(B)(216); 370.2(b)(217) (except the last sentence); 370.2(b)(218) through (b)(221); 370.3 (except 370.3(c)); 370.4; 370.5 (except (b)).

Part 371—Identification and Listing of Hazardous Waste: Sections 371.1(a) through (c); 371.1(d) (except (d)(1)(ii)(c) and (d)(1)(ii)(e)); 371.1(e) (except 371.1(e)(2)(vi)(b)(21); 371.1(f)(1) through (7); 371.1(f)(8) (except the phrase "or such mixing occurs at a facility regulated under Subpart 373-4 or permitted under Part 373 of this Title"); 371.1(f)(9) and (f)(10); 371.1(g)(1)(i); 371.1(g)(1)(ii) (except (g)(1)(ii)(c)); 371.1(g)(1)(iii); 371.1(g)(2) through (4); 371.1(h) through (j); 371.2; 371.3; 371.4(a)

and (b); 371.4(c) (except K064, K065, K066, K090 and K091 entries); 371.4(d), (f) and (i).

Part 372—Hazardous Waste Manifest System and Related Standards for Generators, Transporters and Facilities: Sections 372.1(a) through (d); 372.1(e)(2)(ii)(c) (January 31, 1992); 372.1(e)(2)(iii)(c) (January 31, 1992); 372.1(e)(3) through (e)(8); 372.1(g) and (h); 372.2 introductory paragraph through (b)(4); 372.2(b)(5) (except (b)(5)(ii)); 372.2(b)(6) through (b)(8); 372.2(b)(10); 372.2(c); 372.2(d) 1; 372.3 (except (a)(1), (a)(4), (a)(7)(i), (a)(8), (b)(3), (b)(5)(ii), (b)(6)(iv), (b)(7)(i)(d), (c)(4) and (d)(3)); 372.5 (except (h) and (i)); 372.6; 372.7(a) and (b); 372.7(c) (except (c)(1)(ii)); and 372.7(d).

Part 373, Subpart 373-1—Hazardous Waste Treatment, Storage and Disposal Facility Permitting Requirements: Sections 373-1.1(a) through (c), 373-1.1(d) introductory paragraph through (d)(1)(xx) (except reserved paragraphs, (d)(1)(x) and (d)(1)(xviii)); 373-1.1(d)(1)(xxi) 1; 373-1.1(d)(2); 373-1.1(e); 373-1.1(h) and (i); 373-1.2; 373-1.3; 373-1.4(a); 373-1.4(g) and (h); 373-1.5(a)(1); 373-1.5(a)(2) (except (a)(2)(xviii)); 373-1.5(a)(3) and (4); 373-1.5(b) and (c); 373-1.5(d) through (p) (except reserved paragraphs); 373-1.6 (except (c)); 373-1.7 through 373-1.11.

Part 373, Subpart 373-2—Final Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities: Sections 373-2.1 through 373-2.4; 373-2.5(a); 373-2.5(b) (except (b)(1)(i)(c), (b)(3)(ii)(d) and (b)(3)(ii)(e)); 373-2.5(c) through (g); 373-2.6 through 373-2.11; 373-2.12 (except 373-2.12(a)(1) and (d)); 373-2.12(a)(1) (January 31, 1992); 373-2.13; 373-2.14; 373-2.15 (except (a)(2)); 373-2.19 (except (e)(1)(ii)); 373-2.23; 373-2.24; 373-2.27; 373-2.28; 373-2.29; 373-2.30; and 373-2.31.

Part 373, Subpart 373-3—Interim Status Standards Regulations for Owners and Operators of Hazardous Waste Facilities: Sections 373-3.1 (except 373-3.1(a)(4) and the phrase "or Subpart 374-2 of this Title" in 373-3.1(a)(6)); 373-3.2 through 373-3.4; 373-3.5 (except 373-3.5(b)(1)(i)(c), (b)(3)(ii)(d) and (b)(3)(ii)(e)); 373-3.6 through 373-3.18; 373-3.23; and 373-3.27 through 373-3.31.

Part 374, Subpart 374-1—Standards for the Management of Specific Hazardous Wastes and Specific Types of Hazardous Waste Management Facilities: Sections 374-1.1; 374-1.3; 374-1.6 (except (a)(2)(iii)); 374-1.7; 374-1.8(a)(1); 374-1.8(a)(2) (except the second sentence "Such used oil \* \* \* of this Title" in (a)(2)(i)); 374-1.8(a)(3) through (a)(6); 374-1.8(b) through (m) (except reserved paragraphs); 374-1.9; and 374-1.13.

Part 374, Subpart 374-3—Standards for Universal Waste: Sections 374-3.1 (except (f) and (g)); 374-3.2; 374-3.3; 374-3.4 (except (a)(2)); 374-3.5; 374-3.6; and 374-3.7.

Part 376—Land Disposal Restrictions: Sections 376.1 (except (a)(5), (a)(9), (e), (f), and (g)(1)(ii)(b)); 376.2; 376.3 (except (b)(4) and (d)(2)); 376.4 (except (c)(2), (e)(1)-(7) and (f)); and 376.5.

*Appendices:* Appendices 19 through 25; Appendices 27 through 30; Appendix 33; Appendix 37; Appendix 38; Appendices 40 through 49 and Appendices 51 through 55.

Copies of the New York regulations that are incorporated by reference are available from West Group, 610 Opperman Drive, Eagan, MN 55123, ATTENTION: D3-10 (Phone #: 1-800-328-9352).

**Note:** Both the Federal and State requirements for the NY State Public Utilities Project XL, which were authorized effective August 31, 2009 (74 FR 31380), will, unless extended, expire on May 24, 2011.

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 1

[WC Docket No. 07-245; GN Docket No. 09-51; FCC No. 10-84]

#### Implementation of Section 224 of the Act; a National Broadband Plan for Our Future

**AGENCY:** Federal Communications Commission.

**ACTION:** Declaratory ruling.

**SUMMARY:** In this Declaratory Ruling, the Commission clarifies that communications providers have a statutory right to use space- and cost-saving techniques that are consistent with pole owners' use of those techniques. The Commission also establishes that providers have a statutory right to timely access to poles.

**DATES:** Effective September 2, 2010.

**FOR FURTHER INFORMATION CONTACT:** Jonathan Reel, Wireline Competition Bureau, Competition Policy Division, 202-418-1580.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Declaratory Ruling in WC Docket No. 07-245, GN Docket No. 09-51, adopted May 20, 2010, and released May 20, 2010. This Declaratory Ruling rules on issues raised in Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking 73 FR 6879, February 6, 2008.

#### Synopsis of the Declaratory Ruling

1. In this Order, the Commission takes steps to clarify the statute to lower the costs of telecommunications, cable, and broadband deployment and to promote competition, as recommended in the National Broadband Plan. The Commission clarifies that communications providers have a statutory right to use space- and cost-saving techniques that are consistent

with pole owners' use of those techniques. The Commission also establishes that providers have a statutory right to timely access to poles.

#### Background

2. In 1978, Congress first directed the Commission to ensure that the rates, terms, and conditions for pole attachments by cable television systems are just and reasonable when it added section 224 to the Act. The Telecommunications Act of 1996 (1996 Act) expanded the definition of pole attachments to include attachments by providers of telecommunications service, and granted both cable systems and telecommunications carriers an affirmative right of nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a utility. However, the 1996 Act permits utilities to deny access where there is insufficient capacity and for reasons of safety, reliability or generally applicable engineering purposes. Besides establishing a right of access, the 1996 Act mandates a rate formula for telecommunications carriers that differs from the rate formula for attachments used solely to provide cable service.

3. The Commission implemented the new section 224 access requirements in the *Local Competition Order*. At that time, the Commission concluded that it would determine the reasonableness of a particular condition of access on a case-by-case basis. Finding that no single set of rules could take into account all attachment issues, the Commission specifically declined to adopt the National Electric Safety Code (NESC) in lieu of access rules. The Commission also recognized that utilities typically develop individual standards and incorporate them into pole attachment agreements, and that, in some cases, federal, state, or local laws also impose relevant restrictions. The *Local Competition Order* acknowledged concerns that utilities might deny access unreasonably, but rather than adopt a set of substantive engineering standards, the Commission decided that procedures for requiring utilities to justify the conditions they placed on access would best safeguard attachers' rights. The Commission did adopt five rules of general applicability and several broad policy guidelines in the *Local Competition Order*. The Commission also stated that it would monitor the effect of the case-specific approach, and would propose specific rules at a later date if conditions warranted.

4. In the *1998 Implementation Order*, the Commission adopted rules implementing the 1996 Act's new pole attachment rate formula for

telecommunications carriers. The Commission also concluded that cable television systems offering both cable and Internet access service should continue to pay the cable rate. The Commission further held that the statutory right of nondiscriminatory access includes attachments by wireless carriers. The latter two determinations were challenged but ultimately upheld by the Supreme Court. In particular, the Court held that section 224 gives the Commission broad authority to adopt just and reasonable rates. The Court also deferred to the Commission's conclusion that wireless carriers are entitled by section 224 to attach facilities to poles.

5. On November 20, 2007, the Commission issued the *Pole Attachment Notice* 73 FR 6879, February 6, 2008 in recognition of the importance of pole attachments to the deployment of communications networks, in part in response to petitions for rulemaking from USTelecom and Fibertech Networks. USTelecom argued that incumbent LECs, as providers of telecommunications service, are entitled to just and reasonable pole attachment rates, terms, and conditions of attachment even though, under section 224, they do not count as "telecommunications carriers" and have no statutory right of access. Fibertech petitioned the Commission to initiate a rulemaking to set access standards for pole attachments, including standards for timely performance of make-ready work, use of boxing and extension arms, and use of qualified third-party contract workers, among other concerns. The *Pole Attachment Notice* focused on the effect of disparate pole-attachment rates on broadband competition and arrived at two tentative conclusions: first, that all attachers should pay the same pole attachment rate for all attachments used to provide broadband Internet access service and second, that the rate should be higher than the current cable rate, yet no greater than the telecommunications rate. In addition to the concerns raised by USTelecom and Fibertech, the *Pole Attachment Notice* inquired about application of the telecommunications rate to wireless pole attachments and other pole access concerns.

6. The American Recovery and Reinvestment Act of 2009 included a requirement that the Commission develop a national broadband plan to ensure that every American has access to broadband capability. On March 16, 2010, the National Broadband Plan was released, and identified access to rights-of-way—including access to poles—as having a significant impact on the deployment of broadband networks.