

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Office of Hearings and Mediation Services
625 Broadway, First Floor
Albany, New York 12233-1550

In the Matter of
Proposed Part 247 (Outdoor Wood Boilers)
and Proposed Revisions to Part 200 (General Provisions)
of Title 6 of the Official Compilation of Codes, Rules and Regulations
of the State of New York

HEARING REPORT

-by-

_____/s/_____

Susan J. Dubois
Administrative Law Judge

_____/s/_____

Helene G. Goldberger
Administrative Law Judge

_____/s/_____

P. Nicholas Garlick
Administrative Law Judge

_____/s/_____

Molly T. McBride
Administrative Law Judge

_____/s/_____

Maria E. Villa
Administrative Law Judge

_____/s/_____

Richard A. Sherman
Administrative Law Judge

July 30, 2010

PROCEEDINGS

Background

The New York State Department of Environmental Conservation (“Department” or “DEC”) scheduled hearings to receive public comment on the proposed revisions to Part 200 (General Provisions) and proposed Part 247 (Outdoor Wood Boilers) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”).

The purpose of the rulemaking is to regulate outdoor wood fired boilers, including provisions with respect to stack height for new and existing units, setback requirements, and particulate emissions for new outdoor wood boilers, or “OWBs.” The proposal incorporates phase out provisions, as well as seasonal prohibitions.

The Department’s Division of Air Resources (“DAR”) requested that the Department’s Office of Hearings and Mediation Services (“OHMS”) assign administrative law judges (“ALJs”) to conduct the legislative hearing sessions and to provide a report summarizing the comments.

On April 16, 2010, ALJ Susan J. Dubois was assigned to conduct the hearing in Pomona; ALJ Helene G. Goldberger was assigned to conduct the hearings in Batavia and Harrietstown; ALJ P. Nicholas Garlick was assigned to conduct the hearings in Watertown, Albany, and Herkimer; ALJ Molly T. McBride was assigned to conduct the hearings in Belmont and Jamestown; ALJ Maria E. Villa was assigned to conduct the hearings in Cortland and Staatsburg; and ALJ Richard A. Sherman was assigned to conduct the hearing in Stony Brook.

Prior to the hearings, the DAR staff provided the ALJs with a copy of the Department’s notice of proposed rulemaking and proof of publication of this notice. The notice appeared in the April 21, 2010, edition of the *State Register*, the *Environmental Notice Bulletin*, and in the following newspapers: the *New York Post*, *Newsday*, *Poughkeepsie Journal*, *Middletown Times Herald*, *Adirondack Daily Enterprise*, *Batavia Daily News*, *Jamestown Post-Journal*, *Herkimer Evening Telegraph*, *Wellsville Daily Reporter*, *Watertown Daily Times*, *Utica Observer Dispatch*, *Binghamton Press*, *Salamanca Press*, *Albany Times Union*, *Buffalo Evening News*, *Syracuse Post-Standard*, *Glens Falls Post Star*, and the *Rochester Democrat & Chronicle*.

The Department received written comments on the rulemaking until 5:00 p.m. on Friday, July 2, 2010.

Public Hearings

Watertown

Approximately 160 people attended this hearing session, on Thursday evening, June 3, 2010 at the Dulles State Office Building, 1st Floor Auditorium, 317 Washington Street. Thirty-three people spoke, all in opposition, and when one speaker asked for a show of hands from the

audience, it appeared that all in attendance were opposed. The hearing followed an hour long question and answer session at the same location.

At the opening of the hearing, John Barnes, an Environmental Engineer with the Division of Air Resources, Central Office, spoke on behalf of Department staff with respect to the proposed regulations. Three elected officials immediately followed. Senator Darrel J. Aubertine spoke in opposition to the regulations and noted his introduction of Senate Bill S.8101, which would overrule several aspects of the proposed regulations. Mr. Warren Shaw, the Highway Superintendent for the Town of Croghan, summarized the resolutions passed by five towns in Lewis County opposing the regulations (Towns of Croghan, Diana, Lowville, New Bremen, and Martinsburg). Councilman James Durkish, from the Town of Diana, spoke next, opposing the regulations and suggesting that the regulation of OWBs be left to the local governments.

Following the elected officials, thirty members of the public, including a representative of the Farm Bureau, spoke in opposition to the proposed regulations. Nearly all those who spoke owned and operated OWBs, and several also sold and installed them. Among the recurring points made by the speakers were: (1) the relative poverty of the area, the high cost of heating with oil or gas, and the economic impact on the region from the regulation; (2) the relative safety of OWB compared to indoor wood stoves; (3) concerns about the regulation's requirements regarding stack height and the increased risk of chimney fires with higher chimneys; (4) the fact that recently installed OWBs with 25-year warranties would have to be replaced before the end of their useful life; (5) the regulation's impact on OWB owners with small lots or who owned adjacent lots; (6) OWB owners who lived in locations far removed from any neighbors; and (7) the regulation's prohibition on use of OWBs to heat water during the summer.

There was general support for tougher emission limits for new OWBs and unanimous support for grandfathering existing units. Numerous speakers made the analogies to new and old cars, where older vehicles are grandfathered and their owners are not required to comply with new regulatory requirements. A majority of the speakers favored leaving the regulation of OWBs to local governments and responding to complaints about the few problem OWBs, as opposed to the forced removal of newly installed units. Several speakers questioned why, with the emphasis on development of renewable energy sources (such as wood) and the federal government's tax credits for OWBs, the Department was forcing OWB owners to remove these units. Several speakers stated that the regulations would force them to convert to fossil fuels, and because of their economic situation, force them to sell their homes.

Stony Brook

This hearing session was held on Monday evening, June 7, 2010, at the DEC Region 1 offices, 50 Circle Road, Stony Brook, New York. Prior to the public hearing, from 5:00 p.m. to 6:00 p.m., Department staff held an informational session during which materials concerning wood boilers and the proposed regulations were made available to the public.

At the commencement of the public hearing, Daniel Rozell, Environmental Engineer, Division of Air Resources, Region 1, presented Department staff's opening statement on the

proposed regulations. Three members of the public attended the hearing and one offered comments on the proposed regulations.

Michael Seilback, Vice President, Public Policy & Communications, American Lung Association of New York, spoke in favor of the proposed regulations and suggested that the regulations should be made more stringent. Mr. Seilback stated that scientific evidence shows that the particle pollution found in wood smoke is a serious lung health hazard. He also noted that, over the last two years, his organization had received more telephone complaints concerning outdoor wood boilers than on any other air quality issue. No other members of the public offered comments on the proposed regulations. Department staff remained at the hearing location until 8:00 p.m., at which time the hearing record was closed.

Albany

Approximately 140 people attended this hearing session, on Tuesday evening, June 8, 2010, at the Department's Central Office, 625 Broadway, Public Assembly Room 129. Forty people spoke, with over thirty people speaking in opposition. Approximately six spoke in support and the remaining speakers offered no opinion. The hearing followed an hour long question and answer session at the same location.

At the opening of the hearing, John Barnes, an Environmental Engineer with the Division of Air Resources, Central Office, spoke on behalf of Department staff with respect to the proposed regulations. Only one elected official, Kevin Lennon, a Town of Catskill Councilman, offered comments. Mr. Lennon talked about an upcoming vote by the Catskill Town Board on a proposed local law banning the use of OWBs. Mr. Lennon stated that he had come to the hearing to learn more about the issue.

Of the thirty members of the public who spoke in opposition to the proposed regulations, nearly all owned and operated OWBs and several also sold and installed them. Among the recurring points made by the speakers were: (1) the high cost of heating with oil or gas, and the economic impact of the regulations; (2) the relative safety of OWB compared to indoor wood stoves; (3) concerns about the proposed regulation's requirements regarding stack height; (4) the fact that recently installed OWBs with 25 year long warranties would have to be replaced before the end of their useful life; (5) the proposed regulation's impact on OWB owners with small lots or who owned adjacent lots; (6) OWB owners who lived in locations far removed from any neighbors; and (7) the regulation's prohibition on use of OWBs to heat water during the summer. Several speakers also stated that the public notice for the hearing was inadequate.

Those who spoke in favor of the regulations, including a representative of the Adirondack Council, generally cited the health impacts that OWBs can have, especially on those with respiratory diseases, such as asthma. The proponents argued that the regulations were science-based and that OWBs heated through inefficient combustion at lower temperatures that released more pollutants. Several speakers recalled living next to improperly operated OWBs and noted the difficulty in getting DEC regional staff to enforce existing regulations.

Pomona

Five persons attended the hearing, which was held at the Rockland County Fire Training Center in Pomona, New York, on Wednesday, June 9, 2010. Mr. Barnes described the proposed regulation and two persons presented comments about the proposal. The commenters criticized the requirement that existing units be replaced and proposed other approaches including education of owners about how to adjust their boilers to reduce emissions, enforcement against the units that are causing complaints rather than phasing out all of the existing units, limits on boiler use during the summer, and use of filtration or emission control devices.

Both speakers identified what they had paid for their boilers and for related equipment and structures. One speaker from Tuxedo (Rockland County) recommended that the Department should have a buy-back program, if the requirement to replace existing units remains in the regulation. He asked whether he would need to replace a high-efficiency boiler if he installed it in the near future but prior to April 15, 2011. The other speaker, from Yorktown Heights (Westchester County) stated that outdoor wood boilers could last for 15 or 20 years, and compared the removal of existing boilers to a requirement for getting rid of new cars that are not hybrids. He stated that the locations of the hearings were difficult to find on the DEC web site.

Herkimer

Approximately 80 people attended this public hearing, on Thursday evening, June 10, 2010, at Herkimer Community College, Robert McLaughlin College Center, 100 Reservoir Road. Twenty-eight people spoke, all in opposition to the proposed regulation. The hearing followed an hour long question and answer session at the same location.

At the opening of the hearing, Rob Sliwinski, an Environmental Engineer with the Division of Air Resources, Central Office, spoke on behalf of Department staff with respect to the proposed regulations. Following DEC staff's presentation, two elected officials spoke. Fred Shaw, a county legislator, spoke in opposition and noted an effort to pass resolutions in opposition in all county legislatures in the North Country. Keith Munz, a councilman from the Town of Osceola, also spoke in opposition and stated his opinion that the public notice for the hearing was inadequate.

The remaining speakers echoed the grounds for opposition heard at the hearings in Watertown and Albany. Several speakers raised other points including: (1) the impact of these regulations on dairy farmers; (2) the increased cost of fire insurance with indoor wood burning stoves; (3) the possibility of stacks being so high that it would contravene local zoning; and (4) failure of the regulations to take into account local topography. Near the close of the hearing, Benjamin Simons, president of the Oneida County Farm Bureau, spoke forcefully against the regulations and its impacts on the 700 member farmers in his county.

Batavia

The hearing in Batavia took place at Genesee Community College on Monday, June 14, 2010. At 6:00 p.m., at the conclusion of the public information session, Rob Sliwinski, of the

Department's Division of Air Resources, summarized the proposed regulations for the approximately 80 people in the audience. His remarks were followed by 22 speakers who commented on the regulations – of which only two spoke in favor. Five individuals were retailers of wood burning stoves. The general themes of the remarks are summarized below.

Two individuals spoke about their experiences of having smoke from a neighbor's outdoor wood boiler interfere significantly with their ability to live normally and the difficulties they encountered in getting relief.

A number of speakers commented that the regulations were overly inclusive and that OWBs that functioned without causing problems and were properly maintained should not be subject to removal. Paul Bencal from the Farm Bureau opposed the "one size fits all" regulatory strategy. He said removing useful units from service was wasteful and expensive. He said this course of action would force owners to resort to more expensive models or to use oil and gas – non-renewable resources. He said that the phase-out period was too short and amounted to a taking. He said that the vast majority of the units were placed in remote areas where they did not cause harmful effects. He said that these units were an expensive investment and that DEC should deal with complaints on a case-by-case basis.

During the public information session, Department staff had responded that the regulations were intended to allow efficient enforcement, because the Department lacks sufficient staff to respond on a case-by-case basis. Several speakers pointed out that many people will simply refuse to take their units out of service and this will compound the enforcement dilemma.

Many speakers suggested that complaints be addressed by localities because towns and villages were more familiar with the circumstances than a State agency. Many also argued that the stack heights proposed were too high – the height would make them difficult to clean, was dangerous, and would cause the systems to malfunction due to a cooling effect. Numerous speakers suggested that in many cases where there were problems it was likely due to the use of incorrect fuels – garbage, etc. and that if dry wood is used there should not be a problem.

A number of speakers responded to the volume of complaints DEC staff stated were received by the agency that gave rise to the regulatory proposal (about 100) stating that this was a very small fraction of the units out there (15,000) and therefore a weak basis for the regulations.

Some speakers asked if individual owners will be compensated for taking out equipment that still had a useful life, and others asked why the units were not grandfathered, as was the case with automobiles that did not have current emission equipment but still were allowed on the road. A number of individuals argued that the regulations proposed by DEC are not consistent with those in other states because in other jurisdictions there is no requirement to shut down older units.

Many speakers criticized the regulations for being onerous and causing a further burden on middle class people who were trying to save money and reduce reliance on foreign oil. Some

of the speakers asserted that whether wood was burned or allowed to rot on the ground the same amount of greenhouse gases was emitted.

Some speakers noted that forced air units ran very clean but that the manufacturers did not want to spend the money to obtain certification because of the cost of testing.

Quite a few people stated that there were many other activities that caused worse air pollution than these devices such as unregulated fireplaces, wood burning stoves, and camp fires. Many people also commented that the removal of wood burning devices from inside the home was a vast improvement in terms of safety because of the reduced danger of chimney fires.

The hearing concluded at 8:00 p.m. DEC staff remained at the hearing location to speak with individuals about their concerns and questions.

Cortland

The hearing in Cortland took place on Tuesday evening, June 15, 2010, at the Cortland County Office Building, second floor auditorium. After a question and answer session that began at 5:00 p.m., the public comment hearing commenced. Rob Sliwinski, of the Division of Air, offered brief remarks, and then public comment was received from 33 speakers out of an audience of approximately 60-75 persons. Only two persons supported the proposal, citing health concerns and the difficulties associated with obtaining relief in a situation where a neighbor's OWB was not operating properly, or where complaints were disregarded. One of the speakers recommended that complaints be evaluated through testing with particulate meters when complaints were received, and dealing with violators on that basis.

The remaining speakers cited the financial burdens associated with replacement, particularly where existing warranties extended past the removal dates set forth in the proposed regulation. A number of speakers were older retirees, and noted that they were on fixed incomes and would be unable to heat their homes if they were forced to remove the boilers. Still others stated that they lived in remote locations, at the end of long driveways or unplowed roads, and were unable to have alternate fuel delivered, such as gas or oil. Many speakers asserted that existing units should be grandfathered, and noted the advantages of siting a unit for heat and hot water outside the structure being heated, with the consequent reduction in indoor pollutants, such as carbon monoxide, and the lessened danger of chimney fires. Some of the speakers sold and serviced the units, and spoke about the improved efficiency, safety, and convenience associated with OWBs when those units were properly sited, maintained, and operated.

Fred Forbes, the Supervisor of the Town of Homer, stated that he had never received any complaints associated with OWBs. He stated that two years ago, he met with State Senator Jim Stewart to recommend that the State consider regulating the boilers. Supervisor Forbes also stated that he would like to see the names of the persons who wrote the proposed regulation made public, and would like to know if any of those persons have stock in oil, gas, or utility companies.

A number of speakers maintained that the matter should be handled on the local level, and pointed out the difficulties inherent in enforcing the proposed regulations. Others stated that in rural areas, where there are significant distances between neighbors, the boilers should not be regulated. During the informational session, Department staff indicated that 25 separate complaints had been received. This prompted a number of speakers to point out that a relatively small number of complaints should not trigger a response by the Department to regulate the majority because of a small minority that did not maintain their units or operate those units properly. Some of the speakers represented commercial operations that use the units to heat their businesses or run generators. These speakers stated that they would be forced out of business if they were obliged to replace the units. A number of persons contended that the Department should reimburse owners of existing units who were obliged to replace those units.

Several speakers cited reduced dependence on fossil fuels as one of their reasons for using an OWB, and observed that they had enough land to manage their own woodlots. They pointed out that they did not wish to support the oil and gas industry, which, according to these speakers, pollute the environment and do not help to maintain the local economy. The expense associated with the use of other fuels was the subject of a number of comments. Others pointed out that unlike a wood stove, the units were designed to burn an entire tree, including twigs and branches, thus reducing waste, and noted that the units are more efficient than a wood stove. Other speakers pointed out that they no longer needed to bring wood, which might contain dirt, insects, or allergens, into the house. The proposed stack height requirements were criticized, and many persons argued that the setbacks should take into account the nearest residence, rather than property lines.

Some of the attendees pointed out that the State receives revenues as a result of taxes on oil and gas, and questioned why, if bills introduced in the legislature to address OWBs failed to advance, the Department is attempting to “push through” the proposed regulations. Noting that New York is the only State seeking to ban the use of OWBs, several persons stated that they bought the units in good faith and operated them properly, and noted that manufacture, sales and service associated with the units creates jobs.

Other points of objection included the proposed seasonal restrictions (restrictions on summertime use), as well as the State’s collection of sales tax on the units and fees for permits for the units, where required. Various persons stated that their neighbors were not even aware of the presence of the unit until the speaker informed them, and other speakers opined that the stack height regulations were not well thought out. Bradd Vickers, the president of the Chenango Farm Bureau, stated that he was appalled that the Department was attacking a single industry, noting that the units are the only source of heat for many households and businesses. Mr. Vickers also pointed out that with the removal of the units, many people would be obliged to resort to indoor wood stoves for heat, with a corresponding increase in their homeowners’ insurance premiums.

The hearing concluded at approximately 8:15.

Belmont

The hearing took place on Wednesday, June 16, 2010, at the Allegany County Courthouse in Belmont, New York. An information session was held before the start of the public hearing and Department Staff met with the public at this session to answer questions. The public hearing began at 6:00 p.m. Approximately 150 people were in attendance. John Barnes, engineer with the DEC's Division of Air resources spoke briefly, summarizing the proposed regulations. After Mr. Barnes gave a brief presentation, members of the public were invited to comment on the proposed regulations and 38 people made comments on the record. All speakers were opposed to the regulations in the current form. The objections stated were those voiced at previous hearings held across the State.

The majority of speakers requested that the units be grandfathered in so that the owners do not lose the financial investment they have made in the stoves. The units cost many speakers in excess of ten thousand dollars and several had just purchased them in the past year or two. Many speakers complained about government interference on their private property and questioned the government's motivation for such interference. They noted that outdoor wood boilers are a common heating method where they live, noting that natural gas is not available. Several commented on the environmental benefits of a wood stove versus using fossil fuels as well as the financial savings of burning wood from their own property.

The speakers questioned the reasoning behind implementing such regulations when OWB are the norm in these communities and most speakers had never encountered any complaints regarding their units. Overall, the speakers were united in their opposition to the regulations in their entirety. Most stated that if regulations are implemented, they would face serious financial harm from them, both from the cost of purchasing a new unit and from the significant increase in cost to heat their homes.

Dunkirk

The hearing in Dunkirk was held on Thursday, June 17, 2010, at the Jamestown Community College in Dunkirk, New York. As with all hearings on the proposed regulation, an information session was held before the start of the public hearing. The hearing began at 6:00 p.m. Approximately fifty people were in attendance and 27 people spoke, all opposing the regulation. John Barnes from the Division of Air summarized the proposed regulation before the comments were taken. The comments made were the same in content as at all previous hearings. No one spoke in favor of the regulations and the opposition was strong.

Staatsburg

The hearing in Staatsburg took place on the evening of Monday, June 21, 2010, at the Norrie Point Environmental Education Center in Norrie Point State Park. Approximately sixty persons were in attendance, and 21 persons spoke at the hearing. An information session was held prior to the commencement of the hearing, and Department staff answered questions and

provided a short presentation. John Barnes, of the Division of Air, also offered brief remarks at the beginning of the hearing.

All of the speakers except one opposed the measure, and the individual in support had a number of objections to the proposed rule, specifically, the setback requirements. This speaker stated that the setback should be increased to 150 feet, and that the boilers should not be permitted on any lot smaller than four acres.

Many of the speakers urged that existing units be grandfathered, and took issue with the setback and stack height requirements, pointing out that these were unrealistic, overly broad, and would not lead to cleaner combustion or solve the problem of neighbor complaints. Many speakers stated that they burned wood in order to decrease dependence on fossil fuels. A number of persons stated that this was their only source of heat and hot water, and objected to the proposed shutdown periods during the warmer months. Several speakers pointed out that the issue of complaints should be handled on the local level, rather than involving the State and implementing regulations that paint with too broad a brush. Many speakers noted the significant financial investment associated with the OWBs that they had installed, and questioned whether the State would compensate them for the monetary losses they would sustain if the new regulations were implemented.

One speaker asserted that New York is the only State that is outlawing the stoves, and argued that an analysis of the complaints should be undertaken to determine the basis for and the circumstances of those complaints. This point was echoed by several other speakers, who urged the Department to review the complaints and provide an analysis rather than impose retroactive regulation on OWB owners who burn responsibly. Several speakers with an engineering background spoke about the technical problems with the rule, arguing that any regulation should be based on data and analysis, and actual conditions. Others pointed out that the proposal does not take into account those units that burn dual fuels, such as wood and coal. One speaker urged that variance provisions be incorporated into the proposed regulation.

The speakers emphasized that wood burning is a way of life in many communities, and that the owners of OWBs take pride in properly operating the units. Several persons pointed out that wood, a renewable resource, should not be allowed to go to waste.

Several speakers also maintained that the regulations should be rewritten, circulated a second time, and public comment solicited on the revisions.

Harrietstown

This hearing session took place on Wednesday evening, June 23, 2010, at the Harrietstown Town Hall in Saranac Lake, New York. Because the stenographer was not able to travel to this hearing due to a disabled automobile, the public comment session did not start until 6:45 p.m. when Region 5 staff were able to deliver a tape recorder to the administrative law judge. Due to the length of the public comment session, ALJ Goldberger began the hearing immediately with calling the individuals who had requested the opportunity to speak. There

were approximately 60 people in attendance and 24 people spoke. All of these individuals opposed the regulations as proposed.

The comments reflected the sentiments that had been expressed at the Batavia hearing. Many of those who commented argued that the regulation reflects a “one size fits all” approach while many or most of the boilers do not cause nuisance complaints. The speakers were concerned that they had invested significant sums on these units and that many years before their usefulness expires they will be forced to retire them. These individuals also noted that many of the people who installed these units did so because they could not afford the high cost of petroleum to heat their homes and certainly could not afford to shut the units down and purchase new ones. Many speakers expressed the view that in rural areas like the Adirondacks, using wood for heat is appropriate and economical.

Speakers stated that the stack heights were unreasonable and would cause the units to function poorly, with high creosote buildup. Many people explained that the setbacks were also unreasonable and even if the newer, approved units were installed, the setbacks and stack heights in the proposed regulations would make the units unworkable. Others argued that if the State wishes to phase the units out, the State should compensate owners for the economic loss. Many speakers criticized the regulations on the basis that the number of complaints was not worthy of this approach and regulation should be left to the localities. A number of speakers expressed the sentiment that the effort spent on the regulations was well beyond the gravity of the issue the Department was attempting to address and that bigger environmental issues should be the Department’s focus. One speaker noted that old power plants are grandfathered until equipment breaks and that approach is not being used here.

Many speakers argued that the use of the outdoor heating system was safer than burning wood in the home and that other forms of wood burning heating systems were more polluting.

A few people stated that there was inadequate notice for the hearing; municipalities should be given individual notice electronically from the Department; and that the date in the *Adirondack Daily Enterprise* was incorrect for this hearing.

The hearing concluded at 8:30 p.m. DEC staff remained at the hearing location to speak with individuals about their concerns and questions.