SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

INDECK CORINTH, L.P.,

Petitioner/Plaintiff,

- against -

DAVID A. PATERSON, as Governor, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY, and NEW YORK STATE PUBLIC SERVICE COMMISSION,

Respondents/Defendants.

INDEX NO. 369/2009
RJI NO. 2009/0369

Hon. Thomas D. Nolan, Jr.

MEMORANDUM OF LAW OF RESPONDENTS/DEFENDANTS DAVID A. PATERSON, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY

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MISCELLANEOUS

LIST OF ACRONYMS

AR	Administrative Record
EU ETS	European Union Emissions Trading Scheme
EE & CET Account	Efficiency and Clean Energy Technology Account
FERC	Federal Energy Regulatory Commission
GHGs	Greenhouse Gases
IPPNY	Independent Power Producers of New York
LTCs	Long Term Contracts
LRACs	Long-Run Avoided Costs
MOU	Memorandum of Understanding
MW	Megawatt
NYISO	New York Independent Systems Operator
PURPA	Public Utilities Regulatory Policy Act
QF	Qualifying Facility (under PURPA)
RGGI	Regional Greenhouse Gas Initiative
RIS	Regulatory Impact Statement
RPS	Renewable Portfolio Standard
SBC	System Benefits Charge
SWG	Staff Working Group

INTRODUCTION

This litigation involves a challenge to New York's regulations implementing the Regional Greenhouse Gas Initiative ("RGGI"), a program that New York adopted after working cooperatively with other northeast states to further the important environmental goal of reducing global warming pollution from power plants. New York's RGGI regulations establish a cap-and-trade air pollution reduction program that reduces the limit on the overall emissions of carbon dioxide ("CO_2") from power plants by 10 percent by the end of 2018, but gives power plants considerable flexibility in how they choose to comply with the regulations in order to meet this goal. Among other options, power plants can purchase carbon allowances to comply with RGGI's requirements.

New York's RGGI program is the product of a multi-year process, which included extensive stakeholder input from regulated entities (including the Petitioner), environmental groups, and members of the general public. Working from a model rule developed with the other participating states, but in no way bound by it, New York engaged in an extensive rulemaking process that used stakeholder input to adopt a rule tailored to address New York's circumstances. In so doing, New York incorporated into the final regulations a provision that sets aside 1.5 million allowances to be given for free to a few entities such as the Petitioner that have long-term contracts to sell their electricity at fixed rates, if a showing of economic need is met.

Despite New York's efforts to address Petitioner's concerns, and without waiting for a determination by Respondent New York State Department of Environmental Conservation ("DEC") as to whether it would qualify for free allowances, Petitioner filed this action. Contrary to its stated support for the goal of reducing greenhouse gas emissions, Petitioner makes a broad assault on the entire RGGI program, alleging that

three state agencies and the Governor himself have violated numerous laws and infringed on Petitioner's constitutional rights. Petitioner's claims are factually and legally erroneous, and based on numerous unsworn and unsubstantiated allegations. In adopting the RGGI rules, New York and its agencies acted within the broad authority granted to them by the Legislature to address air pollution, and properly exercised agency discretion based on their technical expertise and an extensive two-year rulemaking record. As a result, the Court should dismiss this hybrid petition and complaint and should enter judgment in favor of the Respondents.[1]

STATEMENT OF FACTS

A. Emissions of Carbon Dioxide From Electricity Generation in New York Contribute to Significant Environmental and Public Health Harms

The combustion of coal and other fossil fuels in electricity generating power plants, among other sources, causes the emission of several air pollutants, including CO_2 and other greenhouse gases ("GHGs"). Affidavit of Alan Belensz, sworn to on May 14, 2009 ("Belensz Aff."), at ¶ 29.[2] CO_2 and other GHGs trap heat in our atmosphere. Id. at ¶ 6. Since the Industrial Revolution, atmospheric concentrations of GHGs have increased substantially as a result of human activities, including the combustion of fossil fuels. Id. There is clear and overwhelming scientific consensus that anthropogenic, or human-caused, emissions of CO_2 are contributing to the warming of our planet. Id. at ¶ 7.

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[1] Petitioner's Joint Petition and Complaint brings a hybrid special proceeding pursuant to Article 78 of the Civil Practice Law and Rules and action for declaratory judgment and injunctive relief. To the extent that Petitioner's claims are in the nature of an Article 78, Respondents are entitled to dismissal of the Petition. With regard to Petitioner's other claims, Respondents move for summary judgment on the basis that there are no material issues of fact and Respondents are entitled to judgment in their favor as a matter of law, including a declaratory judgment that promulgation of the RGGI regulations was authorized and did not violate any Constitutional rights or prohibitions.

[2] Mr. Belensz is the Acting Director of DEC's Office of Climate Change, in which position he is responsible for overseeing the development and implementation of programs and policies that mitigate GHG emissions in New York, including New York's participation in RGGI.

The warming climate represents an enormous environmental challenge for the State, because unabated, climate change will have serious adverse impacts on the State's natural resources, public health and infrastructure. Id. at ¶ 8. Scientists have already observed significant warming in New York's climate due in part to increased concentrations of GHGs in the atmosphere. Id. at ¶¶ 8, 10. These temperature increases already have resulted in the several impacts to the Northeast climate, including more frequent extreme heat days, an increase in heavy rainfall events, earlier breakup of winter ice on lakes and rivers, less precipitation falling as snow and more as rain, rising sea surface temperature and sea level, and reduced snow pack. Id. at ¶ 11; Revised Regulatory Impact Statement ("RIS"), 6 NYCRR Part 242, CO_2 Budget Trading Program [Administrative Record ("AR") 10], at 16-17.

In addition to these already-observed climatic changes, scientists have made several projections for trends in the Northeast climate depending on whether atmospheric GHG concentrations and CO_2 emissions are reduced. Belensz Aff. at ¶ 13; RIS [AR 10], at 17-18. Under a higher emissions scenario that assumes the unabated continuation of fossil fuel-intensive economic growth, projections for the Northeast climate include: (1) warmer winters by 8 to 12°F and summers by 6 to 14°F, by the end of the century; (2) increased number of extreme heat days; (3) increased risk of winter flooding, as more precipitation falls as rain rather than snow; (4) increased frequency of heavy rainfall and extreme storms; (5) more frequent short-term droughts, due to increased evaporation rates and reduced soil moisture from rising temperatures; (6) earlier snow melt; (7) a rise in sea surface temperatures and sea levels. Belensz Aff. at ¶ 16; RIS [AR 10], at 18-19.

These potential climatic changes would harm New York's environment and human health. Belensz Aff. at ¶ 18. For instance, more intense and prolonged periods of summertime heat can result in increased mortality and heat illnesses, especially in cities. Id. at ¶ 19. Higher temperatures also enhance the formation of ground-level ozone, which promotes respiratory illness in children, the elderly, and those with pre-existing illnesses. Id. at ¶ 20. Increased temperatures and precipitation levels also produce conditions favorable to the introduction or spread of vector-borne illnesses such as Lyme Disease, Equine Encephalitis, West Nile Virus, and other diseases spread by mosquitoes, ticks, and rodents. Id. Numerous other impacts on New York's environment and human health are projected, including: (1) rising sea levels, which contribute to coastal erosion and an increase in the frequency and magnitude of storms such as the 100-year storms, which would result in increased flood damage; (2) stress on public water supplies from changes in temperature and precipitation; (3) a reduced growing season for cold weather crops such as applies and potatoes, and stress on the dairy industry, which requires cooler temperatures for milk production; and (4) displacement of hardwood forests, including sugar maple trees, to the north as the temperature increases, as well as a decrease in maple syrup production and a dulling of fall foliage. Id. at ¶¶ 22-26.

Some of the adverse impacts in New York can be avoided or minimized by reducing GHG emissions, thereby helping to stabilize atmospheric GHG concentrations at acceptable levels. Id. at ¶ 28. The risks of injury from a warming climate increase with the rate and magnitude of the warming. Id. at ¶ 29. In turn, the rate and magnitude of warming is primarily dependent upon the level of CO_2 emissions. Id. The greater the emissions, the greater and faster the temperature change, with greater resulting injuries.

Id. Thus, reductions in CO_2 emissions from sources such as power plants will reduce the risk of injury to New York and its residents from global climate change. Id. at ¶¶ 30-31. In promulgating the CO_2 Budget Trading Program, 6 NYCRR Part 242 ("Budget Trading Program"), DEC determined that reducing CO_2 emissions from power plants will reduce New York's contribution to climate change, and therefore reduce the risk of injury to the State and its residents. Id. at ¶ 31.

B. Development of the Model Rule

On April 24, 2003, then-Governor George Pataki sent letters [AR 244] to the governors of ten northeastern states inviting them to work cooperatively to design a cap-and-trade program to address emissions of CO_2 from power plants. Affidavit of Michael Sheehan ("Sheehan Aff."), sworn to on May 14, 2009, at ¶ 36.[3] On December 20, 2005, after a two-year design process that included extensive stakeholder and expert input, and comprehensive technical analyses by the states, the governors of seven of these states—Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, and Vermont—agreed to propose implementation of RGGI rules in their states. Id. This agreement was set forth in a Memorandum of Understanding ("MOU") [AR 245] signed by the governors on or about December 20, 2005. Id. In the MOU, the States agreed as an overall environmental goal to "commit to propose for legislative and/or regulatory approval a CO_2 Budget Trading Program (the 'Program') aimed at stabilizing and then reducing CO_2 emissions within the Signatory States . . .." MOU ¶ 1 [AR 245], at 2.

[3] Michael Sheehan is the Chief of DEC's Division of Air Resources' Mobile Source Planning Section. He was the Division's lead staff person assigned to serve on the RGGI Staff Working Group tasked with developing the Model Rule and also was intimately involved in developing New York's Budget Trading Program regulations at issue in this case.

Subsequently, Massachusetts, Rhode Island, and Maryland became signatories to the MOU, bringing the states currently participating in RGGI to ten. Sheehan Aff. at ¶ 36.

In September 2003, the agency heads of the then-participating states adopted a statement of "Goals, Proposed Tasks, and Short-Term Action Items" [AR 221] to govern development of the program. Id. at ¶ 37. This document specifies that the goal of the program is "to reduce carbon dioxide emissions from power plants in the participating states, while maintaining energy affordability and reliability and accommodating, to the extent feasible, the diversity in policies and programs in individual states." [AR 221], at 1. Design principles include that the program will: (1) "emphasize uniformity to facilitate interstate trading in GHG allowances and will build on successful cap and trade programs and mechanisms already in place"; (2) "be expandable and flexible, permitting other states to seamlessly join in the initiative when they deem it appropriate"; and (3) "not unduly interfere with other national, state or regional emission trading programs and initiatives, but may serve as a platform and model for the implementation of future additional emissions trading programs and initiatives that individual or multiple states might deem appropriate." Id. The document further called for the establishment of a Staff Working Group ("SWG") comprised of designated representatives from each state's environmental and energy regulatory agencies. Id. at 2.

In August 2003, the agency heads for each state designated representatives to the SWG. Sheehan Aff. at ¶ 38. At that time, a DEC representative was appointed to be the chair of the SWG and several subgroups were formed to work on various aspects of the program. Id. Staff members from DEC, NYSERDA and the New York Department of Public Service ("DPS") served on one or more of these subgroups. Id. The Model Rule

concluded that a certain amount of consistency among the state RGGI rules was necessary to provide the regulated community and the public with certainty and to facilitate participation in a regional allowance trading program. Id. at ¶ 45. However, DEC and the other RGGI state regulatory agencies also decided to provide states with flexibility in adopting several of the Model Rule provisions, including provisions regarding applicability and source exemptions, allowance allocations, allowance set-asides, and permitting. Id. Thus, while it was intended (although not required) that the regulatory agencies in the region propose rules that were materially consistent with the Model Rule, the rules proposed by the RGGI states were not, nor were they required to be, identical in all respects, and indeed New York retained and still retains the ability to amend its rules. Id. Moreover, each state would be required to follow its own state administrative rulemaking procedures, which included, but was not limited to: notice, opportunity for comment and assessment of public comment. Id.

On March 23, 2006, the RGGI States released a draft model rule to stakeholders and the public [AR 223-224]. Id. at ¶ 46. During the public comment period on the draft model rule, the RGGI states received over 1,000 pages of comments from over 100 organizations. Id.; [AR 238]. On August 15, 2006, the RGGI states released a Model Rule after taking into consideration the extensive public comments received from stakeholders and the public. Sheehan Aff. at ¶ 47; [AR 241]. At no time did DEC cede or delegate any regulatory authority or decisions regarding the Budget Trading Program to the SWG. Sheehan Aff. at ¶ 47. Rather, a representative from DEC was involved in and agreed to each design decision made regarding the MOU and the Model Rule. Id.

Further, the Model Rule was never intended to and, in fact did not, supplant DEC's own regulatory efforts to promulgate final binding RGGI program rules in New York. Id.

The Model Rule contemplates that each state will impose a cap, or "annual base budget," on CO_2 emissions from covered power plants annually from 2009 through 2014, and then reduce the cap by 10% by the end of 2018. Id. at 48; Model Rule Subpart XX-5.1 [AR 243], at 38. The state implements the cap by creating CO_2 emission allowances up to the level of the cap. Sheehan Aff. at ¶ 48. Affected power plants are required, as a condition to their operating permit, to hold in their account at the end of a three-year control period enough allowances to cover their emissions of CO_2 during such period. Model Rule Subpart XX-1.5(c) [AR 243], at 23-24. Each allowance represents a limited authorization to emit up to one ton of CO_2. Id., at 24.

The participating states each agreed in the Model Rule to allocate a minimum of 25% of their allowances to support consumer benefit programs. Sheehan Aff. at ¶ 49. Many commenters on the Model Rule had encouraged the states to allocate 100% of the allowances to the public benefit rather than giving them to generators at no cost. See RGGI Stakeholder Comments – Bullet-Point Summary by Issue [AR 238], at 2. The Model Rule, however, did not specify how participating states were to allocate the remaining 75% of the allowances. Model Rule XX-5.3(a) [AR 243], at 39. Many states, including New York, exercised their independent discretion to promulgate rules requiring that all or nearly all of their allowances be auctioned and the proceeds be dedicated to support the various purposes that each state determined would best further the goals of their programs. Sheehan Aff. at ¶ 49. Thus, each RGGI State independently decided on

the percentage of allowances they would auction as opposed to directly allocate to covered sources and independently decided how to use the auction proceeds. Id.

Not surprisingly, the percentage of allowances being auctioned varies from state to state. Id. at ¶ 49. For instance, Delaware is initially auctioning 60% and directly allocating 40% of its allowances, with such percentages to move toward a 100% auction by 2014. Id. In addition, several states, including New York, have included provisions that "set aside" a certain number of allowances to directly allocate for specific purposes or to specific generators, such as to signatories to long term contracts ("LTCs"), who claimed that they did not have the ability to pass on the costs of the allowances and so would be unfairly impacted. Id. at ¶ 50. The Model Rule did not provide for any set-aside of allowances for LTC generators. Id. However, in response to comments from the Petitioner and others, DEC proposed regulations specifically providing for a set-aside of 1.5 million allowances. Id. DEC may directly allocate allowances for free to LTC generators that meet the requirements of the regulation. See 6 NYCRR 242-5.3(d) [AR 6], at 54-58 (section entitled "Long term contract set-aside allocation.")

C. Overview of New York's RGGI Program Rules

In October 2008, DEC and NYSERDA adopted regulations implementing New York's RGGI program: the Budget Trading Program and the CO_2 Allowance Auction Program ("Auction Program"). Sheehan Aff. at ¶ 85; Affidavit of John G. Williams, sworn to on May 14, 2009 ("Williams Aff."), at ¶ 5.[4] DEC established the Budget Trading Program through a new rule, 6 NYCRR Part 242, and revisions to an existing

[4] John G. Williams is the Director of NYSERDA's Energy Analysis program, and in such position he is responsible for overseeing development of the plan for utilizing allowance auction proceeds to fund energy efficiency and clean energy technology programs. He also participated in development of the Auction Program regulations.

rule, 6 NYCRR Part 200. Id. NYSERDA established the Auction Program through a new rule, 21 NYCRR Part 507. Id.

The Budget Trading Program caps New York's CO_2 emissions from power plants of 25 megawatts and larger at approximately 64 million tons annually from 2009 through 2014, and reduces the cap by 10% by the end of 2018. Sheehan Aff. at ¶ 31. Affected power plants are required, as a condition to their operating permit issued by DEC pursuant to 6 NYCRR Parts 201 and 621, to hold in their account at the end of a three-year control period enough allowances to cover their CO_2 emissions during such period. Id. Each allowance represents a limited authorization to emit up to one ton of CO_2. Id.

The Budget Trading Program provides for NYSERDA's establishment of an Energy Efficiency and Clean Energy Technology Account ("EE & CET Account"), into which DEC deposits most of the allowances. 6 NYCRR 242-5.3(a) [AR 6], at 46. The NYSERDA Program rule provides that such allowances are to be made available for sale through open and transparent CO_2 allowance auctions. 21 NYCRR Part 507.4 [AR 127], at 4. The regional auctions are conducted by Regional Greenhouse Gas Initiative, Inc. ("RGGI, Inc."), a non-profit corporation formed to provide technical and program support services to the states signatory to the RGGI MOU. Williams Aff. at ¶ 8. RGGI, Inc. administers the auctions of allowances under the Auction Program on behalf of NYSERDA pursuant to a Cooperative Agreement [AR 251] between DEC, NYSERDA, and RGGI, Inc. Id.; 21 NYCRR Part 507.5(b) [AR 127], at 5-6.

Neither the Budget Trading Program nor the Auction Program dictate how affected sources must acquire allowances, which are available to sources through either CO_2 allowance auctions or on a secondary market. Williams Aff. at ¶ 6. The secondary

market for RGGI allowances is comprised of the trading of physical allowances and financial derivatives, such as futures and options contracts. Id. Standard futures and options contracts for RGGI allowances are traded both "over-the-counter," i.e. not on a public exchange, and on several public exchanges, including the New York Mercantile Exchange. Id. In addition to purchasing allowances, affected sources may comply with the requirements of the Budget Trading Program by reducing their CO_2 emissions, for instance through heat rate improvements, fuel switching, or co-firing of biofuels, and by obtaining emissions "offsets," which are project-based GHG reductions or involve the sequestering of GHG emissions from sources that are not subject to the Budget Trading Program. Sheehan Aff. at ¶ 33.

DEC determined to auction most of the allowances based on analyses indicating that ratepayers in New York will ultimately bear most of the compliance costs of the Budget Trading Program whether allowances are granted for free or auctioned. Id. at ¶ 56. On the other hand, if the value of the allowances were used to aggressively reduce electrical demand through energy efficiency and the development of clean energy technologies, then consumer electricity rates and the costs to comply with the Program, as represented by allowance prices, would be lower. Id. at ¶ 63. Therefore, when formulating the Program, DEC determined that, rather than giving the allowances for free, which might result in windfall profits to some generators, the value of the allowances should be used to support the purpose of the program, i.e. the reduction of CO_2 emissions, and to reduce the costs of the program to electricity consumers by promoting "investments in energy efficiency, renewable or non-carbon-emitting

technologies, and/or innovative carbon emissions abatement technologies with significant carbon reduction potential." Id. at ¶ 65; 6 NYCRR 242-5.3(a) [AR 6], at 46.

D. DEC's Promulgation of the Budget Trading Program

1. The Decision to Allocate a Majority of the Allowances to the EE & CET Account to Be Auctioned.

On December 5, 2006, DEC released a pre-proposal draft of the Budget Trading Program rule ("Pre-Proposal") [AR 96]. The purpose of the Pre-Proposal was to allow an opportunity for additional public feedback before formal proposal. Sheehan Aff. at ¶ 53. The Pre-Proposal reflected the provisions that DEC had agreed to propose as part of the Model Rule, as well as several New York-specific provisions. Id. The principal New York-specific provision on which DEC specifically sought public comment was a proposal to allocate 100% of the allowances though an open, transparent auction, the proceeds of which were to be used for "energy efficiency and clean energy technology purposes." Id.; see also Notice of Pre-Proposal of New York RGGI Rule [AR 94]. The Notice of the Pre-Proposal [AR 94] set out in detail the rationale for the 100% auction approach:

> In New York's deregulated electricity market, generators place bids with the New York Independent System Operator to supply electricity to meet demand in the State. In general, the generator's bid price is determined by costs incurred by the generator to supply the electricity. Thus, the amount of a generator's bid will include the incremental cost of fuel, labor, and emissions allowances necessary to operate its plant to generate electricity. A generator will include in its bid the value of the emissions allowances necessary to generate the electricity even if the generator has received the allowance at no cost.
>
> Because the value of the allowances will be included as a cost in the generator's bids to supply electricity, the price of electricity will be the same whether the allowances are given away at no cost to generators or generators must purchase the allowances. An allowance giveaway, therefore, means generators are able to substantially increase their revenues (and, hence, profits) under a program like RGGI because they

> pass on the cost of a commodity they obtained at no charge. This has been referred to as "excess revenues," and these excess revenues occur at the expense of electricity consumers.
>
> Under the proposed RGGI rule, the modestly increased costs to electricity consumers under RGGI will be cycled back through energy efficiency investments that will reduce the demand for electricity, thereby taking pressure off electricity prices and the need for new generation in the State. These investments will also greatly complement the carbon cap-and-trade rule by maximizing emissions reductions. In short, the full benefits of the program will inure to those paying for it, rather than end up increasing the profits of generators through a non-auction allocation method.

Notice of Pre-Proposal [AR 94] at 3-4.

Prior to proposing to allocate 100% of allowances through an auction, DEC engaged in an extensive review of economics literature, consulted with experts in economics theory, studied examples of other successful emissions allowances auctions, and examined the experience of the European Union Emissions Trading Scheme ("EU ETS"), a carbon trading program with free allocation of allowances. DEC also analyzed, in consultation with other state agencies and the NYISO, the expected impacts on the electricity markets, system reliability, and electricity prices in New York, and considered the comments that had been received during the three and a half year stakeholder process to develop the Model Rule. Sheehan Aff. at ¶ 55. This analysis confirmed that in a competitive wholesale generation market, such as in New York, generators generally will pass on the value of allowances as a cost of generation whether these allowances are allocated at no cost or generators are required to purchase the allowances. Id. at ¶ 56.

On the other hand, an analysis conducted by ICF International and DPS indicated that, if the value of the allowances were used to aggressively reduce electrical demand in the RGGI region, rather than going to the generators for free, RGGI CO_2 compliance costs, as represented by projected allowance prices, would be lower. Id. at ¶ 63; RGGI

Electricity Sector Modeling Results, Updated Reference and Sensitivity Results [AR 186]; RGGI Region Projected Household Bill Impacts [AR 174]. DEC also received comments and studies during the rulemaking process that supported the conclusion that increased funding for energy efficiency would reduce consumer electricity rates and CO_2 emissions. Sheehan Aff. at ¶ 63; see, e.g., [AR 108, 109, 170, 215, 216].

Based on this information, DEC decided that the value of the allowances should be used to support the purpose of the program, i.e. the reduction of CO_2 emissions, and to reduce the costs of the program to electricity consumers by promoting energy efficiency and clean energy technologies. Sheehan Aff. at ¶ 65. Therefore, the Pre-Proposal specified that DEC would allocate all of the allowances to an EE & CET Account. Id.; Pre-Proposal, 6 NYCRR 242-5.3(a) [AR 96], at 42.

The comments that DEC received on the Pre-Proposal did not call into question the fundamental economic rationale behind DEC's choice to auction all of the allowances. Sheehan Aff. at ¶ 76. However, as discussed below, in response to concerns raised by Petitioner and other generators subject to LTCs, DEC decided to include in the version of the rule that it formally proposed for public comment a "Long term contract set-aside allocation," which set aside a pool of up to 1.5 million allowances to be allocated for free to qualifying LTC generators. Id.

2. *The Decision to Set Aside a Pool of Free Allowances for LTC Generators.*

In response to the Pre-Proposal's approach of auctioning 100% of the allowances, IPPNY submitted a document [AR 207] to DEC raising concerns with this approach, including its potential impact on parties to LTCs. Sheehan Aff. at ¶ 70. Subsequently, DEC distributed a document [AR 205] entitled "The Proposed Auction of 100% of the

Emissions Allowances, Frequently Asked Questions." Id. This document detailed DEC's rationale for the 100% auction approach and responded to the concern regarding generators subject to LTCs. Id. DEC took the position that special treatment for generators operating under LTCs was not warranted for several reasons: (1) it is not uncommon for LTC generators to "negotiate for a 're-opener' or 'change in law' provision in such contracts that would enable the supplier to renegotiate the price or pass on unforeseen costs incurred because of a change in law like RGGI"; (2) in cases where no such re-opener is included, "it may be likely that the supplier of the electricity under the contract has assumed the risk of any change in law that occurs during the term of the contract"; (3) since at least 1992, when then-President George H.W. Bush signed the United Nations Framework Convention on Climate Change, it was reasonable to expect LTC suppliers to have anticipated potential regulation of CO_2 and to have negotiated a re-opener or a risk premium to cover the eventuality; and (4) giving preferential treatment to generators under LTCs might require DEC to review and interpret contracts, which is better left to the parties to the contracts and to the courts. Id.; [AR 205], at 4-5.

In March 2007, Petitioner, jointly with Brooklyn Navy Yard Cogeneration Partners, L.P. ("BNYCP"), another LTC generator, submitted written comments [AR 100] to DEC regarding the Pre-Proposal. Sheehan Aff. at ¶ 73. Petitioner and BNYCP represented that their LTCs, both with Consolidated Edison, did not include any "re-opener" and offered to meet with DEC to further discuss the terms of their LTCs. Id. Petitioner and BNYCP suggested several different options to address the LTC issue. Id. DEC also received comments from other LTC generators, such as Calpine [AR 102], East Coast Power L.L.C. [AR 103], and Suez Energy Generation NA [AR 107], and trade

groups representing LTC generators, such as Northeast Suppliers [AR 104] and IPNYY [AR 105]. Id. at ¶ 74. These commenters presented several options in addition to those proposed by Petitioner and BNYCP, including creation of a LTC set-aside account from which allowances could be allocated directly to LTC generators at no cost. Id.

In May 2007, representatives of Petitioner and BNYCP met with DEC staff, as well as staff from DPS, and exchanged correspondence with DEC, to discuss the terms of their LTCs and the potential impact of the program on their operations. Id. at ¶ 74. Petitioner refused to provide specific information to support its claim regarding the financial impact to it of the Budget Trading Program. Id.; [AR 258].

On September 24, 2007, DEC formally proposed the Budget Trading Program rule ("Proposed Rule") [AR 61]. Sheehan Aff. at ¶ 77. The Proposed Rule reflected DEC's addition of the LTC set-aside allocation provision. Id. at ¶ 78. This provision set aside a pool of up to 1.5 million allowances to be allocated for free to qualifying generators who submit an application showing that they are subject to LTCs without the ability to pass the costs of the allowances to the purchasing party or renegotiate the terms of the contract, such that purchasing allowances would lead to a financial hardship. Id.; Proposed Rule, 6 NYCRR 242-5.3(d) [AR 61], at 50-52.

Despite this significant change, Petitioner was not satisfied with the Proposed Rule. Sheehan Aff. at ¶ 80. Counsel for Petitioner sent DEC a letter [AR 257] and representatives of Petitioner met with DEC on December 19, 2007, to request changes to the LTC set-aside language. Id. A few days later, Petitioner submitted formal comments [AR 89] on the Proposed Rule, which requested, among other things, that DEC allocate additional allowances to the set-aside in the event that there were other LTC generators

that would qualify for such allowances. Id. At the same time, during the public comment period on the Proposed Rule, DEC received numerous comments opposing the free allocation of allowances to LTC generators on the grounds that special treatment for any power generators was not warranted and would violate the emission reduction goals of the program. See APC I [AR 17], at 301-04, 310, 315-17, 321-26.

On May 7, 2008, DEC released a revised Budget Trading Program rule ("Revised Rule") [AR 30]. Sheehan Aff. at ¶ 81. DEC made some changes to the LTC set-aside provision in response to comments received from stakeholders opposed to the set-aside as well as from LTC generators, including Petitioner. Id. at ¶ 82; [AR 58], at 54-57. However, DEC kept the size of the set-aside at 1.5 million allowances. Sheehan Aff. at ¶ 82. As explained in the APC I, which DEC released with the Revised Rule to respond to comments received on the Proposed Rule, DEC "created the Long Term Contract (LTC) set-aside to accommodate generators that will not be able to recover the cost of allowances in an auction as a result of the terms of the LTC. The Department limited the size of the set-aside based on the best information available to the Department during the development of the regulation." APC I [AR 17], at 301. DEC further stated that "[i]n light of the overwhelming opposition to this set-aside provision, the Department is not considering any increases at this time." Id. at 320-21.

In June 2008, Petitioner submitted public comments [AR 55] on the Revised Rule again urging DEC to make changes to the LTC set-aside provision. Sheehan Aff. at ¶ 83. Petitioner represented that there were four additional LTC generators that would be unable to pass through the costs of the RGGI allowances and urged DEC to increase the size of the set-aside to at least 3.5 million allowances. Id. Despite this representation, the

other four alleged LTC generators did not supply DEC with their LTCs to confirm the terms of their contracts or their projected emissions. Id. DEC again received numerous comments opposing DEC's inclusion of the LTC set-aside during the comment period on the Revised Rule. See APC II [AR 15], at 47, 49, 55-56, 64.

Effective on October 24, 2008, DEC adopted the final Budget Trading Program. Sheehan Aff. at ¶ 85; [AR 1]. The final rule retained the LTC set-aside and kept the set-aside at 1.5 million allowances. Id. DEC's rationale for such decision was set forth in the APC II [AR 15], at 50, as follows:

> As noted in the Initial APC, the Department limited the size of the set-aside based on information provided and available to the Department during the development of the regulation. While the commenter mentions that current available information indicates that the set-aside should be at least 3.5 million tons, the information submitted[] did not include copies of the long term contracts to support the tonnage being requested. In light of the fact that the Department could not validate the tonnage and that this regulatory provision has been overwhelmingly opposed by the majority of commenters, the Department has not increased the set-aside.

E. The LTC Set-Aside Application Process

The LTC set-aside allocation and its application requirements are established in 6 NYCRR § 242-5.3(d). Sheehan Aff. at ¶ 86. To be eligible for free allowances, an applicant must show that the LTC was entered into prior to March 2006, that purchasing allowances leads to financial hardship under the conditions of the contract, and that the applicant's primary fuel is natural gas or its emission rate is no higher than 1100 lbs/MWhr. Id. at ¶ 87; 6 NYCRR § 242-5.3(d)(3) [AR 6], at 55-56. In determining financial hardship, DEC considers a number of factors, including: (1) that the LTC applicant is unable to pass the cost of allowances on to the purchasing party or renegotiate the terms of the contract; (2) financial statements from each of the previous five years that demonstrate the revenues and expenses of the LTC applicant; (3) fuel,

total net output and emissions data from the previous three years; (4) costs associated with the Budget Trading Program compared to all other costs associated with the operation of the unit; and (5) a demonstration that the LTC applicant will suffer losses in excess of the value of allowances sought. Sheehan Aff. at ¶ 87. If DEC receives qualifying requests for allowances that exceed the number of allowances in the set-aside account, DEC will award allowances on a "basis proportional to the number of CO_2 allowances requested by each LTC applicant." 6 NYCRR § 242-5.3(d)(7) [AR 6], at 57.

DEC received applications from ten LTC generators requesting a total of 6.6 million allowances. Sheehan Aff. at ¶ 89. Upon reviewing the applications, DEC has preliminarily determined that some of the applications likely will be denied on the basis that they do not meet the eligibility requirements. Id. Prior to making any final allocations the DEC will factor in all of the regulatory requirements of the set-aside program prior to the determination of an actual or prorated allocation award. Id.

Petitioner applied for 441,990 allowances from the LTC set-aside account. Id. at ¶ 90. In support of its request, Petitioner submitted CO_2 emissions data for the three preceding years, which showed emissions of 452,058 tons in 2005, 238,326 tons in 2006, and 248,973 tons in 2007. Id. Under the regulations, DEC calculates the number of allowances to be allocated based upon the greatest total net output experienced by the unit for any single year during the three years prior to submission of the application. Id.; 6 NYCRR § 242-5.3(d)(4) [AR 6], at 56-57. Therefore, an award of allowances from the set-aside to Petitioner would be based on its 2005 total net output, even though 2005 emissions are substantially higher than in more recent years. Sheehan Aff. at ¶ 90. DEC has concluded that Petitioner may be eligible to receive allowances for free under the

LTC set-aside provision. Sheehan Aff. at ¶ 91. If DEC makes such an eligibility determination, Petitioner would be able to receive an actual or a pro rata share of the 441,990 allowances it requested. Id.

F. NYSERDA's Implementation of the Auction Program

NYSERDA was selected as the appropriate entity to administer the EE & CET Account because of its extensive experience and expertise in administering energy efficiency and renewable energy programs. Williams Aff. at ¶ 21. For instance, NYSERDA was selected by the Public Service Commission ("PSC") as the administrator of both the System Benefits Charge ("SBC") and Renewable Portfolio Standard ("RPS") programs, which to date have been the State's principal programs in the area of energy efficiency and clean energy development. Id.

NYSERDA will design and implement the programs funded with RGGI auction proceeds consistent with the principles that NYSERDA has employed in effectively managing the SBC, RPS, and other energy efficiency and clean energy programs. Id. at ¶ 26. These principles include: seeking stakeholder input in program design; competitive selection of projects using both NYSERDA's staff and outside reviewers, maximizing administrative efficiency, independent program evaluation, and a commitment to public transparency and accountability. Id. In adhering to these principles, NYSERDA has followed and will continue to follow the model employed under current SBC-funded programs, including adopting an Operating Plan developed in consultation with a stakeholder group, developing and issuing program status and evaluation reports, and subjecting program expenditures to independent audits as part of NYSERDA's annual audited financial statements and by the Office of the State Comptroller. Id.

1. *The Auction Process and Results to Date.*

The Budget Trading Program requires that the auctions be designed to meet the following objectives: achieve fully transparent and efficient pricing of allowances; promote a fluid allowance market (by making entry and trading as easy and low-cost as possible); facilitate participation by all eligible bidders; safeguard against market manipulation; be held as frequently as is needed to achieve design objectives; avoid interference with existing allowance markets; align well with wholesale energy and capacity markets; and not act as a barrier to efficient investment in relatively clean existing or new electricity generating sources. 6 NYCRR § 242-5.3(a)(3) [AR 6], at 47; see also Part 507 RIS [AR 129], at 4-8.

The first quarterly RGGI auction took place in September 2008, at which approximately 12.56 million allowances were auctioned by Connecticut, Maine, Maryland, Massachusetts, Maryland, Rhode Island and Vermont at a clearing price of $3.07 per allowance. Williams Aff. at ¶ 28. New York participated in the second and third quarterly auctions in December 2008 and March 2009, at which New York sold approximately 12.4 million allowances for about $42 million and approximately 13 million allowances for almost $46 million, respectively. Id. The auctions, as well as the secondary market for allowances, are monitored by an independent market monitor for signs of market manipulation or collusion and to ensure that the auctions are administered in a fair and transparent manner consistent with noticed procedures. Id. at ¶ 29.

2. *Development of an Operating Plan Governing Expenditure of Auction Proceeds.*

The Auction Program rules provide that the "proceeds of the CO_2 Allowance Auctions will be used by the Authority to promote and implement programs for energy

efficiency, renewable or non-carbon emitting technologies, and innovative carbon emissions abatement technologies with significant carbon reduction potential, and for reasonable administrative costs incurred by the Authority in undertaking the activities described in Part 507 and for administrative costs, auction design and support costs, and program design and support costs associated with the CO_2 Budget Trading Program, whenever incurred." 21 NYCRR Part 507.4(d) [AR 127], at 5.

The funds from each of the auctions in which New York participated have been deposited into a segregated NYSERDA financial EE & CET Account. Williams Aff. at ¶ 29. In accordance with 21 NYCRR Part 507.4(e) [AR 127], at 5, NYSERDA has convened an advisory group of stakeholders representing a broad array of energy and environmental interests to advise it on how to best use the auction proceeds ("Advisory Group"). Id. at ¶ 31. NYSERDA staff presented a draft "Operating Plan of Investments in New York under the CO_2 Budget Trading Program and the CO_2 Allowance Auction Program" to the Advisory Group at a meeting on March 6, 2009. Id. at ¶ 32. NYSERDA staff subsequently received and addressed comments from 43 stakeholders on the draft Operating Plan. Id. At a board meeting on April 27, 2009, the NYSERDA board unanimously approved the final Operating Plan. Id. at ¶ 33 & Exhibit D.

The Operating Plan calls for investment of the auction proceeds in programs that will reduce CO_2 emissions in New York and reduce the costs of achieving the emission reduction goals of the Budget Trading Program. Id. at ¶ 36. The estimated benefits associated with the portfolio of programs in the Operating Plan include:

- Energy bill savings of almost $1.3 billion over the lifetime of the implemented measures
- Approximately 70 million MMBtu in lifetime fuel savings
- Lifetime electricity savings of approximately 1,840,000 megawatt-hours

- Emissions reductions over the lifetime of the measures and practices ranging from approximately 7.6 to 8.3 million tons of CO_2.
- The creation or retention of approximately 3,000 sustained jobs.

Id. at ¶ 37. The Operating Plan also allocates up to 7% and 5% of the auction proceeds to cover NYSERDA's program administration and evaluation expenses, respectively, which is consistent with costs spent to administer and evaluate the SBC. Id. at ¶ 38.

SUMMARY OF ARGUMENT

In an attempt to overturn New York's RGGI program, Petitioner advances a number of statutory and constitutional claims, including: (1) then-Governor Pataki exceeded his authority when he signed the RGGI MOU; (2) DEC and NYSERDA lacked the statutory authority to promulgate the RGGI regulations; (3) the RGGI regulations impose an unlawful administrative tax; (4) the RGGI regulations are the byproduct of an interstate compact that required congressional approval under the federal constitution; (5) the RGGI regulations are arbitrary and capricious; (6) the RGGI regulations violate Petitioner's equal protection and due process rights; and (7) the RGGI regulations are preempted by the Public Utilities Regulatory Policy Act ("PURPA"). None of these claims has any merit.[5]

[5] In addition to lacking merit, Petitioner's claims are based on a number of unsubstantiated and erroneous factual assertions. Petitioner's claim of financial injury as a result of the RGGI regulations (Br. at 3, 6, 8, 9, 22) is unsupported by any sworn affidavits and is grossly overstated. For instance, Petitioner's claim that the regulations will increase its operating costs by a "minimum of $2.5 million annually," Br. at 8, is supported only by an unsworn letter to Governor Paterson [AR 254] in which Petitioner actually claims that its costs will be $2.75 million annually. Nowhere in its brief does Petitioner attempt to explain this discrepancy. Further, Petitioner's $2.75 million figure was based on several faulty assumptions: (1) that allowances prices will be $5.50, when the clearing price at the last auction was well below that, at $3.51; and (2) that Petitioner's emissions will be 500,000 tons of CO_2/year, when Petitioner's highest CO_2 emissions in the last four years was well below that and, in the most recent years, was almost half that number. Sheehan Aff. at ¶ 90. Petitioner also makes many assertions that are unsupported by and contrary to the record evidence, including that: (1) the proceeds from allowance auctions will be spent on programs "unrelated" to the goal of reducing CO_2 emissions (Br. at 1, 20, 22, 33, 34); (2) the RGGI regulations "bar" or "prevent" Petitioner from recovering its allowance costs (Id. at 6, 8, 41, 46-47) and/or Respondents "refused" to include any provision in the regulations that would address Petitioner's claimed harm (Id. at 7,

First, Petitioners' argument that then-Governor Pataki violated the principle of separation of powers when he signed the RGGI MOU is moot because DEC's promulgation of the Budget Trading Program and NYSERDA's promulgation of the Auction Program are based, respectively, on the authority of those agencies under the Environmental Conservation Law ("ECL") and the Public Authorities Law ("PAL"), respectively. Moreover, the argument fails on the merits because the Governor was acting within the scope of his executive powers to further the broad policies and goals set forth by the Legislature in the ECL to control air pollution.

Second, because DEC's promulgation of the Budget Trading Program and NYSERDA's promulgation of the Auction Program are both consistent with the powers provided by the Legislature in the agencies' enabling statutes, Petitioner's *ultra vires* claim must fail. The ECL authorizes DEC to broadly regulate air contaminants, such as CO_2 emissions, to choose the method best suited for reducing air pollution, such as establishing cap-and-trade programs, and to contract with public benefit corporations, such as NYSERDA, as appropriate to carry out environmental protection policies. Thus, Petitioner's assertion that the Budget Trading Program exceeds DEC's authority is meritless. Also, the PAL gives NYSERDA broad authority to do "all things necessary or convenient" to carry out its corporate purposes, which provides ample authority for it to accept the allowances allocated to it by DEC. In addition, NYSERDA is authorized to spend the auction proceeds for specific purposes given its statutory authority to conduct, sponsor and assist programs related to "new energy technologies" and "energy conservation technologies," and to provide services related to their development.

9, 41); and (3) DEC was required to adopt regulations that "matched" the Model Rule (Id. at 9, 11, 40). As explained *supra*, each of these claims is erroneous.

Third, Petitioner's argument that RGGI imposes an unlawful tax also fails. Power generators are not required to purchase allowances from New York State, but can choose to comply with the requirements of the Budget Trading Program through other compliance paths or by purchasing allowances from other states or from secondary markets. Moreover, neither the motive behind the program in general nor the decision to auction most of the allowances was driven by a desire to generate revenue. Instead, the primary purpose of the program is to reduce CO_2 emissions from power plants and the decision to auction the allowances – rather than giving them away for free – was motivated by a desire to further the regulatory goal of reducing CO_2 emissions in the most economically-efficient manner with the least cost to electricity consumers. Moreover, all of the proceeds from the auctions will be spent on programs related to the regulatory goal of reducing CO_2 emissions, not on general government programs. Finally, emission allowances are compliance mechanisms that are treated under the Tax Code as assets with value, not as taxes.

Fourth, Petitioner's argument that RGGI is the result of an interstate compact that required congressional approval under the federal constitution fails because Petitioner misreads the Supreme Court's precedent under the Compact Clause, under which only interstate agreements that increase the political influence of the contracting states at the expense of the federal government require the approval of Congress. Because, *inter alia*, states participating in RGGI reserved their rights to modify the Model Rule as necessary to suit their circumstances (a right that New York exercised) and to withdraw from the RGGI MOU at any time, did not delegate any sovereign authority to RGGI, Inc., and expressed their intent to transition to a federal program once Congress takes

commensurate action to regulate greenhouse gas emissions, no congressional authorization of RGGI was required.

Fifth, Petitioner's claim that DEC acted arbitrarily and capriciously in promulgating the Budget Trading Program is wholly without merit. The first alleged defect, that DEC abdicated its discretion to an interstate working group by adhering to the strictures of the Model Rule, is erroneous. In fact, the record shows that DEC departed from the Model Rule at the suggestion of Petitioner to provide a pool of allowances to be given away for free. Petitioner's second cited basis, that the regulations deny Petitioner the ability to recover the costs of allowances, which in turn undermines the design and purpose of the regulations, fares no better. Petitioner's alleged inability to recover the cost of allowances stems from its own contracting decisions, not the RGGI regulations. In addition, that Petitioner may not be able to pass on its allowance costs would not undermine the design and purpose of the program. DEC's decision to auction most of the allowances was to help create price signals at a level "sufficient" to cause investment in technologies and strategies that would reduce CO_2 emissions and reduce the costs of the program. Petitioner has not presented any proof that its inability to pass on its costs will have any material impact on such price signal.

Sixth, Petitioner's claim that the RGGI program violates Petitioner's equal protection and due process rights is incorrect. Petitioner has not stated a cognizable facial or as applied claim under the Equal Protection clause. Contrary to Petitioner's assertions, the RGGI regulations treat all covered electric generators equally. To the extent that there is any favorable treatment, it inures to Petitioner's benefit in the form of the free allowances set aside for long-term contract generators. Moreover, even if

Petitioner could demonstrate that the regulations treated it differently to its detriment, DEC's decision not to exempt Petitioner from the program (or not to give Petitioner all of its allowances for free) was rationally related to a legitimate state interest: obtaining reductions in CO_2 emissions at the least cost to electricity consumers. Petitioner's due process claim also lacks merit. As an initial matter, the claim is unripe because DEC has yet to make a final decision on whether Petitioner is entitled to receive any free allowances, and if so, how may. Even if Petitioner's claim were ripe, it would fail on the merits for the same reasons as its equal protection claim must fail.

Finally, Petitioners' seventh argument, that PURPA preempts the RGGI regulations, also must be dismissed. Petitioner's claim that the RGGI regulations violate its right to be paid the "full avoided cost" of the price of energy is based on a misreading of the PURPA regulations. Petitioner's choice twenty years ago to elect to receive estimated avoided costs under its long-term contract with Consolidated Edison, rather than actual avoided cost, cannot be undone now on the grounds that RGGI will increase Petitioner's cost of producing energy. Petitioner's attempt to argue that PURPA preemption should be broadened to encompass a state regulatory program that relates to air emissions, not electricity rates, is unprecedented and must be rejected.

ARGUMENT

I. PETITIONER'S CLAIM THAT GOVERNOR PATAKI'S ENTRY INTO THE MOU WAS UNAUTHORIZED SHOULD BE DISMISSED AS LACKING IN MERIT AND AS MOOT

Petitioner argues first that, by entering into a MOU committing to propose regulations to stabilize and then reduce CO_2 emissions from power plants in New York through a regional trading program, then-Governor George Pataki violated the principle of separation of powers under the State Constitution. See Br. at 24-27. Petitioner's claim

is without merit. First, Petitioner fundamentally mischaracterizes the nature of the MOU, which was a collaborative, non-obligatory expression of a mutual commitment by states to develop their own cap-and-trade rules for CO_2 emissions, not an interstate "compact." Further, Petitioner incorrectly alleges that RGGI is a taxation program, when it is a market-based air pollution control program instead. All pollution programs impose compliance costs on the regulated industry, and RGGI is no different. Indeed, the flexible "cap-and-trade" allowance-based compliance mechanism is aimed at increasing compliance options and reducing compliance costs. Finally, Petitioner incorrectly argues that the Governor's agreement to cooperate with other states in the implementation of such a program in New York involved fundamental policy choices that were not authorized by the Legislature.

To the contrary, the Legislature has clearly enunciated a broad policy, and has given the executive branch broad authority, to use all practical and reasonable methods to control air pollution in New York in cooperation with other states and to promote energy conservation and the development of new energy technologies. In entering into the MOU, the Governor was acting within the scope of his executive powers consistent with this broad policy and authority. Regardless, any claim that the Governor's entry into an MOU committing to propose regulations was unauthorized has been rendered moot by DEC's and NYSERDA's promulgation of the final regulations at issue here.

A. The Governor Was Not Required to Seek Legislative Approval to Enter Into a Memorandum of Understanding with Other States Reflecting a Mutual Commitment to Regulate Air Pollution.

It is well established under New York law that the Governor enjoys "great flexibility" in the implementation of legislative policy. Clark v. Cuomo, 66 N.Y.2d 185, 189 (1985). The Constitution "requires that the Legislature make the critical policy

decisions, while the executive branch's responsibility is to implement those policies." See Bourquin v. Cuomo, 85 N.Y.2d 781, 784 (1995). Nonetheless, despite this functional separation, "the duties and powers of the legislative and executive branches cannot be neatly divided into isolated pockets," id., and "some overlap between the three separate branches does not violate the constitutional principle of separation of powers." Clark, 66 N.Y.2d at 189. Thus, only executive acts that are inconsistent with or usurp the prerogatives of the Legislature violate the doctrine of separation of powers. See Bourquin, 85 N.Y.2d at 785.

In New York, the Governor has broad executive powers to enforce legislation and has great flexibility in determining the methods of enforcement. Indeed, "there need not be a specific and detailed legislative expression authorizing a particular executive act as long as the 'basic policy decisions underlying the regulations have been made and articulated by the Legislature.'" Borquin, 85 N.Y.2d at 785. In such a case, executive action "may entail some policy selectivity without offending separation of powers." Dorst v. Pataki, 90 N.Y.2d 696, 699 (1997). The Legislature may "declare its policy in general terms by statute, endow administrative agencies with the power and flexibility to fill in the details and interstices and to make subsidiary policy choices consistent with the enabling legislation." Citizens for an Orderly Energy Policy, Inc. v. Cuomo, 78 N.Y.2d 398, 410 (1991). This is especially so in complex or technical areas of the law, such as air pollution control, where "the guidelines and standards established by the Legislature need not be precise." See Motor Vehicle Mfrs. Ass'n v. Jorling, 181 A.D.2d 83, 87 (3d Dep't 1992) [hereinafter "MVMA"]; see also Citizens for an Orderly Energy Policy, 78

N.Y.2d at 410 (holding that, especially in "complex" fields, the "Legislature is not required in its enactments to supply agencies with rigid marching orders").

MVMA involved a challenge to DEC's authority to promulgate new regulations requiring that all automobiles sold in New York meet California air pollution standards. Petitioners argued that DEC did not have sufficient general authority under the ECL to promulgate regulations imposing such a significant change in new motor vehicles and that the regulations involved policy determinations that must be made by the Legislature. 181 A.D.2d at 87. The Third Department rejected this argument, finding instead that the "broad enabling legislation existing in New York was sufficient to permit DEC to adopt the California standards" and that DEC "did not engage in policymaking by promulgating the new part 218 regulations, but, rather, proposed rules which implemented the goals and plan set forth by the Legislature." Id. at 87-88.

Here, the Legislature set the overall policy regarding air pollution control programs. It expressly declared it to be the policy of the State "to require the use of all available practical and reasonable methods to prevent and control air pollution in the state of New York," ECL § 19-0103, and to coordinate and cooperate with other states and regions in formulating environmental programs. ECL §§ 1-0101, 3-0301. By committing to propose regulations to control emissions of CO_2, an air pollutant, from in-state electric generating units through a regional cap-and-trade program, the Governor was merely taking action to further the broad policies and goals set forth by the Legislature in the ECL. Thus, the Governor was not acting inconsistent with or usurping any legislative policymaking prerogatives by entering into the MOU.

Petitioner does not claim that the MOU is inconsistent with any declared legislative policy. Rather, Petitioner argues that, despite the executive branch's broad authority under the ECL to adopt air pollution control regulations, Governor Pataki usurped the Legislative function by entering into a "compact" that made "policy decisions regarding the regulation and taxation of CO_2 emissions" without authority or approval from the Legislature. Br. at 25-26. As explained below, Petitioner's argument is rooted in a fundamental mischaracterization of the nature of the MOU.

In support of its claims, Petitioner relies exclusively on Saratoga III. In that case, the Governor entered into a binding compact with an Indian tribe to allow gaming on a reservation. 100 N.Y.2d at 808. The Federal Indian Gaming Regulatory Act required a compact between a state and a tribe before permitting a tribe to conduct gaming and required a state to negotiate such a compact in good faith upon request by a tribe. See id. at 809. Further, the federal act contemplated that states would have to make several fundamental policy choices when negotiating the compacts, including decisions involving "licensing, taxation and criminal and civil jurisdiction." Id. at 822. Finally, the compact required the adoption of new regulations for the oversight of casino gambling when there was no legislative authorization for any state agency to promulgate such regulations. See id. at 823. Based on the foregoing, the Court held that the Governor's actions in unilaterally negotiating and executing a tribal gaming compact violated separation of powers.

The MOU signed by Governor Pataki differs from the compact at issue in Saratoga III in many crucial respects. First, the MOU is not a compact – it is a non-obligatory, non-binding *memorandum of understanding* expressing the signatory states'

mutual commitment to propose for legislative and/or regulatory approval within their own states a program that seeks to stabilize and then reduce CO_2 emissions and allows for regional allowance trading. MOU [AR 245], at 2. A state's entry into the MOU is voluntary and a state can withdraw from the MOU at any time. Id. at 8-9. Further, Petitioner has cited to no provision of New York law that requires legislative approval of an agreement such as the MOU and, as discussed below at Point IV, the MOU is not an interstate compact requiring approval from Congress under the Compact Clause of the U.S. Constitution. As the MOU is not an interstate compact, Petitioner's citation to legislatively-approved compacts dating back to the 1940s and 1960s, Br. at 26-27, is entirely irrelevant.

Second, unlike the compact in Saratoga III, the MOU does not make any fundamental policy choices not already made by the Legislature. Contrary to Petitioner's assertions, as explained in greater detail below, the Budget Trading Program does not enact a taxation program. Consistent with the Legislature's broad policy mandate to use all methods to control air pollution in cooperation with other states, the Budget Trading Program implements a cap-and-trade program that causes covered entities within the State to incur regulatory compliance costs. Petitioner mistakenly conflates the costs incurred by regulated entities to obtain allowances – one of several mechanisms by which entities may comply with the regulatory requirements – with the imposition of a tax. Finally, the MOU does not authorize an agency to promulgate regulations without any legislative authorization. As discussed in detail below, DEC and NYSERDA promulgated the Budget Trading Program and Auction Program under their broad

enabling statutes. DEC and NYSERDA did not rely upon the MOU as authority to promulgate such regulations.

In relying solely upon Saratoga III, Petitioner ignores well-settled separation of powers principles that the Governor and administrative agencies may implement broad expressions of legislative policy through the signing of agreements and the promulgation of regulations that "fill in details and interstices" and "make subsidiary policy choices" consistent with such policy. Citizens for an Orderly Energy Policy, 78 N.Y.2d at 410-12 (upholding Governor Cuomo's signature of a settlement agreement providing for the transfer and closing of the Shoreham nuclear power plant, finding that the Legislature had given broad discretion and authority to the executive branch to effectuate the legislative goal of plant closure); see also Borquin, 85 N.Y.2d at 785; Clark, 66 N.Y.2d at 189-90; MVMA, 181 A.D.2d at 86-88. Governor Pataki's entry into the MOU was entirely consistent with the Legislature's broad expression of policy regarding the control of air pollution in New York.

B. Petitioner's Claim that the Governor Lacked Authority to Enter Into the MOU Is Moot.

The jurisdiction of this Court extends only to live controversies. Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707, 713 (1980). Courts are prohibited from giving advisory opinions or ruling on "academic, hypothetical, moot, or otherwise abstract questions." Id. Accordingly, a claim will be considered moot unless "the rights of the parties will be directly affected by the determination" and the judicial determination carries "immediate consequence[s]" for the parties. Id. at 714; see also NRG Energy, Inc. v. Crotty, 18 A.D.3d 916, 918 (3d Dep't 2005). The only exception to the mootness prohibition is if

the controversy or issue involved is likely to recur, typically evades review, and raises a substantial and novel question. Hearst, 50 N.Y.2d at 714-15.

Petitioner's challenge to the Governor's authority to enter into the MOU has been rendered moot by DEC's and NYSERDA's promulgation of final regulations implementing a cap-and-trade program for CO_2 emissions and allowing for regional trading of allowances. DEC's and NYSERDA's authority to promulgate these regulations is based on the ECL and the PAL, not on the MOU. APC II [AR 15], at 22 (stating, in response to comments, that the "RGGI MOU is not a source of authority for the revised proposal. Instead, the RGGI MOU is merely a non-binding document that sets forth the principles of the RGGI Program"). Thus, this Court's invalidation of the MOU would not, as claimed by Petitioner, "negate the authority of the Respondent/Defendant agencies to implement RGGI." Br. at 27. Since invalidation of the MOU on the grounds asserted by Petitioner would have no direct or immediate, practical consequence for the parties, Petitioner's claim challenging the Governor's authority to enter into the MOU is moot.

Further, this claim does not fall within the recognized exception to the mootness doctrine. Petitioner cannot show that the issues here are likely to recur or that they will evade review, since Petitioner has directly challenged DEC's and NYSERDA's authority to promulgate the final regulations in a separate claim currently before the Court. The Court, therefore, should dismiss as moot Petitioner's claim challenging the Governor's entry into the MOU.

II. THE LEGISLATURE HAS GIVEN DEC AND NYSERDA BROAD AUTHORITY TO PROMULGATE AIR POLLUTION RULES SUCH AS THE NEW YORK RGGI REGULATIONS

Petitioner next argues that the Legislature has not authorized "any aspect" of the RGGI regulations, Br. at 15, including: (1) DEC's regulation of CO_2 emissions from electric generating plants, id.; (2) DEC's regulation of such emissions through a cap-and-trade program allowing for interstate trading of allowances, id.; (3) DEC's allocation of allowances to an account to be administered by NYSERDA, id. at 30; (4) NYSERDA's administration of the EE & CET account, including forwarding the allowances to an auction, id. at 28-29; and (5) NYSERDA's receipt of auction proceeds and use of such proceeds to implement EE & CET programs, id. at 15-16. Contrary to Petitioner's allegations, each of these activities falls within the broad statutory authority that the Legislature has conferred upon DEC under the ECL and NYSERDA under the PAL.

A. DEC Has Broad Authority Under the ECL to Limit the Emission of All Air Contaminants, Including CO_2, From the Generation of Electricity.

Petitioner alleges that the Legislature has not specifically authorized DEC to regulate CO_2 emissions from electric generating units. Br. at 15. However, Petitioner ignores the fact that CO_2 is an air contaminant that DEC is authorized to address pursuant to its broad authority. ECL §§ 19-0103; 19-0301(1)(a), (1)(b)(2), (2)(a). Given that the Legislature provided DEC with very broad powers to limit emissions of all pollutants irrespective of their source, and the inherently technical nature of air pollution regulation, there is no question that DEC's promulgation of the CO_2 limitations at issue here was authorized by the ECL.

An expressed policy of the State is "to conserve, improve and protect its natural resources and environment and control water, land and air pollution, in order to enhance

the health, safety and welfare of the people of the state and their overall economic and social well being." ECL § 1-0101. To that end, DEC is authorized to "[f]ormulate, adopt and promulgate . . . regulations for preventing, controlling or prohibiting air pollution in such areas of the state as shall or may be affected by air pollution, [including] controlling air contamination." ECL § 19-0301(1)(a). See also id. §§ 3-0301(1)(i) (DEC Commissioner responsible to "[p]rovide for prevention and abatement of all . . . air pollution including . . . that related to particulates, gases, dust [and] vapors"); 19-0301(2)(a) (DEC responsible for preparing and developing "a general comprehensive plan for the control or abatement of existing air pollution and for the control or prevention of any new air pollution . . ."). DEC's authority to limit air pollution includes the specific right to regulate "the extent to which air contaminants may be emitted to the air by any air contamination source." ECL § 19-0301(1)(b)(2). ECL § 19-0103 establishes the appropriate policy guidelines pursuant to which DEC promulgate regulations to limit emissions from any air contamination sources: Such regulations are to be "consistent with the public health and welfare and the public enjoyment thereof, the industrial development of the state, the propagation and protection of flora and fauna, and the protection of physical property and other resources [and] should be clearly premised upon scientific knowledge of causes as well as effects."

In promulgating the Budget Trading Program, DEC determined that it has the authority under the ECL to regulate CO_2 as an "air contaminant" that causes "air pollution" within the State. Sheehan Aff. at ¶ 12. DEC determined, based on overwhelming scientific evidence, that CO_2 is a "gas" that is "present in the atmosphere in quantities that engender and/or provoke climate change, which is injurious to life and

property in New York State." Id.; RIS [AR 10], at 4. DEC further determined that "[o]verwhelming scientific evidence suggests that a warming climate poses a serious threat to the environmental resources and public health of New York State – the very same resources and public health the Legislature has charged the [DEC] to preserve and protect. The warming climate threatens the State's air quality, water quality, marine and freshwater fisheries, salt and freshwater wetlands, surface and subsurface drinking water supplies, river and stream impoundment infrastructure, and forest species and wildlife habitats." RIS [AR 10], at 1. The regulatory record documents in detail the scientific basis for and an explanation of the current and future projected impacts on New York's environment and human health from climate change. RIS [AR 10], at 14-23.

In promulgating the Budget Trading Program, DEC further determined that the ECL provides it with authority to regulate CO_2 emissions from electric generating units as an "air contamination source." Sheehan Aff. at ¶ 14. In New York, electric power plants are responsible for approximately one-quarter of all CO_2 emissions. RIS [AR 10], at 24. Thus, DEC determined that "[t]he burning of fossil fuels to generate electricity is a major contributor to a warming climate because fossil-fuel generators emit large amounts of CO_2, the principal GHG." RIS [AR 10], at 1.

Petitioner does not contest DEC's determination that CO_2 is an "air contaminant" that causes "air pollution," that such pollution is injurious to and interferes with life and property in New York, or that electric generating units are "air contamination sources," all within the meaning of the ECL. Indeed, Petitioner would be hard pressed to do so in light of the Supreme Court's determination that EPA has the authority to regulate CO_2 under language in the CAA similar to that contained in the ECL and that the harms

associated with such emissions are serious and well recognized. See Massachusetts v. EPA, 127 S. Ct. 1438, 1455 (2007).[6]

Petitioner implies that, in the absence of regulation of CO_2 emissions at the federal level, DEC is somehow precluded from relying upon its general authority under the ECL to regulate such emissions. Br. at 16-17. However, the Legislature reaffirmed and reiterated DEC's broad authority to limit emissions of any air contaminant in 1993 through enactment of ECL § 19-0303(4), which specifically empowered DEC to adopt emissions limitations that are "more stringent than" those imposed under the CAA. Thus, by the specific terms of the law, DEC may require more stringent limitations than those required under the CAA, precisely as it has done here.

Several courts have acknowledged DEC's broad grant of authority to regulate and limit air contaminants from any source. See, e.g., NRG Energy, Inc. v. DEC, Index No. 5307-03 (N.Y. Sup. Ct., Albany Co., May 26, 2004) [attached hereto as **Ex. A**] (upholding DEC's authority to promulgate the cap-and-trade Acid Deposition Reduction Program ("ADRP") for SO_2 and NO_X and stating that the ECL's broad statutory provisions (including those relied on here) "clearly give respondent general authority to promulgate regulations limiting air pollution emissions from the generation of electricity"); MVMA , 152 Misc.2d 405 (upholding DEC's authority to promulgate motor vehicle emission standards that were stricter than those required under the CAA based on

[6] As required by such decision, EPA recently issued a "Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Proposed Rule," 74 Fed. Reg. 18886 (Apr. 24, 2009), in which EPA proposes to find that GHGs, including CO_2, in the atmosphere endanger the public health and welfare and that motor vehicles cause or contribute to such pollution. Such findings trigger an obligation under Section 202(a) of the CAA for EPA to regulate CO_2 emissions from new motor vehicles. See "Regulating Greenhouse Gas Emission Under the Clean Air Act; Proposed Rule," 73 Fed. Reg. 44,354, 44,419 (July 30, 2008). Similar findings with respect to GHG emissions from power plants will trigger an obligation under Section 111 of the CAA for EPA to regulate CO_2 and other GHGs from power plants. See 42 U.S.C. § 7411.

the ECL's general grant of authority (including the identical provisions under which DEC acted here)), aff'd 181 A.D.2d 83, 87 (3d Dep't 1992) (ruling that "[t]he broad enabling legislation existing in New York was sufficient to permit DEC to adopt the" more stringent state regulations and finding sufficient the legislative guidelines set forth in ECL Article 19: "[i]n complex or technical areas existing in the air pollution control field, the guidelines and standards established by the Legislature need not be precise"); United Petroleum Ass'n v. Williams, 102 A.D.2d 491, 494 (3d Dep't 1984) (DEC's regulations controlling the burning of waste oil upheld under "[t]he department's authority to promulgate regulations for preventing, controlling or prohibiting air pollution [] expressly provided by statute (ECL 19-0301)"); see also Matter of Sherwood Medical Co. v. New York State Dep't of Envtl. Conserv., 158 Misc.2d 281, 286 (N.Y. Sup. Ct., Albany Co. 1993) ("[t]hroughout the Environmental Conservation Law it is evident that the Legislature intended to confer upon the Commissioner a broad-based authority to implement the environmental policy of this State") (citing ECL Article 19), rev'd on other grounds, 206 A.D.2d 819 (3d Dep't 1994). Thus, Petitioner's bald assertion that DEC does not have authority to regulate CO_2 emissions from electric generating units lacks merit.

B. DEC Has Broad Authority Under the ECL to Limit the Emission of Air Contaminants Through a Cap-and-Trade Program.

Petitioner further alleges that the Legislature has not authorized DEC to "create a tradable allowance program to control greenhouse gases." Br. at 15. Petitioner ignores DEC's broad authority under the ECL, not only to regulate CO_2 emissions from power plants, but to choose the best method of doing so. DEC's decision to promulgate regulations controlling CO_2 emissions through a cap-and-trade program in New York that

allows for the interstate trading of allowance falls well within such broad general authority.

In ECL § 19-0103, the Legislature declares it to be the policy of the State "to require the use of all available practical and reasonable methods to prevent and control air pollution in the state of New York." (emphasis added). Further, ECL § 1-0101 provides that it is the policy of the State "to improve and coordinate the environmental plans, functions, powers and programs of the state, in cooperation with the federal government, regions, local governments, other public and private organizations and the concerned individual . . .." [emphasis added] Consistent with this policy, ECL §§ 3-0301 and 19-0301 specifically authorize DEC promulgate rules and regulations to control air pollution in cooperation with other states and regions. The Legislature has set forth procedural requirements and guidelines for promulgating regulations, specifically contemplating that such regulations may be more stringent than federal requirements, and specifying that emissions limitations are to be based on DEC's consideration of the impacts of the regulations on the public health, the environment, and the industrial development of the State, the scientific knowledge of the causes and effects of air pollutant emissions, and the cost-effectiveness of reasonably available alternatives. ECL §§ 19-0103; 19-0303(4).

Acting under the guidelines specified in the ECL by the Legislature, DEC determined that the best method to regulate CO_2 emissions was through a cap-and-trade program allowing for the interstate trading of emissions allowances. Sheehan Aff. at ¶ 21. In promulgating the Budget Trading Program, DEC determined that it had the authority under the ECL to utilize a cap-and-trade program, rather than command-and-control. Id. at ¶ 19; RIS [AR 10], at 2-8, 57-59. Under a command-and-control program

the regulated source is required to use a particular type of pollution control equipment, meet a specific emissions limitation, or use a fuel with certain characteristics. Sheehan Aff. at ¶ 19. Additionally, a command and control program is typically more expensive when compared to other programs such as cap-and-trade because some sources are likely to have very high compliance costs relative to other sources, which drives up the total cost of the program. Id.

DEC determined that the regulatory flexibility inherent in a cap-and-trade program better enables it to balance the competing interests of the "protection of the public health and welfare" with continued "industrial development of the state" and "the protection of physical property and other resources," as the Legislature has given DEC the authority to do under ECL § 19-0103. Id. at ¶ 20; RIS [AR 10], at 12. By setting a cap, a cap-and-trade program provides assurances that the goals of the program will be met and, by allowing trading, a cap-and-trade program helps ensure the continued reliability and adequacy of the State's electricity supply. Sheehan Aff. at ¶ 20; RIS [AR 10], at 12, 57-59.

Further, DEC determined that the ECL provides it with general authority to cooperate with other states to implement a cap-and-trade program that allows for the interstate trading of allowances. Sheehan Aff. at ¶ 21; RIS [AR 10], at 2-8, 59-60. By allowing sources to purchase allowances issued by other participating RGGI states, either through a regional auction or on a secondary market, regulated sources enjoy additional flexibility to comply with the overall regulatory cap. Sheehan Aff. at ¶ 22. DEC determined that allowing sources to purchase allowances issued by other participating RGGI states "will result in greater emission reductions, will increase the overall

effectiveness of the Program, and will enhance the economic benefits to the affected sources that result from a larger allowance market." Id.; RIS [AR 10], at 12, 57-59.

Cap-and-trade programs have been used successfully by DEC, as well as EPA, to reduce emissions of air pollutants. Sheehan Aff. at ¶ 24. For instance, over the past 10 years, DEC has promulgated the Pre-2003 NO_X Emission Budget and Allowance Program (6 NYCRR Subpart 227-3), the NO_X Budget Trading Program (Part 204); the Acid Deposition Reduction NO_X Budget Trading Program (Part 237), the Acid Deposition Reduction SO_2 Budget Trading Program (Part 238), the CAIR NO_X Ozone Season Trading Program (Part 243), the CAIR NO_X Annual Trading Program (Part 244), and the CAIR SO_2 Trading Program (Part 245). Id. In promulgating the Budget Trading Program, DEC relied on the fact that the Court in NRG Energy, Inc., Index No. 5307-03 **[Ex. A]**, held that the ECL gave DEC the general authority to promulgate the cap-and-trade ADRP (6 NYCRR Parts 237 and 238). Id.; APC I [AR 17], at 3-4.

In complex and technical areas such as air pollution control, courts have determined that "the guidelines and standards established by the Legislature need not be precise," MVMA, 181 A.D.2d at 87, but rather that "it is sufficient if the Legislature confers broad power upon the agency to fulfill the policy goals embodied in the statute, leaving it up to the agency itself to promulgate the necessary regulatory details." Matter of Consolidated Edison Co. v. DEC, 71 N.Y.2d 186, 191 (1988). Courts have held that these same statutory provisions cited above "clearly give [DEC] general authority to promulgate regulations limiting air pollution emissions from the generation of electricity," including through a cap-and-trade program. See NRG Energy, Index No. 5307-03 **[Ex. A]**, at 7-8; see also MVMA, 181 A.D.2d at 87-88. Further, courts have

determined that these statutory provisions provide appropriate and adequate guidelines to DEC in implementing the broad policy of regulating air pollution. NRG Energy, Index No. 5307-03 [**Ex. A**], at 8; MVMA, 181 A.D.2d at 87.

In support of its *ultra vires* argument, Petitioner points to the fact that other states participating in RGGI have obtained express statutory authorization for all or part of their programs. Br. at 11. However, as the Court stated in MVMA, "this fact is not relevant to New York where legislation was unnecessary." Id. Further, Petitioner broadly asserts that attempts to establish regulatory cap-and-trade systems "at the federal level" have been struck down. Br. at 17. As an initial matter, Petitioner ignores that, at the state level, the court in NRG Energy, Index No. 5307-03 [**Ex. A**], rejected an *ultra vires* challenge to DEC's authority to establish a cap-and-trade program for SO_2 and NO_X. That case, not the D.C. Circuit's interpretation of the CAA, is controlling here.

Furthermore, the two cases cited by Petitioner are inapposite. New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008) is not applicable here because the court never reached the issue of whether EPA had authority to establish a cap-and-trade program for mercury pollution. See 517 F.3d at 577-78 (invalidating regulations on ground that EPA improperly delisted mercury as a hazardous air pollutant under Section 112 of the Act prior to establishing cap-and-trade program under Section 111). In any event, establishing a cap-and-trade program for mercury, a potent neurotoxin, presents concerns of "hotspot" concentrations that a CO_2 cap-and-trade program would not. North Carolina v. EPA, in which the court invalidated EPA's regional cap-and-trade programs for SO_2 and NO_X emissions, likewise does not support Petitioner. 531 F.3d 896 (D.C. Cir. 2008), modified, rehearing granted, and remanded in part by 550 F.3d 1176 (D.C. Cir. 2008).

The court struck down the regulations primarily on grounds that EPA had not shown that the trading programs – which focused on decreasing emissions on a regional basis – would satisfy the statute's prohibition against a source in one state significantly contributing to nonattainment in another state. 531 F.3d at 908 (The regulations "must actually require elimination of emissions from sources that contribute significantly and interfere with maintenance in downwind nonattainment areas."). By contrast, the statutory language DEC relied upon to promulgate the RGGI regulations is very broad and is not at all narrowly prescribed, as was the "contribute significantly" language in North Carolina. See Point II.A-C, supra.[7] Finally, Petitioner omits mention of the D.C. Circuit's decision in Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000), in which the court upheld EPA's cap-and-trade program established to reduce NO_X emissions.

Thus, DEC had ample authority under the ECL to cooperate with other states to implement a cap-and-trade program in New York that allows for the interstate trading of allowances.

C. DEC Has Broad Authority Under the ECL to Allocate Emissions Allowances to an Account to Be Administered by NYSERDA Consistent with the Goals of and to Reduce the Costs of the Program.

Petitioner further argues that DEC lacks statutory authority to issue and transfer allowances to an account to be administered by NYSERDA by selling such allowances at auctions. Br. at 30. Again, Petitioner ignores DEC's broad authority under the ECL to determine the most "cost-effective" method of reducing air pollution and to contract with and delegate to public benefit corporations of the State, such as NYSERDA, such

[7] The D.C. Circuit also found the SO_2 program to be legally flawed on the basis that EPA lacked the authority to require the retirement of emission allowances issued under the statute's Title IV program. Given that there is no analogous provision in the Act currently for CO_2, the court's reasoning on that point also has no applicability here.

functions as DEC deems necessary, convenient or appropriate to carry out the environmental protection policies of the State. ECL §§ 3-0301(2)(b); 3-0301(2)(d)(2); ECL § 3-301(2)(p). Such statutory provisions provide DEC with ample general authority to allocate emissions allowances to the EE & CET Account to be administered by NYSERDA to further the goals of and reduce the costs associated with the program, rather than directly to regulated sources.

To assist DEC in carrying out the policy of the state to control air pollution and protect the environment and the health and welfare of the people of the state, ECL § 3-0301(2)(b) authorizes DEC to "enter into contracts with any person to do all things necessary or convenient to carry out the functions, powers and duties of the department." "Person" is defined in ECL § 1-0303(18) to include any "public . . . corporation, political subdivision, government agency, department or bureau of the state." Further, ECL § 3-0301(2)(d)(2) authorizes DEC "to consult with and co-operate with" "officials and representatives of any public benefit corporation in the state." NYSERDA is such a "public benefit corporation." PAL § 1852(1). Finally, ECL § 3-301(2)(p) authorizes DEC, to assist in carrying out the policy of the State, to delegate to "environmental departments or agencies or other appropriate governmental entities" "such functions of review, approval of plans, issuance of permits, licenses, certificates or approvals required or authorized by this chapter as the commissioner may deem appropriate in order to . . . enhance environmental protection, subject to such conditions as he may establish."

DEC's authority to allocate allowances for the benefit of the public follows from its authority to create a cap-and-trade program, which was upheld in NRG, Inc., Index No. 5307-03. As the ECL provides DEC with the authority to allocate valuable

allowances directly to polluters, it certainly provides authority for DEC to allocate allowances to an account to be administered by a public benefit corporation of the State to ensure that the value of such allowances will be used to further the goal of the program to reduce CO_2 emissions and to reduce the costs to electricity ratepayers from such program, rather than end up as windfall profits for electricity generators.

ECL § 19-0303(4)(b) requires DEC to evaluate the cost-effectiveness of the proposed rule compared to alternatives. It is uncontested that, in a deregulated electricity market such as exists in New York, electricity generators generally will pass on the value of allowances as a cost of generation whether these allowances are allocated at no cost or generators are required to purchase allowances at an auction or in the market. Sheehan Aff. at ¶ 56. Thus, electricity consumers in New York will ultimately bear most of the compliance costs of a cap-and-trade program whether allowances are granted for free or auctioned. Id. Allocation to an account to be administered by NYSERDA for the public benefit, rather than directly to covered sources at no cost, allows the value inherent in the allowances to be used for purposes of the program and to reduce the costs associated with the program. Id. at ¶ 65. By retaining this value instead of giving it away for free, DEC is acting within its statutory authority to "use all available practical and reasonable methods to prevent and control air pollution in the state of New York," ECL § 19-0103 (emphasis added), and consistent with Legislative direction to choose the most "cost-effective" manner of doing so, ECL § 19-0303(4)(b).

Petitioner claims that, by allocating allowances to an account to be administered by NYSERDA, DEC is delegating licensing authority to NYSERDA without any statutory authorization. Br. at 29-30. Petitioner's argument is faulty for several reasons.

First, it is DEC that exercises regulatory authority by setting a cap on CO_2 emissions and by issuing the allowances. By allocating allowances to an account to be administered by NYSERDA, DEC is not delegating any regulatory or licensing authority, but is merely delegating to NYSERDA the act of selling the allowances in the EE & CET Account and using the proceeds to promote the purposes set forth in the regulations (i.e., "promoting or rewarding investments in energy efficiency, renewable or non-carbon-emitting technologies, and/or innovative carbon emissions abatement technologies with significant carbon reduction potential," 6 NYCRR 242.5.3(a)). NYSERDA is uniquely situated to perform this function given its statutory mandate to promote, develop, encourage and assist energy conservation technologies and special energy projects, its broad general authority to carry out its corporate purposes, and its extensive experience in administering other similar energy efficiency and clean energy programs in New York State.

Second, the allowances are not "licenses" under the State Administrative Procedures Act § 102(4), but are one of several regulatory compliance mechanisms. An allowance is defined as a "limited authorization to emit." 6 NYCRR § 242-1.2(17) [AR 6], at 8. Under a cap-and-trade program such as the Budget Trading Program, covered sources can choose the most cost-effective method of complying with regulatory requirements. An allowance is an exchangeable, market-based instrument that, once purchased from either an auction or on a secondary market, becomes an asset of the purchaser that can be used for compliance with the regulatory requirements of the Budget Program or sold to another party, potentially for a profit. Purchasing allowances is one compliance mechanism available to covered sources to meet the regulatory limitation on

CO_2 emissions. Other compliance mechanisms include reducing emissions through heat rate improvements, fuel switching, co-firing of biofuels, environmental dispatch of a company portfolio of units that considers the CO_2 emissions rate of individual units, and the use of emissions offsets. Thus, allowances are regulatory compliance mechanisms similar in nature to emission reduction technologies, not licenses. However, even if allowances were considered to be licenses for purposes of SAPA, which they are not, DEC's delegation to NYSERDA of the function of selling the allowances is specifically authorized by ECL § 3-0301(2)(p); see also Suffolk Co. Builders Ass'n, Inc. v. Co. of Suffolk, 46 N.Y.2d 613, 620 (1979) (upholding delegation of power to establish and impose charges for issuance of licenses "to the officer and department most capable of effectively performing that task").

Petitioner also claims that the RGGI rules fail to comply with the procedures applicable to "minor permits" under DEC's Uniform Procedures Act, ECL Article 70 ("UPA"). Under the Budget Trading Program, as well as under its other cap-and-trade programs, DEC does not consider or treat allowances themselves as "permits," as that term is defined in ECL § 70-0105(4). Sheehan Aff. at ¶ 31. The prefatory language to the definition of "permit" in ECL § 70-0105 provides that "[u]nless the context otherwise requires, the definitions in this section shall govern the construction of the following terms as used in this article." DEC has determined that, in the context of the cap-and-trade programs that it has promulgated, allowances are not "permits" for purposes of the definition and procedures contained in the UPA. Id. Rather, under such programs, the "permit" for purposes of the UPA is the covered source's overarching operating permit issued by DEC pursuant to 6 NYCRR Parts 201 and 621 and the requirement to hold

allowances sufficient to cover emissions is one of several "conditions" to such permit. Id.; 6 NYCRR 242-3 [AR 6], at 41-42; Title V Air Permit Issued for the Petitioner Corinth Energy Center Facility (Mar. 9, 2009) [AR 252], at 83 (setting forth, as "Condition 1-18," the "Compliance Demonstration" required for the CO_2 Budget Trading Program, 6 NYCRR Part 242). "DEC, as a State agency, has broad powers to construe the statutes and regulations it administers and should be upheld unless such construction is unreasonable or irrational." New York Public Interest Research Group, Inc. v. Williams, 127 A.D.2d 512, 513 (1st Dep't 1987); see also Matter of Brooklyn Assembly Halls of Jehovah's Witnesses, Inc. v. Dep't of Envtl. Protection of the City of N.Y., 11 N.Y.3d 327, 334 (2008). Petitioner has not alleged and cannot show that such interpretation by DEC is unreasonable or irrational. Therefore, DEC's interpretation that allowances under cap-and-trade programs are not "minor permits" within the meaning of ECL § 70-0105 is entitled to deference.

Further, the cost of purchasing allowances is not a licensing or regulatory fee imposed by DEC outside of its authority under the ECL as alleged by Petitioner. Br. at 30-31. The cost of purchasing the allowances is not a "fee," but rather is a compliance cost similar to the costs associated with alternative compliance mechanisms, such as the purchase of a control technology to reduce emissions. In addition, such cost is not "imposed" by DEC. Covered sources have a choice as to how they acquire the allowances and are not required to purchase allowances directly from any governmental agency, unlike a fee, which is imposed directly on a regulated source.

Petitioner has not cited any authority that supports its claim that DEC needed express statutory authority to create and issue allowances under a cap-and-trade program,

that the costs of such allowances are fees as opposed to regulatory compliance costs, or that all compliance costs associated with DEC regulations must be expressly authorized by the Legislature. The one case that Petitioner cites, Matter of Tze Chun Liao v. New York State Banking Dep't, 74 N.Y.2d 505 (1989), lends no support to Petitioner's claims. That case has nothing to do with an agency's authority to establish fees *sua sponte* without an express delegation of fee making authority, as represented by Petitioner. Br. at 31. At issue in that case was the authority of the Superintendent of Banks to regulate the issuance of check casher licenses under the Banking Law. The Court in Liao determined that, since the Legislature had specifically enumerated the factors to be considered by the Superintendent in issuing licenses, the Superintendent's denial of a license upon a factor not contained in the statute was *ultra vires*. 74 N.Y.2d at 510.

On the contrary, the courts have implied "the power to impose reasonable fees in connection with effective regulation" "from broad delegations of authority," such as are contained in the ECL. Suffolk Co. Builders Ass'n, 46 N.Y.2d at 618-19 (upholding implied statutory authority of the County Board of Health to impose fees under the broad grant of authority contained in the Public Health Law); see also Jewish Reconstructionist Synagogue of North Shore v. Incorp. Vil. of Roslyn Harbor, 40 N.Y.2d 158, 162-63 (1976) (upholding implied authority of village to enact fees reasonably necessary to the accomplishments of the statutory command); C.I.D. Landfill, Inc. v. DEC, 167 A.D.2d 827, 827-28 (4th Dep't 1990) (holding that DEC "has authority to impose any permit condition that is rationally related to protecting the environment," including a special permit condition requiring petitioner to pay a portion of the costs of an on-site environmental monitor). Indeed, the Court has implied such power even where another

section of the authorizing statute provided explicit authority for the collection of fees. Suffolk Co. Builders Ass'n, 46 N.Y.2d at 619 (finding that an expansive delegation of power should not be "negated on the strength of so ambiguous on inference as might be drawn from [a] single instance of express legislative authorization").

Here, as discussed above, the ECL gives DEC authority to implement a "pervasive regulatory program" to control air pollution. Matter of the City of New York v. N.Y. Comm'n on Cable Tel., 47 N.Y.2d 89, 93 (1979) (stating that "the propriety of [an] action often depends upon the nature of the subject matter and the breadth of legislatively conferred authority" and upholding challenged action where respondent was charged with implementing a "pervasive regulatory program"). Requiring electricity generators to purchase allowances if fully consistent with the Legislative policies of the State. See, e.g., ECL § 72-0101 (declaring a policy that "regulated entities which use or have an impact on the state's environmental resources should bear the costs of the regulatory provisions which permit the use of these resources in a manner consistent with the environmental, economic and social needs of the state"). Thus, even if the costs of allowances were to be considered a regulatory fee (which they are not), as opposed to compliance costs, DEC has ample authority under the police powers conferred by the ECL to impose such costs as reasonably necessary to accomplishing the goal of reducing CO_2 emissions under the Budget Trading Program.

D. NYSERDA Has Broad Authority Under the PAL to Administer the EE & CET Account.

Petitioner argues that NYSERDA lacks "specific" statutory authority to administer the EE & CET Account. Br. at 28. However, as with DEC's broad authority under the ECL, Petitioner disregards NYSERDA's broad "general powers" set forth in

PAL § 1855, including NYSERDA's authority to do "all things necessary or convenient" to carry out its corporate purposes and exercise the powers given and granted by NYSERDA's enabling statute. Such provisions give NYSERDA ample authority to accept the allowances allocated to it by DEC and to sell such allowances in auctions.

NYSERDA is a public authority created by the State legislature, whose purposes are "to develop and implement new energy technologies consistent with economic, social and environmental objectives, to develop and encourage energy conservation technologies . . . and to promote, develop, encourage and assist special energy projects and thereby advance job opportunities, health, general prosperity and economic welfare of the people of the state of New York." PAL § 1854. Section 1854 of the PAL contains the specific powers of NYSERDA and states that, "[i]n exercising the powers granted by this title, the authority shall, insofar is practicable, cooperate and act in conjunction with . . . agencies . . . of the state and its political subdivisions, of other states, and joint agencies thereof," and that "[i]n carrying out its corporate purposes and exercising the powers granted by this title, the authority shall be regarded as performing an essential governmental function." PAL § 1854(8). NYSERDA is also specifically authorized to "advise and assist the governor and the legislature in the development and implementation of state policies relating to energy and energy resources," PAL § 1854(11), and "to apply for and to administer federal research and development grants and other monies for the benefit of consumers." Id. at § 1854(14) [emphasis added].

In addition to these specific powers, NYSERDA has several "general powers" granted under PAL § 1855. Powers that are relevant to NYSERDA's broad statutory authority to promulgate regulations allowing it to accept the allowances allocated to it

under DEC's regulations and to sell such allowances include: "to make rules and regulations governing the exercise of its corporate powers and the fulfillment of its corporate purposes," PAL § 1855(4); "to enter into any contracts and to execute all instruments necessary or convenient for the exercise of its corporate powers and the fulfillment of its corporate purposes," id. at § 1855(10); "to accept any gifts or grants or loans of funds or property or financial or other aid in any form . . .from the state or from any other source and to comply, subject to the provisions of this Title, with the terms and conditions thereof," id. at § 1855(14); and "to do all things necessary or convenient to carry out its corporate purposes and exercise the powers given and granted by this Title, id. at § 1855(17).

In setting out NYSERDA's powers under the PAL, Br. at 28, Petitioner fails to mention any of the above enumerated broad powers despite the fact that NYSERDA specifically listed and relied upon these powers as authority to promulgate the Auction Program. Part 507 RIS [AR 129], at 2-3. Petitioner has not and cannot demonstrate that these powers are insufficient to provide NYSERDA with the requisite authority to accept allowances from a State agency under terms specified by DEC and to sell the allowances through auctions.

Petitioner cites to Civil Serv. Forum v. New York City Transit Auth., 4 A.D.2d 117, 123 (2d Dep't 1957), aff'd 4 N.Y.2d 866 (1958),[8] as "holding that NYSERDA has only powers that [sic] expressly conferred to it or by necessary implication but that those powers should not be freely inferred." Br. at 28-29. Petitioner misstates the holding of

[8] The other cases cited by Petitioner, Koch v. Dyson, 85 A.D.2d 346 (2d Dep't 1982) and Rye v. Metro. Transp. Auth., 24 N.Y.2d 627 (1969), similarly provide no support for Petitioner's constrained construction of NYSERDA's broad powers.

this case, which actually strongly supports NYSERDA's broad authority here.[9] Similar to NYSERDA's enabling statute, PAL § 1855(17), the New York City Transit Authority's ("Transit Authority") enabling statute, PAL § 1804(16), provides it with the power "to do all things necessary or convenient to carry out its purposes and for the exercise of the powers granted in this title." In holding that such language provided the Transit Authority with authority to enter into a collective bargaining agreement with a union, the court stated: "It is difficult to conceive of language broader in scope or conferring greater general power in the operation of the transit system, than that which is used in the statute." 4 A.D.2d at 123. The court went farther to state that "[i]ndeed, while it has been held that the implied power must be necessary and not merely convenient . . ., that rule seem inapplicable where, as in the case at bar, the statute . . . provides that the Authority 'may do all things necessary *or convenient*' for the exercise of the powers granted." Id. (citations omitted, emphasis in original).

As in Civil Serv. Forum, numerous other cases have broadly interpreted provisions granting similar powers to public benefit corporation to carry out their corporate purposes. See, e.g., New York Tunnel Auth. v. Consolidated Edison Co., 295 N.Y. 467, 477 (1946); Carey Transp., Inc. v. Triborough Bridge & Tunnel Auth., 38 N.Y.2d 545, 552-53 (1976); Matter of Lancaster Dev., Inc. v. Power Auth. of N.Y., 145 A.D.2d 806, 807 (3d Dep't 1988); People of the State of New York v. Malmud, 4 A.D.2d 86, 91-92 (2d Dep't 1957); Bamonte v. New York City Off-Track Betting Corp., 80 Misc. 2d 980 (Sup. Ct. 1975). Thus, Petitioner's claim that NYSERDA has only limited "specific" powers that must be strictly construed is mistaken.

[9] The respondent in Civil Serv. Forum was the New York City Transit Authority, not NYSERDA, as stated by Petitioner. Br. at 28.

E. NYSERDA Has Broad Authority Under the PAL to Use Auction Proceeds to Implement Energy Efficiency and Clean Energy Technology Programs.

Similarly unavailing is Petitioner's claim that NYSERDA lacks statutory authority to use the auction proceeds to implement the goals of the EE & CET Account. Pursuant to DEC's rules, such proceeds are to be used to promote or reward "investments in energy efficiency, renewable or non-carbon-emitting technologies, and/or innovative carbon emissions abatement technologies with significant carbon reduction potential." 6 NYCRR § 242-5.3(a) [AR 6], at 46. These stated purposes are consistent with NYSERDA's statutory authority, which directs NYSERDA to conduct, sponsor and assist programs related to "new energy technologies" and "energy conservation technologies," and to provide services related to their development. Thus, NYSERDA has clear statutory authority to use the auction proceeds for the specified purposes.

Specifically, the Legislature declared, in relevant part, that the purpose of NYSERDA is, among other things, to promote the development and utilization of "safe, dependable, renewable and economic energy sources and the conservation of energy and energy resources." PAL § 1850-a. The statute directs NYSERDA to develop and implement [these] "new energy technologies" and "energy conservation technologies" as such terms are broadly defined by the statute, in a manner consistent with economic, social and environmental objectives. PAL §§ 1851(10), (11); 1854. Taken together, the "new energy technologies" and "energy conservation technologies" that the statute directs NYSERDA to promote closely match the "energy efficiency, renewable or non-carbon-emitting technologies" that are to be promoted through the Budget Trading Program.

Petitioner claims that the Legislature has not established a policy regarding NYSERDA's use of the auction proceeds. Br. at 16. To the contrary, the Legislature has specifically declared a need for investment in the development of new energy technologies that will "promote the state's economic growth, protect its environmental values and be in the best interests of the health and welfare of the state's population." PAL § 1850-a. The Legislature created NYSERDA and gave it broad powers to "do all things necessary or convenient to carry out its corporate purposes," which are the development and implementation of such technologies. PAL §§ 1854, 1855(17). NYSERDA has relied on this same broad general authority in fulfilling its responsibilities to administer the SBC and RPS programs, pursuant to PSC Orders. Williams Aff. at ¶ 21. Similarly, NYSERDA's use of the auction proceeds to promote and develop energy efficiency and clean energy technology through the EE & CET Account is consistent with the Legislature's stated policy.

Contrary to Petitioner's claims, Br. at 16, NYSERDA is not using the auction proceeds at its "unfettered discretion," since its use of the proceeds is specifically directed by the DEC rules and is limited to the purposes specified in such regulations, as well as NYSERDA's corporate purposes set forth in its enabling statute. Malmud, 4 A.D.2d at 92 (finding an Authority's powers to be "sufficiently defined" and "clearly limited" when "the power to act and the limitations on such power, although not defined in express terms, are clearly implied when the statute is read in the light of its history and purpose"). In addition, if NYSERDA were to abuse the broad power that the Legislature has conferred upon it, the Legislature is free to respond with "corrective legislation." Carey Transp., Inc., 38 N.Y.2d at 553 (stating that "courts are not, however, appropriate

to make such correction"). The RGGI rules have been developed over a number of years and yet the Legislature has taken no action to disallow NYSERDA's exercise of its broadly-conferred powers here.

III. THE RGGI PROGRAM DOES NOT IMPOSE AN IMPERMISSIBLE TAX

Petitioner erroneously argues that the Budget Trading Program, by requiring covered sources to purchase allowances through an auction, imposes an unlawful administrative tax. Br. at 31-35. Whether a particular exaction is a tax or a regulatory measure under the police power "must be determined from its whole scope and tenor." People ex rel. Einsfeld v. Murray, 149 N.Y. 367, 378 (1896). This includes an examination of the intent behind the law. See id., 149 N.Y. at 378 (only where the creation of revenue is the motive of the regulation, as opposed to a consequence of its adoption, will such an exaction be deemed a tax). In addition, courts look to how the resulting funds will be used, including whether the funds will be spent for the common welfare or whether they will be targeted toward the regulation of the industry that is the subject of the regulation or to defray the costs of such regulation. See American Sugar Refining Co. v. Waterfront Comm'n of N.Y. Harbor, 55 N.Y.2d 11, 26-27 (1982). If the funds are to be used to the benefit of those that bear the cost of the regulation or to defray agency costs, this factor weighs against finding the measure a tax. See Health Servs. Med. Corp. v. Chassin, 175 Misc. 2d 621 (Sup. Ct. Onondaga Co. 1998), aff'd, 259 A.D.2d 1053 (4th Dep't 1999). Under these principles, the Budget Trading Program does not impose a tax.

First, RGGI is an air pollution reduction program, as demonstrated by its intent, goals, design, and structure. There is no evidence that the motive behind the concept of

RGGI was a desire to raise revenue for the common welfare. Governor Pataki's invitation to the governors of other states emphasized the development of a "cooperative program which will achieve meaningful reductions in carbon dioxide emissions on a regional basis," and made no mention of using GHG regulation to generate revenue. See Letter from Hon. George Pataki to Hon. Mitt Romney (Apr. 24, 2003) [AR 244], at 2. Further, the regulatory record establishes that, in designing the Budget Trading Program, DEC decided to auction the allowances, rather than give them away for free, not as a revenue generation tool, but as the best way to further the regulatory goal of reducing CO_2 emissions in the most economically-efficient manner with the least cost to electricity consumers. See, e.g., RIS [AR 10], at 43 ("the EE & CET Allocation ensures that the value of the allowances is used to promote the emissions reduction goals of the program through cost-effective energy efficiency and clean energy technologies, while simultaneously reducing the cost of the Program to consumers"); APC I [AR 17], at 14 ("By allocating allowances to the Authority for auction, the Proposal attempts to retain, for purposes of protecting the environment and public welfare, the value of the public resource for which the Department is responsible and to ensure that such value is used to promote the emissions reductions goals of the Proposal") & 22-23 ("The proposal, which includes the auctioning of allowances, does not constitute a tax or a fee. The primary purpose of this measure is to discourage emissions of CO_2. . . .. As a result of the Proposal, any revenue raised is merely an incidental occurrence to the chief purpose of reducing air pollution. . . .. The sale and auction of allowance[s] will help create CO_2 allowance price signals at a level sufficient to cause investment in technologies and strategies that would reduce or avoid emissions of CO_2"); APC II [AR 15], at 7 ("The

primary objective of the RGGI Proposal is pollution control, not the generation of revenue for the sake of generating revenue"). Thus, the primary and sole motive behind DEC's promulgation of the Budget Trading Program was to "control, restrict and regulate" CO_2 emissions, Einsfeld, 149 N.Y. at 378, not to generate revenue.

The Court of Appeal's decision in Einsfeld is instructive here. In that case, the Court determined that the challenged law regulating the trafficking of liquor was enacted under the police power and, thus, was not a tax, even though there was "no doubt that a large revenue [would] result" and that "this was contemplated." Id. The Court determined that "this will be a consequence of the system, and was not the motive of its adoption." Id. Rather, the motive of the law was "to control, restrict and regulate." Id. Here, similarly, the RGGI air pollution program, including the provision with respect to the sale of allowances, was adopted by DEC under its traditional police power to regulate pollution, with the clear goal of addressing an important pollution problem. Thus, the fact that the sale of RGGI allowances will generate revenue is "a consequence of the system" that does not somehow convert the Budget Trading Program into a tax.

There is simply no basis to assert, and no evidence in the record that that suggests in any way that DEC's primary motive in adopting the Budget Trading Program was to raise revenue, and indeed Petitioner has pointed to no such evidence.[10] Petitioner merely states that "DEC and NYSERDA have admitted from the inception of the auction concept that the auction process would generate significant revenues and that the purpose of using the auction process was to take the revenue that might otherwise flow to affected facilities and to use that revenue for state purposes, not private purposes." Br. at 33.

[10] In fact, with the exception of its citation to the APC I, none of the other record documents cited by Petitioner on page 33 of its Brief (AR 82, 120-121, 159) have anything to do with the motive for auctioning allowances or the intended use of auction proceeds.

However, the mere fact that DEC and NYSERDA recognized or contemplated that the auctions would generate funds does not make the program into a tax. As noted above, under Einsfeld, this is merely a "consequence" of the system chosen by DEC, not the motive for its adoption, which was undeniably to regulate CO_2 emissions. Rather, it is necessary to look to the purposes behind the need to raise money – if it is for the purpose of funding or offsetting the costs of general government services, it is a tax, whereas if it is for the purpose of regulating or restricting a particular activity, it is not. See American Sugar Refining Co., 55 N.Y.2d at 26-27. Under this test, the Budget Trading Program clearly does not impose a tax.

Second, an examination of the treatment and ultimate use of the auction proceeds further shows that the Budget Trading Program does not impose a tax. All of the auction proceeds will be spent on programs related to the regulatory goal of reducing CO_2 emissions, not on "unrelated" or "general" governmental programs as claimed by Petitioner. Br. at 20, 22, 33-34. Specifically, the auction proceeds will be used to fund programs that, through investment in energy efficiency and clean energy technologies, will obtain further reductions in CO_2 emissions and will reduce the costs of the program to electricity consumers, who are the ones that largely bear the costs of the regulation through increased electricity rates. See Williams Aff. at ¶ 35; Sheehan Aff. at ¶ 56 & 63. Thus, the auction proceeds are used in a manner that "redounds to the benefit" of those who will pay for most of the program's costs in the end, i.e., the electricity consumers. See American Sugar Refining Co., 55 N.Y.2d at 26; cf. Health Servs. Med. Corp., 175 Misc. 2d at 625 (finding that the revenue was not being used for the common welfare and not for the benefit of the HMOs or the specific regulation of the health care industry, who

were the ones paying the costs of the regulation). The Budget Trading Program is further distinguishable from several of the cases cited by Petitioner in which a particular assessment or charge was found to be a tax because, rather than going into the general fund of the State, the auction proceeds are placed in a segregated account to be used solely for the specific regulatory purposes of the program. Cf. Health Servs. Med. Corp., 175 Misc. 2d at 624 (finding it "significant" that the amounts generated by the assessment in excess of the expenses to administer the funds and the amount earmarked for the "social goal" were to end up in the general fund of the State); New York Tel. Co. v. City of Amsterdam, 200 A.D.2d 315, 318 (3d Dep't 1994) (finding it notable that moneys garnered under the challenged ordinance were to be deposited in the city's general fund).

In addition to these two factors, a third consideration – the unique nature of an emission allowance – compels the conclusion that the Budget Trading Program does not impose a tax. The purchase of an allowance is one mechanism, along with obtaining emission offsets and taking steps to reduce emissions through heat rate improvements, fuel switching, or, if available, installing control technologies, that sources may use to comply with the program requirements. Correspondingly, allowance costs are not a tax, but are the price of purchasing a regulatory compliance mechanism, similar to the costs to purchase or implement these other compliance measures. Unlike a tax, in exchange for payment for an allowance, the purchaser gets a valuable, marketable asset that they may freely trade, potentially for a profit. Indeed, for that very reason, emission allowances are not treated as "taxes" under the federal tax code, but as assets. See Rev. Proc. 92-91, 1992-2 C.B. 503, 1992 IRB LEXIS 584 (treating SO_2 emission allowances issued

pursuant to Title IV of the CAA as capital assets, the cost of which must generally be capitalized, and the gain or loss recognized on the sale of which is generally treated as capital gain or loss under the Internal Revenue Code); see also Priv. Ltr. Rul. 9612009, 1995 PLR LEXIS 2159 (Dec. 18, 1995) (treating mitigation credits received by utility for restoring wetlands as capital assets the sale or exchange of which would result in capital gains or losses, similar to treatment of SO_2 emission allowances in Rev. Proc. 92-91).

These unique factors distinguish the Budget Trading Program from any of the laws or rules in the cases cited by Petitioner held by courts to be taxes. See, e.g., Health Servs. Med. Corp., 175 Misc. 2d at 622 (imposition of a 9% assessment on amounts paid by HMOs to hospitals for in-patient services); Phillips v. Town of Clifton Park Water Auth., 286 A.D.2d 834 (3d Dep't 2001) (assessment of $22,000 source and storage fees on two newly constructed buildings); New York Tel. Co., 200 A.D.2d at 316 (ordinance charging $13 per square foot for street excavation permit); Matter of Torsoe Bros. Const. Corp. v. Bd. of Trustees of the Incorp. Village of Monroe, 49 A.D.2d 461 (2d Dep't 1975) (imposition of a water tap-in fee to obtain permit to tap water). Petitioner has not cited to a single case in which costs incurred to purchase a marketable regulatory compliance mechanism such as emissions allowances have been found to be a tax.

Petitioner attempts to make much of the fact that the auction proceeds exceed NYSERDA's projected costs to administer the allowance auctions and the EE & CET Account. Br. at 34. However, Petitioner's narrow view of the types of costs that courts look at in determining whether the funds are being spent in a manner indicative of a tax is not supported by case law. Rather, to the extent that the funds are used to offset the direct and indirect costs of regulation, as well as to promote the specific purposes of the

regulatory program, they are not considered a tax. See, e.g., Health Serv. Med. Corp., 175 Misc. 2d at 624 (considering only amounts in excess of expenses and monies earmarked for the "social goal" of aiding managed care development in determining whether costs exceeded regulatory expenses); San Juan Cellular Tel. Co. v. Public Serv. Comm'n, 967 F.2d 683, 685-87 (1st Cir. 1992) (cited in Health Serv. Med. Corp., 175 Misc. 2d at 625); see also San Diego Gas & Elec. Co. v. San Diego Co. Air Pollution Control Dist., 203 Cal. App. 3d 1132 (Cal. App. 1988) (finding emissions-based fees not to be a tax because such fees were reasonably related to the costs of regulating air pollution). Regardless, whether or not sums collected through a regulatory measure exceed the cost of administration is irrelevant where, as here, the motive for enacting the provision is not the creation of revenue. Mobil Oil Corp., 85 Misc. 2d at 806 ("When the sums collected through a licensing or regulatory measure exceed the cost of administration, then it can be deemed a revenue act regardless of its label . . . although the rule is applicable only where the creation of revenue is the motive for enacting the provision") (citing Einsfeld, 149 N.Y. at 378); see also American Ass'n of Bioanalysts v. Axelrod, 106 A.D.2d 53, 55-56 (3d Dep't 1985) (rejecting argument that statute imposes a tax because the amount of fees collected exceed actual costs, since purpose of statute was to "recover the cost of regulating clinical laboratories, not to raise revenue for the support of government generally"); Matter of Joslin v. Regan, 63 A.D.2d 466, 470-71 (4th Dep't 1978). Thus, Petitioner's argument that the Budget Trading Program imposes an unlawful tax must fail.

IV. THE RGGI REGULATIONS DO NOT VIOLATE THE COMPACT CLAUSE OF THE FEDERAL CONSTITUTION

Petitioner's assertion that the RGGI regulations are the product of an interstate compact that required congressional approval under the Compact Clause of the federal Constitution is erroneous. Not every agreement or compact among states is a "compact" for purposes of the Compact Clause. Rather, the Supreme Court has adopted a functional test to determine whether an interstate agreement requires congressional consent under the Compact Clause, framing the question as whether the agreement at issue "tend[s] to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States." Virginia v. Tennessee, 148 U.S. 503, 518 (1893); United States Steel v. Multistate Tax Comm'n, 434 U.S. 452, 468 (1959) ("Looking at the clause in which the terms 'compact' and 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.") (citation omitted); see Star Scientific, Inc. v. Beales, 278 F.3d 339, 359-60 (proper balance between federal and state governments is struck by limiting the Compact Clause to agreements that increase political power of states that may encroach upon federal supremacy). No court has invalidated an interstate agreement on Compact Clause grounds. Note, The Compact Clause and the Regional Greenhouse Gas Initiative, 120 Harvard L. Rev. 1958, 1960 (2007).

Petitioner makes several arguments in support of its position that RGGI violates the Compact Clause: First, the RGGI MOU impermissibly enlarges the RGGI states' political influence over environmental issues without congressional approval. Pet., ¶ 61. Second, the MOU creates incentives for the increase of GHG emissions in states outside

of RGGI, and thus interferes with federal authority regarding the interstate effects of pollution. Pet., ¶ 62. Third, RGGI benefits participating states at the expense of other states. Br. at 38. Fourth, the RGGI regulations are stricter than federal law and thus impermissibly encroach on federal supremacy. Pet., ¶ 63. Fifth, RGGI creates a regional organization with greater powers than the sum of the member states acting individually. Br. at 38. None of these arguments has merit.

A. RGGI Does Not Impermissibly Enlarge the Participating States' Political Influence on Environmental Issues.

Under Supreme Court precedent, RGGI does not impermissibly enlarge the participating states' political influence over GHG regulation. The controlling case is U.S. Steel, which involved a challenge to the Multistate Tax Compact, an interstate agreement for the uniform apportionment of income tax liability of multi-state businesses. At the time the Court heard the case, the Model Act, which effectuated the Tax Compact, had been ratified by 19 states. The Tax Compact also created the Multistate Tax Commission, which was authorized to study state and local tax systems, adopt uniform advisory administrative regulations for the consideration of states, and conduct audits at the request of a member state. The Court held that the Tax Compact did not run afoul of the Compact Clause, reasoning that no provision of the agreement would enhance the power of the states at the expense of the national government:

> On its face the Multistate Tax Compact contains no provisions that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States. There well may be some incremental increase in the bargaining power of the member States quoad the corporations subject to their respective taxing jurisdictions. Group action in itself may be more influential than independent actions by the States. But the test is whether the Compact enhances state power quoad the National Government. . . [The Tax Compact] does not purport to authorize the member States to exercise any powers they could not

> exercise in its absence. . . . Moreover, as noted above, each State is free to withdraw at any time.

434 U.S. at 472-73. The Court also rejected that the Tax Compact unlawfully delegated sovereign power to the Commission, reasoning that "each State retains complete freedom to adopt or reject the rules and regulations of the Commission." Id. at 473.

Similarly, the RGGI program does not encroach on federal supremacy. The RGGI MOU simply memorializes the understanding that each of the participating states would enact either a statute or a regulation establishing a cap-and-trade program. The Model Rule is simply that, a model for states to use while implementing their own rules. Although certain aspects of each state's rules are intended to be uniform, states can customize allowance allocation and other essential program elements as matters of state regulation. Sheehan Aff. at ¶ 45; see, e.g., Model Rule [AR 243], §§ XX-1.5(a), XX-5.3(a), (d), at 22, 39, 41. In addition, states will enforce RGGI under their own existing state environmental enforcement programs, rather than delegate such authority to a regional authority. See MOU, § 4(A)(5) [AR 245], at 8. RGGI states have unlimited discretion to withdraw from RGGI and may unilaterally amend state implementation regimes. See id., § 5(B) [AR 245], at 9. Finally, no state's RGGI laws were conditional on any other state adopting its own RGGI program. Based on these features, RGGI does not trigger the Compact Clause. See U.S. Steel, 434 U.S. at 468-78; Virginia v. Tennessee, 148 U.S. at 517-19; see also Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys., 472 U.S. 159, 175-76 (1985) (finding Compact Clause inapplicable to interstate agreement, citing, *inter alia*, that each state could unilaterally modify or repeal its law).

Petitioner cites to the undisputed interest of the federal government in climate change policy. Br. at 38. However, "[a]bsent a threat of encroachment or interference through enhanced state power, the existence of a federal interest is irrelevant" for purposes of triggering the Compact Clause. U.S. Steel, 424 U.S. at 479, n.33. Where, as here, Congress has neither established emission limits for GHGs nor prohibited states from regulating GHGs, states may take action to safeguard the environment and public health without encroaching upon federal authority. See id. at 470 (The Constitution "is not to be construed to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution.'") (quoting New York v. O'Neill, 359 U.S. 1, 6 (1959)).

Moreover, nothing in the MOU interferes with Congress' superior right to enter the field of GHG regulation in the future. In fact, the MOU indicates the RGGI states' intention to transition to a federal program should one arise. See MOU, § 6(C) [AR 245], at 10. The Fourth Circuit in the Star Scientific case cited an analogous provision in a multistate settlement agreement with major tobacco companies as one of the reasons for rejecting a Compact Clause challenge. In that case, the multistate agreement at issue included provisions anticipating that Congress would, in the future, pass laws regulating tobacco, and providing for adjustments of the agreement under such a scenario. 278 F.3d at 360. The RGGI states' similar acknowledgment of future federal involvement in GHG regulation further evidences the lack of encroachment on federal power.

RGGI also does not present a scenario under which states are acting together to exercise power that they would not be able to employ individually. Given that CO_2 is an

air pollutant, see Massachusetts v. EPA, 127 S. Ct. at 1460, it is without question that New York has the authority to directly regulate CO_2 emissions. Thus, RGGI does not provide participating states with power to do something it would not be able to do on its own. Indeed, DEC's establishment of a cap-and-trade program to reduce pollutants that contribute to acid rain (NO_X and SO_2) was upheld in NRG Energy, Inc., Index No. 5307-03 (**Ex. A**). The regional nature of the RGGI program merely enhances the effectiveness of the cap-and-trade system, and the Court made clear in U.S. Steel that "strength in numbers" in this context does not implicate Compact Clause concerns. See 434 U.S. at 480, n.33. The same holds true with respect to Petitioner's argument that joint auctioning of allowances impermissibly enlarges the power of states to regulate commerce at the expense of the federal government, as opposed to each state conducting its own auction. Br. at 36.[11] A joint auction does offer certain benefits over a single-state auction, such as cost savings and administrative convenience, see Williams Aff. at ¶ 8, but none of these features impermissibly intrudes on federal power.

Finally, within the participating states, no state's acceptance of out-of-state emission allowances is expressly contingent on other states' acceptance of its allowances. Thus, there is also no "reciprocity" requirement that the Court has found indicative (but not dispositive) of an agreement requiring congressional consent under the Compact

[11] In making this argument, Petitioner selectively quotes from one of the several Whereas clauses in the MOU: "[t]he admitted purpose of RGGI is to enhance the region's economy by augmenting the region's energy security and by retaining energy spending and investments in the region." Br. at 36. Petitioner omits the central language in this Whereas clause, which refers to the need to "reduc[e] our dependence on imported fossil fuels." Furthermore, Petitioner ignores the other Whereas clauses that make plain that the primary goal of RGGI is to reduce CO_2 emissions, which may have the incidental benefit of enhancing the region's economy and energy security. See MOU [AR 245] at 1-2.

Clause. See Northeast Bancorp, 472 U.S. at 174-76 (rejecting that interstate agreement was subject to Compact Clause, despite finding reciprocity indicator present).[12]

B. Petitioner's Argument that RGGI Impermissibly Interferes with Interstate Commerce Because of Emissions "Leakage" Is Unripe.

Petitioner initially contended that the RGGI MOU "creates incentives for the increase of GHG emissions in states outside of the RGGI area, and thus interferes with Federal authority regarding interstate effects of emissions of pollutants." Pet., ¶ 62. In its brief, Petitioner argues that the ability of out-of-state electricity generators that do not have to purchase RGGI allowances to sell their electricity into RGGI states creates the problem of emissions "leakage," and "any attempt by RGGI to curb this 'leakage' will necessarily involve an attempt to regulate interstate commerce in derogation of the federal government's jurisdiction in this area." Br. at 36. This claim is unripe.

The RGGI Staff Working Group studied the potential problem of leakage and summarized their findings and recommendations in a report. See "Potential Emissions Leakage and the Regional Greenhouse Gas Initiative," March 2008 ("Leakage Report") [AR 24-2]. The RGGI states are monitoring electricity purchases in the region to evaluate whether any significant emissions "leakage" is occurring. Sheehan Aff. at ¶ 52. At this time, the RGGI states have not yet been determined whether there has been any emissions leakage. Sheehan Aff. at ¶ 52. If and when there is a finding that leakage has occurred, New York will evaluate at that time what steps to take in response.

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[12] Petitioner's listing of interstate compacts involving New York that were submitted to Congress for approval does not assist Petitioner's argument. First, for the reasons described above, the RGGI MOU is not an interstate compact. Second, as the Court stated in U.S. Steel when presented with a similar argument challenging the Tax Compact, such "historical practice, which may simply reflect considerations of caution and convenience on the part of the submitting States, is not controlling." 434 U.S. at 471.

Given these circumstances, Petitioner's "leakage" argument is plainly unripe. The legal doctrine of ripeness ensures that litigation is not brought prematurely, before the controversy is ready for judicial intervention. See Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967); CPLR 7801(1) (only final agency actions may be challenged). The challenged administrative action must impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process. Matter of Essex County v. Zagata, 91 N.Y.2d 447, 453 (1998). Given that New York has not taken any final action to address "leakage" (other than to monitor whether such a problem is occurring), Petitioner's claim that RGGI impermissibly intrudes on federal authority to regulate interstate commerce is unripe. See id. at 453.

C. RGGI Does Not Benefit the RGGI States at the Expense of Nonparticipating States.

RGGI does not, contrary to Petitioner's argument, benefit participating states at the expense of other states. Br. at 38. The RGGI states have not sought to impose costs on non-participating states. Moreover, because of the nature of global warming pollution, these other states actually stand to benefit from emission reductions that occur in the RGGI states. There is also no coercive pressure on non-participating states to join RGGI. Unlike the Multistate Tax Compact (which was nonetheless upheld in U.S. Steel), RGGI does not create a competitive advantage for participating states.

D. The RGGI Regulations Do Not Impermissibly Interfere with Federal Interest in Climate Policy.

Petitioner also argues that the RGGI regulations are stricter than federal law and, as a result, impermissibly encroach on federal supremacy and interfere with federal interest in climate policy. Pet., ¶ 63; Br. at 36. Regarding the former assertion, the decision of each of the RGGI states to require power plants in their states to meet

additional emission requirements than required by the CAA not only does not encroach on federal supremacy, but is fully consistent with two specific provisions of the Act: Section 102 and Section 116, 42 U.S.C. §§ 7402, 7416.

In Section 102 of the Act, Congress encouraged and explicitly gave approval for multistate agreements designed to combat air pollution. Section 102(a) encourages cooperation between states to address air pollution, including the enactment of "uniform State and local laws relating to the prevention and control of air pollution[] and encourage[ment of] the making of agreements and compacts between States for the prevention and control of air pollution." 42 U.S.C. § 7402(a). Next, Section 102(c) provides congressional "consent" for interstate agreements for the "cooperative effort and mutual assistance for the prevention and control of air pollution and the enforcement of their respective laws thereto." Id., § 7402(c). Thus, Section 102 supports the conclusion that, far from being viewed as an encroachment on federal power, agreements among states to address air pollution are favored by Congress.[13]

In addition, Section 116 of the Act specifically reserves the authority of states to impose more stringent emission standards and pollution control requirements than the federal government. 42 U.S.C. § 7416. This provision embodies the spirit of cooperative federalism in the Act under which the federal government sets the minimum standards and states can choose to enact stricter requirements. See Union Electric v. EPA, 427 U.S. 246, 263-264 (1976); Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 336 (6th Cir. 1989). Thus, the fact that the RGGI regulations are more stringent than federal requirements at present is fully consistent with the CAA.

[13] For such agreements to be binding on participating states, Section 102(c) provides that congressional approval is required. Because, as explained in Point IV.A, the RGGI MOU was not binding on any of the signatory states, that provision of Section 102(c) is inapposite here.

Moreover, given that President Obama has called addressing global warming a "high priority" of his Administration, see Memorandum from EPA Administrator Jackson to All EPA Employees (Jan. 23, 2009) at 2, available at http://www.epa.gov/administrator/memotoemployees.html, it cannot be seriously contended that the RGGI states' actions to take modest steps to require power plants to reduce their GHG emissions is contrary to the federal interest in climate policy. As further evidence, U.S. EPA recently awarded the RGGI states a Climate Protection Award, stating that RGGI "is being considered a model example as a federal strategy to reduce greenhouse gas emissions is debated in Congress." See U.S. EPA, "2009 Climate Award Winners," available at http://www.epa.gov/cppd/awards/2009winners.html. As a result, Petitioner's argument is meritless.

E. The RGGI MOU Did Not Create a Regional Organization that Has Greater Powers than the Individual Participating States.

Finally, Petitioner's contention that RGGI creates a regional organization with greater powers than the sum of the member states acting individually is unfounded. In particular, Petitioner's statement that RGGI "creates a regional administrative body empowered to issue regulations and adopt practices to regulate CO_2 emissions." Br. at 38, is completely erroneous. RGGI, Inc. possesses no regulatory or enforcement authority at all; it simply provides technical assistance to the states in administering their programs. The RGGI MOU could not be any plainer in this regard: "Limitation on Powers: The RO [Regional Organization] is a technical assistance organization only. The RO shall have no regulatory or enforcement authority with respect to the program, and such authority is reserved to each Signatory State for the implementation of its rule." MOU § 4(A)(5) [AR 245] at 8; see also RGGI, Inc., Certificate of Incorporation [AR 249], at 1; RGGI, Inc.

Bylaws [AR 250], at 1-2. RGGI, Inc. has even less powers than the Tax Commission in U.S. Steel, which the Court found did not raise Compact Clause fears. See 434 U.S. at 474-76 (discussing Commission's authority to issue administrative regulations and enforce them). In light of the foregoing, Petitioner's Compact Clause claim must be dismissed.

V. DEC'S PROMULGATION OF THE BUDGET TRADING PROGRAM REGULATIONS WAS RATIONAL

Petitioner alleges that the DEC Program regulations are arbitrary and capricious because: (1) DEC abdicated its discretion to an interstate working group by adhering to the strictures of a Model Rule without meaningfully considering the impacts of the regulations on New York State generators and consumers; (2) the regulations deny Petitioner the ability to pass on the costs of allowances, which undermines the design and purpose of the regulations; (3) the regulations violate Petitioner's due process and equal protection rights; (4) the regulations are inconsistent with the requirements of PURPA. Br. at 41-45.[14] However, as shown by the accompanying affidavit of Michael Sheehan and the extensive regulatory record in this case, Petitioner's claims are factually incorrect, based upon a distortion of the regulations, and otherwise wholly without merit.

The standard for judicial review of regulations promulgated by administrative agencies is whether the regulation has a rational basis and is not unreasonable, arbitrary or capricious. Matter of Consolation Nursing Home, Inc. v. Comm'r of New York State Dep't of Health, 85 N.Y.2d 326, 331 (1995); Chemical Specialties Mfrs. Assn. v. Jorling, 85 N.Y.2d 382, 396 (1995). An administrative agency's exercise of its rule-making

[14] Since Petitioner pled the due process/equal protection and PURPA arguments as separate claims for relief in the Petition, Respondents have addressed these claims individually under Points VI and VII. The analysis in those sections establishes that DEC's regulations are in no way arbitrary and capricious on those grounds either.

powers is accorded a high degree of deference, especially when the agency acts in the area of its particular expertise. Consolation Nursing Home, 85 N.Y.2d at 331; West Village Committee, Inc. v. Zagata, 242 A.D.2d 91, 96 (3d Dept.), appeal denied, 92 N.Y.2d 802 (1998); 5 Davis, Administrative Law, § 29:3, at 343 (2d ed). The agency "is not confined to factual data alone but also may apply broader judgmental considerations based upon the expertise and experience of the agency he heads." Consolation Nursing Home, 85 N.Y.2d at 332. Accordingly, the party seeking to nullify such a regulation has the heavy burden of showing that the regulation is unreasonable and unsupported by any evidence. Consolation Nursing Home, 85 N.Y.2d at 331-32; Brodsky v. Zagata, 222 A.D.2d 48, 51 (3d Dept.), appeal denied, 89 N.Y.2d 803 (1996).

A. DEC Did Not Improperly Abdicate Its Rulemaking Authority.

Petitioner claims that DEC improperly promulgated the Budget Trading Program regulations because it "surrendered its discretion and authority" to the RGGI Staff Working Group, which was responsible for developing the Model Rule. Br. at 39-41. Petitioner claims that DEC's regulations blindly adhered to the "strictures" of the Model Rule, which caused such regulations to be arbitrary in two respects: (1) in requiring all allowances to be allocated by auction; and (2) in imposing costs on facilities like Petitioner "without a safety valve to assure cost recovery." Br. at 40. Petitioner's claims are based on a number of erroneous factual statements unsupported by the record and, therefore, are meritless.

First, DEC did not in fact strictly adhere to the Model Rule. Rather, DEC used the Model Rule as exactly that, a model, in crafting its own regulations for proposal and promulgation in New York. DEC specifically tailored several provisions to New York's

particular regulatory environment, including the specific allowance allocation provision that is at the root of Petitioner's complaints here. Sheehan Aff. at ¶ 49, 51, 53. Under such provision, DEC independently decided, in a departure from the Model Rule, to allocate a majority of allowances to the EE & CET Account to be auctioned, rather than directly allocated to covered sources. Id. at ¶ 49. DEC further deviated from the Model Rule by setting aside a pool of 1.5 million allowances to be directly allocated to LTC generators like Petitioner. Id. at ¶ 51. Therefore, Petitioner's claim that DEC improperly surrendered its discretion or rulemaking authority by strictly adhering to the Model Rule is completely unfounded.

Further, Petitioner has not and cannot meet its substantial burden of showing that DEC's independent decision to auction nearly all of the allowances under the Budget Trading Program was unreasonable and unsupported by any evidence. Rather, as summarized by Michael Sheehan, the extensive record here demonstrates that DEC's decision to auction the allowances was undertaken after, among other things, an extensive review of economics literature, consultation with experts in economics theory, a review of other successful emissions allowances auctions, consultation with other state agencies and the NYISO regarding the expected impacts of such an approach to the operation of the electricity markets, system reliability, and electricity prices in New York, and consideration of the comments that were received during the extensive stakeholder process to develop the rule. Id. at ¶ 55. Based on these activities, DEC came to the conclusion that, rather than giving the allowances for free, which might result in windfall profits to some generators, the value of the allowances should be used to support the purpose of the program, i.e. the reduction of CO_2 emissions, and to reduce the costs of the

program to electricity consumers by promoting energy efficiency and clean energy technologies. Id at ¶ 65. The record here contains sufficient evidence to provide a rational basis for such conclusion and, therefore, DEC did not act arbitrarily in deciding to auction almost all of the allowances.

Further, Petitioner has not and cannot meet its substantial burden to demonstrate that DEC's independent decision to set-aside a pool of 1.5 million allowances to be allocated free of charge to qualifying LTC generators was unreasonable and unsupported by any evidence. Rather, the affidavit of Mr. Sheehan demonstrates that, despite initially declining to include such a provision on the basis that special treatment for LTC generators was not justified, DEC decided during the rulemaking process, in response to concerns raised by Petitioner and other generators subject to LTCs, to add a LTC set-aside provision to the final regulations. Sheehan Aff. at ¶¶ 76, 78. In its brief, Petitioner alternates between completely ignoring this set-aside and writing it off as "inadequate." Presumably, Petitioner believes the set-aside to be inadequate because, given the limit of 1.5 million allowances, Petitioner is not assured of getting for free all of the allowances it claims its needs. However, Petitioner has not shown that, although DEC was not required to include such a provision in the first instance, having decided to include the LTC set-aside, DEC's decision not to increase the size of the set-aside or make any assurances that Petitioner would receive 100% of the allowances it claims to need was unreasonable.

Rather, the administrative record establishes that DEC determined not to increase the size of the set-aside because it could not validate speculative assertions that additional allowances would be necessary and because of significant public opposition based on

concerns that it would be contrary to the emission reduction goals of the program. Sheehan Aff. at ¶ 79; APC I [AR 17], at 301-04, 310, 315-17, 321-26; APC II [AR 15], at 47, 49, 55-56, 64. In reviewing the DEC's determination, this Court's role "is not to determine if the agency action was correct or to substitute its judgment for that of the agency, but rather to determine if the action taken by the agency was reasonable." Chemical Specialties Manufacturers Ass'n v. Jorling, 85 N.Y.2d 382 386 (1995), citing Pell v. Board of Education, 34 N.Y.2d 222, 230 (1974). Such review "must be conducted on the record as it existed before the agency when the determination was made." Regional Action Group for the Environment v. DEC, 245 A.D.2d 798, 801 (3d Dep't 1997), leave denied, 91 N.Y.2d 811 (1998). The record here amply demonstrates that, based on the record before it, DEC did not act arbitrarily in declining to increase the size of the LTC set-aside.

B. Petitioner's Inability to Recover Allowance Costs Through Increased Rates Does Not Undermine the Design and Purpose of the Budget Trading Program.

Petitioner alleges that the Budget Trading Program "prevents," "bars", and "forecloses" it from any opportunity to recover the allowance costs, which Petitioner claims "undermines the design and purpose of the auction process." Br. at 46-47. Again, Petitioner misstates the facts. First, to the extent that Petitioner is "prevented" or "foreclosed" from recovering its allowance costs, it is Petitioner's contract with Con Ed, not the RGGI regulations themselves that cause that result. Second, the regulations specifically give Petitioner and other LTC generators, unlike any other generators in the state, the opportunity to obtain at least some free allowances, and therefore avoid incurring or reducing allowance costs. With the exception of the LTC set-aside provision, which is for the benefit of LTC generators like Petitioner, the regulations treat

all covered generators the same regardless of the ability of particular generators to pass on costs.

Further, that Petitioner may not be able to pass on its allowance costs does not undermine the design and purpose of the auction. In designing the Budget Trading Program and the auctions under the Auction Program, DEC and NYSERDA merely intended to create "price signals at a level sufficient to cause investment in technologies and strategies that would reduce or avoid emissions of CO_2." APC I [AR 17], at 22. The decision to auction nearly all of the allowances under the Budget Trading Program was not based on an intent that generators must or should be able to pass on *all* of their costs to consumers through increased electricity prices so as to ensure a perfect "price signal" to consumers. Sheehan Aff. at ¶ 66. Rather, DEC recognized that not all generators would be able to pass on all of their allowance costs. Id.; Consumer Allocation Approach [AR 218], at 5-6. For instance, DEC recognized that coal plants would likely recover only about half of their allowance costs when natural gas sets the market price, as it often is in the New York energy market. Id., at ¶ 66.

Finally, Petitioner has not presented any proof that its inability to pass on all of its costs will have any material impact on the "price signal." To the extent that Petitioner relies on the argument that RGGI creates an incorrect price signal that "causes the Petitioner facility to be dispatched more (i.e., to be called on more often to produce more power than would otherwise the case" compared to other electricity generators), Br. 46-47, this argument is (i) speculative, in that it is based on a dubious prediction of how RGGI may impact the electricity market in the future, and (ii) unsubstantiated, in that it is merely counsel's argument in a brief, and therefore not admissible evidence. See Miller

v. McMahon, 240 A.D.2d 806, 808 (3d Dep't 1997). With respect to Petitioner's contention that the cost of the RGGI allowances will result in the Corinth plant being dispatched more frequently (in turn driving up Petitioner's cost of doing business), the affidavit of Joseph P. Oates, the Vice President of Energy Management at Consolidated Edison Company of New York, Inc. ("Con Edison") indicates that Petitioner's claim is baseless. See Affidavit of Joseph P. Oates, sworn to on May 13, 2009, at ¶ 6 (analyzing Con Edison's dispatch of Corinth plant in 2008 and concluding that factoring in cost of RGGI allowances would have reduced dispatch of plant by less than one percent, even assuming a much higher price for allowances than sold at auction).

Moreover, even if one were to assume that the plant will operate more in the future as a result of the price of allowances, there would be nothing "perverse" about such an outcome. If the Corinth power plant is, as Petitioner asserts, one of the cleanest burning plants in New York, having that plant utilized more than a dirtier, less efficient plant, is fully consistent with the central purpose of New York's RGGI program: to reduce CO_2 emissions from power plants.

VI. THE RGGI PROGRAM DOES NOT VIOLATE THE EQUAL PROTECTION OR DUE PROCESS CLAUSES OF THE CONSTITUTION

Contrary to Petitioner's claims, the RGGI regulations do not unlawfully discriminate against Petitioner or violate the company's due process rights. Because there is no fundamental constitutional right or suspect class at issue in this case, the constitutionality of RGGI must be adjudged based on the rational basis test. Petitioner's Equal Protection claim fails because the RGGI regulations do not treat covered electricity generators differently. Moreover, New York's decision not to exempt long-term contract

generators such as Petitioner from compliance with RGGI was rationally related to the legitimate state interest of cost-effectively reducing CO_2 emissions through investments in energy efficiency and the development of clean energy technologies. Petitioner's due process claim is unripe because it may be able to obtain allowances free of charge through the LTC set-aside provision and, in any event, lacks merit.

A. RGGI Does Not Violate the Equal Protection Clause.

Petitioner alleges that the Budget Trading Program impermissibly treats it differently from other similarly situated pollutant sources, in violation of the Equal Protection clause of the federal Constitution. Pet., ¶ 69. At the outset, it is unclear whether Petitioner is making a facial Equal Protection challenge or an "as applied" challenge. The crux of Petitioner's claim appears to be that the Budget Trading Program impermissibly discriminates against Petitioner and other generating facilities that entered into long-term fixed price contracts to sell energy by "barring" them from passing through the costs of CO_2 allowances. See Pet., ¶ 69; Br. at 23, 41-42.

Regardless of whether Petitioner asserts its claim as a facial or as applied challenge, neither type of challenge is meritorious. Despite Petitioner's assertions, the Budget Trading Program treats equally all power plants covered under the Program (i.e., plants that have a capacity to generate 25 megwatts or more of electricity); any reduced profits that Petitioner may experience because of having to comply with the regulations are solely due to its own contracting decisions. In fact, this lawsuit makes plain that Petitioner does not want equal treatment, it wants special treatment. Petitioner's claim is further undermined by the fact that – after considering the comments of Petitioner and

other long-term contract generators – DEC in fact did include a LTC set-aside provision, which enables qualifying facilities to receive allowances at no charge.

1. RGGI is not facially discriminatory.

Statutes and regulations that allegedly treat similarly situated parties in a different manner are subject to rational basis scrutiny unless the petitioner claims the violation of a fundamental right or disparate treatment based on a suspect classification. Dittmer v. County of Suffolk, 188 F.Supp.2d 286, 292 (E.D.N.Y. 2002) (citing Weinstein v. Albright, 261 F.3d 127, 140 (2d Cir. 2001)) (citation omitted). Given that Petitioner has not alleged that the Budget Trading Program violates a fundamental right or discriminates based on a suspect classification, the rational basis standard applies to any facial challenge of RGGI. See Dittmer, 188 F.Supp.2d at 293. The rational basis test is highly deferential, presuming the regulation to be valid if there is any reasonably conceivable set of facts that could provide a rational basis for the classification. Weinstein, 261 F.3d at 140 (citation omitted); Kittay v. Giuliani, 112 F.Supp.2d 342, 353 (S.D.N.Y. 2000) (Where neither a fundamental right nor a suspect class is implicated, the law's treatment of different classes carries with it a "heavy presumption of constitutionality"), aff'd 252 F.3d 645 (2d Cir. 2001); see Matter of Shattenkirk v. Finnerty, 97 A.D.2d 51, 55 (3d Dep't 1983). Petitioner cannot meet this heavy burden.

The Budget Trading Program does not discriminate against one set of electricity generators or another: all covered power plants are treated equally. There is nothing in the language of the regulations that treats Petitioner (and other generators with long-term contracts) differently from other electric generators. Each power plant of greater than or equal to 25 megawatts ("CO_2 budget unit") is required, beginning on January 1, 2012, to

have sufficient allowances in its account to cover its CO_2 emissions during the initial control period (2009-11), and for subsequent control periods. 6 NYCRR §§ 242-1.2(b)(40), 1.5(c). All power plants have the choice of complying by reducing emissions, purchasing allowances, securing offsets, and/or obtaining early reduction allowances. See Sheehan Aff. at ¶ 33; 6 NYCRR §§ 242-5.3(b), 6.5(a), 10.1. The anticipated effect is a 10 percent reduction in CO_2 emissions in New York and the other the RGGI states by 2019. See 6 NYCRR § 242-5.1. This reduction of CO_2 emissions from power plants is rationally related to the State's interest in combating the adverse impacts of global warming. See Belensz Aff. at ¶¶ 27-30. DEC's decision plainly satisfies the rational basis standard. See Dittmer, 188 F.Supp.2d at 292-93 (upholding statute that imposed restrictions on development against Equal Protection challenge on grounds that restrictions were rationally related to state interest in protecting pine barrens ecosystem).

To the extent that Petitioner's claim is founded on the argument that DEC acted arbitrarily by deciding not to exempt LTC generators from RGGI (or rejecting that such generators should be given all of their allowances for free), such a decision was rationally related to the State's objective of obtaining reductions in CO_2 emissions at the least cost to electricity consumers. See Sheehan Aff. at ¶¶ 65-76, 82-85. In an analogous case, Kittay v. Giuliani, the court rejected an Equal Protection claim by a real estate developer challenged regulations limiting development in the New York City watershed. The developer alleged that the regulations unlawfully discriminated against Watershed landowners as compared to City residents. 112 F.Supp.2d at 353. The court, while presuming that the regulations created different classes of persons recognizable under constitutional analysis, found the claim to lack merit because the developer could not

show that the regulations on their face bore no rational relation to the legitimate governmental interest in protecting the City's drinking water. Id. at 354.

Petitioner's contention that all other electric generators (other than the few similarly situated LTC generators) can recover the costs of RGGI allowances by passing their costs through to ratepayers, Br. at 41, is erroneous. Instead, the amount of compliance costs that can be recovered by different types of generators depends on the relative carbon emissions rate of the marginal unit in relation to other units that also dispatch. Sheehan Aff. at ¶ 61. For example, if the market price for electricity happens to be based on a natural gas plant, a coal-fired unit would be able to recover less than half of its compliance costs, while the natural gas-fired unit would recover all of its compliance costs. Id.

Finally, Petitioner's Equal Protection claim is further undercut by the LTC set-aside provision of New York's regulations. As discussed above, the regulations give all covered power plants the option of complying with RGGI through a combination of reducing emissions, purchasing allowances, securing offsets, and/or obtaining early reduction allowances. LTC generators like Petitioner may qualify for an additional compliance option: obtaining free allowances from the LTC set-aside pool of 1.5 million allowances. See 6 N.Y.C.R.R. 242-5.3(d). Therefore, Petitioner's statement that "the regulations as promulgated offer no 'safety valve' by which to allow generators like Petitioner to recover the cost of allowances," Br. at 41, is plainly wrong. In sum, because the Budget Trading Program treats Petitioner at least equally (if not favorably) compared to other power plant owners, the company's facial Equal Protection claim must fail.

2. An "as applied" Equal Protection challenge is unripe and, even if it were ripe, is meritless.

To the extent that Petitioner intended its Equal Protection challenge to be an "as applied" challenge, such a claim would be premature because the Petition does not allege selective enforcement or application of the Budget Trading Program or Auction Program regulations. Even assuming, *arguendo*, that Petitioner has alleged such facts, it has not stated a cognizable Equal Protection claim.

To succeed in an "as applied" Equal Protection challenge, the petitioner must establish that the government has applied or enforced an admittedly valid law "'with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances.'" Matter of 303 West 42nd Street Corp. v. Klein, 46 N.Y.2d 686, 693 (1979) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886)). To invoke the right successfully, "there must be not only a showing that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based on an impermissible standard such as race, religion, or some other arbitrary classification." Id. (citations omitted).

Petitioner has not made out an "as applied" Equal Protection claim. First, regarding the "unequal hand" prong, Petitioner does not argue – much less establish --that DEC and NYSERDA are impermissibly applying or enforcing the Budget Trading Program or Auction Program. There is nothing in Petitioner's petition or brief, for instance, alleging the selective enforcement of the regulations against Petitioner. As a result, such a claim must be rejected. See Matter of Sour Mtn. Realty Inc. v. DEC, 260 A.D.2d 920, (3d Dep't 1999) (affirming motion to dismiss Equal Protection claim premised on denial of mining permit where developer conclusorily asserted that DEC

granted mining permits to similarly-situated developers). Second, Petitioner has likewise failed to demonstrate that DEC or NYSERDA have applied the regulations based on an arbitrary classification. As discussed above in the facial challenge section, the regulations treat covered power plant owners equally, so there is no disparate treatment based on classification. Furthermore, any claim that Petitioner may seek to raise with respect to the distribution of free allowances under the LTC set-aside provision would be premature at this time given that DEC has not made a final determination regarding the distribution of those allowances. Sheehan Aff. at ¶ 91; see also Kittay, 112 F.Supp.2d at 349. As explained in the Sheehan Affidavit, DEC has concluded that Petitioner may be eligible to receive free allowances under 6 NYCRR 242-5.3(d)(3). Sheehan Aff. at ¶ 91. Under that scenario, Petitioner would be able to receive at least a pro rata share of the 441,990 tons it requested. See id.

The Supreme Court's decision in Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000), does not assist Petitioner, and in fact further confirms that Petitioner has failed to even allege the facts that could support an "as applied" challenge. In the Olech case, the Supreme Court affirmed the reversal of the trial court's grant of a motion to dismiss a landowner's complaint alleging an Equal Protection violation. The landowner argued that the Village had arbitrarily required a 33-foot easement for her property, when the Village's ordinance only required a 15-foot set back. The Court agreed that, even though the landowner was a "class of one," she had stated a cognizable claim where the complaint alleged that the Village allowed other landowners to build as long as they met the 15-foot set back requirement. However, unlike in Olech, as described above,

Petitioner has not even alleged – much less proven – the facts necessary to state an as applied claim.

B. Petitioner's Substantive Due Process Claim Is Unripe and Meritless.

Petitioner further claims that the Budget Trading Program violates its due process rights because it obligates Petitioner to pay for allowances "without assuring that it has a fair opportunity to recover the costs they have imposed." Pet., ¶ 68. To challenge the facial validity of a regulation on substantive due process grounds,[15] a petitioner must allege that the regulation deprives petitioner of a constitutionally protected interest and that the regulation lacks any rational relationship to a legitimate government interest. Kittay, 112 F.Supp.2d at 352 (citing Crowley v. Courville, 76 F.3d 47, 52 (2d Cir. 1996) (citation omitted)). A court should be "reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). A substantive due process claim based on allegedly tortious conduct by state actors ordinarily requires evidence of conduct that "can be properly characterized as arbitrary, or conscience-shocking, in a constitutional sense." Interport Pilots Agency, 14 F.3d at 144 (internal quotations and citation omitted). Petitioner cannot satisfy this test.

To begin, Petitioner's due process claim is unripe. Even assuming arguendo that Petitioner has a constitutionally protected interest at stake, its assertion that it has been deprived of that interest "without a fair opportunity to recover the costs" is unripe given that its application for free allowances under the LTC set-aside provision is still being processed. See Liberty Cable Co., Inc. v. City of New York, 60 F.3d 961, 963 (2d Cir.

[15] Given that notice-and-comment rulemakings, like the Budget Trading Program, are classified as legislative acts, a procedural due process claim is not available to challenge a regulation. See Interport Pilots Agency, Inc. v. Sammis, 14 F.3d 133, 142-43 (2d Cir. 1994) (citations omitted).

1995) (affirming dismissal of plaintiffs' complaint alleging due process violation based on inability to obtain license; reasoning claim was unripe given that the city was developing process by which plaintiff could obtain license); cf. Kittay, 112 F.Supp.2d at 349 ("Without a final agency decision regarding the applicability of the Regulations to [plaintiff's] property, the alleged injury to [plaintiff's] estate is . . . speculative"). The likelihood that Petitioner will receive at least some of these free allowances, as described above, see Point V.A, supra, further undercuts its due process claim.

Even if its claim were ripe, however, it would lack merit because DEC's decision not to exempt Petitioner and other LTC generators from the regulations (or alternatively, not to give them all of its allowances for free) was rationally related to a legitimate state interest. As explained above, the auctioning of allowances is rationally related to the state's interest in reducing CO_2 emissions at the least cost to consumers of electricity by promoting energy efficiency and clean energy technologies.[16]

VII. THE BUDGET TRADING PROGRAM AND AUCTION PROGRAM ARE NOT PREEMPTED BY PURPA

Petitioner's claim that the Public Utilities Regulatory Policies Act of 1978 ("PURPA") preempts the Budget Trading Program and Auction Program is unfounded. Under the Supremacy Clause of the U.S. Constitution, Article VI, Clause 2, federal law will not prohibit enforcement of state regulation unless: (1) the federal statute contains express language indicating congressional intent to occupy the field, see Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); (2) the comprehensive and pervasive nature of

[16] Petitioner raises for the first time in its brief that the RGGI "regulations as promulgated constitute an unlawful taking of Petitioner's property rights." Br. at 39. Because this claim is not in the Petition, it has been waived. See Matter of Miller v. McMahon, 240 A.D.2d 806, 807-08 (3d Dep't 1997). In any event, Petitioner cannot state a takings claim because it does not – and cannot – allege that the regulations deny it all economic use of the Corinth plant. See Kittay, 112 F.Supp.2d at 350-51 (citing Hodel v. Virginia Surf. Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 295-96 (1981)). Further, Petitioner's claims of financial harm are unsupported by the record and are otherwise grossly overstated. See, *supra*, at fn.5.

the federal law indicates an intention by Congress to leave no room for the states to supplement it, or if the federal law concerns a dominant federal interest, see Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); or (3) if compliance with both federal and state law is an impossibility. Analysis under the Supremacy Clause begins with the presumption that Congress did not intend to prohibit state action. Matter of Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n, 63 N.Y.2d 424 (1984). That presumption is especially warranted where preemption would displace a state law governing an area historically regulated under the state's police power, id. (citing Rice, 331 U.S. at 230), such as protection of public health and the environment.

Congress enacted PURPA to reduce this country's dependence on fossil fuels by encouraging the development of alternate energy sources. See FERC v. Mississippi, 456 U.S. 742, 750 (1982). Section 210 of PURPA charges the Federal Energy Regulatory Commission (FERC) with prescribing rules to foster the development of qualifying co-generation and small power production facilities. See 16 U.S.C. § 824a-3(a). By also directing FERC to promulgate rules requiring electric utilities to offer to sell and purchase electric energy from these qualifying facilities, Congress sought to eliminate an obstacle to the development of alternate energy sources: the reluctance of utilities to buy power from, or sell power to, alternate power producers. FERC v. Mississippi, 456 U.S. at 750; Matter of Consolidated Edison, 63 N.Y.2d at 431.

In setting the regulatory rates of such purchases and sales, PURPA directed FERC to establish rates that are: (1) just and reasonable and in the public interest, and (2) not discriminatory against qualifying co-generators or small power producers. 16 U.S.C. § 824a-3(b). Congress intended the "just and reasonable" prong to apply to costs borne

by the ratepayer (not cogenerators or utilities), and the "discrimination" prong to prevent utilities from charging "non-cost based rates for power solely to discourage cogeneration." H.R. Rep. No. 95-1750, as reprinted in 1978 U.S.C.C.A.N. 7797, 7831. PURPA also prescribes the purchase rate of energy from qualified facilities ("QFs") by providing that FERC may not establish a rate that exceeds the purchasing utility's "avoided cost," *i.e.*, the amount it would have cost the utility to generate the same energy had that purchase not been made. 16 U.S.C. § 824a-3(d); 18 C.F.R. § 292.304(b)(2).

Petitioner argues that the RGGI regulations conflict with PURPA's "policy and practice" of ensuring that QFs receive the utility's full avoided cost, thereby failing to provide the requisite encouragement to cogeneration facilities as required by PURPA. Pet., ¶ 56; Br. at 42. The statutory language Petitioner relies upon, Section 210(f) of PURPA, merely provides in relevant part that "each State regulatory authority shall . . . implement such rule [promulgated by FERC concerning QFs]." 16 U.S.C. § 824a-3(f). The relevant regulatory provision mirrors the statute, requiring that rates for purchases be just and reasonable and in the public interest, and not discriminate against qualifying facilities. 18 C.F.R. § 292.304(a). A rate meets these criteria if it equals the full avoided costs. Id., § 292.304(b)(2). Under PURPA, QFs receive payments for their power based on capacity (the amount of energy a facility is capable of producing at any given time) and energy (the amount of electricity actually produced by the facility over time). City of Boulder v. Colorado Pub. Util. Comm'n, 996 P.2d 1270, 1279 (Colo. 2000).

Under PURPA, QFs may sell energy to utilities on a short-term or long-term basis. FERC explained that authorizing LTCs was necessary to provide QFs with certainty for the return on investment in new technologies. 45 Fed. Reg. 12,214, 12,224

(Feb. 25, 1980). For a QF that enters into an LTC to sell its power to a utility, the regulations give the QF the choice of receiving a fixed rate equal to the avoided cost estimated at the time the contract is executed or a rate determined when the electricity is delivered. 18 C.F.R. § 292.304(d)(2) (For QFs that choose "[t]o provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, . . . the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) the avoided costs calculated at the time of delivery; or (ii) the avoided costs calculated at the time the obligation is incurred."). In the latter case, the rates for such purchases do not violate PURPA if they differ from avoided costs at the time of delivery. Id., § 292.304(b)(5). Although stakeholders expressed concern with inequities resulting from estimates that proved too high or too low over the course of a multi-year contract, FERC reasoned that "in the long run 'overestimations' and 'underestimations' of avoided costs will balance out." 45 Fed. Reg. at 12,224. The Supreme Court upheld the rule in American Paper Inst. v. American Elec. Power Service Corp., 461 U.S. 402 (1983).

In light of these regulations, there is simply no support for Petitioner's position that, nearly 20 years after entering a long-term fixed-price agreement, Petitioner, which never challenged the PSC's 1990 approval of its contract, can now invoke PURPA to challenge environmental regulations merely because they impose costs that Petitioner must bear by virtue of its contractual obligations. At the time Petitioner entered into the power purchase agreement with Con Edison, it chose – as it was permitted to do under the FERC regulations,18 C.F.R. § 292.304(d)(2)(ii) – to receive an avoided cost rate based on estimates of Con Edison's long-run avoided costs. See Revised Power Purchase

Agreement between Consolidated Edison and Indeck Energy Services of Corinth [AR 261], Appendix C; Oates Aff. at ¶ 3. Petitioner's claim that the RGGI regulations run afoul of PURPA by increasing its cost of energy production, in turn lowering its profits, is based on a misreading of the PURPA regulations, which focus not on a QF's profits, but on the utility's avoided cost. 18 C.F.R. § 292.304(b)(2). Moreover, the regulations expressly provide that where "the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate PURPA if the rates for such purchases differ from avoided costs at the time of delivery." Id., § 292.304(b)(5). Given that Petitioner elected long ago to receive its payments based on Con Edison's estimated, not actual, avoided costs, the language of the regulations defeats Petitioner's claim.

The relevant case law affirms that a change in state regulation which, because of a pre-existing contract, results in a QF receiving payments that are less than the utility's "full avoided costs" does not thereby violate PURPA. In City of Boulder, 996 P.2d at 1279, the City owned several QFs selling power to the Public Service Company of Colorado ("PSCo") under pre-existing contracts. The City challenged the approval by the Colorado Public Utilities Commission ("CPUC") of a turbine upgrade at a power plant owned by the PSCo, the Pawnee power plant. The upgrade increased the capacity of the plant, and reduced the plant's costs of producing power. As a result, the upgrade effectively reduced the level of energy payments under the pre-existing contract between PSCo and the City, which was tied to the level of power production costs at the plant. At the same time, although the upgrade increased the plant's capacity, the capacity payments did not increase because they were fixed under the contract. The end result was that

payments under the contracts decreased. The City claimed this violated PURPA because the utility would not "truly be paying its full avoided costs" to the QFs.

The court rejected these arguments, reasoning that FERC's and the CPUC's regulations allowed QFs to elect to fix their payment levels pursuant to contract. 996 P.2d at 1279 (citing 18 C.F.R. 292.304(d)(2)) (additional citations omitted). The court noted that "[i]n the past, this contractual framework has worked to the benefit of many QFs, as utilities delivered payments pursuant to contract that actually exceeded their avoided costs," and that FERC had determined that certainty as to rates was sufficiently important to justify this occurrence. Id. (citing 45 Fed. Reg. at 12,224) (citation omitted). As a result, the court declined to "disturb a rule that the PUC established to guide the contracting process between utilities and QFs simply because financial returns to QFs may change over time under the adopted framework." Id. at 1280.

The City of Boulder case is analogous to this case. Here, Petitioner alleges the RGGI program will effectively increase Con Edison's "full avoided costs" but that, because the contract price is fixed, Con Edison will not truly be paying its full avoided costs. However, as was the case in City of Boulder, Petitioner elected to fix its payment levels pursuant to contract. A change in state regulations that affects Petitioner's cost of producing electricity does not violate PURPA merely because Petitioner's pre-existing contract does not allow Petitioner to recover the increased costs from the utility. Under that interpretation, PURPA would become a veritable straightjacket, preventing states from enacting any number of public health and environmental regulations that could conceivably drive up the cost of producing electricity.

Next, cases involving utility challenges to LTCs have established that, once the QF and utility agree in a contract that avoided cost will be calculated based on long-run estimates, the contract cannot be subsequently modified on grounds that the estimates turned out to be unfavorable to one party or the other. In a case cited by Petitioner, New York State Elec. & Gas Co. v. Saranac Power Partners, L.P., 117 F. Supp. 2d 211 (N.D.N.Y. 2000), the court upheld FERC's refusal to grant relief to utilities from LTCs. The utilities claimed that requiring them to honor payments to QFs under LTCs in which avoided cost was calculated at a fixed rate equal to long-run avoided costs ("LRACs") – rates that turned out to be significantly higher than actual avoided costs – ran afoul of PURPA. FERC ruled that the regulations provided for setting the rate of avoided costs at the long-run avoided cost estimate and rejected that PURPA required a "minute-by-minute evaluation of costs which would be checked against rates established in long term contracts between [QF's] and electric utilities." Id. at 221. In upholding FERC's determination, the court reasoned that "FERC obviously anticipated a circumstance where estimated LRACs would differ in some respect from actual avoided costs at the time power was delivered pursuant to a long-term PPA." Id. at 229. As FERC reasonably determined, the purpose of this provision "is to ensure that a QF which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances." Id. (citation omitted).

Similarly, in another case cited by Petitioner, Indep. Energy Producers Ass'n v. California Pub. Util. Comm'n, 36 F.3d 848, 858 (9th Cir. 1994), the court held that the PUC was preempted from modifying LTCs to reduce the rate paid by utilities so that it would equal the actual avoided cost. Instead, "the proper remedy for such a situation is

to ensure that future standard offer contracts contain more flexible pricing mechanisms." Id. at 859 (citation omitted). Petitioner's contention that Indep. Energy Producers supports its position, Br. at 44, is unfounded. First, that case is factually distinct from the case at bar. As Petitioner notes, that case involved a state regulation that suspended payment of rates and substituted a lower rate than the rate specified in the QF's contact with the utility. At most, the RGGI regulations have an effect on Petitioner's cost of doing business; they do not alter the terms of the LTC at all. Second, the court's discussion of the need for federal uniformity in the treatment of QFs was made in the context of reviewing a state regulation that permitted states to determine the status of QFs, a determination that Congress expressly entrusted to FERC. See id. at 853-54 (citing 16 U.S.C. 796(18)(B)(i)). In any event, the Budget Trading Program regulations are consistent with the policy of treating QFs uniformly: All QFs that generate 25 megawatts or more are subject to the regulations. 6 NYCRR § 242-1.4(a). To the extent that the regulations deviate from uniform treatment, they do so in a manner that *favorably* treats QFs, such as Petitioner. See Point VI.A, supra.

None of the other cases Petitioner cites is helpful to its PURPA claim. In particular, the Court of Appeals' decision in Matter of Consolidated Edison, 63 N.Y.2d 424, adopted a very narrow view of preemption, holding that the PSC could require utilities to pay QFs at a rate even greater than full avoided cost. Petitioner unpersuasively attempts to use a footnote from the decision in which the Court quoted the preamble to FERC's initial PURPA regulations for the unremarkable proposition that "State laws or regulations which would provide rates lower than the federal standards would fail to provide the requisite encouragement to these technologies, and must yield to federal

law." Br. at 43 (quoting 63 N.Y.2d at 438, n.9). The RGGI regulations do not, however, "provide rates lower than the federal standards." First, the Budget Trading Program is an environmental regulation governing the emissions of CO_2; it does not set the rate utilities pay when they purchase electricity from QFs. The PSC, not DEC, determines the level of the utilities' "avoided costs." 16 U.S.C. § 824a-3(f)(1) (requiring state rate-setting agencies, in this case the PSC, to implement FERC's rules). Second, while RGGI may impact the costs of generating electricity, it is not necessarily part of a utility's "avoided costs" because it does not necessarily impact the price at which utilities purchase electricity from QFs.[17] Even if RGGI impacts utilities' "avoided costs" in the absence of a contract (a question for PSC, not DEC, to decide), here the parties entered into an LTC setting a price based on an estimate of the utility's avoided costs. As explained above, such a pricing arrangement is lawful under PURPA, even if the contract price differs from actual avoided costs at the time electricity is delivered. 18 C.F.R. § 292.304(b)(5). Therefore, even if the RGGI regulations ultimately have some impact on utilities' current level of "avoided costs," any such impact would not change Petitioner's contractual obligations, and would not render Petitioner's pre-existing contract inconsistent with, or contrary to, PURPA. Given all this, the language Petitioner quotes from the Consolidated Edison case plainly refers to a state law or regulation that provides for establishment of rates that are less than full avoided cost, and does not refer to a state environmental regulation that does not attempt to set Con Edison's rates.

Petitioner's reliance on Freehold Cogeneration Assoc., L.P. v. Board of Reg. Comm'rs of New Jersey, 44 F.3d 1178 (3d Cir. 1995), is likewise misplaced. In that

[17] Petitioner alleges only that market prices "will likely reflect the cost" of RGGI. Pet., ¶ 19. Thus, it fails to allege facts which, if true, would demonstrate that RGGI costs are necessarily part of Con Edison's "avoided cost."

case, the court held that the state PUC was preempted from changing the terms of a LTC under PURPA where, several years after the contract was entered into, the payments under the contract, which were based on an estimate of avoided costs calculated at the time the contract was executed, were significantly higher than actual avoided costs. Just as the court held there that the principle of price certainty protected the QF from modification of the LTC to more accurately reflect the actual avoided cost of producing electricity, so too here does that principle protect the settled expectations of the utility. See 45 Fed. Reg. at 12,224 (stating that the rule allowing use of LRACs "can also work to preserve the bargain entered into by the electric utility; should the actual avoided cost be higher than those contracted for, the electric utility is nevertheless entitled to retain the benefit of its contracted for, or otherwise legally enforceable, lower price for purchases from the qualified facility").

Finally, Occidental Chem. Corp. v. Louisiana Pub. Serv. Comm'n, 494 F.Supp.2d 401 (M.D. La. 2007) is also inapposite. In that case, the court denied the state utility commission's motion to dismiss where the QFs had shown that the commission's decision to revise the payment methodology for avoided cost resulted in QFs receiving less than full avoided cost. Unlike in the instant case, however, the contracts in that case specified a rate based on the avoided cost at the time of delivery. Id. at 407. A year after the contracts were entered into, the utilities petitioned the commission to change to the methodology for calculating the avoided cost rate. The commission subsequently changed the methodology, resulting in the QFs being paid less than the utilities' full avoided costs. Id. In those limited circumstances, the court held that the QFs had made out a claim for preemption under PURPA, *i.e.*, the statute preempted the decision by the

state's rate-setting agency to set the rate at a level below the utilities' full avoided cost. Here, by contrast, Petitioner argues that PURPA preemption should be broadened to encompass state regulations that relate to air emissions, not electricity rates. Petitioner overlooks that the RGGI regulations do not dictate a new methodology for calculating "avoided costs" for the purpose of setting electricity rates under long-term power purchase agreements. Petitioner's attempt to enlarge the scope of PURPA preemption to include an environmental regulation that, at most, may incidentally affect regulated utilities' "avoided costs," is unprecedented and should be rejected.

CONCLUSION

For the foregoing reasons, Respondents Paterson, DEC and NYSERDA respectfully request that the Court dismiss the Petition, enter judgment in their favor as a matter of law on all of Petitioner's claims and declare that promulgation of the RGGI regulations was authorized and did not violate any Constitutional rights or prohibitions.

Dated: Albany, New York
May 15, 2009

Respectfully submitted,

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Exhibit A

COPY

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of

NRG ENERGY, INC., ARTHUR KILL POWER LLC, DUNKIRK POWER LLC, HUNTLEY POWER LLC, and OSWEGO HARBOR POWER LLC,

Petitioners,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules

DECISION AND JUDGMENT

-against-

Proceeding No. 1
Index No. 5307-03
RJI No. 01-03-ST3824

ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation, the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and the NEW YORK STATE ENVIRONMENTAL BOARD,

Respondents.

In the Matter of

MULTIPLE INTERVENORS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCALS 83, 97 AND 503 and UTILITY WORKERS UNION OF AMERICA, AFL-CIO, LOCAL 1-2,

Petitioners,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules

-against-

Proceeding No. 2
Index No. 5348-03
RJI No. 01-03-ST3825

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent.

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Leslie E. Stein, J.

Petitioners in proceeding number 1 (hereinafter NRG) commenced the first Article 78 proceeding seeking a judgment annulling and setting aside 6 NYCRR Parts 237 and 238, and an amendment to 6 NYCRR 200.9, collectively known as the Acid Deposition Reduction Program (ADRP), on the grounds that respondents in the first proceeding failed to comply with State Administrative Proceedings Act (hereinafter SAPA) §§104 (1), 202 (2) and 202-a (6) and failed to make a proper submission to the New York State Environmental Board.

In their answer to the first petition, respondents assert a general denial and interpose the following affirmative defenses and objections in point of law: the amended petition fails to state a cause of action; the New York State Environmental Board is not a proper party to this proceeding and the proceeding should be dismissed as against said party pursuant to CPLR 1003; and the causes of action are barred by the statute of limitations.

Petitioners in proceeding number 2 (hereinafter Multiple Intervenors) commenced the second Article 78 proceeding, seeking a judgment annulling and setting aside the ADRP on the grounds that the regulations violate the State Acid Deposition Control Act (hereinafter SADCA)(Environmental Conservation Law [hereinafter ECL], Article 19, Title 9) and are *ultra vires*, that respondent acted arbitrarily and capriciously in promulgating the ADRP and failed to rationally balance the costs and benefits of the regulations.

Multiple Intervenors have moved to strike a number of affidavits which were not part of the administrative record on the ground that judicial review is limited to the record actually before an administrative agency. For the most part, the affidavits in question set forth the procedural history of the ADRP, SADCA and other related air pollution regulation, together with the history of actual impacts of acid deposition on the natural resources and the health of the people of the state. Such facts are part of the knowledge and expertise of the respondent and were clearly brought to bear in its decision-making process. As such, the affidavits do not improperly interpose any new evidence which was not before the agency at the time of its decision (*see Matter of Grogan v Zoning Bd. of Appeals of Town of E. Hampton*, 221 AD2d 441).

Multiple Intervenors also object that the affidavit of Robert Sliwinski contains improper legal conclusions. Mr. Sliwinski is, by education and experience, an environmental engineer, not an attorney. However, he has been intimately involved in the respondent's interpretation of the ECL, has drafted regulations, and is familiar with respondent's construction of the relevant statutes and regulations. To the extent that his affidavit includes evidence of such construction, it is appropriate. However, Mr. Sliwinski's affidavit will be disregarded to the extent that it may be construed to contain legal opinions of the correct statutory construction. Accordingly, petitioner's motion to strike shall be granted only to such extent.

The ADRP establishes budget trading programs for emissions of sulfur dioxide (SO_2) and nitrogen oxides (NO_x), which are the major precursors of acid rain and other forms of acid deposition. Upon full implementation of the ADRP, the total amount of allowed emissions will be approximately 50% of that allowed under the federal Clean Air Act. Major electricity generators are allocated allowances of the number of tons of SO_2 and NO_x, which they may emit during a control period. If they emit fewer tons through effective pollution control, they may sell or trade their excess allowances or keep them for future use. If they emit more tons than allowed, they may purchase or trade allowances instead of incurring the costs of reducing their emissions. This cap and trade program was chosen because it theoretically provides the greatest efficiency and flexibility in reducing emissions.

It is clear that acid deposition is a major problem for a number of sensitive areas in the state. Many of the waters in the Adirondacks are excessively acidic and have experienced devastating impacts upon their aquatic populations. In addition, many of the trees are stressed and exhibit serious problems. The impacts of current acid deposition are compounded by the fact

that decades of excessive acid deposition have eliminated the areas' ability to neutralize acid, so that even the significant reductions in emissions attributable to the Clean Air Act have not been sufficient to reverse the process of acidification. Thus, in 1999, as a result of the damage caused by SO_2 and NO_x, the Governor directed respondent to promulgate regulations further limiting the amount of these acid precursors which could be emitted by the power plants of this state.

The damage from acid deposition was clearly evident two decades ago. At that time, the federal government was slow to act on what amounts to an interstate and international problem. Much of the acid deposition in New York originates in upwind states and in Canada. As a result, the New York legislature passed SADCA in 1984, partially to encourage federal regulation of acid precursors. SADCA directed respondent to undertake studies, prepare reports and impose interim limits on emissions. In addition, it included very specific requirements for promulgating regulations to control acid deposition in the event the federal government did not act by 1991. Multiple Intervenors contend that the ADRP regulations violate a number of provisions of SADCA and, further, that respondent did not have sufficient authority to promulgate them. These issues are inter-related to a great extent and will be addressed together.

Multiple Intervenors contend that respondent's general authority to regulate air pollution does not extend to imposing regulations of such broad sweep, with projected capital costs to the power producers of $430 million and estimated annual expenses of $370 million. They argue that such costs will ultimately be passed on to consumers and will impact the economy of the entire state. They liken the ADRP to the public smoking ban invalidated in *Matter of Boreali v Axelrod* (71 NY2d 1), claiming that the ADRP involves significant public policy decisions which must be made by the legislature, not the executive. Multiple Intervenors also contend that, even if respondent had general authority to promulgate the regulations, such authority was limited by

the provisions of SADCA, specifically ECL §19-0911 (2), which states that "[T]he department shall not adopt or implement the final control target until such time as further specific statutory authorization shall have been enacted ***."

In determining whether an administrative agency's authority to promulgate a regulation has been limited by statute, the Court must first determine whether the agency initially had general authority to act. If the agency did have such authority, then the presumption against a repeal or modification of legislation applies to require an express provision repealing or modifying the agency's power to regulate (*see Matter of Consolidated Edison Co. of N. Y. v Department of Envtl. Conservation*, 71 NY2d 186, 194 -195).

In *Matter of Motor Vehicle Mfrs. Assn. of U.S. v Jorling* (181 AD2d 83), the Court upheld regulations which required that all automobiles sold in New York meet California air pollution standards. Petitioners therein made similar claims that the Department of Environmental Conservation (DEC) did not have sufficient general authority to promulgate regulations imposing such a significant change in new motor vehicles and that the regulations involved policy determinations which must be made by the legislature, also citing *Boreali, supra*. The Court stated in *Jorling*

> "that the necessary authority was granted to DEC. Under ECL 19-0301(1)(a), DEC could '[f]ormulate, adopt and promulgate * * * regulations for preventing, controlling or prohibiting air pollution', including 'controlling air contamination'. DEC could also regulate 'the extent to which air contaminants may be emitted to the air by any air contamination source' (ECL 19-0301[1] [b][2]) ***" (*Matter of Motor Vehicle Mfrs. Assn. of U.S. v Jorling*, 181 AD2d 83, 86).

Similarly, in *Matter of Consolidated Edison Co. of N. Y. v Department of Envtl. Conservation* (*supra*), the Court of Appeals found sufficient authority for DEC to promulgate regulations applicable to all major and nonmajor petroleum storage facilities to control ground

water pollution caused by spills of stored petroleum products, even though legislation directed DEC to promulgate regulations addressed to new or modified nonmajor facilities, exempting both major and pre-existing nonmajor facilities.

The notice of proposed rule making and the notice of adoption of the ADRP state that statutory authority is found at ECL §§1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305 and 19-0311. Section 1-0101 declares it to be the policy of the state to protect the environment and control water, land and air pollution in order to enhance the health, safety and welfare of the people, including preserving special resources such as the Adirondack and Catskill forest preserves. Section 19-0103 declares it to be the policy of the state "to maintain a reasonable degree of purity of the air resources of the state, which shall be consistent with the public health and welfare and the public enjoyment thereof, the industrial development of the state, the propagation and protection of flora and fauna, and the protection of physical property and other resources, and to that end to require the use of all available practical and reasonable methods to prevent and control air pollution in the state of New York." Section 19-0301 specifically authorizes respondent to promulgate regulations preventing, controlling or prohibiting air pollution from any air contamination source (*see Matter of Motor Vehicle Mfrs. Assn. of U.S. v Jorling, supra*). Section 19-0303 sets forth certain procedural requirements for promulgating regulations and specifically contemplates that such regulations may be more stringent than federal standards. These statutes clearly give respondent general authority to promulgate regulations limiting air pollution emissions from the generation of electricity (*see Matter of Consolidated Edison Co. of N. Y. v Department of Envtl. Conservation, supra*; *Matter of Motor Vehicle Mfrs. Assn. of U.S. v Jorling, supra*).

There is also no merit to petitioner's claim that the regulations essentially constitute legislative policy-making rather than administrative rule-making, as in *Boreali* (*supra*). The Court of Appeals stated in *Boreali* that the line between the two was difficult to define and that, only when a number of distinct circumstances coalesced, would there be a finding that the line had been crossed. First, in *Boreali*, no legislative guidelines were provided with respect to making a cost-benefit determination. Second, there were no broad legislative statements of policy, leaving only the details to be provided by the agency. Third, the agency acted in an area in which the Legislature had repeatedly tried and failed to reach agreement. Finally, no special expertise or technical competence was involved in developing the regulations. None of these factors is applicable to the ADRP, as the ECL sets forth guidelines for making cost-benefit analyses and statements of policy. There is no significant history of recent legislative attempts to regulate the subject, nor any history of repeated inability to agree. Furthermore, it appears that considerable technical expertise was employed in formulating the regulations.

Since respondent had general authority to promulgate the ADRP, the Court must determine whether SADCA repealed the grant of general authority or otherwise limited the scope of the regulations. As stated above, such a limitation must be express and clear. Multiple Intervenors contend that respondent's authority to promulgate the regulations was expressly limited by ECL §19-0911 (2), which provides that "[t]he department shall not adopt or implement the final control target until such time as further specific statutory authorization shall have been enacted ***." Multiple Intervenors construe this requirement as being applicable to any limitation on the emissions of acid precursors. However, the statute is extremely specific.

The prohibition on adopting or implementing regulations is limited to the "final control target"[1]. Such limitation must be construed in light of the entirety of SADCA, including section 1 of chapter 72 of the Laws of 1984, as amended, which stated that the legislature found that the reductions in emissions which would occur if the federal Clean Air Act was passed, are "presumed adequate to effectively control acid deposition in the northeastern United States." This finding has clearly proven to be false.

Moreover, SADCA was enacted partially to pressure the federal government to pass the Clean Air Act and specifically provided that the contemplated state limitations on emissions would not be imposed if the Clean Air Act was passed (ECL §19-0911[1][a]). It further required the respondent to formulate a "final control target" no later than January 1, 1991 (*id.*) The ADRP is not the "final control target" which was required to be formulated before 1991 and which could not be imposed without specific statutory authorization. The ADRP was promulgated more than a decade after the time required to formulate the "final control target," is not based upon the stated formula and considers dry, as well as wet, deposition of both sulfates and nitrates.

Based upon the foregoing, the Court finds that the specificity of the limitation of ECL §19-0911(2) cannot be construed as requiring legislative approval or authorization of all future administrative regulation of acid precursors. Rather, the statute's requirement of obtaining additional statutory authorization must be limited to its express terms. Accordingly, it is determined that respondent had sufficient general authority to promulgate the ADRP.

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[1] "Final control target" is defined in ECL §19-0903 (8) as a limitation on emissions derived from a stated formula based entirely upon wet sulfate deposition.

Multiple Intervenors also contend that the ADRP violates certain provisions of SADCA in that it does not control emissions on a facility specific basis (ECL §19-0907[3]), does not allow offsets of emissions (ECL §19-0915), and does not adjust offsets or credits to reflect the proximity of the emitter to sensitive receptor areas (*id.*) Respondent seeks dismissal of such claims on the ground that Multiple Intervenors did not exhaust their administrative remedies, in that they failed to raise these issues during the public comment period.

Exhaustion of administrative remedies is not required where the administrative action is challenged as being beyond the authority of the agency or as being directly contrary to law *(see Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation*, 87 N.Y.2d 136, 140; *Matter of Kindlon v County of Rensselaer*, 158 AD2d 178, 180; *Matter of Sievers v City of New York, Dept. of Bldgs.*, 146 AD2d 473; *Matter of Dobbs Ferry Hosp. Assn. v Whalen*, 62 AD2d 999). Clearly, respondent does not have authority to promulgate a regulation in conflict with a statute. Therefore, the failure to raise the alleged statutory violations during the comment period does not preclude judicial review of the regulations.

With respect to the merits of the claims, respondent contends that the entirety of SADCA is of no continuing force or effect because it was addressed only to contemplated regulations which were never promulgated due to the passage of the Clean Air Act. Any intent to repeal a statute must be clearly and unequivocally expressed (*see Matter of Consolidated Edison Co. of N. Y. v Department of Envtl. Conservation*, 71 NY2d 186, 194 -195, *supra*).

Respondent's argument has some validity with respect to some provisions of SADCA, such as §19-0911, discussed above. ECL §19-0907, which directs respondent to investigate and report with respect to numerous specific aspects of the acid deposition problem, also appears to

be directed solely toward the immediate future. Subdivision 3 thereof provides that, "[b]ased on the activities listed in subdivisions one and two of this section, the department shall formulate a preliminary final control target for each sensitive receptor area, and shall develop a strategy identifying any emissions reductions for the various facilities and stationary sources in the state that will be required to meet the deposition control targets." Multiple Intervenors construe this to require facility specific emissions limits. Webster's II New College Dictionary defines "various" as meaning diverse kinds, unlike or different, more than one or several, or being an individual or separate member of a class or group. Only the last definition would support Multiple Intervenors' construction. The other, more common uses, support a construction of the statute addressed to the state as a whole and the many or several sources of acid precursors. In addition, it appears that Multiple Intervenors' construction is inconsistent with the requirements of ECL §19-0915, which mandates offsets or credits of emissions between different sources. In any event, ECL §19-0907(3) expressly states that the targets and strategies shall constitute a preliminary sulfur deposition control program. There is no indication of legislative intent that the requirements apply to all future regulation of acid precursors. Therefore, the Court concludes that the ADRP does not violate ECL §19-0907 (3).

In contrast, ECL §19-0915 uses very broad language applicable not only to SADCA, but to all of article 19, which governs air pollution control. It provides:

> "For the purposes of determining the attainment of, or compliance with, the emission controls or reductions required by this article, or any rules or regulations promulgated thereunder, the department shall allow offsets of greater emissions of acid deposition precursors from a facility or stationary source against lower emissions from the same or another facility or stationary source within the state. Any such offsets or credits shall be adjusted to reflect the proximity of the subject facility or stationary source to sensitive receptor areas."

Nothing in the statute can be construed to limit its application to SADCA or to the initial regulations or programs proposed in the 1980's. Rather, it imposes general requirements applicable to any rules or regulations governing air pollution by facilities or stationary sources. Respondent's argument that the entire Act has been without effect since 1991 is controverted by the 2000 amendment of ECL §19-0921. If the Legislature intended the entire Act to be of no force or effect, it would not have amended it to impose further reporting requirements upon respondent (*see Alweis v Evans*, 69 NY2d 199, 205).

Respondent's construction of SADCA is also contrary to its prior stated administrative opinions, as acknowledged by respondent, and to judicial precedent (*see Matter of Astoria Generating Co. v General Counsel of N.Y. State Dept. of Envtl. Conservation*, 299 AD2d 706). Moreover, the fact that there may be some inconsistency with a later enacted definition of "offset" (ECL 19-0107[15]) which, by its own terms, is not applicable to SADCA, does not indicate an intent to repeal the entire Act. Therefore, it is determined that the ADRP must comply with the requirements of ECL §19-0915.

The ECL did not contain a definition of "offset" at the time SADCA was enacted. It would appear from the language of ECL §19-0915, requiring both offsets and credits of greater emissions against lesser emissions, that the ADRP cap and trade methodology does constitute a system of offsets and credits. The ADRP specifically allows facilities to sell or trade allowances of lesser emissions to offset greater emissions from other plants or to keep such allowances to offset different time periods of greater emissions from the same plant. Therefore, it is determined that the ADRP is in compliance with that portion of ECL §19-0915.

However, the ADRP does not comply with the statutory requirement that the offsets be adjusted to reflect the proximity of the source to sensitive receptor areas. Nothing in the ADRP adjusts the value or number of allowances provided to, or required by, sources based upon their proximity, either in distance or prevailing wind patterns, to sensitive receptors, as required. As such, the Court concludes that the ADRP violates the provisions of ECL §19-0915 and is, to that extent, invalid.

Multiple Intervenors also contend that respondent acted arbitrarily and capriciously in promulgating the ADRP on the following grounds: that the costs of the program, including alleged impacts upon the reliability of the state's electricity supply and the loss of thousands of jobs, far outweigh any benefits; that the availability of emissions allowances generated by the ADRP will result in greater emissions in upwind states or in sensitive areas; and that, in the absence of federal regulation, the ADRP will not have any significant benefit, since most of the acid deposition in New York originates in upwind states.

Judicial review of regulations is extremely limited. It has been held that

> "[t]he Legislature may establish administrative agencies to accomplish its purposes and such agencies may be given the power to adopt rules and regulations to advance the purposes for which they were created. The regulations so adopted, if reasonable, have the force and effect of law [citations omitted]. The court may not disturb them unless they are 'so lacking in reason for [their] promulgation that [they are] essentially arbitrary' (*Matter of Marburg v Cole*, 286 NY 202, 212)." (*Molina v Games Mgt. Servs.*, 58 NY2d 523, 529).

Multiple Intervenors have submitted only conclusory assertions that the ADRP will seriously impact the reliability of electricity supplies and will not provide any significant reduction in acid deposition and related air pollution.

On the other hand, respondent has shown that it referred issues of electricity supply reliability and costs to other agencies with considerable experience and knowledge concerning modeling of impacts of various changes in electricity generation. Such modeling indicates no significant impact upon reliability. Respondent has also conducted numerous scientific studies of the impact of emissions of acid precursors from different locations both within and without the state. Such studies indicate that emissions within the state have a much greater impact, per ton, than emissions without the state. Respondent has concluded that there will be significant reductions in acid deposition and increases in air quality as a result of the ADRP and that these benefits outweigh the costs. Multiple Intervenors' submissions show "at best, that reasonable minds might differ as to the conclusions to be drawn, which is not sufficient to establish the irrationality necessary to warrant annulment of the *** regulation (*see, Matter of Cohn v Flacke*, 84 AD2d 595)." (*Matter of Medical Socy. of State of N.Y. v New York State Dept. of Social Servs.*, 148 AD2d 144, 148).

Turning now to the NRG petition, the first cause of action alleges that the ADRP is invalid based upon respondents' failure to comply with SAPA §104(1), which requires an agency to produce any scientific or statistical studies and data that are used as the basis for a proposed rule. Prior to publishing the notice of proposed rule making, respondents contacted a number of major electricity producers to gain information on the most efficient and effective means of reducing acid precursors. Respondents collected surveys from the electricity producers which indicated the manner in which each expected to comply with the proposed reductions. This information was then used in modeling the impacts of the regulation with respect to cost and

reliability issues. However, most of the producers requested that the survey information be kept confidential, claiming that it contained trade secrets which, if disclosed, might injure their competitive positions.

After publication of the notice of proposed rule making, NRG requested access to all such surveys pursuant to SAPA §104. The majority of other producers refused to agree to allow access to the information. As a result of the problems with disclosure of the material, the respondents postponed the last public hearing and extended the public comment period. The request for disclosure was ultimately denied, in part, on the ground that the exemptions from disclosure under the Freedom of Information Law were also applicable to SAPA disclosure and that some of the requested information constituted exempt material. It was further indicated that the exempt material could not be redacted in any meaningful manner. Consequently, the information was never provided to NRG.

NRG now contends that the failure to disclose requires that the regulations be invalidated. The first version of SAPA §104 proposed in the Legislature contained a specific provision that, in the event of a failure to comply with the disclosure requirements, a person who requested the documents "may file an action in court to enjoin the effectiveness of the agency action and compel the production of the requested material." The provision authorizing injunctive relief was removed from the final bill, with the sponsor stating that it was removed so that agency regulatory and enforcement actions would not be jeopardized. Such legislative history clearly establishes that a violation of SAPA §104 will not support a cause of action seeking to invalidate a regulation (see McKinney's Statutes §125). NRG's only legal remedy would have been a proceeding to compel production of the material. The petition herein does not request such relief

which, in any event, would be untimely, as this proceeding was commenced more than one year after the denial of the request for documents. Therefore, it is determined that the first cause of action is without merit and shall be dismissed.

The second cause of action of the NRG petition alleges that the notice of proposed rule making had expired at the time the notice of continuation and the notice of adoption were published. SAPA §202(2) provides that a notice of proposed rule making shall expire and be ineffective unless the proposed rule is adopted and filed with the secretary of state within 180 days after the later of publication in the State Register of a notice of proposed rule making or the date of the last public hearing announced in a notice of proposed rule making. Pursuant to SAPA §202(3), such 180 day period may be extended once for an additional 185 days by publication of a notice of continuation, whieh must be published before the original 180 day period expires. A notice of continuation may not be published until at least 120 days after the later of the notice of proposed rule making or the date on which the last public hearing was held. While the standard of review applicable to the content of such notices is substantial compliance (*Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 869; *Matter of Home Care Assn. of N. Y. State v Dowling*, 218 AD2d 126, 129-130; *Matter of Pacific Salmon Unlimited v New York State Dept. of Envtl. Conservation*, 208 AD2d 241, 244-245), it has been held that strict compliance with the time periods of SAPA §202 is required (*Matter of Desmond-Americana v Jorling*, 153 AD2d 4, 7). Thus, a regulation was held to be invalid when it was formally adopted one day after the expiration of the notice of proposed rule making, as extended (*id.*)

Respondents herein published a notice of continuation 201 days after the date of the last public hearing scheduled in the original notice of proposed rule making. They seek to excuse this late publication based upon the publication of a notice of a rescheduled hearing date and

extension of the comment period. The public hearing was rescheduled for 45 days after the date of the last public hearing scheduled in the original notice of proposed rule making. They contend that this served to extend the original 180 day period by 45 days, thereby making the notice of continuation timely. However, there is no statutory or regulatory authority for such procedure.

Article 2 of SAPA is very explicit with respect to the procedures which must be followed in promulgating regulations. The only authorized procedure for extending the time period to adopt a regulation is publication of a notice of continuation or a notice of revised rule making. Respondents contend that the notice of rescheduled hearing date should be considered a notice of continuation. However, only one such notice is permitted. If the notice of rescheduled hearing were considered a notice of continuation, then the notice of continuation published in October 2002, would be a nullity. Moreover, the notice of rescheduled hearing date was published less than 120 days after the last hearing, in violation of SAPA §202(3)(a). The notice also fails to contain a description of the subject, purpose, substance and changes of the proposed rules, as required of a notice of continuation by SAPA §202(3)(b). Additionally, it cannot be considered a notice of revised rule making, as there was no substantial revision at the time of publication.

In the alternative, respondents contend that the notice of rescheduled hearing should be considered a new notice of proposed rule making, commencing a new 180 day period. However, the notice of rescheduled hearing date did not identify itself as a notice of proposed rule making and did not contain the complete text of the proposed rule or any description of the subject, purpose or substance of the rule, a regulatory impact statement or summary of such a statement, or a regulatory flexibility analysis or rural area flexibility analysis, as required by SAPA §202(1)(f). Thus, the notice of rescheduled hearing date does not substantially comply with the requirements for a notice of proposed rule making. Moreover, if the Court were to allow the

procedure followed herein, it would render the time limitations of SAPA §202 totally illusory, contrary to the requirement that such time periods be strictly construed (*see Matter of Desmond-Americana v Jorling*, 153 AD2d 4). Therefore, the Court is constrained to find that the notice of proposed rule making had expired at the time the notice of continuation was published and at the time the regulations were adopted, requiring that the regulations be adjudged invalid (id.)

The third cause of action of the NRG petition alleges that respondents violated SAPA §202-a(6) by failing to issue a revised regulatory impact statement when informed of an error in certain calculations concerning historic emissions of NO_x. SAPA §202-a(6) requires issuance of a revised regulatory impact statement when the information presented in the original statement is inadequate or incomplete. NRG has failed to show that either the original or revised regulatory impact statements were inadequate or incomplete. Such statements did not refer to the particular historic emissions and respondents did not consider them in determining the costs of compliance with the regulations. Rather, the statement of the amount of such emissions was contained in a response to comments. NRG has failed to offer any evidence indicating that the errors in calculations actually affected the accuracy of the respondents' estimates of the costs associated with compliance or that such estimates were inaccurate.

In addition, NRG did not raise the issue of the errors in calculations until almost 10 months after the public comment period had ended and only three weeks before the regulations were formally adopted. Under such circumstances, it was reasonable to determine that a revised regulatory impact statement was unnecessary (*see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 427). Accordingly, it is determined that the third cause of action is without merit.

The fourth cause of action of the NRG petition alleges that there were a number of procedural defects in the referral of the proposed regulations to respondent New York State Environmental Board. NRG contends that respondents Crotty and DEC failed to provide all the relevant documentation to the Environmental Board at least 30 days before its meeting, as required by the Board's bylaws. However, such bylaws authorize the Chair of the Board to reduce the thirty day period upon approval of the Board. Such procedure was followed. NRG has withdrawn that portion of the cause of action.

The fourth cause of action also alleges that the failure to correct the calculation errors, which were the subject of the third cause of action, before submitting the documentation to the Environmental Board, constituted a failure to provide all relevant and necessary documentation to the Board (*see Matter of Buffalo Sewer Auth. v New York State Dept of Envtl. Conservation*, 151 AD2d 95). As indicated above, the calculation errors have not been shown to be directly relevant to the costs of compliance or any other significant issues concerning the regulations. Moreover, the first notice of any error in the calculations was given to the Department of Environmental Conservation on the day of the meeting of the Environmental Board and the notice, itself, contained significant errors. Under such circumstances, it was reasonable not to notify the Environmental Board of the newly alleged errors *see Matter of Jackson v New York State Urban Dev. Corp., supra*). Therefore, it is determined that the fourth cause of action is without merit and the proceeding shall be dismissed as to respondent Environmental Board.

Accordingly, it is,

Ordered and Adjudged that the petitions be and hereby are granted to the extent that the ADRP is determined to be invalid and of no force or effect since it was adopted after the notice of proposed rule making had expired pursuant to SAPA §202(2) and, further, that the ADRP is

invalid to the extent that it fails to adjust offsets or credits based upon the proximity of the source to sensitive receptor areas. Such determinations are without prejudice to new proceedings in compliance with the SAPA and the ECL; and it is further,

Ordered and Adjudged that Proceeding No. 1 is hereby dismissed as to the New York State Environmental Board, and it is further,

Ordered that the motion to strike is hereby granted to the extent indicated herein.

This memorandum constitutes the Decision and Order of the Court. The original of this Decision and Order is being forwarded to the attorneys for Multiple Intervenors, who are directed to pick up, from Chambers, all original papers submitted in connection with these proceedings, for filing in the Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

SO ADJUDGED!

ENTER.

Dated: May 26, 2004
Albany, New York

Leslie E. Stein, J.S.C.

Papers Considered:

Proceeding No. 1

1. Notice of Verified Petition of NRG dated August 15, 2003;
2. Verified Petition of NRG dated August 15, 2003, with Exhibits A-G annexed;
3. Affidavit of Thomas F. Coates, sworn to on August 14, 2003, with Exhibits 1-18 annexed;
4. Verified Amended Petition of NRG dated November 24, 2003, with Exhibits A-G annexed;
5. Affirmation of Gregory M. Brown, Esq., dated November 21, 2003, with annexed Exhibit 1;
6. NRG's Memorandum of Law dated November 21, 2003, with Exhibits A-B annexed;

7. Verified Answer of Respondent DEC *et al*, dated November 5, 2003, with return;
8. Memorandum of Law of Respondent DEC *et al*, dated November 5, 2003, with Exhibits A-H annexed;
9. Affidavit of Robert Sliwinski, sworn to on November 5, 2003, with Exhibits A-FF annexed;
10. Affidavit of Karl Michael, sworn to on November 4, 2003;
11. Affidavit of Steven Keller, sworn to on November 3, 2003, with Exhibits A-C annexed;
12. Affidavit of Steven Blow, sworn to on November 3, 2003, with Exhibits A-B annexed;
13. Affidavit of Thomas Collins, sworn to on November 4, 2003, with Exhibits A-B annexed;
14. Affidavit of Erin Hogan, sworn to on November 4, 2003;
15. Verified Answer to Amended Petition of Respondent DEC *et al*, dated December 4, 2003, with return;
16. Affirmation of Michael J. Myers, Esq., dated December 4, 2003;
17. Supplemental Memorandum of Law of Respondent DEC *et al*, dated December 5, 2003;

Proceeding No. 2

1. Notice of Petition of Multiple Intervenors dated August 18, 2003; Petition verified August 18, 2003;
2. Petitioners' Memorandum of Law (4 Volumes) dated August 18, 2003, with Exhibits 1-23 annexed;
3. Petitioners' Memorandum of Law, Typographical Errata, dated August 21, 2003;
4. Answer dated November 5, 2003;
5. Affidavit of Robert Sliwinski, sworn to on November 5, 2003, with Exhibits A-FF annexed;
6. Affidavit of Howard A. Simonin, sworn to on October 30, 2003, with Exhibits A-F annexed;
7. Affidavit of Thomas Gentile, sworn to on October 30, 2003, with Exhibits A-G annexed;
8. Respondent's Memorandum of Law dated November 5, 2003;
9. Petitioners' Exhibits 26-29 dated November 14, 2003;
10. Petitioners' Reply Memorandum of Law dated November 18, 2003;
11. Notice of Motion dated November 13, 2003; Affidavit of Lawrence G. Malone, Esq., sworn to on November 13, 2003;
12. Petitioners' Memorandum of Law dated November 13, 2003;
13. Notice of Motion dated November 14, 2003; Affidavit of Lawrence G. Malone, Esq., sworn to on November 14, 2003;
14. Petitioners' Memorandum of Law dated November 14, 2003;
15. Affirmation of Robert Rosenthal dated November 20, 2003.