

## 1. BACKGROUND AND SUMMARY

### a. Background and Statutory Scheme

RGGI started a decade ago as a multi-State effort to curb CO<sub>2</sub> emissions from the electric generation sector operating within the cooperating jurisdictions. Executive branch officials from Delaware were involved with those efforts almost from inception. But it was not until 2008 that Delaware - by a legislative enactment - first formally defined its participation in the RGGI CO<sub>2</sub> emission control scheme. 76 Del. Laws ch. 262 (June 30, 2008), *codified as* 7 Del. C. §§ 6043-6047 (“2008 Act”). The 2008 Act declared CO<sub>2</sub> an “air contaminant” subject to State regulation and endorsed a “cap and trade” allowance model as the strongest scheme to limit and reduce covered CO<sub>2</sub> emissions.<sup>1</sup> As set forth in the Act, the goal was to “cap” total covered Delaware CO<sub>2</sub> emissions at no more than 7,559,787 short tons per year for the period 2009 through 2014 and then reduce that limit by 10% over the ensuing four years.<sup>2</sup> For each year, a covered Delaware electric generation facility would have to hold sufficient government-issued “CO<sub>2</sub> allowances” to match its CO<sub>2</sub> emissions in that year.<sup>3</sup> By 2014, Delaware would auction off all of its yearly allowances (determined by that year's cap level).<sup>4</sup> Consequently, covered Delaware generation facilities must now look to either these primary auctions or secondary market transactions to obtain their needed allowances. Under the Act, the proceeds from the primary auctions flow to a special State fund. The 2008 Act appropriates these monies to DNREC (for administrative costs and greenhouse gas projects), to the SEU (for energy efficiency uses), and to DHSS (to partially fund low income weatherization and heating bill aid programs).<sup>5</sup>

Apparently, neither the “cap” set forth in the 2008 Act, nor the greater cumulative RGGI regional cap, has ever become “binding.” Due to a variety of factors, actual CO<sub>2</sub> emissions from covered facilities from 2009 through today have come in significantly below the levels previously projected. And because the “cap” limits had been set based on these earlier projections, the actual emission amounts were also a great gap below the “cap” limit level. To most, that would seem to be good news. The *legislative* goal adopted in the 2008 Act has been achieved: CO<sub>2</sub> emissions have been “stabilized” significantly below 2008 levels and are likely to remain below even the further discounted 10% reduction limit over the next five years. But that success has also brought a down side. Because the supply of allowances (linked to the cap

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1 7 Del. C. § 6043(a)(3) (“contaminant”), 6043(a)(5) (endorsing “cap and trade”).

2 7 Del. C. § 6043(a)(8), (a)(9).

3 7 Del. C. §§ 6043(b) (1) (“CO<sub>2</sub> allowance”); 6044(d).

4 7 Del. C. § 6045.

5 7 Del. C. § 6046.

levels) now far exceeds demand, the auction prices paid for allowances have also greatly declined. Over the last few years, clearing prices for allowances have hovered around the \$1.86-\$1.98 reserve price levels. With auction price levels so low, the result has been that the auction proceeds flowing to the RGGI participating States have also flattened or decreased.

To the State executive officials who sit as directors on the board of RGGI, Inc. , the success in meeting RGGI's prior goals indeed represents a problem that had to be addressed. Consequently, earlier this year, they recommended to the States participating in RGGI that the States – in a mid-stream move – reset their 2014 benchmark emissions cap level. The new State benchmarks – to which the 2.5% yearly reduction would then apply – would be cap numbers about 45% below the 2014 levels set in 2008. In the directors' minds, such an immediate change would offer two benefits:

- (a) it would further constrain the amount of CO2 emissions discharged into the atmosphere (relative to real world 2012-13 actual emission levels) and
- (b) it would reinvigorate the now somewhat dormant and morose allowance auction system.

Lower cap levels would return the auction process to a “working” condition; a newly decreed scarcity of allowances would likely drive auction price levels to higher points. And of course, these higher auction prices would then translate into higher auction *proceeds* to be sent to the participating States.

The rule provisions now being proposed by DNREC seek to adopt and implement the mid-course corrections recommended by RGGI, Inc. Under DNREC's proposed rule changes - going forward from 2014 - the CO2 emissions cap levels for Delaware would be as follows:

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

See proposed revisions and additions to 7 DE Admin. Code 1147, § 5.0, 5.1.1 through 5.1.7.

DNREC also proposes to change the reserve price applicable to each allowance

auctioned. This minimum would move from its present sub-\$2.00 level to a \$2.00 amount for year 2014, to be increased by 2.5% each year thereafter. See proposed new 7 DE Admin. Code 1147, § 1.3 “minimum reserve price.” No allowance could be sold at a price lower than the reserve price. See proposed new 7 DE Admin. Code 1147, §§ 9.2.3.1 & 9.2.3.2.

b. Summary

Do the changes now being proposed by DNREC - to slash the 2008 emissions cap levels and up auction reserve price amounts – represent good policy? Folks can debate their wisdom: I tend to tilt towards the “yes” side. These comments are not offered on that issue. Rather, these comments go to *where* that discussion or debate should take place. That is question of process. And under our constitutional scheme of government, issues of *process* often are just as important as matters of *policy*. Democracies cannot function without a respect for process.

The central question of this rule-making is whether DNREC can make the above changes to the pre-existing *statutory* CO2 emission control scheme without further legislative enactment. The better answer to that question is “no.” First, the 2008 Act lacks any clear text that one can point to confirm that the General Assembly and Governor delegated to either RGGI, Inc. or DNREC the authority to unilaterally change the CO2 emission cap levels applicable to Delaware without legislative action. Nothing in the 2008 enactment suggests that this major policy choice – about how much CO2 emissions are to be tolerated from Delaware generation sources - was to be left to either a private corporation (RGGI, Inc.) or to the Secretary to resolve in his unguided discretion. In fact, general constitutional non-delegation principles push toward a conclusion that any such type of transfer of decision-making authority would have been constitutionally impermissible. Second, the new lower cap limits, and the increase in auction reserve prices, both point towards a significant increase in the dollars of auction proceed revenues that will flow to this State's coffers. Indeed, such an increased revenue stream for State programs might have been one of the drivers for reduced cap numbers. The kicker is that for more than 20 years, section 10 of Article VIII of our State Constitution has assigned to the legislative process, not the executive branch, the final say on tax or license fee increases that will expand State revenues. The above two changes proposed by DNREC trigger those section 10 restrictions. They require prior legislative approval under the section 10 regime. Until that legislative approval is forthcoming, DNREC cannot make those changes by the end-run of an administrative rule-making process.

2. THE GENERAL ASSEMBLY AND GOVERNOR DID NOT DELEGATE TO EITHER RGGI, INC. OR THE SECRETARY OF DNREC THE AUTHORITY TO MAKE SUBSEQUENT CHANGES OR ALTERATIONS TO THE EMISSIONS CAP LEVELS ADOPTED IN DELAWARE'S 2008 CO2 EMISSION TRADING PROGRAM ACT.

In 2008, Delaware enacted its first CO2 emissions control scheme for Delaware-sited electric generation facilities. *See* 7 Del. C. §§ 6043-6047, *as added by* 76 Del. Laws ch. 262, § 1 (June 30, 2008) (“2008 Act”).<sup>6</sup> In setting up the regime, the General Assembly made specific findings concerning the “development, utilization and control of air resources of the State related to impacts of carbon dioxide (CO2) emissions.” 7 Del. C. § 6043(a). In particular, the General Assembly found that - consistent with prior RGGI commitments that were to now be ratified by the legislation – the goal of the Delaware program was to “establish a cap-and-trade program for CO2 with the goal of stabilizing CO2 emissions at current levels through 2015 and reducing by 10 percent such emissions by 2019.” 7 Del. C. § 6043(a)(8).<sup>7</sup> , The General Assembly acknowledged that under such goal to first stabilize and then later reduce emissions, “the initial emissions cap” for Delaware would be “7,559,787 short tons of CO2.” 7 Del. C. § 6043(a)(9).

To implement this new CO2 control scheme, the General Assembly then authorized the DNREC Secretary “to promulgate regulations to implement the RGGI cap and trade program consistent with the RGGI MOU, as amended.” 7 Del. C. § 6044(c). The MOU, or Memorandum of Understanding, was a document executed by the Governors of the participating States in 2005, outlining the mechanics of the multi-state cooperative CO2 cap and trade program. The original MOU was signed in December, 2005 and has been amended twice since then: first to make substantive technical changes in August, 2006 and then to admit Maryland into the regional group in 2007. *See* <<http://www.rggi.org/design/history/mou>> (reproducing MOU and two amendments).<sup>8</sup>

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6 The 2008 Act was amended only once thereafter. *See* 78 Del. Laws ch. 290 § 176 (July 1, 2012) (budget bill epilogue language amending the description of the sub-agency under DHSS to receive 15% of allowance auction proceeds).

7 “Current levels” under such finding presumably referred to the estimated (and projected) CO2 emissions for the years 2008 (the date of enactment) or 2009 (the start date of the cap regime).

8 The present proposal to significantly decrease the emissions cap levels for each State and the region is not part of the 2005 MOU or any later amendment of that document. Rather it is only a recommendation being made by RGGI, Inc. an entity that the MOU says is not to have “any regulatory or enforcement authority with respect to the program . . . . MOU at ¶ 4.A.(5). In fact, the MOU did not anticipate that any change in the emissions cap levels it had adopted would become effective until after 2018. MOU at ¶ 6.D.(3) (in comprehensive 2012 review, the signatory States “will consider whether additional reductions *after 2018* should be implemented.”).

Nothing in the text of the 2008 Act clearly demonstrates any intent on the part of the General Assembly to delegate to either RGGI, Inc. a non-profit New York corporation, or to the Secretary of DNREC the power to change, or reset, the overall emission cap levels for CO2 emissions by Delaware electric generating facilities. The 2008 Act sets forth legislative findings of what that cap levels were to be: current (2008-09) levels of allowable emissions through 2014 with a 10 percent cumulative reduction from 2015 through 2018. 7 Del. C. § 6043(a)(8), (a)(9). There is nothing in the Act to show any intent to allow either a non-State actor, RGGI, Inc., or the Secretary the power to change those legislative determinations at any later time. And to sustain such a delegation of authority, DNREC must be able to point to text clearly authorizing such power. As a Delaware court said years ago: “[i]mplied authority in an executive officer to repeal, amend or modify a law may not be lawfully inferred from authority to enforce it.” *State v. Retowski*, 175 A. 325, 327 (Del. Gen. Sess. 1934). Here the 2008 Act makes explicit reference to the cap level to govern - current levels through 2014 reduced by 10% more by 2019. In fact, the legislative findings announce the baseline “current” level: 7,559,787 short tons. No further text allows either RGGI Inc. or the Secretary to later make reductions to these legislatively recognized numbers. Without any clear indication of such a problematic delegation (*see below*), the decision whether to lower the cap levels – as proposed by RGGI, Inc. – must be made by the General Assembly by further legislative enactment. It cannot be made in the present administrative rule-making.

Moreover, a change in the cap level is not some administrative detail that executive officers are able to routinely revise. The emissions cap level determines the amount of CO2 emissions that Delaware electric generators can emit over an extended period of years. It determines how much production such generators can undertake and what costs they must bear in terms of meeting the cap levels. Those are not matters of execution or administrative detail. Rather it is a major *policy* decision, just the type that the State Constitution expects to be left to the legislative process to resolve. Determining the emissions cap level is not fact-finding, nor is it fact-application; rather, it is making a normative judgment about what level of CO2 emissions from Delaware facilities is to be tolerated.

DNREC may suggest it has been granted the power to make the cap level reductions (without further legislative decision-making) because 7 Del. C. § 6044(c) authorizes the Secretary to implement the RGGI cap and trade program “consistent with the RGGI MOU, *as amended*.” (emphasis added). Yet, the “as amended” language does not necessarily convey an intent to allow non-legislative post-2008 changes to the statutory scheme recognized and adopted in the Act. As noted earlier, by the time the Delaware General Assembly authorized a Delaware CO2 emissions control scheme in June, 2008, the 2005 RGGI MOU between the various States had already been amended twice. Thus, the “as amended” language in subsection 6044(c) is more readily read to direct the Secretary to implement in Delaware the RGGI program consistent with the 2005 MOU and the two pre-2008 MOU amendments. That is the more natural reading and indeed the presumed one (*see below*).

So too, one cannot find any implicit delegation of such power to the Secretary in the fact that the General Assembly said - after setting forth the goal of the Delaware program (with specific reference to an initial cap level number) – that “[t]he cap and Delaware's allocation may be adjusted in the future.” 7 Del. C. § 6043(a)(9). Such a recital is simply a statement that the cap level then being adopted was not set in stone and that a new level could be adopted in the future. It says nothing about granting either RGGI, Inc. or DNREC the power to make such changes without obtaining further legislative approval for such a change in emissions levels. And in particular, it says nothing about the Secretary's ability to make any such a change in the cap level during the initial cap level period (2009-2018) described by the legislative findings.<sup>9</sup>

Finally, there are two background principles that argue against finding that the 2008 Act made a delegation to either RGGI, Inc. or DNREC to unilaterally make changes in the cap levels. First, in questions of statutory interpretation, the Delaware courts have long recognized a presumption that when, in an enactment, the legislature has incorporated by reference an external document (such as another statutory provision), then the later enactment adopts the external document only as it existed at the time of the later statutory enactment. In other words, the incorporation by reference of an external document is presumptively “static.” The incorporating language does not necessarily call for also incorporating any changes to the external document that might occur after the enactment of the incorporating law. *Perkins v. Winslow*, 133 A. 235, 236 (Del. Super. 1926) (“While always a question of intention, in the absence of anything to indicate a contrary legislative intent, it is likewise true that provisions so adopted and read into other statutes will not ordinarily be affected by the repeal of the adopted statute, . . . , or by any subsequent changes by way of additions, modifications, or otherwise in the adopted statute.”) (citations omitted). *See also Powell v. Levy Court of Kent County*, 236 A.2d 374, 375 (Del. 1967) (“Furthermore, the adopted statute is incorporated as of the time of reference and subsequent amendments to it will have no effect upon the adopting statute.”). Under this presumption, the language in the 2008 Act referring to the RGGI MOU only incorporated the regime set forth in the RGGI MOU *as it existed in 2008*; it did not incorporate later changes that might be recommended by RGGI, Inc. In that situation, further amendment of the 2008 Act would be the only way to adopt any such later changes.

Second, a delegation to RGGI, Inc. or DNREC to make changes to the emissions cap without further legislative approval (by means of a statute) would raise significant constitutional issues under non-delegation principles.

Initially, one might suggest the 2008 Act's references to RGGI and RGGI, Inc. - a private New York non-profit corporation – meant that Delaware was deferring to RGGI, Inc. to determine the appropriate later cap levels to govern Delaware generating facilities; i.e., the cap levels will be changed to whatever level RGGI, Inc., might later deem appropriate. Yet such a

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<sup>9</sup> Again, the RGGI MOU did not speak to any change in the cap levels except for possible further reductions to be effective after 2018. See n. 8 above.

scheme would run head long into traditional understandings that the General Assembly cannot delegate to politically unaccountable private actors the power to make governmental decisions that bind third parties. *See Dangel v. Williams*, 99 A. 84, 85-86 (Del. Ch. 1916) (zoning authority cannot be delegated to neighbors). *Cf. State ex rel. James v. Schorr*, 65 A.2d 810, 812-17 (Del. 1948) (General Assembly cannot delegate to private political parties the power to appoint state election officers). Here, RGGI, Inc., is private actor, a New York franchised corporation. And although its directors come from the various participating State governments, its processes are not open to political review by Delaware voters. It would violate the basic precepts of our State Constitution to vest in RGGI, Inc. the authority to change, repeal, or amend the emissions caps level for Delaware adopted in the 2008 Act. *Compare Assoc. of American Railroads v. U.S. Dept. of Transportation*, No. 12-5204, slip opinion at 6-21 (DC Cir. July 2, 2013) (Congress violated constitutional vesting clauses by delegating to AMTRAK, a quasi-government corporation, the authority to jointly author or veto federal agency rules that determine priority to rail access between passenger and freight trains; result follows even though Cabinet secretary sits as one AMTRAK director and President appoints almost all of the other directors).

Second, if the delegation to make changes to the cap is seen as running, not to RGGI, Inc., but to the Secretary of DNREC, the delegation would still remain constitutionally suspect. First, as noted above, there is no clear indication that such a delegation was intended by, or announced in, the 2008 Act. Moreover, under state delegation principles, any delegation of power to administrative agencies to implement statutory enactments generally must be accompanied by some legislative pronouncements about what principles are to govern the officer's exercise of the granted discretion. *See Atlantis I Condominium Assoc. v. Bryson*, 403 A.2d 711, 713-14 (Del. 1979). Here, the 2008 Act expresses no principle to guide the Secretary in determining when to abandon the legislatively endorsed cap level and impose on electric generators further limits on their electric production. Without such intelligible principle, the Secretary's decision is simply an exercise in what he thinks is good for Delaware; not an exercise in carrying into effect what the General Assembly by law has determined to be good for Delaware.

In summary, there is no clear text delegating to either RGGI, Inc. or the Secretary the power to change the emissions cap levels set forth in 2008 Act. Reading phrases and clauses in the 2008 Act to tease out such a power would render the statute constitutionally suspect. Given that, the appropriate course is to find that no such power has been delegated and defer to allow the General Assembly to decide whether to change the present 2008 emissions cap levels.

3. DNREC'S ATTEMPT, BY REGULATION, TO CHANGE THE CO2 CAP LIMIT FOR DELAWARE AND TO INCREASE THE CO2 ALLOWANCE AUCTION RESERVE PRICE AMOUNT VIOLATES ARTICLE VIII, § 10(a) OF THE DELAWARE CONSTITUTION.

During the period between 1978 and 1981, the General Assembly amended Article VIII of our State Constitution three times. The changes were intended to reassert fiscal discipline and legislative supremacy over State expenditures and revenues. One amendment mandates an annual budget reconciliation between State appropriations and expected State revenues, so that the former should never outrun the latter. Del. Const., article VIII, § 6(b)-(d). The other two changes spoke more directly to the revenue side of government operations. In particular, section 10(a) of article VIII now commands:

(a) The effective rate of any tax levied or license fee imposed by the State may not be increased except pursuant to an act of the General Assembly adopted with the concurrence of three-fifths of all members of each House.

In a like manner, section 11(a) imposes the same requirement of legislative action, approved by supermajorities, before any *new* tax or license fee can be imposed or charged. In tandem, sections 10 and 11 were meant to return to the legislative enactment regime – and to remove from the administrative process within the executive branch – all policy questions about whether to increase state revenues by either imposing a new tax or fee or increasing the “effective rate” of an already existing tax levy or license fee. As the justices of our Supreme Court recognized, the purpose of these two amendments was to provide “the General Assembly with complete control over *any* tax or *license fee*.” *Request for an Advisory Opinion of the Justices*, 575 A.2d 1186, 1189-90 (Del. Justices 1990) (“*Opinion*”).<sup>10</sup>

With such purpose, the two amendments necessarily must have broad reach. The plain language of section 10(a) (and the companion § 11(a)) does not “distinguish between licensing (permit) fees which can be categorized as *de facto* taxes and fees which can be attributed to an exercise of the police power.” *Opinion*, 575 A.2d at 1189. Instead, the text reflects an “inclusive intent to make these Constitutional provisions applicable to *all* license fees of *any* nature.” *Id.*

Here, there should be little dispute that the likely effect – and indeed one purpose - of the proposed changes in the CO2 emissions cap level is to cause an increase in the amount of auction proceeds that will flow to the State as revenues to be used for the purposes set forth in 7 Del. C. § 6046. The downward adjustment of the emission cap level, and the anticipated

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<sup>10</sup> Advisory opinions by the Justices do not have binding precedential effect. They do carry extreme persuasive weight. That weight should be well-nigh conclusive within the executive branch when a Governor originally sought the justices' advice.

supply-side scarcity that will ensue, will increase auction market prices for CO2 allowances and in turn bring additional revenues to the State. In light of that, it is incumbent on DNREC to *clearly* demonstrate that the proposed changes in the emissions cap level and the auction reserve price amounts are *not* subject to section 10(a) and its requirement that the legislative process, and not administrative rule-making, be used to implement an increase in State revenues.

a. Is a “CO2 Allowance” a license?

The answer is yes. By statutory definition, a “CO2 Allowance” is a government-issued “authorization to emit up to one ton of CO2.” 7 Del. C. § 6043(b)(1). Indeed, the CO2 emissions control scheme for Delaware makes such CO2 allowances a necessary business license for covered electric generation facilities in this State: “[n]o person that is required by regulation to hold CO2 allowances shall operate in Delaware unless it holds CO2 allowances as required by the regulations implementing the RGGI program.” 7 Del. C. § 6044(d). DNREC's present rules for its CO2 Budget Trading Program similarly announce the license or permit nature of the CO2 allowance. *See* 7 DE Admin. Code 1147, § 1.5.3.6 (“A CO2 allowance under the CO2 Budget Trading Program is a limited authorization by the Department or a participating State to emit one ton of CO2 in accordance with the CO2 Budget Trading Program.”).<sup>11</sup>

b. Are Auction Prices for CO2 allowances “license fees”?

Again, the response is yes. The auction price for an allowance – whether it be the “reserve price” or the actual auction clearing price – represents the price a purchaser must pay to obtain the CO2 allowance and its emission authorization. The prices so paid flow to the State's coffers to be used to fund governmental operations and programs or to be disbursed by a continuous appropriation to the SEU. *See* 7 Del. C. § 6046(c)(1) (65% of auction price proceeds appropriated to SEU), 6046(c)(2) (15% of auction price proceeds appropriated to State DHSS agency to partially fund low income weatherization and heating bill assistance programs), 6046(c)(3) (10% of auction price proceeds appropriated to DNREC for greenhouse gas grants), 6046(c)(5) (initial 10% of auction price proceeds committed to pay for costs of State CO2 emission control program).<sup>12</sup> As such, the auction prices meet the common

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11 The present rules also emphasize that, while the CO2 allowances have a “value” that can be traded, they do not represent “property” that the State has sold or given away. *See* 7 DE Admin. Code 1147, § 1.5.3.7 (“A CO2 allowance . . . does not constitute a property right.”). The fact that the rules may describe the CO2 allowance in “authorization” or “permitting” language rather than “licensing” terminology is not dispositive for section 10(a) purposes. *Opinion*, 575 A.2d at 1188-89.

12 The CO2 allowance auction proceeds flow to a special fund maintained by DNREC. 7 Del. C. § 6046(b). That fact does not render the allowance prices “non-license” fees or place them outside the reach of section 10(a). *Opinion*, 575 A.2d at 1189.

understanding of a “license fee:” a fee paid to the government for the privilege of being licensed to do something (as selling liquor or practicing medicine).” Free Online Dictionary (Farlex) at <<http://www.thefreedictionary.com/license+fee>>. <sup>13</sup>

In particular, the reserve price imposed in the CO2 allowance auction process looks very much like a license fee. One cannot procure the State's permission to emit one ton of CO2 into the atmosphere unless someone has paid to the State at least the reserve price for such allowance. To that extent, the CO2 auction reserve price looks very much like the run-of-the-mill license fee charged for a fishing license, for car registration, or for a permit to enter a State park.

It might be suggested that because CO2 allowance prices are initially set by a State-sanctioned auction process, the auction proceeds flowing to the State's coffers do not represent monies from “license fees.” After all, the prices for allowances are determined by private parties' bids assessing the “value” of such allowances rather than being dictated by State fiat. True, in many cases, the legislature sets license fees by denoting a specific dollar amount to be paid to obtain the government's authorization. But in other situations, the government often looks to “market values” (as determined by private party transactions) to determine the amount that must be paid to the government as either a “tax” or “fee.” For example, the State imposes a fee on the sale of an automobile with the amount to be paid based on the private parties' determination of the value of the automobile. 30 Del. C. §§ 3001(5), 3002 (“motor vehicle document fee”). A similar regime, looking to the private market sale price of real property, sets the amount of the tax or fee the State imposes for land transfers. 30 Del. C. §§ 5401(3), 5402(a) (“realty transfer tax”). And indeed, the age-old property tax uses the market-based value of the property as the means for setting a landowner's annual tax amount. *See New Castle County Dept. of Finance v. Teachers Ins. and Annuity Assoc.*, 669 A.2d 100, 102 (Del. 1995).

Consequently, the fact that an auction sets the amount to be paid to the State for a CO2 allowance does not remove CO2 allowance prices from the reach of section 10(a). If the proceeds of the auction process reflect monies extracted by the State in order to obtain State authorization, section 10(a) requires that the General Assembly “have complete control” over that “license fee.” *Opinion*, 575 A.2d at 1189-90.

- c. Do the proposed revisions to the CO2 emissions cap level and the CO2 allowance reserve auction price increase the “effective rate” of the CO2 allowance license fee?

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<sup>13</sup> *Accord Black's Law Dictionary* at 940 (“licensing fee”) (8<sup>th</sup> ed. 1999) (“1. a monetary charge imposed by a governmental authority for the privilege of pursuing a particular occupation, business, or activity.”).

In answering this question, careful attention must be paid to the constitutional text. Section 10(a) does not require legislative – rather than executive – action just for upward changes in *the rate* of a tax or fee. Rather, the constitutional provision bars any increase in the “*effective rate*” of a tax or fee without prior legislative approval. As such, section 10(a) is not limited to circumstances where the change is an increase in the specified dollar amount for a license or the substitution of a higher percentage to be applied. Instead, consistent with section 10’s purpose to give the General Assembly broader control over both state expenditures and revenues, the “*effective rate*” language requires an inquiry into whether the alternation in the tax or fee will “*effectively*” result in increased revenues flowing to the State.

### (1) Auction Reserve Prices for Allowances

At one level, it is clear that the proposed changes do make a change in the “*effective rate*” for CO2 emission permits (allowances). The pending proposal seeks to move the reserve price for each auctioned CO2 allowance from its present sub-\$2.00 level to a price of \$2.00 for year 2014, followed by 2.5% increases each year thereafter. Proposed 1147, § 1.3 “*minimum reserve price.*” Because a CO2 allowance will not be sold below the reserve price, the reserve price is the minimum amount that the purchaser must pay to the State to obtain the permit. Thus, the proposed upward changes in the reserve auction price are no different than an increase in the cost of a fishing license or any other environmental permit. But section 10(a) bans DNREC from making such increases in the cost of those other type of permits without first obtaining legislative approval. So too then, section 10(a) applies to the upward movement of the reserve auction price. Without explicit legislative approval for this increase in the reserve price, DNREC cannot *administratively* impose such an increased license fee.

### (2) Reduction in Emission Cap Levels

Of course, the proposal to significantly lower the emission cap levels does not on its face decree a higher price to be paid for CO2 allowances. The allowance auctions will still determine the amount to be paid for such permits, subject to the applicable higher reserve price. But the likely result – the “*effect*” - of the significant decreases in the emission cap levels will be to drive up the cost of the allowances.<sup>14</sup> Indeed, one purpose for the proposed immediate drop in the emission cap level is to create a greater degree of scarcity for allowances and thus invigorate the now almost dormant auction market for allowances.<sup>15</sup> True, the proposed drop in the emissions cap will serve a public benefit goal – it will further limit the amount of CO2 that

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14 It appears that the auction prices for allowances have moved somewhat higher this year after the RGGI, Inc. publicly released its recommendations that State's slash their cap levels. Some have suggested that the higher prices can be attributed to buyers' anticipation of scarce and even higher priced allowances if the cap levels are indeed significantly decreased.

15 DNREC, *The RGGI: 2012 Program Review Amendments, 07/24/2013 Public Workshop* at 3 (July 24, 2013) (“To maintain a working market the cap needs to be adjusted.”).

Delaware generators can emit into the air. That probably is a laudable goal, and one that the General Assembly and Governor should adopt by legislation.

If - as projected – the drop in cap levels does drive up the prices for allowance prices in the auction, this in turn will increase the revenues flowing to the State's coffers for use under 7 Del. C. § 6046. Allowances will cost more, and the State will gain additional revenues beyond those that could be expected to be sent to it under the “old” cap levels. *See DNREC, The RGGI: 2012 Program Review Amendments 6/18/2013* at 11 (June 18, 2013) (projected that Delaware auction revenues under proposed changes will increase by \$108.43 million over “old caps” reference case revenues). In sum, the drop in the cap will have the “effect” to increase the “rate” or price to be paid for the “license” to emit CO<sub>2</sub> in the atmosphere. As such, the change in the cap limit is a change in the “effective rate” for such license fee. Accordingly, section 10(a) requires that such change – which will have such an “effect” - must be approved, not by an administrative rule change, but by a legislative enactment.

