

## Special Executive Report

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S- 4948

July 30, 2009

### **Rule Amendments to Existing NO<sub>x</sub> Emissions Allowance Futures and Regional Greenhouse Gas Initiative (RGGI) CO<sub>2</sub> Allowance Futures Contracts**

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Effective trade date Monday, August 3, 2009, the New York Mercantile Exchange, Inc. is implementing amendments to its existing NO<sub>x</sub> Emissions Allowance Futures, Seasonal NO<sub>x</sub> Emissions Allowance Vintages 2009 through 2012 Futures, Annual NO<sub>x</sub> Emissions Allowance Vintages 2009 through 2012 Futures and Regional Greenhouse Gas Initiative (RGGI) CO<sub>2</sub> Allowance Futures contracts. These amendments are intended to implement conforming language across similar contract groups. The amendments are provided below in blackline format.

Should you have any questions, please contact Brad Leach at (212) 299-2609.

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(bold/underline indicates additions; strikethrough indicates deletion)

#### **~~NYMEX~~ NO<sub>x</sub> Emissions Allowance Futures ~~Contract~~**

##### **783.01 Scope**

The provisions of these rules shall apply to all NO<sub>x</sub> ozone season emissions allowances bought or sold for future delivery on the Exchange with the Delivery at the U.S Environmental Protection Agency's (EPA) ~~Allowance Tracking System~~ **NO<sub>x</sub> Allowance Management System (NAMS)**.

##### **783.01A Definitions**

(A) EPA means the U.S. Environmental Protection Agency or any successor agency with similar jurisdiction.

(B) ~~NO<sub>x</sub>~~ **NO<sub>x</sub>** Allowance refers to a tradable permit to emit ~~NO<sub>x</sub>~~ **NO<sub>x</sub>** as specified further by EPA.

(C) ~~NO<sub>x</sub>~~ **NO<sub>x</sub>** Allowance Management System (NAMS) means the system established by the EPA for recording the transfer of Allowances among various entities under the Clean Air Act as set.

(D) Vintage Year means the first calendar year for which the allowance may be utilized for compliance.

(E) ~~The Clean Air Markets Division (CAMD) Business System is the EPA's electronic platform for recording information submitted by regulated entities and other Program participants, including the electronic transfer of allowances between accounts.~~

~~(F)~~ The terms "Seller" and "Buyer" shall mean the short Clearing Member and the long Clearing Member, respectively.

~~(FG)~~ The terms "Seller's Customer" and "Buyer's Customer" shall mean the seller and buyer of the physical product **or swap transaction**.

~~(GD)~~ The term “Settlement Price” shall mean the final settlement price used as the price for delivery of the product, which shall be the settlement price for the last trading day of the expiring delivery month. The settlement price for the last day of the trading shall be determined in accordance with the procedures set forth in NYMEX Exchange Rule 813.6.52

### **783.03 Contract Unit**

The contract unit shall be ten (10) allowances ~~tons~~ of ~~NOX~~ NO<sub>x</sub> emissions allowances for delivery made by transfer through NAMS. Deliverable ~~NOX~~ NO<sub>x</sub> emissions allowances are of the current vintage year.

### **783.05 Delivery Months**

Trading shall be conducted in contracts providing for delivery in such periods as shall be determined by the Exchange ~~Board of Directors~~.

### **783.06 Minimum Price Fluctuations**

Prices shall be quoted in dollars and cents per allowance ~~ton~~. The minimum price fluctuation shall be \$25.00 per allowance ~~ton~~ (\$250.00 per contract). There shall be no maximum price fluctuation.

### **783.08 Product Placement**

For purposes of Rule 9A.19, the Seller and Buyer shall fulfill its contractual obligation on a maturing contract only if, by 12:00 noon on the day preceding the last trading day in the applicable delivery month, such Seller and Buyer have received NAMS account certification from his customer, in the form prescribed by the Exchange stating that the Customer has an account with NAMS, ~~with access to CAMD Business System.~~

The receipt of such certification shall not relieve the Seller or Buyer, or their respective Customers of any obligations under any Rule other than Rule 9A.19.

### **783.12 Exchange of Futures for, or in Connection with Product- Physical (EFP) and Exchange of Futures for Swaps (EFS)**

- A. An exchange of futures for, or in connection with, ~~the product (EFP)~~ or exchange of futures for, or in connection with, swap (EFS) transactions consist of two discrete, but related, transactions; a cash transaction and a futures transaction. At the time such transaction is effected, the Buyer’s Customer and the Seller’s Customer of the futures must be the Seller’s Customer and the Buyer’s Customer of a quantity of the physical product or swaps agreement covered by this Section (or any derivative, by-product or related product.) The quantity of physical product must be approximately equivalent to the quantity covered by the futures contracts.
- B. Except as provided below, an EFP or EFS transaction must take place during the hours of futures trading for the NO<sub>x</sub> Emissions Allowance futures contract. An EFP or EFS is permitted in the expiring futures contract until two hours after trading terminates on the last day of trading of the expiring futures contract. An EFP or EFS which establishes a futures position for both the buyer and the seller shall not be permitted during the two hour period following the termination of trading of expired futures contract.
- C. Any EFP or EFS transaction ~~Exchange of Futures for, or in Connection with, Product (EFP)~~ shall be governed by the provisions of Rule 6.21 and 6.21A, respectively.
- D. Each Buyer’s Customer and Seller’s Customer must satisfy the Exchange, at its request, that the transaction is a legitimate EFP or EFS transaction. All documentary evidence relating to EFP or EFS, including, without limitation, evidence as to change of ownership of the physical commodity or swap commitment, shall be obtained by the Clearing Members from their customers or and made available by the Clearing Members for examination by the Exchange upon request.

**E. A report of each EFP or EFS transaction shall be entered on the day that the transaction thereto was made, or if such agreement was made after the close of trading, then on the next business day. EFP or EFS transactions shall be cleared through the Exchange in accordance with normal procedures, shall be clearly identified as EFP or EFS transactions, and shall be recorded as such by the Exchange and by the Clearing Members involved.**

#### **783.14 Force Majeure, Late Performance and Failure to Perform**

(A) DEFINITION. As used in this Rule 783.14 the following terms, as well as variations thereof, shall have the meaning described below:

- (1) "Late Performance" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules.
- (2) "Failure to Perform" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.
- (3) "Contract Value" means the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of tons per contract) times the number of contracts to be delivered.
- (4)(a) "Party" means a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.
- (b) "Other Party" means the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.
- (5) "Day of Late Performance" means the twenty four hour period commencing twelve hours after a Buyer or a Seller was to have performed, provided however, with respect to the obligations of Buyers and Sellers to submit documents to the Exchange pursuant to the Rules in this chapter, and with respect to the failure to transfer allowances within the nominated half cycle, "Day of Late Performance" means that twenty four hour period commencing immediately after the time specified in the Rules in this chapter for the submission of a document. Each subsequent Day of Late Performance shall commence twenty four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act is performed shall be a Day of Late Performance.
- (6) "Force Majeure" means any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.

#### **(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY**

- (1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.
- (2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.

#### **C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE**

- (1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:
  - (a) When the Chairman is advised by the President or any person designated by the President that it appears that the performance of a Party to the delivery is late;
  - (b) Upon the written request of both the Buyer and the Seller;
  - (c) When the President or any person designated by the President requests such appointment; or

~~(d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.~~

~~(2) The Chairman shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.~~

~~(3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Compliance Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.~~

~~(4) Absent a declaration of a force majeure, the Panel may, with the consent of both the Buyer and the Seller, take anyone or combination of the following actions as it deems suitable grant an extension of time not to exceed five days from the date of the scheduled delivery.~~

~~Nothing in this Subsection shall preclude a Party or the Exchange from seeking the remedies set forth in Sections (D) and (E) of this Rule.~~

~~(5) Upon a finding of force majeure, the Panel may take anyone or combination of the following actions as it deems suitable order an extension of time not to exceed five days from the date of the scheduled delivery; or, refer the delivery to the Board of Directors for emergency action as provided in Article 7.~~

#### ~~(D) EXCHANGE ACTION~~

~~(1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of or to have failed to perform a delivery, the Exchange, represented by the Compliance Department, shall issue a Notice of Assessment in accordance with subsections (2) of this Section, specifying the findings of the Panel with respect to the late or failed delivery.~~

~~(2) When a Party has failed to perform, the Compliance Department shall issue a Notice of Assessment assessing penalties of ten percent (10%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (2) hereof, to be paid to the Exchange.~~

~~(3)(a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Compliance Counsel, within two business days of receipt of the Notice of Assessment from the Compliance Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.~~

~~(b) The Compliance Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.~~

~~(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(4)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Bylaw 106. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment the Assessment and findings of the Delivery Committee shall constitute a final disciplinary action of the Exchange.~~

~~(4) Within ten (10) days after receipt of the Compliance Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by the Compliance Department or are otherwise relevant to the matter.~~

~~(5) In the event of an appeal by a Party, the Chairman of the Exchange, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. The Panel shall be composed of three members~~

of the Exchange, at least one of whom shall be a member of the Board of Directors. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the Chairman any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.

~~(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:~~

~~(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Compliance Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.~~

~~(b) At such hearing: The Appellant may appear personally and may be represented by counselor or other representative of his choice at the appeal.~~

~~(c) The Compliance Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Compliance Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.~~

~~(d) The Appellant shall be entitled to rebut the Compliance Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.~~

~~(e) The Compliance Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.~~

~~(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.~~

~~(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.~~

~~(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.~~

~~(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.~~

~~(8) The Assessment Appeal Panel shall consider, and make recommendations to the Board concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the Board shall constitute the final disciplinary action of the Exchange.~~

#### ~~(E) ARBITRATION PROCEDURE~~

~~(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.~~

~~(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.~~

~~(3) The Arbitration will be governed by Chapter 5 of the Rules except that the Chairman of the Exchange or his designee shall appoint an Arbitration Panel composed of three Members of the Exchange, at least one of whom shall be a Member of the Board of Directors.~~

**(A) DEFINITION. As used in this Rule 783.14, the following terms, as well as variations thereof, shall have the meaning described below.**

- (1) "Late Performance" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules. Late Performance shall be restricted to three business days. Late Performance beyond three business days by, a Seller or a Buyer will be deemed a Failure to Perform.
- (2) "Day of Late Performance" shall mean the twenty-four hour period commencing immediately after a Buyer, a Seller, or the Clearing House was to have performed. Each subsequent Day of Late Performance shall commence twenty-four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act was to have performed shall be a Day of Late Performance.
- (3) "Failure to Perform" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.
- (4) "Contract Value" shall mean the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of allowances per contract) times the number of contracts to be delivered.
- (5) (a) "Party" shall mean a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.  
(b) "Other Party" shall mean the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.
- (6) "Force Majeure" shall mean any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.

#### (B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY

- (1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.
- (2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.

#### (C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE

- (1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three
  - (3) members of the Committee, to review a delivery:
    - (a) When the Chairman of the Emissions Allowance Delivery Committee is advised by the President of the Exchange or any person designated by the President of the Exchange that it appears that the performance of a Party to the delivery is late;
    - (b) Upon the written request of both the Buyer and the Seller;
    - (c) When the President of the Exchange or any person designated by the President of the Exchange requests such appointment; or
    - (d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.
- (2) The Chairman of the Emissions Allowance Delivery Committee shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has

been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.

- (3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Market Regulation Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.
- (4) Upon a finding of force majeure, the Panel may take any one or combination of the following actions as it deems suitable order: an extension of time not to exceed ten days from the date of the scheduled delivery; or, refer the delivery to the Exchange, represented by the Market Regulation Department, for emergency action.

#### (D) EXCHANGE ACTION

- (1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of a delivery obligation, the Exchange, represented by the Market Regulation Department, shall issue a Notice of Assessment, assessing a penalty of 10% of contract value for each applicable day of Late Performance.
- (2) Whenever a Buyer or Seller is found by the Panel or otherwise deemed to have a "Failure to Perform" the Exchange, represented by the Market Regulation Department shall issue a Notice of Assessment assessing penalties of twenty percent (20%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (1) above, to be paid to the Exchange.
- (3) (a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Market Regulation Department, within two business days of receipt of the Notice of Assessment from the Market Regulation Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.
- (b) The Market Regulation Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.
- (c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(3)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Chapter 4. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment, the Assessment and findings of the Emissions Allowance Delivery Committee shall constitute a final disciplinary action of the Exchange.
- (4) Within ten (10) days after receipt of Market Regulation Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by Market Regulation Department or are otherwise relevant to the matter.
- (5) In the event of an appeal by a Party, the President, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the President, or his designee, any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence

shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.

(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Market Regulation Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.

(b) At such hearing: The Appellant may appear personally and may be represented by counselor other representative of his choice at the appeal.

(c) The Market Regulation Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Market Regulation Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.

(d) The Appellant shall be entitled to rebut the Market Regulation Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.

(e) The Market Regulation Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.

(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.

(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.

(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.

(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.

(8) The Assessment Appeal Panel shall consider, and make recommendations to the President, or his designee concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the President shall constitute the final disciplinary action of the Exchange.

#### (E) ARBITRATION PROCEDURE

(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.

(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.



**(3) The Arbitration will be governed by Chapter 6A of the Rules except that the President or his designee shall appoint an Arbitration Panel.**

## Seasonal NO<sub>x</sub> Emissions Allowance Vintage 2009 Futures ~~Contract~~

### 860.01 Scope

The provisions of these rules shall apply to Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> emissions allowances vintage 2009 (or earlier vintages) bought or sold for future delivery on the Exchange with the Delivery at the U.S. Environmental Protection Agency's (EPA) NO<sub>x</sub> Allowance Management System (NAMS).

### 860.01A Definitions

- A. EPA means the U.S. Environmental Protection Agency or any successor agency with similar jurisdiction.
- B. Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> Allowance refers to a tradable permit to emit ~~one ton of NO<sub>x</sub>~~NO<sub>x</sub> from May 1 to September 30 in a given or subsequent calendar year under the Clean Air Interstate Rule (CAIR) Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> Budget Trading Program as specified further by EPA.
- C. ~~NO<sub>x</sub>~~NO<sub>x</sub> Allowance Management System (NAMS) means the system established by the EPA for recording the transfer of Allowances among various entities under the Clean Air Act as set.
- D. Vintage Year means the first calendar year for which the allowance may be utilized for compliance.
- E. The terms "Seller" and "Buyer" shall mean the short Clearing Member and the long Clearing Member, respectively.
- F. The terms "Seller's Customer" and "Buyer's Customer" shall mean the seller and buyer of the physical product or swap transaction.
- G. The term "Settlement Price" shall mean the final settlement price used as the price for delivery of the product, which shall be the settlement price for the last trading day of the expiring delivery month. The settlement price for the last day of the trading shall be determined in accordance with the procedures set forth in ~~NYMEX~~ Exchange Rule ~~8134G.11~~.

### 860.03 Contract Unit

The contract unit shall be ten (10) ~~allowances~~tons of Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> emissions allowances vintage 2009 (or earlier vintages) for delivery made by transfer through NAMS.

### 860.05 Delivery Months

Trading shall be conducted in contracts providing for delivery in such periods as shall be determined by the ~~Exchange Board of Directors~~.

### 860.06 Minimum Price Fluctuations

Prices shall be quoted in dollars per ~~allowance~~ton. The minimum price fluctuation shall be \$25.00 per ~~allowance~~ton (\$250.00 per contract). There shall be no maximum price fluctuation.

### 860.08 Product Placement

For purposes of Rule 9A.19, the Seller and Buyer shall fulfill its contractual obligation on a maturing contract only if, by 12:00 noon on the day preceding the last trading day in the applicable delivery month, such Seller and Buyer have received NAMS account certification from his customer, in the form prescribed by the Exchange stating that the Customer has an account with NAMS.

The receipt of such certification shall not relieve the Seller or Buyer, or their respective Customers of any obligations under any Rule other than Rule 9A.19.

### 860.12 Exchange of Futures for, ~~or in Connection with Product~~ Physical (EFP) and Exchange of Futures for Swaps (EFS)

- A. An exchange of futures for, or in connection with, ~~the product (EFP)~~ or exchange of futures for, or in connection with, swap (EFS) transactions consist of two discrete, but related, transactions; a

cash transaction and a futures transaction. At the time such transaction is effected, the Buyer's Customer and the Seller's Customer of the futures must be the Seller's Customer and the Buyer's Customer of a quantity of the physical product or swaps agreement covered by this Section (or any derivative, by-product or related product.) The quantity of physical product must be approximately equivalent to the quantity covered by the futures contracts.

- B. Except as provided below, an EFP or EFS transaction must take place during the hours of futures trading for the Seasonal NO<sub>x</sub> Emissions Allowance futures contract. An EFP or EFS is permitted in the expiring futures contract until two hours after trading terminates on the last day of trading of the expiring futures contract. An EFP or EFS which establishes a futures position for both the buyer and the seller shall not be permitted during the two hour period following the termination of trading of expired futures contract.
- C. Any EFP or EFS transaction ~~Exchange of Futures for, or in Connection with, Product (EFP)~~ shall be governed by the provisions of Rule 6.21 and 6.21A, respectively.
- D. Each Buyer's Customer and Seller's Customer must satisfy the Exchange, at its request, that the transaction is a legitimate EFP or EFS transaction. All documentary evidence relating to EFP or EFS, including, without limitation, evidence as to change of ownership of the physical commodity or swap commitment, shall be obtained by the Clearing Members from their customers or and made available by the Clearing Members for examination by the Exchange upon request.
- E. A report of each EFP or EFS transaction shall be entered on the day that the transaction thereto was made, or if such agreement was made after the close of trading, then on the next business day. EFP or EFS transactions shall be cleared through the Exchange in accordance with normal procedures, shall be clearly identified as EFP or EFS transactions, and shall be recorded as such by the Exchange and by the Clearing Members involved.

#### **860.14 Force Majeure, Late Performance and Failure to Perform**

(A) DEFINITION. As used in this Rule 860.14 the following terms, as well as variations thereof, shall have the meaning described below:

- (1) "Late Performance" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules.
- (2) "Failure to Perform" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.
- (3) "Contract Value" means the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of tons per contract) times the number of contracts to be delivered.
- (4)(a) "Party" means a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.
- (b) "Other Party" means the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.
- (5) "Day of Late Performance" means the twenty four hour period commencing twelve hours after a Buyer or a Seller was to have performed, provided however, with respect to the obligations of Buyers and Sellers to submit documents to the Exchange pursuant to the Rules in this Chapter, and with respect to the failure to transfer allowances within the nominated half cycle, "Day of Late Performance" means that twenty four hour period commencing immediately after the time specified in the Rules in this Chapter for the submission of a document. Each subsequent Day of Late Performance shall commence twenty-four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act is performed shall be a Day of Late Performance.

(6) "Force Majeure" means any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.

#### ~~(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY~~

~~(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.~~

~~(2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.~~

#### ~~(C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE~~

~~(1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:~~

~~(a) When the Chairman is advised by the President or any person designated by the President that it appears that the performance of a Party to the delivery is late;~~

~~(b) Upon the written request of both the Buyer and the Seller;~~

~~(c) When the President or any person designated by the President requests such appointment; or~~

~~(d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.~~

~~(2) The Chairman shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.~~

~~(3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Compliance Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.~~

~~(4) Upon a finding of force majeure, the Panel may take anyone or combination of the following actions as it deems suitable order an extension of time not to exceed five days from the date of the scheduled delivery; or, refer the delivery to the Board of Directors for emergency action as provided in Article 7.~~

#### ~~(D) EXCHANGE ACTION~~

~~(1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of or to have failed to perform a delivery, the Exchange, represented by the Compliance Department, shall issue a Notice of Assessment in accordance with subsections (2) of this Section, specifying the findings of the Panel with respect to the late or failed delivery.~~

~~(2) When a Party has failed to perform, the Compliance Department shall issue a Notice of Assessment assessing penalties of ten percent (10%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (2) hereof, to be paid to the Exchange.~~

~~(3)(a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Compliance Counsel, within two business days of receipt of the Notice of Assessment from the Compliance Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.~~

(b) ~~The Compliance Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.~~

(c) ~~Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(4)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Bylaw 106. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment the Assessment and findings of the Delivery Committee shall constitute a final disciplinary action of the Exchange.~~

(4) ~~Within ten (10) days after receipt of the Compliance Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by the Compliance Department or are otherwise relevant to the matter.~~

(5) ~~In the event of an appeal by a Party, the Chairman of the Exchange, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. The Panel shall be composed of three members of the Exchange, at least one of whom shall be a member of the Board of Directors. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the Chairman any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.~~

(6) ~~The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:~~

(a) ~~At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Compliance Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.~~

(b) ~~At such hearing: The Appellant may appear personally and may be represented by counselor or other representative of his choice at the appeal.~~

(c) ~~The Compliance Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Compliance Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.~~

(d) ~~The Appellant shall be entitled to rebut the Compliance Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.~~

(e) ~~The Compliance Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.~~

(f) ~~The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.~~

(g) ~~The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.~~

(h) ~~The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.~~

(i) ~~The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.~~

(8) ~~The Assessment Appeal Panel shall consider, and make recommendations to the Board concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the Board shall constitute the final disciplinary action of the Exchange.~~

#### **(E) ARBITRATION PROCEDURE**

(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.

(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.

(3) The Arbitration will be governed by Chapter 5 of the Rules except that the Chairman of the Exchange or his designee shall appoint an Arbitration Panel composed of three Members of the Exchange, at least one of whom shall be a Member of the Board of Directors.

**(A) DEFINITION. As used in this Rule 860.14, the following terms, as well as variations thereof, shall have the meaning described below.**

**(1) "Late Performance" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules. Late Performance shall be restricted to three business days. Late Performance beyond three business days by, a Seller or a Buyer will be deemed a Failure to Perform.**

**(2) "Day of Late Performance" shall mean the twenty-four hour period commencing immediately after a Buyer, a Seller, or the Clearing House was to have performed. Each subsequent Day of Late Performance shall commence twenty-four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act was to have performed shall be a Day of Late Performance.**

**(3) "Failure to Perform" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.**

**(4) "Contract Value" shall mean the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of allowances per contract) times the number of contracts to be delivered.**

**(5) (a) "Party" shall mean a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.**

**(b) "Other Party" shall mean the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.**

**(6) "Force Majeure" shall mean any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.**

#### **(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY**

**(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.**

**(2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.**

#### **(C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE**

**(1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the**

Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:

(a) When the Chairman of the Emissions Allowance Delivery Committee is advised by the President of the Exchange or any person designated by the President of the Exchange that it appears that the performance of a Party to the delivery is late;

(b) Upon the written request of both the Buyer and the Seller;

(c) When the President of the Exchange or any person designated by the President of the Exchange requests such appointment; or

(d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.

(2) The Chairman of the Emissions Allowance Delivery Committee shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.

(3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Market Regulation Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.

(4) Upon a finding of force majeure, the Panel may take any one or combination of the following actions as it deems suitable order: an extension of time not to exceed ten days from the date of the scheduled delivery; or, refer the delivery to the Exchange, represented by the Market Regulation Department, for emergency action.

#### (D) EXCHANGE ACTION

(1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of a delivery obligation, the Exchange, represented by the Market Regulation Department, shall issue a Notice of Assessment, assessing a penalty of 10% of contract value for each applicable day of Late Performance.

(2) Whenever a Buyer or Seller is found by the Panel or otherwise deemed to have a "Failure to Perform" the Exchange, represented by the Market Regulation Department shall issue a Notice of Assessment assessing penalties of twenty percent (20%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (1) above, to be paid to the Exchange.

(3) (a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Market Regulation Department, within two business days of receipt of the Notice of Assessment from the Market Regulation Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.

(b) The Market Regulation Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.

(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(3)(a) of this Rule shall constitute a waiver, and the penalties

set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Chapter 4. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment, the Assessment and findings of the Emissions Allowance Delivery Committee shall constitute a final disciplinary action of the Exchange.

- (4) Within ten (10) days after receipt of Market Regulation Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by Market Regulation Department or are otherwise relevant to the matter.
- (5) In the event of an appeal by a Party, the President, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the President, or his designee, any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.
- (6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

  - (a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Market Regulation Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.
  - (b) At such hearing: The Appellant may appear personally and may be represented by counselor other representative of his choice at the appeal.
  - (c) The Market Regulation Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Market Regulation Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.
  - (d) The Appellant shall be entitled to rebut the Market Regulation Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.
  - (e) The Market Regulation Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.
  - (f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.
  - (g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.
  - (h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.
  - (i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.



- (8) The Assessment Appeal Panel shall consider, and make recommendations to the President, or his designee concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the President shall constitute the final disciplinary action of the Exchange.

**(E) ARBITRATION PROCEDURE**

- (1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.
- (2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.
- (3) The Arbitration will be governed by Chapter 6A of the Rules except that the President or his designee shall appoint an Arbitration Panel.

## Seasonal NO<sub>x</sub> Emissions Allowance Vintage 2010 Futures ~~Contract~~

### 861.01 Scope

The provisions of these rules shall apply to all Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> emissions allowances vintage 2010 (or earlier vintages) bought or sold for future delivery on the Exchange with the Delivery at the U.S. Environmental Protection Agency's (EPA) NO<sub>x</sub> Allowance Management System (NAMS).

#### 861.01A Definitions

- A. EPA means the U.S. Environmental Protection Agency or any successor agency with similar jurisdiction.
- B. Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> Allowance refers to a tradable permit to emit ~~one ton of NO<sub>x</sub>~~NO<sub>x</sub> from May 1 to September 30 in a given or subsequent calendar year under the Clean Air Interstate Rule (CAIR) Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> Budget Trading Program as specified further by EPA.
- C. NO<sub>x</sub> Allowance Management System (NAMS) means the system established by the EPA for recording the transfer of Allowances among various entities under the Clean Air Act as set.
- D. Vintage Year means the first calendar year for which the allowance may be utilized for compliance.
- E. The terms "Seller" and "Buyer" shall mean the short Clearing Member and the long Clearing Member, respectively.
- F. The terms "Seller's Customer" and "Buyer's Customer" shall mean the seller and buyer of the physical product or swap transaction.
- G. The term "Settlement Price" shall mean the final settlement price used as the price for delivery of the product, which shall be the settlement price for the last trading day of the expiring delivery month. The settlement price for the last day of the trading shall be determined in accordance with the procedures set forth in Exchange NYMEX Rule 813~~41G.11~~.

#### 861.03 Contract Unit

The contract unit shall be ten (10) ~~allowances~~allowances of Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> emissions allowances vintage 2010 (or earlier vintages) for delivery made by transfer through NAMS.

#### 861.05 Delivery Months

Trading shall be conducted in contracts providing for delivery in such periods as shall be determined by the Exchange~~Board of Directors~~.

#### 861.06 Minimum Price Fluctuations

Prices shall be quoted in dollars per ~~allowance~~allowance. The minimum price fluctuation shall be \$25.00 per ~~allowance~~allowance (\$250.00 per contract). There shall be no maximum price fluctuation.

#### 861.08 Product Placement

For purposes of Rule 9A.19, the Seller and Buyer shall fulfill its contractual obligation on a maturing contract only if, by 12:00 noon on the day preceding the last trading day in the applicable delivery month, such Seller and Buyer have received NAMS account certification from his customer, in the form prescribed by the Exchange stating that the Customer has an account with NAMS.

The receipt of such certification shall not relieve the Seller or Buyer, or their respective Customers of any obligations under any Rule other than Rule 9A.19.

#### 861.12 Exchange of Futures for, ~~or in Connection with Product~~ Physical (EFP) and Exchange of Futures for Swaps (EFS)

- A. An exchange of futures for, or in connection with, ~~the product (EFP)~~ **or exchange of futures for, or in connection with, swap (EFS) transactions** consist of two discrete, but related, transactions; a cash transaction and a futures transaction. At the time such transaction is effected, the Buyer's Customer and the Seller's Customer of the futures must be the Seller's Customer and the Buyer's Customer of a quantity of the physical product **or swaps agreement** covered by this Section (or any derivative, by product or related product.) The quantity of physical product must be approximately equivalent to the quantity covered by the futures contracts.
- B. Except as provided below, an EFP **or EFS transaction** must take place during the hours of futures trading for the Seasonal NO<sub>x</sub> Emissions Allowance futures contract. An EFP **or EFS** is permitted in the expiring futures contract until two hours after trading terminates on the last day of trading of the expiring futures contract. An EFP **or EFS** which establishes a futures position for both the buyer and the seller shall not be permitted during the two hour period following the termination of trading of expired futures contract.
- C. Any EFP **or EFS transaction** ~~Exchange of Futures for, or in Connection with, Product (EFP)~~ shall be governed by the provisions of Rule 6.21 **and 6.21A, respectively.**
- D. Each Buyer's Customer and Seller's Customer must satisfy the Exchange, at its request, that the transaction is a legitimate EFP **or EFS** transaction. All documentary evidence relating to EFP **or EFS**, including, without limitation, evidence as to change of ownership of the physical commodity **or swap commitment**, shall be obtained by the Clearing Members from their customers or and made available by the Clearing Members for examination by the Exchange upon request.
- E. **A report of each EFP or EFS transaction shall be entered on the day that the transaction thereto was made, or if such agreement was made after the close of trading, then on the next business day. EFP or EFS transactions shall be cleared through the Exchange in accordance with normal procedures, shall be clearly identified as EFP or EFS transactions, and shall be recorded as such by the Exchange and by the Clearing Members involved.**

#### **861.14 Force Majeure, Late Performance and Failure to Perform**

(A) DEFINITION. As used in this Rule 861.14 the following terms, as well as variations thereof, shall have the meaning described below.

- (1) "Late Performance" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules.
- (2) "Failure to Perform" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.
- (3) "Contract Value" means the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of tons per contract) times the number of contracts to be delivered.
- (4)(a) "Party" means a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.
- (b) "Other Party" means the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.
- (5) "Day of Late Performance" means the twenty four hour period commencing twelve hours after a Buyer or a Seller was to have performed, provided however, with respect to the obligations of Buyers and Sellers to submit documents to the Exchange pursuant to the Rules in this chapter, and with respect to the failure to transfer allowances within the nominated half cycle, "Day of Late Performance" means that twenty four hour period commencing immediately after the time specified in the Rules in this chapter for the submission of a document. Each subsequent Day of Late Performance shall commence twenty four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act is performed shall be a Day of Late Performance.

(6) "Force Majeure" means any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.

#### ~~(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY~~

~~(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.~~

~~(2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.~~

#### ~~C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE~~

~~(1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:~~

~~(a) When the Chairman is advised by the President or any person designated by the President that it appears that the performance of a Party to the delivery is late;~~

~~(b) Upon the written request of both the Buyer and the Seller;~~

~~(c) When the President or any person designated by the President requests such appointment; or~~

~~(d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.~~

~~(2) The Chairman shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.~~

~~(3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Compliance Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.~~

~~(4) Upon a finding of force majeure, the Panel may take anyone or combination of the following actions as it deems suitable order an extension of time not to exceed five days from the date of the scheduled delivery; or, refer the delivery to the Board of Directors for emergency action as provided in Article 7.~~

#### ~~(D) EXCHANGE ACTION~~

~~(1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of or to have failed to perform a delivery, the Exchange, represented by the Compliance Department, shall issue a Notice of Assessment in accordance with subsections (2) of this Section, specifying the findings of the Panel with respect to the late or failed delivery.~~

~~(2) When a Party has failed to perform, the Compliance Department shall issue a Notice of Assessment assessing penalties of ten percent (10%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (2) hereof, to be paid to the Exchange.~~

~~(3)(a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Compliance Counsel, within two business days of receipt of the Notice of Assessment from the Compliance Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.~~

~~(b) The Compliance Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.~~

~~(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(4)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Bylaw 106. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment the Assessment and findings of the Delivery Committee shall constitute a final disciplinary action of the Exchange.~~

~~(4) Within ten (10) days after receipt of the Compliance Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by the Compliance Department or are otherwise relevant to the matter.~~

~~(5) In the event of an appeal by a Party, the Chairman of the Exchange, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. The Panel shall be composed of three members of the Exchange, at least one of whom shall be a member of the Board of Directors. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the Chairman any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.~~

~~(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:~~

~~(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Compliance Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.~~

~~(b) At such hearing: The Appellant may appear personally and may be represented by counselor or other representative of his choice at the appeal.~~

~~(c) The Compliance Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Compliance Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.~~

~~(d) The Appellant shall be entitled to rebut the Compliance Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.~~

~~(e) The Compliance Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.~~

~~(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.~~

~~(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.~~

~~(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.~~

~~(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.~~

~~(8) The Assessment Appeal Panel shall consider, and make recommendations to the Board concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the Board shall constitute the final disciplinary action of the Exchange.~~

#### **(E) ARBITRATION PROCEDURE**

(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.

(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.

(3) The Arbitration will be governed by Chapter 5 of the Rules except that the Chairman of the Exchange or his designee shall appoint an Arbitration Panel composed of three Members of the Exchange, at least one of whom shall be a Member of the Board of Directors.

**(A) DEFINITION. As used in this Rule 861.14, the following terms, as well as variations thereof, shall have the meaning described below.**

**(1) "Late Performance" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules. Late Performance shall be restricted to three business days. Late Performance beyond three business days by, a Seller or a Buyer will be deemed a Failure to Perform.**

**(2) "Day of Late Performance" shall mean the twenty-four hour period commencing immediately after a Buyer, a Seller, or the Clearing House was to have performed. Each subsequent Day of Late Performance shall commence twenty-four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act was to have performed shall be a Day of Late Performance.**

**(3) "Failure to Perform" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.**

**(4) "Contract Value" shall mean the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of allowances per contract) times the number of contracts to be delivered.**

**(5) (a) "Party" shall mean a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.**

**(b) "Other Party" shall mean the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.**

**(6) "Force Majeure" shall mean any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.**

#### **(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY**

**(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.**

**(2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.**

#### **(C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE**

**(1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the**

Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:

(a) When the Chairman of the Emissions Allowance Delivery Committee is advised by the President of the Exchange or any person designated by the President of the Exchange that it appears that the performance of a Party to the delivery is late;

(b) Upon the written request of both the Buyer and the Seller;

(c) When the President of the Exchange or any person designated by the President of the Exchange requests such appointment; or

(d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.

(2) The Chairman of the Emissions Allowance Delivery Committee shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.

(3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Market Regulation Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.

(4) Upon a finding of force majeure, the Panel may take any one or combination of the following actions as it deems suitable order: an extension of time not to exceed ten days from the date of the scheduled delivery; or, refer the delivery to the Exchange, represented by the Market Regulation Department, for emergency action.

#### (D) EXCHANGE ACTION

(1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of a delivery obligation, the Exchange, represented by the Market Regulation Department, shall issue a Notice of Assessment, assessing a penalty of 10% of contract value for each applicable day of Late Performance.

(2) Whenever a Buyer or Seller is found by the Panel or otherwise deemed to have a "Failure to Perform" the Exchange, represented by the Market Regulation Department shall issue a Notice of Assessment assessing penalties of twenty percent (20%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (1) above, to be paid to the Exchange.

(3) (a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Market Regulation Department, within two business days of receipt of the Notice of Assessment from the Market Regulation Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.

(b) The Market Regulation Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.

(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(3)(a) of this Rule shall constitute a waiver, and the penalties

set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Chapter 4. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment, the Assessment and findings of the Emissions Allowance Delivery Committee shall constitute a final disciplinary action of the Exchange.

- (4) Within ten (10) days after receipt of Market Regulation Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by Market Regulation Department or are otherwise relevant to the matter.
- (5) In the event of an appeal by a Party, the President, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the President, or his designee, any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.
- (6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

  - (a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Market Regulation Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.
  - (b) At such hearing: The Appellant may appear personally and may be represented by counselor other representative of his choice at the appeal.
  - (c) The Market Regulation Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Market Regulation Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.
  - (d) The Appellant shall be entitled to rebut the Market Regulation Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.
  - (e) The Market Regulation Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.
  - (f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.
  - (g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.
  - (h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.
  - (i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.



(8) The Assessment Appeal Panel shall consider, and make recommendations to the President, or his designee concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the President shall constitute the final disciplinary action of the Exchange.

(E) ARBITRATION PROCEDURE

(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.

(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.

(3) The Arbitration will be governed by Chapter 6A of the Rules except that the President or his designee shall appoint an Arbitration Panel.

## Seasonal NO<sub>x</sub> Emissions Allowance Vintage 2011 Futures Contract

### 862.01 Scope

The provisions of these rules shall apply to all Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> emissions allowances vintage 2011 (or earlier vintages) bought or sold for future delivery on the Exchange with the Delivery at the U.S. Environmental Protection Agency's (EPA) NO<sub>x</sub> Allowance Management System (NAMS).

#### 862.01A Definitions

- EPA means the U.S. Environmental Protection Agency or any successor agency with similar jurisdiction.
- Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> Allowance refers to a tradable permit to emit ~~one ton of NO<sub>x</sub>~~NO<sub>x</sub> from May 1 to September 30 in a given or subsequent calendar year under the Clean Air Interstate Rule (CAIR) Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> Budget Trading Program as specified further by EPA.
- ~~NO<sub>x</sub>~~NO<sub>x</sub> Allowance Management System (NAMS) means the system established by the EPA for recording the transfer of Allowances among various entities under the Clean Air Act as set.
- Vintage Year means the first calendar year for which the allowance may be utilized for compliance.
- The terms "Seller" and "Buyer" shall mean the short Clearing Member and the long Clearing Member, respectively.
- The terms "Seller's Customer" and "Buyer's Customer" shall mean the seller and buyer of the physical product or swap transaction.
- The term "Settlement Price" shall mean the final settlement price used as the price for delivery of the product, which shall be the settlement price for the last trading day of the expiring delivery month. The settlement price for the last day of the trading shall be determined in accordance with the procedures set forth in Exchange NYMEX Rule ~~813~~11G.11.

### 862.03 Contract Unit

The contract unit shall be ten (10) ~~allowances~~allowances of Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> emissions allowances vintage 2011 (or earlier vintages) for delivery made by transfer through NAMS.

### 862.05 Delivery Months

Trading shall be conducted in contracts providing for delivery in such periods as shall be determined by the Exchange ~~Board of Directors~~.

### 862.06 Minimum Price Fluctuations

Prices shall be quoted in dollars per ~~allowance~~allowance. The minimum price fluctuation shall be \$25.00 per ~~allowance~~allowance (\$250.00 per contract). There shall be no maximum price fluctuation.

### 862.08 Product Placement

For purposes of Rule 9A.19, the Seller and Buyer shall fulfill its contractual obligation on a maturing contract only if, by 12:00 noon on the day preceding the last trading day in the applicable delivery month, such Seller and Buyer have received NAMS account certification from his customer, in the form prescribed by the Exchange stating that the Customer has an account with NAMS.

The receipt of such certification shall not relieve the Seller or Buyer, or their respective Customers of any obligations under any Rule other than Rule 9A.19.

**862.12 Exchange of Futures for, ~~or in Connection with Product~~ Physical (EFP) and Exchange of Futures for Swaps (EFS)**

- A. An exchange of futures for, or in connection with, ~~the product (EFP)~~ or exchange of futures for, or in connection with, swap (EFS) transactions consist of two discrete, but related, transactions; a cash transaction and a futures transaction. At the time such transaction is effected, the Buyer's Customer and the Seller's Customer of the futures must be the Seller's Customer and the Buyer's Customer of a quantity of the physical product or swaps agreement covered by this Section (or any derivative, by-product or related product.) The quantity of physical product must be approximately equivalent to the quantity covered by the futures contracts.
- B. Except as provided below, an EFP or EFS transaction must take place during the hours of futures trading for the Seasonal NO<sub>x</sub> Emissions Allowance futures contract. An EFP or EFS is permitted in the expiring futures contract until two hours after trading terminates on the last day of trading of the expiring futures contract. An EFP or EFS which establishes a futures position for both the buyer and the seller shall not be permitted during the two hour period following the termination of trading of expired futures contract.
- C. Any EFP or EFS transaction ~~Exchange of Futures for, or in Connection with, Product (EFP)~~ shall be governed by the provisions of Rule 6.21 and 6.21A, respectively.
- D. Each Buyer's Customer and Seller's Customer must satisfy the Exchange, at its request, that the transaction is a legitimate EFP or EFS transaction. All documentary evidence relating to EFP or EFS, including, without limitation, evidence as to change of ownership of the physical commodity or swap commitment, shall be obtained by the Clearing Members from their customers or and made available by the Clearing Members for examination by the Exchange upon request.
- E. A report of each EFP or EFS transaction shall be entered on the day that the transaction thereto was made, or if such agreement was made after the close of trading, then on the next business day. EFP or EFS transactions shall be cleared through the Exchange in accordance with normal procedures, shall be clearly identified as EFP or EFS transactions, and shall be recorded as such by the Exchange and by the Clearing Members involved.

**862.14 Force Majeure, Late Performance and Failure to Perform**

(A) DEFINITION. As used in this Rule 862.14 the following terms, as well as variations thereof, shall have the meaning described below:

- (1) ~~"Late Performance" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules.~~
- (2) ~~"Failure to Perform" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.~~
- (3) ~~"Contract Value" means the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of tons per contract) times the number of contracts to be delivered.~~
- (4)(a) ~~"Party" means a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.~~
- (b) ~~"Other Party" means the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.~~
- (5) ~~"Day of Late Performance" means the twenty four hour period commencing twelve hours after a Buyer or a Seller was to have performed, provided however, with respect to the obligations of Buyers and Sellers to submit documents to the Exchange pursuant to the Rules in this chapter, and with respect to the failure to transfer allowances within the nominated half cycle, "Day of Late Performance" means that twenty four hour period commencing immediately after the time specified in the Rules in this chapter for the submission of a document. Each subsequent Day of Late Performance shall commence twenty four~~

hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act is performed shall be a Day of Late Performance.

(6) "Force Majeure" means any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.

#### **(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY**

(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.

(2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.

#### **(C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE**

(1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:

(a) When the Chairman is advised by the President or any person designated by the President that it appears that the performance of a Party to the delivery is late;

(b) Upon the written request of both the Buyer and the Seller;

(c) When the President or any person designated by the President requests such appointment; or

(d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.

(2) The Chairman shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.

(3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Compliance Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.

(4) Upon a finding of force majeure, the Panel may take any one or combination of the following actions as it deems suitable: order an extension of time not to exceed five days from the date of the scheduled delivery; or, refer the delivery to the Board of Directors for emergency action as provided in Article 7.

#### **(D) EXCHANGE ACTION**

(1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of or to have failed to perform a delivery, the Exchange, represented by the Compliance Department, shall issue a Notice of Assessment in accordance with subsections (2) of this Section, specifying the findings of the Panel with respect to the late or failed delivery.

(2) When a Party has failed to perform, the Compliance Department shall issue a Notice of Assessment assessing penalties of ten percent (10%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (2) hereof, to be paid to the Exchange.

(3)(a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Compliance Counsel, within two business days of receipt of the Notice of Assessment from the Compliance Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a

Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.

(b) The Compliance Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.

(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(4)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Bylaw 106. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment the Assessment and findings of the Delivery Committee shall constitute a final disciplinary action of the Exchange.

(4) Within ten (10) days after receipt of the Compliance Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by the Compliance Department or are otherwise relevant to the matter.

(5) In the event of an appeal by a Party, the Chairman of the Exchange, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. The Panel shall be composed of three members of the Exchange, at least one of whom shall be a member of the Board of Directors. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the Chairman any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.

(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Compliance Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.

(b) At such hearing: The Appellant may appear personally and may be represented by counselor or other representative of his choice at the appeal.

(c) The Compliance Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Compliance Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.

(d) The Appellant shall be entitled to rebut the Compliance Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.

(e) The Compliance Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.

(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.

(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.

(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.

(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.

(8) The Assessment Appeal Panel shall consider, and make recommendations to the Board concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the Board shall constitute the final disciplinary action of the Exchange.

#### **(E) ARBITRATION PROCEDURE**

(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.

(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.

(3) The Arbitration will be governed by Chapter 5 of the Rules except that the Chairman of the Exchange or his designee shall appoint an Arbitration Panel composed of three Members of the Exchange, at least one of whom shall be a Member of the Board of Directors.

**(A) DEFINITION. As used in this Rule 862.14, the following terms, as well as variations thereof, shall have the meaning described below.**

**(1) "Late Performance" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules. Late Performance shall be restricted to three business days. Late Performance beyond three business days by, a Seller or a Buyer will be deemed a Failure to Perform.**

**(2) "Day of Late Performance" shall mean the twenty-four hour period commencing immediately after a Buyer, a Seller, or the Clearing House was to have performed. Each subsequent Day of Late Performance shall commence twenty-four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act was to have performed shall be a Day of Late Performance.**

**(3) "Failure to Perform" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.**

**(4) "Contract Value" shall mean the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of allowances per contract) times the number of contracts to be delivered.**

**(5) (a) "Party" shall mean a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.**

**(b) "Other Party" shall mean the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.**

**(6) "Force Majeure" shall mean any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.**

#### **(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY**

**(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.**

**(2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.**

#### **(C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE**

- (1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:
- (a) When the Chairman of the Emissions Allowance Delivery Committee is advised by the President of the Exchange or any person designated by the President of the Exchange that it appears that the performance of a Party to the delivery is late;
  - (b) Upon the written request of both the Buyer and the Seller;
  - (c) When the President of the Exchange or any person designated by the President of the Exchange requests such appointment; or
  - (d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.
- (2) The Chairman of the Emissions Allowance Delivery Committee shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.
- (3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Market Regulation Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.
- (4) Upon a finding of force majeure, the Panel may take any one or combination of the following actions as it deems suitable order: an extension of time not to exceed ten days from the date of the scheduled delivery; or, refer the delivery to the Exchange, represented by the Market Regulation Department, for emergency action.

#### (D) EXCHANGE ACTION

- (1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of a delivery obligation, the Exchange, represented by the Market Regulation Department, shall issue a Notice of Assessment, assessing a penalty of 10% of contract value for each applicable day of Late Performance.
- (2) Whenever a Buyer or Seller is found by the Panel or otherwise deemed to have a "Failure to Perform" the Exchange, represented by the Market Regulation Department shall issue a Notice of Assessment assessing penalties of twenty percent (20%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (1) above, to be paid to the Exchange.
- (3) (a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Market Regulation Department, within two business days of receipt of the Notice of Assessment from the Market Regulation Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.
- (b) The Market Regulation Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.

(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(3)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Chapter 4. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment, the Assessment and findings of the Emissions Allowance Delivery Committee shall constitute a final disciplinary action of the Exchange.

(4) Within ten (10) days after receipt of Market Regulation Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by Market Regulation Department or are otherwise relevant to the matter.

(5) In the event of an appeal by a Party, the President, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the President, or his designee, any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.

(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Market Regulation Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.

(b) At such hearing: The Appellant may appear personally and may be represented by counselor other representative of his choice at the appeal.

(c) The Market Regulation Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Market Regulation Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.

(d) The Appellant shall be entitled to rebut the Market Regulation Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.

(e) The Market Regulation Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.

(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.

(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.

(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.

(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.



- (8) The Assessment Appeal Panel shall consider, and make recommendations to the President, or his designee concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the President shall constitute the final disciplinary action of the Exchange.

(E) ARBITRATION PROCEDURE

- (1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.
- (2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.
- (3) The Arbitration will be governed by Chapter 6A of the Rules except that the President or his designee shall appoint an Arbitration Panel.

## Seasonal NO<sub>x</sub> Emissions Allowance Vintage 2012 Futures ~~Contract~~

### 863.01 Scope

The provisions of these rules shall apply to all Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> emissions allowances vintage 2012 (or earlier vintages) bought or sold for future delivery on the Exchange with the Delivery at the U.S Environmental Protection Agency's (EPA) NO<sub>x</sub> Allowance Management System (NAMS).

#### 863.01A Definitions

- A. EPA means the U.S. Environmental Protection Agency or any successor agency with similar jurisdiction.
- B. Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> Allowance refers to a tradable permit to emit ~~one ton of NO<sub>x</sub>~~NO<sub>x</sub> from May 1 to September 30 in a given or subsequent calendar year under the Clean Air Interstate Rule (CAIR) Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> Budget Trading Program as specified further by EPA.
- C. ~~NO<sub>x</sub>~~NO<sub>x</sub> Allowance Management System (NAMS) means the system established by the EPA for recording the transfer of Allowances among various entities under the Clean Air Act as set.
- D. Vintage Year means the first calendar year for which the allowance may be utilized for compliance.
- E. The terms "Seller" and "Buyer" shall mean the short Clearing Member and the long Clearing Member, respectively.
- F. The terms "Seller's Customer" and "Buyer's Customer" shall mean the seller and buyer of the physical product or swap transaction.
- G. The term "Settlement Price" shall mean the final settlement price used as the price for delivery of the product, which shall be the settlement price for the last trading day of the expiring delivery month. The settlement price for the last day of the trading shall be determined in accordance with the procedures set forth in Exchange ~~NYMEX~~ Rule 81311G-11.

### 863.03 Contract Unit

The contract unit shall be ten (10) ~~allowances~~allowances of Seasonal ~~NO<sub>x</sub>~~NO<sub>x</sub> emissions allowances vintage 2012 (or earlier vintages) for delivery made by transfer through NAMS.

### 863.05 Delivery Months

Trading shall be conducted in contracts providing for delivery in such periods as shall be determined by the Exchange ~~Board of Directors~~.

### 863.06 Minimum Price Fluctuations

Prices shall be quoted in dollars per ~~allowance~~allowance. The minimum price fluctuation shall be \$25.00 per ~~allowance~~allowance (\$250.00 per contract). There shall be no maximum price fluctuation.

### 863.08 Product Placement

For purposes of Rule 9A.19, the Seller and Buyer shall fulfill its contractual obligation on a maturing contract only if, by 12:00 noon on the day preceding the last trading day in the applicable delivery month, such Seller and Buyer have received NAMS account certification from his customer, in the form prescribed by the Exchange stating that the Customer has an account with NAMS;2

The receipt of such certification shall not relieve the Seller or Buyer, or their respective Customers of any obligations under any Rule other than Rule 9A.19.

### 863.12 Exchange of Futures for, ~~or in Connection with Product~~ Physical (EFP) and Exchange of Futures for Swaps (EFS)

- A. An exchange of futures for, or in connection with, ~~the product (EFP)~~ **or exchange of futures for, or in connection with, swap (EFS) transactions** consist of two discrete, but related, transactions; a cash transaction and a futures transaction. At the time such transaction is effected, the Buyer's Customer and the Seller's Customer of the futures must be the Seller's Customer and the Buyer's Customer of a quantity of the physical product **or swaps agreement** covered by this Section (or any derivative, by-product or related product.) The quantity of physical product must be approximately equivalent to the quantity covered by the futures contracts.
- B. Except as provided below, an EFP **or EFS transaction** must take place during the hours of futures trading for the Seasonal NO<sub>x</sub> Emissions Allowance futures contract. An EFP **or EFS** is permitted in the expiring futures contract until two hours after trading terminates on the last day of trading of the expiring futures contract. An EFP **or EFS** which establishes a futures position for both the buyer and the seller shall not be permitted during the two hour period following the termination of trading of expired futures contract.
- C. Any EFP **or EFS transaction** ~~Exchange of Futures for, or in Connection with, Product (EFP)~~ shall be governed by the provisions of Rule 6.21 **and 6.21A, respectively.**
- D. Each Buyer's Customer and Seller's Customer must satisfy the Exchange, at its request, that the transaction is a legitimate EFP **or EFS** transaction. All documentary evidence relating to EFP **or EFS**, including, without limitation, evidence as to change of ownership of the physical commodity **or swap commitment**, shall be obtained by the Clearing Members from their customers or and made available by the Clearing Members for examination by the Exchange upon request.
- E. **A report of each EFP or EFS transaction shall be entered on the day that the transaction thereto was made, or if such agreement was made after the close of trading, then on the next business day. EFP or EFS transactions shall be cleared through the Exchange in accordance with normal procedures, shall be clearly identified as EFP or EFS transactions, and shall be recorded as such by the Exchange and by the Clearing Members involved.**

#### **863.14 Force Majeure, Late Performance and Failure to Perform**

(A) ~~DEFINITION. As used in this Rule 863.14 the following terms, as well as variations thereof, shall have the meaning described below:~~

- (1) ~~"Late Performance" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules.~~
- (2) ~~"Failure to Perform" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.~~
- (3) ~~"Contract Value" means the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of tons per contract) times the number of contracts to be delivered.~~
- (4)(a) ~~"Party" means a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.~~
- (b) ~~"Other Party" means the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.~~
- (5) ~~"Day of Late Performance" means the twenty four hour period commencing twelve hours after a Buyer or a Seller was to have performed; provided however, with respect to the obligations of Buyers and Sellers to submit documents to the Exchange pursuant to the Rules in this chapter, and with respect to the failure to transfer allowances within the nominated half cycle, "Day of Late Performance" means that twenty four hour period commencing immediately after the time specified in the Rules in this chapter for~~

~~the submission of a document. Each subsequent Day of Late Performance shall commence twenty four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act is performed shall be a Day of Late Performance.~~

~~(6) "Force Majeure" means any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.~~

#### ~~(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY~~

~~(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.~~

~~(2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.~~

#### ~~C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE~~

~~(1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:~~

~~(a) When the Chairman is advised by the President or any person designated by the President that it appears that the performance of a Party to the delivery is late;~~

~~(b) Upon the written request of both the Buyer and the Seller;~~

~~(c) When the President or any person designated by the President requests such appointment; or~~

~~(d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.~~

~~(2) The Chairman shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.~~

~~(3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Compliance Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.~~

~~(4) Upon a finding of force majeure, the Panel may take anyone or combination of the following actions as it deems suitable order an extension of time not to exceed five days from the date of the scheduled delivery; or, refer the delivery to the Board of Directors for emergency action as provided in Article 7.~~

#### ~~(D) EXCHANGE ACTION~~

~~(1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of or to have failed to perform a delivery, the Exchange, represented by the Compliance Department, shall issue a Notice of Assessment in accordance with subsections (2) of this Section, specifying the findings of the Panel with respect to the late or failed delivery.~~

~~(2) When a Party has failed to perform, the Compliance Department shall issue a Notice of Assessment assessing penalties of ten percent (10%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (2) hereof, to be paid to the Exchange.~~

~~(3)(a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Compliance Counsel, within two business days of receipt of the Notice of Assessment from the Compliance Department. The Party filing~~

the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.

(b) The Compliance Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.

(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(34)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Bylaw 106. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment the Assessment and findings of the Delivery Committee shall constitute a final disciplinary action of the Exchange.

(4) Within ten (10) days after receipt of the Compliance Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by the Compliance Department or are otherwise relevant to the matter.

(5) In the event of an appeal by a Party, the Chairman of the Exchange, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. The Panel shall be composed of three members of the Exchange, at least one of whom shall be a member of the Board of Directors. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the Chairman any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.

(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Compliance Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.

(b) At such hearing: The Appellant may appear personally and may be represented by counselor or other representative of his choice at the appeal.

(c) The Compliance Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Compliance Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.

(d) The Appellant shall be entitled to rebut the Compliance Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.

(e) The Compliance Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.

(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.

(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.

(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.

(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the

decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.

(8) The Assessment Appeal Panel shall consider, and make recommendations to the Board concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the Board shall constitute the final disciplinary action of the Exchange.

#### (E) ARBITRATION PROCEDURE

(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.

(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.

(3) The Arbitration will be governed by Chapter 5 of the Rules except that the Chairman of the Exchange or his designee shall appoint an Arbitration Panel composed of three Members of the Exchange, at least one of whom shall be a Member of the Board of Directors.

**(A) DEFINITION. As used in this Rule 863.14, the following terms, as well as variations thereof, shall have the meaning described below.**

**(1) "Late Performance" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules. Late Performance shall be restricted to three business days. Late Performance beyond three business days by, a Seller or a Buyer will be deemed a Failure to Perform.**

**(2) "Day of Late Performance" shall mean the twenty-four hour period commencing immediately after a Buyer, a Seller, or the Clearing House was to have performed. Each subsequent Day of Late Performance shall commence twenty-four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act was to have performed shall be a Day of Late Performance.**

**(3) "Failure to Perform" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.**

**(4) "Contract Value" shall mean the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of allowances per contract) times the number of contracts to be delivered.**

**(5) (a) "Party" shall mean a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.**

**(b) "Other Party" shall mean the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.**

**(6) "Force Majeure" shall mean any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.**

#### **(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY**

**(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.**

- (2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.

**(C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE**

- (1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:
- (a) When the Chairman of the Emissions Allowance Delivery Committee is advised by the President of the Exchange or any person designated by the President of the Exchange that it appears that the performance of a Party to the delivery is late;
- (b) Upon the written request of both the Buyer and the Seller;
- (c) When the President of the Exchange or any person designated by the President of the Exchange requests such appointment; or
- (d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.
- (2) The Chairman of the Emissions Allowance Delivery Committee shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.
- (3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Market Regulation Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.
- (4) Upon a finding of force majeure, the Panel may take any one or combination of the following actions as it deems suitable order: an extension of time not to exceed ten days from the date of the scheduled delivery; or, refer the delivery to the Exchange, represented by the Market Regulation Department, for emergency action.

**(D) EXCHANGE ACTION**

- (1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of a delivery obligation, the Exchange, represented by the Market Regulation Department, shall issue a Notice of Assessment, assessing a penalty of 10% of contract value for each applicable day of Late Performance.
- (2) Whenever a Buyer or Seller is found by the Panel or otherwise deemed to have a "Failure to Perform" the Exchange, represented by the Market Regulation Department shall issue a Notice of Assessment assessing penalties of twenty percent (20%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (1) above, to be paid to the Exchange.
- (3) (a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Market Regulation Department, within two business days of receipt of the Notice of Assessment from the Market Regulation Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must

be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.

(b) The Market Regulation Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.

(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(3)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Chapter 4. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment, the Assessment and findings of the Emissions Allowance Delivery Committee shall constitute a final disciplinary action of the Exchange.

(4) Within ten (10) days after receipt of Market Regulation Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by Market Regulation Department or are otherwise relevant to the matter.

(5) In the event of an appeal by a Party, the President, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the President, or his designee, any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.

(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Market Regulation Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.

(b) At such hearing: The Appellant may appear personally and may be represented by counselor or other representative of his choice at the appeal.

(c) The Market Regulation Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Market Regulation Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.

(d) The Appellant shall be entitled to rebut the Market Regulation Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.

(e) The Market Regulation Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.

(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.

(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.



(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.

(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.

(8) The Assessment Appeal Panel shall consider, and make recommendations to the President, or his designee concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the President shall constitute the final disciplinary action of the Exchange.

#### (E) ARBITRATION PROCEDURE

(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.

(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.

(3) The Arbitration will be governed by Chapter 6A of the Rules except that the President or his designee shall appoint an Arbitration Panel.

## **Annual NO<sub>x</sub> Emissions Allowance Vintage 2009 Futures Contract**

### **864.01 Scope**

The provisions of these rules shall apply to all Annual ~~NOX~~NO<sub>x</sub> emissions allowances vintage 2009 (or earlier vintages) bought or sold for future delivery on the Exchange with the Delivery at the U.S. Environmental Protection Agency's (EPA) NO<sub>x</sub> Allowance Management System (NAMS).

### **864.01A Definitions**

- A. EPA means the U.S. Environmental Protection Agency or any successor agency with similar jurisdiction.
- B. Annual ~~NOX~~NO<sub>x</sub> Allowance refers to a tradable permit to emit ~~one ton of NOX~~NO<sub>x</sub> from January 1 to December 31 in a given or subsequent calendar year under the Clean Air Interstate Rule (CAIR) Annual NOX Budget Trading Program as specified further by EPA.
- C. ~~NOX~~NO<sub>x</sub> Allowance Management System (NAMS) means the system established by the EPA for recording the transfer of Allowances among various entities under the Clean Air Act as set.
- D. Vintage Year means the first calendar year for which the allowance may be utilized for compliance.
- E. The terms "Seller" and "Buyer" shall mean the short Clearing Member and the long Clearing Member, respectively.
- F. The terms "Seller's Customer" and "Buyer's Customer" shall mean the seller and buyer of the physical product or swap transaction.
- G. The term "Settlement Price" shall mean the final settlement price used as the price for delivery of the product, which shall be the settlement price for the last trading day of the expiring delivery month. The settlement price for the last day of the trading shall be determined in accordance with the procedures set forth in Exchange ~~NYMEX~~ Rule 8134G.11.

### **864.03 Contract Unit**

The contract unit shall be ten (10) allowances~~tons~~ of Annual NOX emissions allowances vintage 2009 (or earlier vintages) for delivery made by transfer through NAMS.

### **864.05 Delivery Months**

Trading shall be conducted in contracts providing for delivery in such periods as shall be determined by the Exchange~~Board of Directors~~.

### **864.06 Minimum Price Fluctuations**

Prices shall be quoted in dollars per allowance~~ton~~. The minimum price fluctuation shall be \$25.00 per allowance~~ton~~ (\$250.00 per contract). There shall be no maximum price fluctuation.

### **864.08 Product Placement**

For purposes of Rule 9A.19, the Seller and Buyer shall fulfill its contractual obligation on a maturing contract only if, by 12:00 noon on the day preceding the last trading day in the applicable delivery month, such Seller and Buyer have received NAMS account certification from his customer, in the form prescribed by the Exchange stating that the Customer has an account with NAMS.

The receipt of such certification shall not relieve the Seller or Buyer, or their respective Customers of any obligations under any Rule other than Rule 9A.19.

### **864.12 Exchange of Futures for, ~~or in Connection with Product~~ Physical (EFP) and Exchange of Futures for Swaps (EFS)**

- A. An exchange of futures for, or in connection with, ~~the product (EFP)~~ **or exchange of futures for, or in connection with, swap (EFS) transactions** consist of two discrete, but related, transactions; a cash transaction and a futures transaction. At the time such transaction is effected, the Buyer's Customer and the Seller's Customer of the futures must be the Seller's Customer and the Buyer's Customer of a quantity of the physical product **or swaps agreement** covered by this Section (or any derivative, by-product or related product.) The quantity of physical product must be approximately equivalent to the quantity covered by the futures contracts.
- B. Except as provided below, an EFP **or EFS transaction** must take place during the hours of futures trading for the Annual NO<sub>x</sub> Emissions Allowance futures contract. An EFP **or EFS** is permitted in the expiring futures contract until two hours after trading terminates on the last day of trading of the expiring futures contract. An EFP **or EFS** which establishes a futures position for both the buyer and the seller shall not be permitted during the two hour period following the termination of trading of expired futures contract.
- C. Any EFP **or EFS transaction** ~~Exchange of Futures for, or in Connection with, Product (EFP)~~ shall be governed by the provisions of Rule 6.21 **and 6.21A, respectively.**
- D. Each Buyer's Customer and Seller's Customer must satisfy the Exchange, at its request, that the transaction is a legitimate EFP **or EFS** transaction. All documentary evidence relating to EFP **or EFS**, including, without limitation, evidence as to change of ownership of the physical commodity **or swap commitment**, shall be obtained by the Clearing Members from their customers or and made available by the Clearing Members for examination by the Exchange upon request.
- E. **A report of each EFP or EFS transaction shall be entered on the day that the transaction thereto was made, or if such agreement was made after the close of trading, then on the next business day. EFP or EFS transactions shall be cleared through the Exchange in accordance with normal procedures, shall be clearly identified as EFP or EFS transactions, and shall be recorded as such by the Exchange and by the Clearing Members involved.**

#### **864.14 Force Majeure, Late Performance and Failure to Perform**

(A) DEFINITION. As used in this Rule 864.14 the following terms, as well as variations thereof, shall have the meaning described below:

- (1) "Late Performance" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules.
- (2) "Failure to Perform" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.
- (3) "Contract Value" means the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of tons per contract) times the number of contracts to be delivered.
- (4)(a) "Party" means a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.
- (b) "Other Party" means the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.
- (5) "Day of Late Performance" means the twenty four hour period commencing twelve hours after a Buyer or a Seller was to have performed, provided however, with respect to the obligations of Buyers and Sellers to submit documents to the Exchange pursuant to the Rules in this chapter, and with respect to the failure to transfer allowances within the nominated half cycle, "Day of Late Performance" means that twenty four hour period commencing immediately after the time specified in the Rules in this chapter for the submission of a document. Each subsequent Day of Late Performance shall commence twenty four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act is performed shall be a Day of Late Performance.

(6) "Force Majeure" means any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.

#### ~~(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY~~

~~(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.~~

~~(2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.~~

#### ~~C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE~~

~~(1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:~~

~~(a) When the Chairman is advised by the President or any person designated by the President that it appears that the performance of a Party to the delivery is late;~~

~~(b) Upon the written request of both the Buyer and the Seller;~~

~~(c) When the President or any person designated by the President requests such appointment; or~~

~~(d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.~~

~~(2) The Chairman shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.~~

~~(3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Compliance Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.~~

~~(4) Upon a finding of force majeure, the Panel may take anyone or combination of the following actions as it deems suitable order an extension of time not to exceed five days from the date of the scheduled delivery; or, refer the delivery to the Board of Directors for emergency action as provided in Article 7.~~

#### ~~(D) EXCHANGE ACTION~~

~~(1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of or to have failed to perform a delivery, the Exchange, represented by the Compliance Department, shall issue a Notice of Assessment in accordance with subsections (2) of this Section, specifying the findings of the Panel with respect to the late or failed delivery.~~

~~(2) When a Party has failed to perform, the Compliance Department shall issue a Notice of Assessment assessing penalties of ten percent (10%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (2) hereof, to be paid to the Exchange.~~

~~(3)(a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Compliance Counsel, within two business days of receipt of the Notice of Assessment from the Compliance Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.~~

(b) The Compliance Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.

(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(4)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Bylaw 106. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment the Assessment and findings of the Delivery Committee shall constitute a final disciplinary action of the Exchange.

(4) Within ten (10) days after receipt of the Compliance Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by the Compliance Department or are otherwise relevant to the matter.

(5) In the event of an appeal by a Party, the Chairman of the Exchange, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. The Panel shall be composed of three members of the Exchange, at least one of whom shall be a member of the Board of Directors. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the Chairman any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.

(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Compliance Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.

(b) At such hearing: The Appellant may appear personally and may be represented by counselor or other representative of his choice at the appeal.

(c) The Compliance Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Compliance Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.

(d) The Appellant shall be entitled to rebut the Compliance Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.

(e) The Compliance Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.

(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.

(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.

(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.

(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.

(8) The Assessment Appeal Panel shall consider, and make recommendations to the Board concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the Board shall constitute the final disciplinary action of the Exchange.

#### **(E) ARBITRATION PROCEDURE**

(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.

(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.

(3) The Arbitration will be governed by Chapter 5 of the Rules except that the Chairman of the Exchange or his designee shall appoint an Arbitration Panel composed of three Members of the Exchange, at least one of whom shall be a Member of the Board of Directors.

**(A) DEFINITION. As used in this Rule 864.14, the following terms, as well as variations thereof, shall have the meaning described below.**

**(1) "Late Performance" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules. Late Performance shall be restricted to three business days. Late Performance beyond three business days by, a Seller or a Buyer will be deemed a Failure to Perform.**

**(2) "Day of Late Performance" shall mean the twenty-four hour period commencing immediately after a Buyer, a Seller, or the Clearing House was to have performed. Each subsequent Day of Late Performance shall commence twenty-four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act was to have performed shall be a Day of Late Performance.**

**(3) "Failure to Perform" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.**

**(4) "Contract Value" shall mean the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of allowances per contract) times the number of contracts to be delivered.**

**(5) (a) "Party" shall mean a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.**

**(b) "Other Party" shall mean the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.**

**(6) "Force Majeure" shall mean any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.**

#### **(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY**

**(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.**

**(2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.**

#### **(C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE**

**(1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the**

Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:

(a) When the Chairman of the Emissions Allowance Delivery Committee is advised by the President of the Exchange or any person designated by the President of the Exchange that it appears that the performance of a Party to the delivery is late;

(b) Upon the written request of both the Buyer and the Seller;

(c) When the President of the Exchange or any person designated by the President of the Exchange requests such appointment; or

(d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.

(2) The Chairman of the Emissions Allowance Delivery Committee shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.

(3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Market Regulation Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.

(4) Upon a finding of force majeure, the Panel may take any one or combination of the following actions as it deems suitable order: an extension of time not to exceed ten days from the date of the scheduled delivery; or, refer the delivery to the Exchange, represented by the Market Regulation Department, for emergency action.

#### (D) EXCHANGE ACTION

(1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of a delivery obligation, the Exchange, represented by the Market Regulation Department, shall issue a Notice of Assessment, assessing a penalty of 10% of contract value for each applicable day of Late Performance.

(2) Whenever a Buyer or Seller is found by the Panel or otherwise deemed to have a "Failure to Perform" the Exchange, represented by the Market Regulation Department shall issue a Notice of Assessment assessing penalties of twenty percent (20%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (1) above, to be paid to the Exchange.

(3) (a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Market Regulation Department, within two business days of receipt of the Notice of Assessment from the Market Regulation Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.

(b) The Market Regulation Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.

(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(3)(a) of this Rule shall constitute a waiver, and the penalties

set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Chapter 4. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment, the Assessment and findings of the Emissions Allowance Delivery Committee shall constitute a final disciplinary action of the Exchange.

- (4) Within ten (10) days after receipt of Market Regulation Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by Market Regulation Department or are otherwise relevant to the matter.
- (5) In the event of an appeal by a Party, the President, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the President, or his designee, any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.
- (6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

  - (a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Market Regulation Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.
  - (b) At such hearing: The Appellant may appear personally and may be represented by counselor other representative of his choice at the appeal.
  - (c) The Market Regulation Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Market Regulation Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.
  - (d) The Appellant shall be entitled to rebut the Market Regulation Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.
  - (e) The Market Regulation Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.
  - (f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.
  - (g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.
  - (h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.
  - (i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.



- (8) The Assessment Appeal Panel shall consider, and make recommendations to the President, or his designee concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the President shall constitute the final disciplinary action of the Exchange.

**(E) ARBITRATION PROCEDURE**

- (1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.
- (2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.
- (3) The Arbitration will be governed by Chapter 6A of the Rules except that the President or his designee shall appoint an Arbitration Panel.

## **Annual NO<sub>x</sub> Emissions Allowance Vintage 2010 Futures Contract**

### **865.01 Scope**

The provisions of these rules shall apply to all Annual ~~NO<sub>x</sub>~~NO<sub>x</sub> emissions allowances vintage 2010 (or earlier vintages) bought or sold for future delivery on the Exchange with the Delivery at the U.S. Environmental Protection Agency's (EPA) NO<sub>x</sub> Allowance Management System (NAMS).

### **865.01A Definitions**

- EPA means the U.S. Environmental Protection Agency or any successor agency with similar jurisdiction.
- Annual ~~NO<sub>x</sub>~~NO<sub>x</sub> Allowance refers to a tradable permit to emit ~~one ton of NO<sub>x</sub>~~NO<sub>x</sub> from January 1 to December 31 in a given or subsequent calendar year under the Clean Air Interstate Rule (CAIR) Annual ~~NO<sub>x</sub>~~NO<sub>x</sub> Budget Trading Program as specified further by EPA.
- ~~NO<sub>x</sub>~~NO<sub>x</sub> Allowance Management System (NAMS) means the system established by the EPA for recording the transfer of Allowances among various entities under the Clean Air Act as set.
- Vintage Year means the first calendar year for which the allowance may be utilized for compliance.
- The terms "Seller" and "Buyer" shall mean the short Clearing Member and the long Clearing Member, respectively.
- The terms "Seller's Customer" and "Buyer's Customer" shall mean the seller and buyer of the physical product or swap transaction.
- The term "Settlement Price" shall mean the final settlement price used as the price for delivery of the product, which shall be the settlement price for the last trading day of the expiring delivery month. The settlement price for the last day of the trading shall be determined in accordance with the procedures set forth in Exchange ~~NYMEX~~ Rule 813-1G.11.

### **865.03 Contract Unit**

The contract unit shall be ten (10) ~~allowances~~allowances of Annual ~~NO<sub>x</sub>~~NO<sub>x</sub> emissions allowances vintage 2010 (or earlier vintages) for delivery made by transfer through NAMS.

### **865.05 Delivery Months**

Trading shall be conducted in contracts providing for delivery in such periods as shall be determined by the Exchange ~~Board of Directors~~.

### **865.06 Minimum Price Fluctuations**

Prices shall be quoted in dollars per ~~allowance~~allowance. The minimum price fluctuation shall be \$25.00 per ~~allowance~~allowance (\$250.00 per contract). There shall be no maximum price fluctuation.

### **865.08 Product Placement**

For purposes of Rule 9A.19, the Seller and Buyer shall fulfill its contractual obligation on a maturing contract only if, by 12:00 noon on the day preceding the last trading day in the applicable delivery month, such Seller and Buyer have received NAMS account certification from his customer, in the form prescribed by the Exchange stating that the Customer has an account with NAMS.

The receipt of such certification shall not relieve the Seller or Buyer, or their respective Customers of any obligations under any Rule other than Rule 9A.19.

**865.12 Exchange of Futures for, ~~or in Connection with Product~~ Physical (EFP) and Exchange of Futures for Swaps (EFS)**

- A. An exchange of futures for, or in connection with, ~~the product (EFP)~~ **or exchange of futures for, or in connection with, swap (EFS) transactions** consist of two discrete, but related, transactions; a cash transaction and a futures transaction. At the time such transaction is effected, the Buyer's Customer and the Seller's Customer of the futures must be the Seller's Customer and the Buyer's Customer of a quantity of the physical product **or swaps agreement** covered by this Section (or any derivative, by-product or related product.) The quantity of physical product must be approximately equivalent to the quantity covered by the futures contracts.
- B. Except as provided below, an EFP **or EFS transaction** must take place during the hours of futures trading for the Annual NO<sub>x</sub> Emissions Allowance futures contract. An EFP **or EFS** is permitted in the expiring futures contract until two hours after trading terminates on the last day of trading of the expiring futures contract. An EFP **or EFS** which establishes a futures position for both the buyer and the seller shall not be permitted during the two hour period following the termination of trading of expired futures contract.
- C. Any EFP **or EFS transaction** ~~Exchange of Futures for, or in Connection with, Product (EFP)~~ shall be governed by the provisions of Rule 6.21 **and 6.21A, respectively.**
- D. Each Buyer's Customer and Seller's Customer must satisfy the Exchange, at its request, that the transaction is a legitimate EFP **or EFS** transaction. All documentary evidence relating to EFP **or EFS**, including, without limitation, evidence as to change of ownership of the physical commodity **or swap commitment**, shall be obtained by the Clearing Members from their customers or and made available by the Clearing Members for examination by the Exchange upon request.
- E. **A report of each EFP or EFS transaction shall be entered on the day that the transaction thereto was made, or if such agreement was made after the close of trading, then on the next business day. EFP or EFS transactions shall be cleared through the Exchange in accordance with normal procedures, shall be clearly identified as EFP or EFS transactions, and shall be recorded as such by the Exchange and by the Clearing Members involved.**

**865.14 Force Majeure, Late Performance and Failure to Perform**

(A) DEFINITION. As used in this Rule 865.14 the following terms, as well as variations thereof, shall have the meaning described below.

- (1) "Late Performance" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules.
- (2) "Failure to Perform" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.
- (3) "Contract Value" means the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of tons per contract) times the number of contracts to be delivered.
- (4)(a) "Party" means a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.
- (b) "Other Party" means the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.
- (5) "Day of Late Performance" means the twenty four hour period commencing twelve hours after a Buyer or a Seller was to have performed, provided however, with respect to the obligations of Buyers and Sellers to submit documents to the Exchange pursuant to the Rules in this chapter, and with respect to the failure to transfer allowances within the nominated half cycle, "Day of Late Performance" means that twenty four hour period commencing immediately after the time specified in the Rules in this chapter for

~~the submission of a document. Each subsequent Day of Late Performance shall commence twenty four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act is performed shall be a Day of Late Performance.~~

~~(6) "Force Majeure" means any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.~~

#### ~~(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY~~

~~(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.~~

~~(2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.~~

#### ~~C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE~~

~~(1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:~~

~~(a) When the Chairman is advised by the President or any person designated by the President that it appears that the performance of a Party to the delivery is late;~~

~~(b) Upon the written request of both the Buyer and the Seller;~~

~~(c) When the President or any person designated by the President requests such appointment; or~~

~~(d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.~~

~~(2) The Chairman shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.~~

~~(3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Compliance Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.~~

~~(4) Upon a finding of force majeure, the Panel may take anyone or combination of the following actions as it deems suitable order an extension of time not to exceed five days from the date of the scheduled delivery; or, refer the delivery to the Board of Directors for emergency action as provided in Article 7.~~

#### ~~(D) EXCHANGE ACTION~~

~~(1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of or to have failed to perform a delivery, the Exchange, represented by the Compliance Department, shall issue a Notice of Assessment in accordance with subsections (2) of this Section, specifying the findings of the Panel with respect to the late or failed delivery.~~

~~(2) When a Party has failed to perform, the Compliance Department shall issue a Notice of Assessment assessing penalties of ten percent (10%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (2) hereof, to be paid to the Exchange.~~

~~(3)(a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Compliance Counsel, within two business days of receipt of the Notice of Assessment from the Compliance Department. The Party filing~~

the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.

(b) The Compliance Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.

(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(4)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Bylaw 106. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment the Assessment and findings of the Delivery Committee shall constitute a final disciplinary action of the Exchange.

(4) Within ten (10) days after receipt of the Compliance Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by the Compliance Department or are otherwise relevant to the matter.

(5) In the event of an appeal by a Party, the Chairman of the Exchange, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. The Panel shall be composed of three members of the Exchange, at least one of whom shall be a member of the Board of Directors. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the Chairman any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.

(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Compliance Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.

(b) At such hearing: The Appellant may appear personally and may be represented by counselor or other representative of his choice at the appeal.

(c) The Compliance Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Compliance Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.

(d) The Appellant shall be entitled to rebut the Compliance Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.

(e) The Compliance Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.

(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.

(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.

(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.

(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the

decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.

(8) The Assessment Appeal Panel shall consider, and make recommendations to the Board concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the Board shall constitute the final disciplinary action of the Exchange.

#### (E) ARBITRATION PROCEDURE

(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.

(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.

(3) The Arbitration will be governed by Chapter 5 of the Rules except that the Chairman of the Exchange or his designee shall appoint an Arbitration Panel composed of three Members of the Exchange, at least one of whom shall be a Member of the Board of Directors.

**(A) DEFINITION. As used in this Rule 865.14, the following terms, as well as variations thereof, shall have the meaning described below.**

**(1) "Late Performance" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules. Late Performance shall be restricted to three business days. Late Performance beyond three business days by, a Seller or a Buyer will be deemed a Failure to Perform.**

**(2) "Day of Late Performance" shall mean the twenty-four hour period commencing immediately after a Buyer, a Seller, or the Clearing House was to have performed. Each subsequent Day of Late Performance shall commence twenty-four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act was to have performed shall be a Day of Late Performance.**

**(3) "Failure to Perform" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.**

**(4) "Contract Value" shall mean the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of allowances per contract) times the number of contracts to be delivered.**

**(5) (a) "Party" shall mean a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.**

**(b) "Other Party" shall mean the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.**

**(6) "Force Majeure" shall mean any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.**

#### **(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY**

**(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.**

- (2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.

**(C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE**

- (1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:
- (a) When the Chairman of the Emissions Allowance Delivery Committee is advised by the President of the Exchange or any person designated by the President of the Exchange that it appears that the performance of a Party to the delivery is late;
- (b) Upon the written request of both the Buyer and the Seller;
- (c) When the President of the Exchange or any person designated by the President of the Exchange requests such appointment; or
- (d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.
- (2) The Chairman of the Emissions Allowance Delivery Committee shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.
- (3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Market Regulation Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.
- (4) Upon a finding of force majeure, the Panel may take any one or combination of the following actions as it deems suitable order: an extension of time not to exceed ten days from the date of the scheduled delivery; or, refer the delivery to the Exchange, represented by the Market Regulation Department, for emergency action.

**(D) EXCHANGE ACTION**

- (1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of a delivery obligation, the Exchange, represented by the Market Regulation Department, shall issue a Notice of Assessment, assessing a penalty of 10% of contract value for each applicable day of Late Performance.
- (2) Whenever a Buyer or Seller is found by the Panel or otherwise deemed to have a "Failure to Perform" the Exchange, represented by the Market Regulation Department shall issue a Notice of Assessment assessing penalties of twenty percent (20%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (1) above, to be paid to the Exchange.
- (3) (a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Market Regulation Department, within two business days of receipt of the Notice of Assessment from the Market Regulation Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must

be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.

(b) The Market Regulation Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.

(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(3)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Chapter 4. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment, the Assessment and findings of the Emissions Allowance Delivery Committee shall constitute a final disciplinary action of the Exchange.

(4) Within ten (10) days after receipt of Market Regulation Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by Market Regulation Department or are otherwise relevant to the matter.

(5) In the event of an appeal by a Party, the President, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the President, or his designee, any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.

(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Market Regulation Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.

(b) At such hearing: The Appellant may appear personally and may be represented by counselor or other representative of his choice at the appeal.

(c) The Market Regulation Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Market Regulation Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.

(d) The Appellant shall be entitled to rebut the Market Regulation Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.

(e) The Market Regulation Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.

(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.

(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.



(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.

(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.

(8) The Assessment Appeal Panel shall consider, and make recommendations to the President, or his designee concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the President shall constitute the final disciplinary action of the Exchange.

#### (E) ARBITRATION PROCEDURE

(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.

(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.

(3) The Arbitration will be governed by Chapter 6A of the Rules except that the President or his designee shall appoint an Arbitration Panel.

## **Annual NO<sub>x</sub> Emissions Allowance Vintage 2011 Futures Contract**

### **866.01 Scope**

The provisions of these rules shall apply to all Annual ~~NO<sub>x</sub>~~NO<sub>x</sub> emissions allowances vintage 2011 (or earlier vintages) bought or sold for future delivery on the Exchange with the Delivery at the U.S. Environmental Protection Agency's (EPA) NO<sub>x</sub> Allowance Management System (NAMS).

### **866.01A Definitions**

- EPA means the U.S. Environmental Protection Agency or any successor agency with similar jurisdiction.
- Annual ~~NO<sub>x</sub>~~NO<sub>x</sub> Allowance refers to a tradable permit to emit ~~one ton of NO<sub>x</sub>~~NO<sub>x</sub> from January 1 to December 31 in a given or subsequent calendar year under the Clean Air Interstate Rule (CAIR) Annual ~~NO<sub>x</sub>~~NO<sub>x</sub> Budget Trading Program as specified further by EPA.
- ~~NO<sub>x</sub>~~NO<sub>x</sub> Allowance Management System (NAMS) means the system established by the EPA for recording the transfer of Allowances among various entities under the Clean Air Act as set.
- Vintage Year means the first calendar year for which the allowance may be utilized for compliance.
- The terms "Seller" and "Buyer" shall mean the short Clearing Member and the long Clearing Member, respectively.
- The terms "Seller's Customer" and "Buyer's Customer" shall mean the seller and buyer of the physical product or swap transaction.
- The term "Settlement Price" shall mean the final settlement price used as the price for delivery of the product, which shall be the settlement price for the last trading day of the expiring delivery month. The settlement price for the last day of the trading shall be determined in accordance with the procedures set forth in Exchange ~~NYMEX~~ Rule 813-I-G-11.

### **866.03 Contract Unit**

The contract unit shall be ten (10) ~~allowances~~tons of Annual ~~NO<sub>x</sub>~~NO<sub>x</sub> emissions allowances vintage 2011 (or earlier vintages) for delivery made by transfer through NAMS.

### **866.05 Delivery Months**

Trading shall be conducted in contracts providing for delivery in such periods as shall be determined by the Exchange ~~Board of Directors~~.

### **866.06 Minimum Price Fluctuations**

Prices shall be quoted in dollars per ~~allowance~~ton. The minimum price fluctuation shall be \$25.00 per ~~allowance~~ton (\$250.00 per contract). There shall be no maximum price fluctuation.

### **866.08 Product Placement**

For purposes of Rule 9A.19, the Seller and Buyer shall fulfill its contractual obligation on a maturing contract only if, by 12:00 noon on the day preceding the last trading day in the applicable delivery month, such Seller and Buyer have received NAMS account certification from his customer, in the form prescribed by the Exchange stating that the Customer has an account with NAMS.

The receipt of such certification shall not relieve the Seller or Buyer, or their respective Customers of any obligations under any Rule other than Rule 9A.19.

## **866.12 Exchange of Futures for, or in Connection with Product Physical (EFP) and Exchange of Futures for Swaps (EFS)**

- A. An exchange of futures for, or in connection with, ~~the product~~ (EFP) **or exchange of futures for, or in connection with, swap (EFS) transactions** consist of two discrete, but related, transactions; a cash transaction and a futures transaction. At the time such transaction is effected, the Buyer's Customer and the Seller's Customer of the futures must be the Seller's Customer and the Buyer's Customer of a quantity of the physical product **or swaps agreement** covered by this Section (or any derivative, by-product or related product.) The quantity of physical product must be approximately equivalent to the quantity covered by the futures contracts.
- B. Except as provided below, an EFP **or EFS transaction** must take place during the hours of futures trading for the Annual NO<sub>x</sub> Emissions Allowance futures contract. An EFP **or EFS** is permitted in the expiring futures contract until two hours after trading terminates on the last day of trading of the expiring futures contract. An EFP **or EFS** which establishes a futures position for both the buyer and the seller shall not be permitted during the two hour period following the termination of trading of expired futures contract.
- C. Any EFP **or EFS transaction** ~~Exchange of Futures for, or in Connection with, Product (EFP)~~ shall be governed by the provisions of Rule 6.21 **and 6.21A, respectively.**
- D. Each Buyer's Customer and Seller's Customer must satisfy the Exchange, at its request, that the transaction is a legitimate EFP **or EFS** transaction. All documentary evidence relating to EFP **or EFS**, including, without limitation, evidence as to change of ownership of the physical commodity **or swap commitment**, shall be obtained by the Clearing Members from their customers or and made available by the Clearing Members for examination by the Exchange upon request.
- E. **A report of each EFP or EFS transaction shall be entered on the day that the transaction thereto was made, or if such agreement was made after the close of trading, then on the next business day. EFP or EFS transactions shall be cleared through the Exchange in accordance with normal procedures, shall be clearly identified as EFP or EFS transactions, and shall be recorded as such by the Exchange and by the Clearing Members involved.**

## **866.14 Force Majeure, Late Performance and Failure to Perform**

(A) DEFINITION. As used in this Rule 866.14 the following terms, as well as variations thereof, shall have the meaning described below.

- (1) "Late Performance" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules.
- (2) "Failure to Perform" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.
- (3) "Contract Value" means the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of tons per contract) times the number of contracts to be delivered.
- (4)(a) "Party" means a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.
- (b) "Other Party" means the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.
- (5) "Day of Late Performance" means the twenty four hour period commencing twelve hours after a Buyer or a Seller was to have performed, provided however, with respect to the obligations of Buyers and Sellers to submit documents to the Exchange pursuant to the Rules in this chapter, and with respect to the failure to transfer allowances within the nominated half cycle, "Day of Late Performance" means that twenty four hour period commencing immediately after the time specified in the Rules in this chapter for

~~the submission of a document. Each subsequent Day of Late Performance shall commence twenty four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act is performed shall be a Day of Late Performance.~~

~~(6) "Force Majeure" means any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.~~

#### ~~(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY~~

~~(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.~~

~~(2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.~~

#### ~~C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE~~

~~(1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:~~

~~(a) When the Chairman is advised by the President or any person designated by the President that it appears that the performance of a Party to the delivery is late;~~

~~(b) Upon the written request of both the Buyer and the Seller;~~

~~(c) When the President or any person designated by the President requests such appointment; or~~

~~(d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.~~

~~(2) The Chairman shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.~~

~~(3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Compliance Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.~~

~~(4) Upon a finding of force majeure, the Panel may take anyone or combination of the following actions as it deems suitable order an extension of time not to exceed five days from the date of the scheduled delivery; or, refer the delivery to the Board of Directors for emergency action as provided in Article 7.~~

#### ~~(D) EXCHANGE ACTION~~

~~(1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of or to have failed to perform a delivery, the Exchange, represented by the Compliance Department, shall issue a Notice of Assessment in accordance with subsections (2) of this Section, specifying the findings of the Panel with respect to the late or failed delivery.~~

~~(2) When a Party has failed to perform, the Compliance Department shall issue a Notice of Assessment assessing penalties of ten percent (10%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (2) hereof, to be paid to the Exchange.~~

~~(3)(a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Compliance Counsel, within two business days of receipt of the Notice of Assessment from the Compliance Department. The Party filing~~

the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.

(b) The Compliance Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.

(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(4)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Bylaw 106. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment the Assessment and findings of the Delivery Committee shall constitute a final disciplinary action of the Exchange.

(4) Within ten (10) days after receipt of the Compliance Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by the Compliance Department or are otherwise relevant to the matter.

(5) In the event of an appeal by a Party, the Chairman of the Exchange, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. The Panel shall be composed of three members of the Exchange, at least one of whom shall be a member of the Board of Directors. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the Chairman any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.

(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Compliance Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.

(b) At such hearing: The Appellant may appear personally and may be represented by counselor or other representative of his choice at the appeal.

(c) The Compliance Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Compliance Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.

(d) The Appellant shall be entitled to rebut the Compliance Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.

(e) The Compliance Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.

(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.

(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.

(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.

(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the

decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.

(8) The Assessment Appeal Panel shall consider, and make recommendations to the Board concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the Board shall constitute the final disciplinary action of the Exchange.

#### (E) ARBITRATION PROCEDURE

(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.

(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.

(3) The Arbitration will be governed by Chapter 5 of the Rules except that the Chairman of the Exchange or his designee shall appoint an Arbitration Panel composed of three Members of the Exchange, at least one of whom shall be a Member of the Board of Directors.

**(A) DEFINITION. As used in this Rule 866.14, the following terms, as well as variations thereof, shall have the meaning described below.**

**(1) "Late Performance" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules. Late Performance shall be restricted to three business days. Late Performance beyond three business days by, a Seller or a Buyer will be deemed a Failure to Perform.**

**(2) "Day of Late Performance" shall mean the twenty-four hour period commencing immediately after a Buyer, a Seller, or the Clearing House was to have performed. Each subsequent Day of Late Performance shall commence twenty-four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act was to have performed shall be a Day of Late Performance.**

**(3) "Failure to Perform" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.**

**(4) "Contract Value" shall mean the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of allowances per contract) times the number of contracts to be delivered.**

**(5) (a) "Party" shall mean a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.**

**(b) "Other Party" shall mean the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.**

**(6) "Force Majeure" shall mean any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.**

#### **(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY**

**(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.**

- (2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.

**(C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE**

- (1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:
- (a) When the Chairman of the Emissions Allowance Delivery Committee is advised by the President of the Exchange or any person designated by the President of the Exchange that it appears that the performance of a Party to the delivery is late;
- (b) Upon the written request of both the Buyer and the Seller;
- (c) When the President of the Exchange or any person designated by the President of the Exchange requests such appointment; or
- (d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.
- (2) The Chairman of the Emissions Allowance Delivery Committee shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.
- (3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Market Regulation Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.
- (4) Upon a finding of force majeure, the Panel may take any one or combination of the following actions as it deems suitable order: an extension of time not to exceed ten days from the date of the scheduled delivery; or, refer the delivery to the Exchange, represented by the Market Regulation Department, for emergency action.

**(D) EXCHANGE ACTION**

- (1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of a delivery obligation, the Exchange, represented by the Market Regulation Department, shall issue a Notice of Assessment, assessing a penalty of 10% of contract value for each applicable day of Late Performance.
- (2) Whenever a Buyer or Seller is found by the Panel or otherwise deemed to have a "Failure to Perform" the Exchange, represented by the Market Regulation Department shall issue a Notice of Assessment assessing penalties of twenty percent (20%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (1) above, to be paid to the Exchange.
- (3) (a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Market Regulation Department, within two business days of receipt of the Notice of Assessment from the Market Regulation Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must

be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.

(b) The Market Regulation Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.

(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(3)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Chapter 4. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment, the Assessment and findings of the Emissions Allowance Delivery Committee shall constitute a final disciplinary action of the Exchange.

(4) Within ten (10) days after receipt of Market Regulation Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by Market Regulation Department or are otherwise relevant to the matter.

(5) In the event of an appeal by a Party, the President, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the President, or his designee, any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.

(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Market Regulation Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.

(b) At such hearing: The Appellant may appear personally and may be represented by counselor or other representative of his choice at the appeal.

(c) The Market Regulation Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Market Regulation Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.

(d) The Appellant shall be entitled to rebut the Market Regulation Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.

(e) The Market Regulation Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.

(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.

(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.



- (h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.
  - (i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.
- (8) The Assessment Appeal Panel shall consider, and make recommendations to the President, or his designee concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the President shall constitute the final disciplinary action of the Exchange.

#### (E) ARBITRATION PROCEDURE

- (1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.
- (2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.
- (3) The Arbitration will be governed by Chapter 6A of the Rules except that the President or his designee shall appoint an Arbitration Panel.

## **Annual NO<sub>x</sub> Emissions Allowance Vintage 2012 Futures Contract**

### **867.01 Scope**

The provisions of these rules shall apply to all Annual ~~NO<sub>x</sub>~~NO<sub>x</sub> emissions allowances vintage 2012 (or earlier vintages) bought or sold for future delivery on the Exchange with the Delivery at the U.S. Environmental Protection Agency's (EPA) NO<sub>x</sub> Allowance Management System (NAMS).

#### **867.01A Definitions**

- EPA means the U.S. Environmental Protection Agency or any successor agency with similar jurisdiction.
- Annual ~~NO<sub>x</sub>~~NO<sub>x</sub> Allowance refers to a tradable permit to emit ~~one ton of NO<sub>x</sub>~~NO<sub>x</sub> from January 1 to December 31 in a given or subsequent calendar year under the Clean Air Interstate Rule (CAIR) Annual ~~NO<sub>x</sub>~~NO<sub>x</sub> Budget Trading Program as specified further by EPA.
- ~~NO<sub>x</sub>~~NO<sub>x</sub> Allowance Management System (NAMS) means the system established by the EPA for recording the transfer of Allowances among various entities under the Clean Air Act as set.
- Vintage Year means the first calendar year for which the allowance may be utilized for compliance.
- The terms "Seller" and "Buyer" shall mean the short Clearing Member and the long Clearing Member, respectively.
- The terms "Seller's Customer" and "Buyer's Customer" shall mean the seller and buyer of the physical product or swap transaction.
- The term "Settlement Price" shall mean the final settlement price used as the price for delivery of the product, which shall be the settlement price for the last trading day of the expiring delivery month. The settlement price for the last day of the trading shall be determined in accordance with the procedures set forth in Exchange ~~NYMEX~~ Rule 813-1G.11.

### **867.03 Contract Unit**

The contract unit shall be ten (10) ~~allowances~~tons of Annual ~~NO<sub>x</sub>~~NO<sub>x</sub> emissions allowances vintage 2012 (or earlier vintages) for delivery made by transfer through NAMS.

### **867.05 Delivery Months**

Trading shall be conducted in contracts providing for delivery in such periods as shall be determined by the Exchange ~~Board of Directors~~.

### **867.06 Minimum Price Fluctuations**

Prices shall be quoted in dollars per ~~allowance~~ton. The minimum price fluctuation shall be \$25.00 per ~~allowance~~ton (\$250.00 per contract). There shall be no maximum price fluctuation.

### **867.08 Product Placement**

For purposes of Rule 9A.19, the Seller and Buyer shall fulfill its contractual obligation on a maturing contract only if, by 12:00 noon on the day preceding the last trading day in the applicable delivery month, such Seller and Buyer have received NAMS account certification from his customer, in the form prescribed by the Exchange stating that the Customer has an account with NAMS.

The receipt of such certification shall not relieve the Seller or Buyer, or their respective Customers of any obligations under any Rule other than Rule 9A.19.

**867.12 Exchange of Futures for, or in Connection with Product Physical (EFP) and Exchange of Futures for Swaps (EFS)**

- A. An exchange of futures for, or in connection with, ~~the product~~ (EFP) **or exchange of futures for, or in connection with, swap (EFS) transactions** consist of two discrete, but related, transactions; a cash transaction and a futures transaction. At the time such transaction is effected, the Buyer's Customer and the Seller's Customer of the futures must be the Seller's Customer and the Buyer's Customer of a quantity of the physical product **or swaps agreement** covered by this Section (or any derivative, by-product or related product.) The quantity of physical product must be approximately equivalent to the quantity covered by the futures contracts.
- B. Except as provided below, an EFP **or EFS transaction** must take place during the hours of futures trading for the Annual NO<sub>x</sub> Emissions Allowance futures contract. An EFP **or EFS** is permitted in the expiring futures contract until two hours after trading terminates on the last day of trading of the expiring futures contract. An EFP **or EFS** which establishes a futures position for both the buyer and the seller shall not be permitted during the two hour period following the termination of trading of expired futures contract.
- C. Any EFP **or EFS transaction** ~~Exchange of Futures for, or in Connection with, Product (EFP)~~ shall be governed by the provisions of Rule 6.21 **and 6.21A, respectively.**
- D. Each Buyer's Customer and Seller's Customer must satisfy the Exchange, at its request, that the transaction is a legitimate EFP **or EFS** transaction. All documentary evidence relating to EFP **or EFS**, including, without limitation, evidence as to change of ownership of the physical commodity **or swap commitment**, shall be obtained by the Clearing Members from their customers or and made available by the Clearing Members for examination by the Exchange upon request.
- E. **A report of each EFP or EFS transaction shall be entered on the day that the transaction thereto was made, or if such agreement was made after the close of trading, then on the next business day. EFP or EFS transactions shall be cleared through the Exchange in accordance with normal procedures, shall be clearly identified as EFP or EFS transactions, and shall be recorded as such by the Exchange and by the Clearing Members involved.**

**867.14 Force Majeure, Late Performance and Failure to Perform**

(A) DEFINITION. As used in this Rule 867.14 the following terms, as well as variations thereof, shall have the meaning described below.

- (1) "Late Performance" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules.
- (2) "Failure to Perform" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.
- (3) "Contract Value" means the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of tons per contract) times the number of contracts to be delivered.
- (4)(a) "Party" means a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.
- (b) "Other Party" means the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.
- (5) "Day of Late Performance" means the twenty four hour period commencing twelve hours after a Buyer or a Seller was to have performed, provided however, with respect to the obligations of Buyers and Sellers to submit documents to the Exchange pursuant to the Rules in this chapter, and with respect to the failure to transfer allowances within the nominated half cycle, "Day of Late Performance" means that twenty four hour period commencing immediately after the time specified in the Rules in this chapter for

~~the submission of a document. Each subsequent Day of Late Performance shall commence twenty four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act is performed shall be a Day of Late Performance.~~

~~(6) "Force Majeure" means any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.~~

#### ~~(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY~~

~~(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.~~

~~(2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.~~

#### ~~C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE~~

~~(1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:~~

~~(a) When the Chairman is advised by the President or any person designated by the President that it appears that the performance of a Party to the delivery is late;~~

~~(b) Upon the written request of both the Buyer and the Seller;~~

~~(c) When the President or any person designated by the President requests such appointment; or~~

~~(d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.~~

~~(2) The Chairman shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.~~

~~(3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Compliance Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.~~

~~(4) Upon a finding of force majeure, the Panel may take anyone or combination of the following actions as it deems suitable order an extension of time not to exceed five days from the date of the scheduled delivery; or, refer the delivery to the Board of Directors for emergency action as provided in Article 7.~~

#### ~~(D) EXCHANGE ACTION~~

~~(1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of or to have failed to perform a delivery, the Exchange, represented by the Compliance Department, shall issue a Notice of Assessment in accordance with subsections (2) of this Section, specifying the findings of the Panel with respect to the late or failed delivery.~~

~~(2) When a Party has failed to perform, the Compliance Department shall issue a Notice of Assessment assessing penalties of ten percent (10%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (2) hereof, to be paid to the Exchange.~~

~~(3)(a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Compliance Counsel, within two business days of receipt of the Notice of Assessment from the Compliance Department. The Party filing~~

the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.

(b) The Compliance Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.

(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(4)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Bylaw 106. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment the Assessment and findings of the Delivery Committee shall constitute a final disciplinary action of the Exchange.

(4) Within ten (10) days after receipt of the Compliance Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by the Compliance Department or are otherwise relevant to the matter.

(5) In the event of an appeal by a Party, the Chairman of the Exchange, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. The Panel shall be composed of three members of the Exchange, at least one of whom shall be a member of the Board of Directors. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the Chairman any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.

(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Compliance Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.

(b) At such hearing: The Appellant may appear personally and may be represented by counselor or other representative of his choice at the appeal.

(c) The Compliance Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Compliance Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.

(d) The Appellant shall be entitled to rebut the Compliance Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.

(e) The Compliance Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.

(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.

(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.

(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.

(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the

decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.

(8) The Assessment Appeal Panel shall consider, and make recommendations to the Board concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the Board shall constitute the final disciplinary action of the Exchange.

#### (E) ARBITRATION PROCEDURE

(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.

(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.

(3) The Arbitration will be governed by Chapter 5 of the Rules except that the Chairman of the Exchange or his designee shall appoint an Arbitration Panel composed of three Members of the Exchange, at least one of whom shall be a Member of the Board of Directors.

**(A) DEFINITION. As used in this Rule 867.14, the following terms, as well as variations thereof, shall have the meaning described below.**

**(1) "Late Performance" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules. Late Performance shall be restricted to three business days. Late Performance beyond three business days by, a Seller or a Buyer will be deemed a Failure to Perform.**

**(2) "Day of Late Performance" shall mean the twenty-four hour period commencing immediately after a Buyer, a Seller, or the Clearing House was to have performed. Each subsequent Day of Late Performance shall commence twenty-four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act was to have performed shall be a Day of Late Performance.**

**(3) "Failure to Perform" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.**

**(4) "Contract Value" shall mean the amount equal to the settlement price on the last day of trading in a futures contract times 10 (the number of allowances per contract) times the number of contracts to be delivered.**

**(5) (a) "Party" shall mean a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.**

**(b) "Other Party" shall mean the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.**

**(6) "Force Majeure" shall mean any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.**

#### **(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY**

**(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.**

- (2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.

**(C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE**

- (1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:
- (a) When the Chairman of the Emissions Allowance Delivery Committee is advised by the President of the Exchange or any person designated by the President of the Exchange that it appears that the performance of a Party to the delivery is late;
- (b) Upon the written request of both the Buyer and the Seller;
- (c) When the President of the Exchange or any person designated by the President of the Exchange requests such appointment; or
- (d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.
- (2) The Chairman of the Emissions Allowance Delivery Committee shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.
- (3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Market Regulation Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.
- (4) Upon a finding of force majeure, the Panel may take any one or combination of the following actions as it deems suitable order: an extension of time not to exceed ten days from the date of the scheduled delivery; or, refer the delivery to the Exchange, represented by the Market Regulation Department, for emergency action.

**(D) EXCHANGE ACTION**

- (1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of a delivery obligation, the Exchange, represented by the Market Regulation Department, shall issue a Notice of Assessment, assessing a penalty of 10% of contract value for each applicable day of Late Performance.
- (2) Whenever a Buyer or Seller is found by the Panel or otherwise deemed to have a "Failure to Perform" the Exchange, represented by the Market Regulation Department shall issue a Notice of Assessment assessing penalties of twenty percent (20%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (1) above, to be paid to the Exchange.
- (3) (a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Market Regulation Department, within two business days of receipt of the Notice of Assessment from the Market Regulation Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must

be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.

(b) The Market Regulation Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.

(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(3)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Chapter 4. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment, the Assessment and findings of the Emissions Allowance Delivery Committee shall constitute a final disciplinary action of the Exchange.

(4) Within ten (10) days after receipt of Market Regulation Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by Market Regulation Department or are otherwise relevant to the matter.

(5) In the event of an appeal by a Party, the President, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the President, or his designee, any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.

(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Market Regulation Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.

(b) At such hearing: The Appellant may appear personally and may be represented by counselor or other representative of his choice at the appeal.

(c) The Market Regulation Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Market Regulation Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.

(d) The Appellant shall be entitled to rebut the Market Regulation Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.

(e) The Market Regulation Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.

(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.

(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.



(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.

(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.

(8) The Assessment Appeal Panel shall consider, and make recommendations to the President, or his designee concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the President shall constitute the final disciplinary action of the Exchange.

#### (E) ARBITRATION PROCEDURE

(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.

(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.

(3) The Arbitration will be governed by Chapter 6A of the Rules except that the President or his designee shall appoint an Arbitration Panel.

## **NYMEX Regional Greenhouse Gas Initiative (RGGI) CO2 Allowance Futures Contract**

### **873.01A Definitions**

- A. The terms "Seller" and "Buyer" shall mean the short Clearing Member and the long Clearing Member, respectively. In Rule 873.12, the terms "Seller" and "Buyer" shall mean the seller and the buyer of the physical product or OTC swap.
- B. The terms "Seller's Customer" and "Buyer's Customer" shall mean the seller and buyer of the physical product or swap transaction.
- C. The term "Settlement Price" shall mean the final settlement price used as the price for delivery of the product, which shall be the settlement price for the last trading day of the expiring delivery month. The settlement price for the last trading day shall be determined in accordance with the procedures set forth in Exchange NYMEX Rule 8134G.11.
- D. The Regional Greenhouse Gas Initiative (RGGI) is a regional cap-and-trade program by Northeast and Mid-Atlantic states to limit carbon dioxide, i.e., CO2 emissions from regional power plants.
- E. RGGI CO2 Allowance shall mean a limited authorization under RGGI program to emit up to one ton of CO2.
- F. RGGI CO2 Allowance Tracking System shall mean the system by which the RGGI CO2 allowances are allocated, deducted, or transferred.

### **873.08 Product Placement**

#### **~~(1) Certification:~~**

For purposes of Rule 9A.19, the Seller and Buyer shall have fulfilled its respective contractual obligation on a maturing contract only if by 12:00 pm on the 10th business day prior to the last business day of the delivery month, such Seller and Buyer have received RGGI CO2 Allowance Tracking System account certification from its customer, in the form prescribed by the Exchange stating that:

(a) If a buyer, the Buyer's Customer has an account with RGGI CO2 Allowance Tracking System; or

(b) If a seller, the Seller's Customer has an account with RGGI CO2 Allowance Tracking System. The receipt of such certification shall not relieve the Seller or Buyer or their respective Customers of any obligations under any Rule other than Rule 9A.19.

### **873.14 Force Majeure, Late Performance and Failure to Perform**

**~~(A) DEFINITION. As used in this Rule 873.14 the following terms, as well as variations thereof, shall have the meaning described below.~~**

~~(1) "Late Performance" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in, the Rules. No Late Performance shall exceed the lesser of two continuous business days or three consecutive calendar days.~~

~~(2) "Failure to Perform" means the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.~~

~~(3) "Contract Value" means the amount equal to the settlement price on the last day of trading in a futures contract times 1000 (the number of allowances per contract) times the number of contracts to be delivered.~~

~~(4)(a) "Party" means a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.~~

~~(b) "Other Party" means the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.~~

~~(5) "Day of Late Performance" means the twenty four hour period after a Buyer or a Seller was to have performed, provided however, with respect to the obligations of Buyers and Sellers to submit documents to the Exchange pursuant to the Rules in this chapter, "Day of Late Performance" means that twenty four hour period commencing immediately after the time specified in the Rules in this chapter for the submission of a document. Each subsequent Day of Late Performance shall commence twenty four hours after the beginning of the prior Day of Late Performance.~~

~~(6) "Force Majeure" means any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.~~

### **~~(B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY~~**

~~(1) The Parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.~~

~~(2) A Party that has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer that has failed to make a payment shall still be required to make such payment.~~

### **~~(C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE~~**

~~(1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:~~

~~(a) When the Chairman is advised by the President or any person designated by the President that it appears that the performance of a Party to the delivery is late;~~

~~(b) Upon the written request of both the Buyer and the Seller;~~

~~(c) When the President or any person designated by the President requests such appointment; or~~

~~(d) When either Party to the delivery notifies the Exchange that circumstances exist that appear to constitute Force Majeure.~~

~~(2) The Chairman shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as legal advisor to the Panel.~~

~~(3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether Force Majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Compliance Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.~~

~~Nothing in this Subsection shall preclude a Party or the Exchange from seeking the remedies set forth in Sections (D) and (E) of this Rule.~~

~~(4) Upon a finding of Force Majeure, the Panel may take any one or combination of the following actions as it deems suitable: order an extension of time not to exceed five days from the date of the scheduled delivery; or, refer the delivery to the Board of Directors for emergency action as provided by Exchange rule.~~

#### **~~(D) EXCHANGE ACTION~~**

~~(1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of or to have failed to perform a delivery, the Exchange, represented by the Compliance Department, shall issue a Notice of Assessment in accordance with subsection (2) of this Section, specifying the findings of the Panel with respect to the late or failed delivery.~~

~~(2) (A) Each day of Late Performance shall result an assessment against the party for 3% of the contract value, but not less than \$500 per contract.~~

~~(B) When a Party has failed to perform, the Compliance Department shall issue a Notice of Assessment assessing penalties of twenty percent (20 %) of the contract value, but not less than \$2000 a contract, in addition to any penalties assessed pursuant to subparagraph (2) hereof, to be paid to the Exchange.~~

~~(3)(a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Exchange's Compliance Counsel, within two business days of receipt of the Notice of Assessment from the Compliance Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Compliance Department and a copy of the same served upon the Exchange's Compliance Counsel.~~

~~(b) The Compliance Department may file with the Appellant an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.~~

~~(c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(4)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Exchange rules. In the event a Party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment, the Assessment and findings of the Delivery Committee shall constitute a final disciplinary action of the Exchange.~~

~~(4) Within ten (10) days after receipt of the Compliance Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by the Compliance Department or are otherwise relevant to the matter.~~

~~(5) In the event of an appeal by a Party, the Chairman of the Exchange, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. The Panel shall be composed of three members of the Exchange. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the Chairman any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.~~

~~(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:~~

~~(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Compliance~~

Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.

(b) At such hearing: The Appellant may appear personally and may be represented by counselor or other representative of its choice at the appeal.

(c) The Compliance Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Compliance Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.

(d) The Appellant shall be entitled to rebut the Compliance Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.

(e) The Compliance Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.

(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall collectively constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.

(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.

(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.

(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.

(8) The Assessment Appeal Panel shall consider, and make recommendations to the Board concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the Board shall constitute the final disciplinary action of the Exchange.

## **(E) ARBITRATION PROCEDURE**

(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.

(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.

(3) The Arbitration will be governed by Chapter 5 of the Rules.

**(A) DEFINITION. As used in this Rule 873.14, the following terms, as well as variations thereof, shall have the meaning described below.**

**(1) "Late Performance" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation imposed by, and within the time period established in,**

the Rules. Late Performance shall be restricted to three business days. Late Performance beyond three business days by, a Seller or a Buyer will be deemed a Failure to Perform.

- (2) "Day of Late Performance" shall mean the twenty-four hour period commencing immediately after a Buyer, a Seller, or the Clearing House was to have performed. Each subsequent Day of Late Performance shall commence twenty-four hours after the beginning of the prior Day of Late Performance. When a Party is late in performance, the day when the act was to have performed shall be a Day of Late Performance.
- (3) "Failure to Perform" shall mean the failure of a Buyer or a Seller to complete a material act with respect to a delivery obligation prior to the expiration of the period allowed for the late performance of such act.
- (4) "Contract Value" shall mean the amount equal to the settlement price on the last day of trading in a futures contract times 1,000 (the number of allowances per contract) times the number of contracts to be delivered.
- (5) (a) "Party" shall mean a Buyer or Seller and such Buyer and Seller are each responsible to the Exchange for their obligations under these Rules and further responsible to the Exchange for the obligations of their respective customers under the Rules of this Chapter.  
(b) "Other Party" shall mean the corresponding Buyer when the Seller is late in performance or has failed to perform and the corresponding Seller when the Buyer is late in performance or has failed to perform.
- (6) "Force Majeure" shall mean any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of such Buyer or Seller, and which prevents the Buyer or Seller from making or taking delivery of product when and as provided for in these Rules.

#### (B) RESPONSIBILITIES OF PARTIES TO THE DELIVERY

- (1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a Party has failed to perform.
- (2) A Party which has failed to perform its obligations may no longer perform such obligations; provided, however, that a Buyer which has failed to make a payment shall make such payment.

#### (C) EMISSIONS ALLOWANCE DELIVERY COMMITTEE

- (1) Force Majeure, Late Performance and Failure to Perform shall be determined by a Panel of the Emissions Allowance Delivery Committee as set forth below. The Chairman of the Emissions Allowance Delivery Committee shall appoint a Panel, which shall consist of three (3) members of the Committee, to review a delivery:
  - (a) When the Chairman of the Emissions Allowance Delivery Committee is advised by the President of the Exchange or any person designated by the President of the Exchange that it appears that the performance of a Party to the delivery is late;
  - (b) Upon the written request of both the Buyer and the Seller;
  - (c) When the President of the Exchange or any person designated by the President of the Exchange requests such appointment; or
  - (d) When either Party to the delivery notifies the Exchange that circumstances exist constituting Force Majeure.
- (2) The Chairman of the Emissions Allowance Delivery Committee shall not appoint to any Panel any person who has a direct or indirect interest in the delivery in question. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a Party has been found to have failed to perform such delivery. Exchange Counsel shall serve as advisor to the Panel.

- (3) The Panel shall meet within one business day of notification as provided in these Rules. Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists, whether a Buyer or Seller is late in performing or has failed to perform its obligations as provided in the Rules, and advise the Market Regulation Department of such determination, and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.
- (4) Upon a finding of force majeure, the Panel may take any one or combination of the following actions as it deems suitable order: an extension of time not to exceed ten days from the date of the scheduled delivery; or, refer the delivery to the Exchange, represented by the Market Regulation Department, for emergency action.

#### (D) EXCHANGE ACTION

- (1) Whenever a Buyer or a Seller is found by the Panel to be late in the performance of a delivery obligation, the Exchange, represented by the Market Regulation Department, shall issue a Notice of Assessment, assessing a penalty of 10% of contract value for each applicable day of Late Performance.
- (2) Whenever a Buyer or Seller is found by the Panel or otherwise deemed to have a "Failure to Perform" the Exchange, represented by the Market Regulation Department shall issue a Notice of Assessment assessing penalties of twenty percent (20%) of the contract value, in addition to any penalties assessed pursuant to subparagraph (1) above, to be paid to the Exchange.
- (3) (a) A Party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange's Market Regulation Department, within two business days of receipt of the Notice of Assessment from the Market Regulation Department. The Party filing the appeal ("Appellant") shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange's Compliance Counsel.
- (b) The Market Regulation Department may file with the Appellant and Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.
- (c) Failure by the Party to file a Notice of Appeal or a Memorandum of Appeal with the time specified in subsection (D)(3)(a) of this Rule shall constitute a waiver, and the penalties set forth in the Notice of Assessment shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in Chapter 4. In the event a party fails to Appeal, or waives the opportunity to appeal a Notice of Assessment, the Assessment and findings of the Emissions Allowance Delivery Committee shall constitute a final disciplinary action of the Exchange.
- (4) Within ten (10) days after receipt of Market Regulation Department's reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by Market Regulation Department or are otherwise relevant to the matter.
- (5) In the event of an appeal by a Party, the President, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the President, or his designee, any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.

(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Market Regulation Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.

(b) At such hearing: The Appellant may appear personally and may be represented by counselor or other representative of his choice at the appeal.

(c) The Market Regulation Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the Market Regulation Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.

(d) The Appellant shall be entitled to rebut the Market Regulation Department's evidence and shall be entitled to call witnesses and introduce documents in support thereof.

(e) The Market Regulation Department and the Appellant shall be entitled to cross-examine any witness called by the opposing Party at the hearing.

(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the Panel shall be based upon the record of the hearing.

(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.

(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce, or waive the charges assessed against the Appellant and shall state the reasons therefore.

(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective day of the decision or as specified. The effective day shall be fifteen (15) days after a copy of the written decision has been delivered to the appellant and to the Commission.

(8) The Assessment Appeal Panel shall consider, and make recommendations to the President, or his designee concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the President shall constitute the final disciplinary action of the Exchange.

#### (E) ARBITRATION PROCEDURE

(1) Any claim for damages arising between a Buyer and a Seller as a result of a delivery pursuant to this contract shall be settled by arbitration in accordance with these Rules.

(2) Notice of Intent to Arbitrate must be submitted to the Secretary of the Exchange within three business days of the occurrence upon which the claim is based or the decision of the Emissions Allowance Delivery Committee with respect to a late or failed performance. Failure to submit a Notice of Intent to Arbitrate within the prescribed period will be deemed a waiver of a Party's rights to arbitrate such a delivery dispute under the special or Regular Arbitration Rules.

(3) The Arbitration will be governed by Chapter 6A of the Rules except that the President or his designee shall appoint an Arbitration Panel.