

MEMORANDUM

To: Lisa Vest, Hearing Officer

Through: Ali Mirzakhali
Ron Amirikian *raa* 10/29/13
Valerie Gray *vg* 10/29/13

From: Babatunde Asere *bta* 10/29/13

Re: Department’s Response to Comments received on the proposed amendments to 7 DE Admin Code 1147 – *CO₂ Budget Trading Program*.

You presided over a public hearing on Wednesday, September 25, 2013 beginning at 6:00 PM at The Kent County Administrative Complex, 555 S. Bay Road Dover. The subject of that public hearing was a proposed revision to 7 DE Admin. Code 1147 – CO₂ Budget Trading Program. The Department received comments from the following:

Date Received	Name	Organization
9/25/2013	Amy Roe	Private Citizen
9/25/2013	Gary Helm	PJM
9/25/2013	John Sykes	Delaware Interfaith Power & Light
9/25/2013	Travis Madsen	Environment America
9/25/2013	Emily Van Alyne	private citizen
9/26/2013	Devon Van Alyne	private citizen
9/27/2013	David T. Stevenson	Caesar Rodney Institute
9/30/2013	Josh Craft/Serafina Zeringo	NEEP
10/4/2013	Robert Muche	DCR
10/9/2013	Pat Todd	League of Women Voters
10/10/2013	Barbara Reader	private citizen
10/10/2013	Thurman Brendlinger	Clean Air Council
10/10/2013	Stephanie Herron	Sierra Club
10/10/2013	Gary Myers	Private Citizen
10/10/2013	Walter Stone	NRG

This memorandum provides a summary of the comments received and the Division of Air Quality (DAQ) response. Each comment received is included verbatim as an attachment.

I. General Comments

Comment 1

One commenter stated that no notice of the public hearing held on September 25, 2013, was ever published in the register or placed in any newspaper.

Department Response

The Department's proposed regulation amendments were published in the Delaware Register of Regulations on 09/01/13.

The public hearing was noticed in two newspapers. An affidavit in the record shows the legal notice appeared in the Delaware State News on 08/18/13 advertising that the public hearing on the proposed amendments would be held at the Kent County Administrative Complex at 6 p.m. on 9/25/13. Another affidavit in the record shows a legal notice that appeared in the News Journal on 08/18/13 advertising that the public hearing would be held at the Kent County Administrative Complex at 6 p.m. on 9/25/13.

Comment 2

The Department cannot change the cap without following the APA (Administrative Procedure Act).

Department Response

The Department agrees it must follow the APA. The Department followed all legal requirements for the proposed amendments to 7 DE Admin Code 1147 including additional in-house processes, which are set out as follows in chronological order:

- A Start Action Notice was approved by the Secretary of the Department on April 24, 2013. (Public Hearing Exhibit 3)
- Information on the first workgroup meeting was placed the Public Meeting Calendar on April 25, 2013. (Public Hearing Exhibit 12)
- The first workgroup meeting was held on May 14, 2013. (Public Hearing Exhibit 13)
- Information on the second workgroup meeting was placed in the Public Meeting Calendar on June 4, 2013. (Public Hearing Exhibit 17)
- The second workgroup meeting was held on June 18, 2013 to discuss the proposed amendments with stakeholders. (Public Hearing Exhibit 19)
- Information on the public workshop was placed in the Public Meeting Calendar on July 1, 2013. (Public Hearing Exhibit 24)
- Legal notice of the public workshop on the proposed amendments was placed in Delaware State News and The News Journal on July 3, 2013. (Public Hearing Exhibit 22 and 23)
- The public workshop was held on July 24, 2013. (Public Hearing Exhibit 26)
- Information on the public hearing was placed in the Public Meeting Calendar on August 19, 2013. (Public Hearing Exhibit 32)
- Legal notice of the public hearing was placed in Delaware State News and The News Journal on August 18, 2013 (Public Hearing Exhibit 30 and 31)
- The proposed amendments to 7 DE Admin Code 1147 were published in the Delaware Register on September 1, 2013.
- The public hearing was held on September 25, 2013.

Comment 3

At the public hearing one commenter said regarding section 1.2.1:

I would like the Department to consider cumulative units on a single parcel that equal 25 megawatts to be a budget unit as part of the regulations.

Department Response

The Department does not agree that the applicability of section 1.2.1 should be revised at this time. The purpose of the regulation has been, and remains, to reduce CO₂ emissions from fossil fuel-fired electricity generating units having a rated capacity equal to or greater than 25 megawatts. The 25 megawatts threshold applies to individual electricity generating units and not cumulative units. However, the Department will be evaluating feasible measures to reduce CO₂ emissions from other source categories in the future, and may consider expansion of this program to smaller units during the 2016 program review (see comment 10).

II. Comments regarding the legal vulnerability of the proposed amendments

Comment 4

The Department has no statutory authority to amend the emissions cap because Delaware Constitution Article VIII, Section 10 and 11, bar any new taxes or fees and increases in any taxes or fees without 3/5 majority approval in each legislative chamber.

Department Response

The Department does not agree. The CO₂ budget trading program is not a tax, but a market based approach to reducing CO₂ emissions in the power sector and is similar to the existing cap and trade programs for SO₂ and NO_x. Although there are costs associated with compliance, the purpose of the program is to stabilize and reduce CO₂ emissions and the program is not a tax or a fee.

Comment 5

Delaware Code Title 7, Chapter 60, sub-chapter II-A establishes Delaware's participation in the RGGI program. Section 6043 titled "Findings, purpose, and definitions" establishes the initial emissions cap at 7,559,787 short tons of CO₂ in (a) (9). The code stabilizes emissions at 7,559,787 short tons through 2015 and reduces such emissions by 10% by 2019 (a) (8). In a separate section, § 6045 titled "Auction of allowances," the Secretary of DNREC is given authority to modify the auction program (c). This authority is related to the auction mechanism, not to the change in the emission reduction goal in a different section of the code. Change to the emission reduction goal requires legislative approval and a signature by the Governor. The Secretary's action in this procedure is illegal.

Department Response

The commenter is correct that §6043 (a)(9) of the Delaware Code sets the initial emissions cap at 7,559,787 short tons of CO₂. However, §6043 (a)(9) also states that "*The cap and Delaware's allocation may be adjusted in the future.*" Indeed, the Department believes that

statute grants the Secretary of the Department the authority to further reduce the emissions cap to comply with the emissions reduction goal.

Furthermore, §6043 (a)(8) stabilizes emissions at “*current levels*,” which at that time was higher than the initial emissions cap. The goal of §6043(a)(8) was to prevent CO₂ emissions from rising above the emissions levels at the time the statute was promulgated.

In addition, §6044 (a) of the Delaware Code authorizes the Secretary of the Department to implement and participate in the Regional Greenhouse Gas Initiative (RGGI). And §6044 (c) authorizes the Secretary of the Department to promulgate regulations to implement the RGGI cap and trade program consistent with the RGGI Memorandum of Understanding, as amended. The Department believes that based on these sections of the Code, the Secretary of the Department has the authority by regulation to implement the amendment to the CO₂ budget trading program and adjust the emissions cap.

Comment 6

RGGI may violate the United States Constitution – specifically the Compact Clause – by encroaching on federal supremacy as an unconstitutional multi-state compact.

RGGI also may conflict with §102(c) of the federal Clean Air Act (“CAA”), which does not authorize an interstate compact such as RGGI. RGGI seeks to address global atmospheric concentrations of greenhouse gases, a matter on which a handful of states can have little or no impact.

Department Response

This regulatory proceeding only concerns the Department’s Regulation. The Department’s regulation does not violate the compact clause of the U.S. Constitution because each of the RGGI states has independent state authority to adopt its own RGGI, which imposes in-state compliance obligations upon in-state pollutant sources.

Further, this regulation does not conflict with the §102(c) of the federal Clean Air Act, which states that:

“The consent of the Congress is hereby given to two or more States to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, for (1) cooperative effort and mutual assistance for the prevention and control of air pollution and the enforcement of their respective laws relating thereto,”

This regulation has independent state authority and is independent of the RGGI MOU and is not inconsistent with §102(c) of the federal Clean Air Act.

Comment 7

RGGI’s legal weaknesses are significant and, when combined with the design flaws, call for a substantial overhaul of the RGGI program. The legal weaknesses and uncertainties present two distinct problems for RGGI. First, due to the policy and economic problems associated with the program, adverse effects of which are all greatly exacerbated by the proposed revisions, RGGI may attract litigation from those materially disadvantaged by its flaws. Second, to the extent any private

investment is elicited by RGGI's price signal that private investment will be limited and made more costly by the significant legal uncertainty and risk created by the RGGI framework. There are numerous examples at both the federal and state level of environmental initiatives that have failed to accomplish their laudable purposes altogether or were significantly delayed because they were placed on weak legal footing and as a result attracted litigation and adverse court rulings.

Department Response

This proceeding is limited to the modification of the Department's regulation and these comments are beyond the scope of this proceeding.

III. Comments regarding the economic impact of the proposed amendments.

Comment 8

The revenues raised by the RGGI tax are used primarily to support energy efficiency programs, and increasingly to replace general revenues, in a manner not contemplated by the RGGI accord. Increased end use efficiency certainly has a role to play in reducing CO₂ emissions, but on its own cannot even come close to bringing about the significant emission reductions necessary to effectively address the risk of climate change. To achieve that end, efficiency must be coupled with a shift from high carbon to low and no carbon supply resources. Until RGGI states provide effective policies to support the deployment of low and no carbon resources, and cease their reliance on simply taxing existing generators to pay for subsidized energy efficiency, they are foregoing much more effective opportunities to reduce overall CO₂ emissions and grow a greener, more sustainable economy.

Department Response

This RGGI program comment is likewise beyond the scope of this proceeding. Nonetheless, the Department reiterates that RGGI is a market based approach to CO₂ emissions reduction and not a tax or fee on power generators. In addition to energy efficiency, CO₂ emissions reduction in the power sector is achieved through switching from high carbon to low carbon intensity fuels. RGGI also re-invests the proceeds from the RGGI auction in the clean energy economy. The clean energy economy accelerates the deployment of no or low carbon supply resources or renewable energy technologies that will incentivize further CO₂ emissions reductions in the power sector. RGGI proceeds are also invested in greenhouse gas abatement projects that are designed to reduce Delaware's overall carbon footprint. These investments reduce greenhouse gas emissions and generate important consumer benefits, including lower energy bills, greater electric system reliability, and more jobs.

Comment 9

The state's program should enhance the ability of the electric generation sector to invest in low carbon supply side solutions – instead of simply requiring the generation sector to pay for another sector's deployment of energy efficiency programs through an increasing tax burden.

Department Response

This RGGI program comment is likewise beyond the scope of this proceeding. Nonetheless, Delaware law sets out the uses for any RGGI auction proceeds, and the Department is bound

by those directives. By establishing a cost associated with the emissions of CO₂ from electric generating units, the RGGI program is creating an incentive for producing electricity by no or low carbon generating resources. This is true because in a competitive market where the marginal unit is likely a fossil unit, all electricity generated (including that generated by low and no-carbon units) will be compensated at a rate which includes consideration of the carbon cost of the marginal unit.

Moreover, 65% of Delaware's RGGI proceeds are re-invested in the Sustainable Energy Utility (SEU), which is partnering with the private sector to invest in cleaner supply side renewable energy.

Comment 10

RGGI advantages smaller units, which generate significantly higher CO₂ and criteria pollutant emissions on a lb/MWh basis when compared to larger units because they are significantly less efficient, generally burn lower quality fuels, have fewer emissions controls, have shorter stacks, and are predominately oil-fired. This exempts many fossil fuel-fired facilities from the provisions and requirements of RGGI even though these units will have a significant impact on CO₂ emissions and displace RGGI-affected facilities in the RGGI region.

Department Response

As above, this proceeding is related to Delaware's regulation. As part of the original RGGI program development, the participating states evaluated applicability thresholds lower than the 25 MW. After considering options on the applicability threshold, the states agreed on the 25 MW level. The states determined that more than 98 percent of the in-region carbon dioxide emissions from the electric generating sector would be covered at this applicability threshold. The states further recognized that the number of facilities covered under the program increased dramatically with lower applicability thresholds, adding significant regulatory burden and costs to the state agencies implementing the program and to the regulated community, particularly small businesses. The Department participated in and agreed with all of these decisions, and at this time does not see such a significant benefit from including smaller fossil fuel-fired facilities to adopt a differing regulation.

In addition, since the launch of the program, RGGI participating states have monitored relative changes in emissions associated with electricity generation from units subject to RGGI versus small fossil fuel-fired electric generators in the RGGI region that are not subject to RGGI. The monitoring results do not show an increase of annual CO₂ emissions from small fossil fuel-fired electric generators in the RGGI region that are not subject to state CO₂ Budget Trading Program regulations in the first three years of the program, 2009 through 2011. The monitoring reports also do not show an increase in imported electricity as a result of the program.

The participating states have released an annual report summarizing the above referenced monitoring efforts and results. The link to the third (and most recent) in a series of annual monitoring reports reflecting actual data through 2011 can be found at:

http://rggi.org/docs/Documents/Elec_monitoring_report_2011_13_06_27.pdf

The participating states have committed to continue to monitor relative changes in emissions associated with electricity generation from units subject to RGGI versus small fossil fuel-fired electric generators in the RGGI region that are not subject to RGGI.

Comment 11

RGGI is flawed by its regional nature. Only a broad national, and ultimately an international, regulatory framework can effectively address climate change.

Department Response

This proceeding is related only to Delaware's regulation. The Department agrees that a broad national and international, regulatory framework can more effectively address climate change, and, indeed, the Delaware statute recognizes a federal framework is likely in the future. Indeed, Delaware, along with other RGGI participating states, is engaging with the United States Environmental Protection Agency as they endeavor to develop national greenhouse gas emission guidelines for existing and modified electric generating units under §111 (d) of the Clean Air Act (CAA) and emission limitations for new electric generating units under §111 (b) of the CAA.

Comment 12

Lowering the cap from 165 million tons to 91 million tons runs headlong into a major design flaw inherent in any regional program: the relocation of generation (and associated emissions of CO₂ and criteria pollutants) from the RGGI States into nearby non-RGGI states.

Department Response

This comment is also pointed at the regional RGGI program and beyond the scope of this proceeding. Delaware's regulation is related to reducing CO₂ emissions from in-state sources through the trading program. Further, Delaware and other RGGI Participating States have committed to address the potential for the relocation of generation from the RGGI states into nearby non-RGGI states that the commenter references (see Principle IV. Emissions Leakage in the document *RGGI 2012 Program Review: Summary of Recommendations to Accompany Model Rule Amendments at:* http://rggi.org/docs/ProgramReview/FinalProgramReviewMaterials/Recommendations_Summary.pdf).

Comment 13

In regard to exemptions, §1.2.3.1 affords the petroleum refinery an exemption of CO₂ emissions from electric generation not placed on the grid whereas only generation sold would be subject to compliance obligations. Treatment of electric generation whether a refinery or merchant electric generation facility should receive equal treatment. In Delaware, any applicable facility's compliance obligation should be based on only net generation sold to the grid.

Department Response

The purpose of §1.2.3.1 is to provide compliance requirements to electric generating units under § 1.2.2 (Limited Exemption). Under §1.2.2, Delaware City refinery has a permit condition that restricts the supply of its annual electrical output to the electric grid to less than or equal to 10 percent of its annual gross generation. Since electric generating facilities are not petroleum refineries, §1.2.3.1 does not apply to them.

Furthermore, the primary objective of the CO₂ budget trading program is to reduce CO₂ emissions from electric generating facilities in the power sector. Amending the compliance requirement to apply to net electrical generation as opposed to gross electrical generation will only reduce the burden of compliance. It will not incentivize further reductions in CO₂ emissions.

Comment 14

Limited Industrial Exemption long-term contracts such as those provided in Maryland and other RGGI states contemplate providing preferential treatment to generators with “stranded contracts,” that cannot recover the cost of complying with RGGI, by allowing them to purchase allowances at the reserve price starting in 2014.

Department Response

As noted above, this proceeding is only related to Delaware’s regulation. Delaware has no set-aside allowances for long term contracts. Delaware’s proposed amendments will allow all Delaware allowances to be available to the market. Furthermore, the Department believes that electricity generating units regulated under the CO₂ Trading Budget Program are not precluded from recovering the cost of complying with RGGI.

Comment 15

In regard to offsets, applicability should be expanded to include a ratio of credits for CO₂ reductions resulting from planned shutdowns, fuel switch projects such as the Dover conversion, and credits for carbon avoidance initiatives including pilot test programs and actual installations for CO₂ reduction controls at any facility within a common holding company, and alternative energy applications such as solar development on a contiguous site.

Department Response

The Department intends to consider additional offset categories and compliance in the future. The Department looks forward to stakeholder comments and suggestions during the next program review.

IV. Suggested Modifications to the proposed amendments.

Comment 16

One commenter suggested lowering the trigger for the cost containment reserve to further guard against leakage driven by high allowance prices. (NRG)

Department Response

The Department believes the cost containment reserve as proposed is the appropriate size (quantity of allowances available) and the price triggers are set at the appropriate levels to provide a balance of environmental goals and cost containment. The extensive electric system and macroeconomic modeling conducted by the participating states supports these policy decisions.

Comment 16

Reducing the cap less drastically to align what can be achieved through the first step above with the reductions demanded by the cap. This will provide more stable and moderate RGGI allowance prices and reduce or eliminate leakage problems.

Department Response

As part of the 2012 program review, RGGI states evaluated several different regional emissions caps using electric-sector models. In order to ensure a robust assessment, RGGI states utilized economic growth and fuel prices, included projections from respected sources such as the US Energy Information Administration, and published assumptions for stakeholder review during the modeling process, and conducted sensitivity analyses across several different scenarios. The information gleaned from the modeling was used to inform the selection of the cap level. The Department participated in and agrees with this and is confident that the proposed cap appropriately accounts for key variables such as fuel prices and economic growth, and is finalizing the cap as proposed. The Department notes that the addition of a cost containment reserve provides additional protection against allowance price variability, and that the level of the cap will be considered again during a comprehensive program review no later than 2016.

V. Comments Received in Support of 7 DE Admin Code 1147

Comment 17

The Department received 9 comments in support of the proposed amendments from the Sierra Club membership, the Clean Air Council, Delaware Interfaith Power & Light, League of Women Voters, Environment America, Northeast Energy Efficiency Partnerships and private citizens. In summary, the comments received applauded Delaware’s strategy to reduce greenhouse gas emissions and show strong support for the adoption of the proposed amendments to 7 DE Admin Code 1147.

Department Response

The DAQ appreciates the letters of support, and recommends that the Department finalize the revisions as proposed.

Attachments (12)