

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
STATE OF DELAWARE**

*In Re:*

*7 Del. Admin. Code 1147, CO2 Budget Trading Program*

Appeal of Secretary's Decision 2013-A-0054 Amending CO2 Budget Trading Program Regulations

Gary Myers, Appellant

**NOTICE OF APPEAL**

GARY MYERS files this appeal from a decision of the Secretary approving amendments to the Department of Natural Resources and Environmental Control's regulations for the CO2 Budget Trading Program, 7 Del. Admin. Code 1147. The decision of the Secretary (20123-A-0054) was published in the Delaware Register of Regulations on December 1, 2013. 17 Del. Register of Reg. 644-646 (Dec. 1, 2013). This appeal is lodged under 7 Del. C. § 6008(a), (c).

1. Background

In 2008, the General Assembly and Governor enacted, by statute, a CO2 emissions regulatory regime that was modeled on the “cap and trade” outlined in the Regional Greenhouse Gas Initiative's Memorandum of Understanding, as adopted in 2005 and as amended in 2006 and 2007. 7 Del. C. §§ 6043- 6047. Under the State statutory scheme, each covered electric generation facility located in Delaware must procure, and then later surrender, a CO2 allowance (or permit) for each ton of CO2 emissions it will discharge into the air during specified multiyear control periods. 7 Del. Code §§ 6043(b)(1), 6044(d). The statutory provision sets forth, by legislative findings, the initial (2009) “cap” on total CO2 allowances to be made available, and the reduction in such cap level for each year through 2018. 7 Del. C. § 6043(a)(8), (9). The overall cap numbers constrain the amount of CO2 emissions that covered electric generators can generate in Delaware.

DNREC dispenses the CO2 allowances. From 2009 through 2013, a portion of the allowances were allocated free of charge to Delaware-covered entities, with the remainder auctioned under the multiple quarterly auctions conducted by RGGI, Inc., a private New York corporation. Beginning in the 2014 compliance year, all of the Delaware CO2 allowances will

be allocated by auction. 7 Del. C. § 6045(d). Since 2009, all of the dollar proceeds from the auctioning of the Delaware allowances or permits flow to an appropriated special fund within the overall State treasury. 7 Del. C. § 6046(b). The statutory scheme appropriates the auction proceeds to specific entities and for specific purposes by percentage disbursements. 7 Del. C. § 6046(c), (d).

The Secretary initially adopted regulations to implement the CO2 emission program in 2009. On December 1, 2013, the Secretary amended those rules. The changes adopted by the Secretary tracked recommendations adopted by RGGI, Inc., directed at altering the RGGI regional cap and trade plan. In part, the amendments approved by the Secretary alter the overall “cap” levels found in the 2008 enactment. The amendments impose a new significantly decreased cap level for allowances for the year 2014, and call for further reductions from this 2014 benchmark through 2018. This downward revision of the cap levels for year 2014 and thereafter will significantly decrease the number of allowances available for purchase at auction over the ensuing years. (Exhibit A is a chart comparing the yearly allowance cap levels under the 2008 statutory enactment and the yearly caps for allowances under the revised rules adopted by the Secretary).

The amended rules adopted by the Secretary on December 1 also the change the minimum reserve price for the auctioning of CO2 allowances. A CO2 allowance cannot be obtained unless the auction clearing price is greater than the minimum reserve price. From 2009 until now, the reserve price for RGGI, Inc. conducted auctions hovered between \$1.86 and \$1.98. The new rule adopted by the Secretary set the minimum reserve price at \$2.00 for 2014, to thereafter be increased by a 2.5% adder in each following year.

I wish to challenge the authority of the Secretary to make these changes without any further legislative action.

## 2. Statement of Interests

### a. Electric Consumer Interest

I am a residential heating customer of Delmarva Power & Light Co. and have been since 1973. I take electric supply under DP&L's Fixed Price SOS service. I consume, and pay for, approximately anywhere from 9.4 to 2.3 MWHs of power each billing cycle, depending on season, weather and usage. My monthly electric bill (including supply and delivery) for 2013 has averaged \$159.

DP&L purchases a large portion of the power supplied to me via yearly RFP solicitations to participants in the wholesale electric market. Consequently, the retail price I pay to DP&L for electric supply to my home is largely set by the competitive markets for sale and purchase of wholesale electric energy.

The new Delaware cap levels adopted by the Secretary track a new overall lower regional cap level set by RGGI, Inc. That organization projects that the lowered CO2 cap levels for the region will increase the prices for auctioned CO2 allowances for the 2014-2020 period to either a \$6.00 – \$8.40 range or a \$3.60 - \$10.20 range. Either of these price scenarios are significantly higher than the price of around \$2.00 that was projected to prevail if the cap levels would remain as initially set.<sup>1</sup> Such significantly higher CO2 allowance prices will increase costs for covered wholesale electric generation entities within the RGGI area. And such covered entities will likely attempt to pass all, or a significant percentage, of such increased allowance prices along in wholesale electric prices. Such increased costs, and prices, for “covered” RGGI entities will also likely allow non-covered electric generators to also raise their offered prices for their wholesale electric output. And because, DP&L procures its wholesale supply in large part in the competitive electric market, the increased wholesale prices will flow through and likely increase the retail prices that I will pay for my electric supply.

DNREC admits that the downward change in the cap level will impact wholesale electric prices.<sup>2</sup> It also admits that the change in cap levels, leading to increased allowance prices, will raise electric supply costs for retail consumers in Delaware. DNREC suggests that “for the average Delaware household” the increased annual supply costs would be equivalent to the yearly cost (\$5-\$10) of a CFL light bulb.<sup>3</sup> Because I use often use electric supply 50-100% above the “average” household consumption point (.9 MWH), I will have increased charges of up to twice the amount assumed by DNREC's scenario.

RGGI, Inc., also has projected the regional bill impacts in light of the decreased cap levels. Under RGGI, Inc.'s analysis, for the period from 2014-2018, with the decreased cap, regional average residential retail electric bills will be .3 - .4% higher than they would be if the initial cap remained in place.<sup>4</sup> If one applies those percentages to my average monthly bill over the 2013 period (\$159), the result is that the cap level decreases will cause my monthly electric bill to increase by at least \$ .47 - .63 over the next four years.<sup>5</sup>

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1 RGGI, Inc., *IPM Analysis: Amended Model Rule* Results at pp. 4, 5, 8, 11-13 (Feb. 8, 2013).

2 Hearing Officer's Rpt. at 7 (Nov. 15, 2013).

3 Hearing Officer's Rpt. at 7-8 & n. 3.

4 RGGI, Inc., *Customer Electricity Bill Analysis 91 Cap Bank Model Rule Case* at 11 & 12 (June 3, 2013).

5 The RGGI, Inc. analysis proceeded on class-wide bases and it made two assumptions: (1) that widespread consumer energy efficiency measures will decrease overall electric demand that will then drive lower wholesale generation supply prices and (2) that the average consumer will reduce his billable demand by using energy efficiency measures. *Bill Analysis* at 5. The latter assumption suggests that the increased costs to a particular consumer (and particularly one who does not, or cannot, undertake individual efficiency measures) may be greater than the percentage increases set forth in the *Analysis* for the “average” bill within the customer class. The initial assumption relies on unstated data about the ability of widespread energy efficiency measures to be implemented and then drive both overall demand, and wholesale costs, to lower levels.

I have an interest in keeping my retail electric charges as low as possible. Every dollar counts. The change in the cap levels under the revised CO2 Trading rules will significantly affect that interest.

b. Citizen and Voter Interest

As summarized below, my two challenges go to the authority of the Secretary – without further legislative action – to change the cap levels and allowance auction reserve prices. First, the Secretary has not been delegated the power to change the cap level under any of the provisions of 7 Del. C. §§ 6043-6046. Without a legislative enactment, the Secretary's executive action decreasing the cap level from that found in the 2008 statute thus violates Article II, § 1 of the State Constitution which vests legislative power in the General Assembly. Second, the Secretary's changes to the cap level and reserve auction prices - as they will, and are intended to, increase the allowance prices - run afoul of Article VIII, § 10(a) of the State Constitution. The Secretary's actions will result in an increased tax or license fee (in the form of increased allowance prices) without the legislative action called for in section 10(a). By his rule changes, the Secretary assumed the power, without legislative enactment, to undertake governmental actions that will increase State revenues. Section 10(a) assigns to the law-making process, not the Secretary, the power to decide whether to increase tax or fee exactions that will increase State revenues.

Both the Article 11 vesting provision and section 10(a) are explicit constitutional commands about the separation of powers between the legislative and executive branches. Executive branch officials cannot make policy decisions that increase State revenues flowing from fees or taxes without explicit legislative action approving such changes. *Cf. Opinion of the Justices*, 575 A.2d 1186, 1188-1190 (Del. Justices 1990).

Delaware courts have historically allowed citizens of this State to challenge governmental actions that contravene constitutional provisions grounded in separation of powers principles without showing any specific interest in the result beyond the public interest in enforcement of the law. *State ex rel. Biggs v. Corley*, 172 A. 415, 417 (Del. Super *en banc* 1934). In *Biggs*, the court realized that a citizen has an interest in the constitutional commands related to a divided State government and that such interest is sufficient, without more, to allow him to bring proceedings to enforce them.

I have been a resident of this State since 1973. I have voted since 1973 in each general election for both a State Representative and State Senator for my district.

Section 10(a) makes the legislature a necessary party in order to increase any tax or the cost or price of any State-issued license. It also requires that any such increase be endorsed by a supermajority of the legislators in each body. The Secretary's action - that will increase prices for the CO2 license allowances - deprives me of the ability to hold my particular legislators accountable for such attendant increases in State revenues. In addition, because section 10(a)

requires supermajority approval for such fee increases, the Secretary's actions deny me the ability to lobby my legislator to join a minority of other legislators to block any such proposed increase in revenues. In either case, the Secretary's action in unilaterally making changes to the cap level and auction reserve price without legislative approval dilutes the power of my vote for legislative representatives.

#### 4. The Challenges

##### a. No Delegation of the Power to the Secretary to Change the Cap Level

The General Assembly has not delegated to the Secretary the authority to change the overall Delaware cap level. No language in 7 Del. C. §§ 6043-6047 explicitly delegates to the Secretary the authority to change the cap level found in § 6043(a)(8) & (9). Without such delegation, the Secretary's action is unauthorized (and violates the vesting clause of the State Constitution).

A delegation of the power to change the cap level – and set the limit on permissible CO<sub>2</sub> emissions in Delaware – needs to be explicit. Such requirement for an explicit command is required by the constitutional principles that the only the legislature can make major policy decisions, that private entities (such as RGGI, Inc.,) cannot be delegated the authority to make binding rules, and that the legislature, not the executive branch, has exclusive control over governmental actions that change tax or fee exactions that result in increased State revenues.

The Secretary, in his order, asserts that he has been delegated the authority to make a change in the cap level for CO<sub>2</sub> emissions by statutory language that empowers him to participate in RGGI; that announces that the cap level set forth in the statute might change; and that that allows him to make regulations to implement the 2005 RGGI Memorandum of Understanding, as amended. None of the statutory provisions (when read in context) are a sufficiently clear delegation to the Secretary authorizing him to make the policy decision on the appropriate cap level and to abandon the cap level findings made by the General Assembly related to the development, utilization, and control of the air resources of the State related to impacts of the carbon dioxide emissions.

##### b. The Secretary's Rule Changes Violate Section 10(a) of Article VIII

Section 10(a) of Article VIII bars any increase in the effective rate of any tax or license fee without prior legislative approval. The purpose of section 10(a) was to assert legislative supremacy over all State revenues and revenue sources so as to prevent the Executive Branch from unilaterally increasing tax levels or permit fee costs that will increase State revenues. The prohibition applies whether the taxes or fees are imposed for revenue producing purposes or simply as an adjunct cost to comply with a regulatory regime. *Opinion of the Justices*, 575 A.2d 1186, 1188-1190 (Del. Justices 1990).

The CO2 allowance under the CO2 Budget Trading program is a permit, or license, granted by the State, to emit CO2. The auction prices for such allowances, which flow to State coffers, are hence “license fees” paid to acquire the needed permit. The lowering of the cap levels will, in effect and by design, increase the auction prices for allowances and increase the auction proceed amounts flowing to the State treasury to be used to fund State programs. In fact, DNREC projects that the decreased cap levels, and resulting increased allowed prices, will result in \$108 more million dollars in auction proceeds flowing to State coffers than would have been received if the cap had not been changed. *See DNREC, The RGGI: 2012 Program Review Amendments 6/18/2013* at 11 (June 18, 2013). Similarly, the increase in the reserve auction price, the lowest price allowable for purchase of a permit, increases the minimum price that can be paid for an allowance. The result of the changes will be that the Secretary will have taken action with regard to the cost of a State permit that will increase State revenues. It will be have been done without legislative approval. As such the Secretary's actions contravene both the text and purpose of section 10(a).

In his order, the Secretary did not respond to the Section 10(a) challenge that I raised in comments. DNREC staff, in its comments, only responded that CO2 program is not a tax or fee and that the charges for allowances that flow to State coffers represent costs associated with compliance with the program aimed at reducing CO2 emission in the power sector. Such conclusion is hard to square with the plain terms of section 10(a) as well as the underlying purpose of such constitutional restriction. Further, DNREC's view that allowance prices fall outside of the reach of section 10(a) because they represent costs to comply with a regulatory program runs counter to the expansive reach of section 10(a) articulated in the 1990 *Opinion of the Justices*.

## 5. Witnesses and Hearing Time

Because both of my challenges to the Secretary's order revolve around legal questions related to the ability of the Secretary to act as he did, I anticipate only a short public hearing. I request the ability to present briefing on the legal issues and to have oral argument.

On the merits, I anticipate calling as witnesses only one or two DNREC staff personnel. The purpose of their testimony would be to present figures related to actual and projected CO2 emissions from Delaware covered facilities from 2009 to 2020. Those figures are relevant to the legal questions and were not, despite my request, included in the record before the Secretary. I also intend to offer as exhibits various legislative materials about RGGI, section 10(a) of Article VIII, and State budgetary principles.

If DNREC challenges my ability to pursue this appeal, I reserve the right to present additional witnesses or exhibits, along with additional briefing, on such question. Until DNREC makes known the nature of its objection, I cannot declare the nature of the evidence, or the expected time for presentation, on that issue.

Respectfully submitted,

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## EXHIBIT A

### COMPARISON OF DELAWARE “CAP” LEVELS FOR CO2 ALLOWANCES UNDER RULES IMPLEMENTING 2008 STATUTE AND THOSE ADOPTED BY SECRETARY IN ORDER NO. 2013-A-0054

<u>Year</u>	<u>Cap level (endorsed in 2008 Act)</u>	<u>Rule Revision's New Cap Level</u>
2014	7,559,787	4,064,687
2015	7,370,792	3,963,069
2016	7,181,708	3,863,993
2017	6,992,803	3,860,079
2018	6,803,808	3,763,577
2019	6,803,808	3,669,487
2020	6,803,808	3,577,750