

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

DAVID T. STEVENSON,  
R. CHRISTIAN HUDSON,  
JOHN W. MOORE, and  
JACK PETERMAN,

Plaintiffs,

C.A. No. S13C-12-

DELAWARE DEPARTMENT  
OF NATURAL RESOURCES AND  
ENVIRONMENTAL CONTROL, an  
agency of the State, and COLIN O'MARA,  
in his capacity as Secretary of the  
Department of Natural Resources and  
Environmental Control,

Defendants.

**COMPLAINT**

Plaintiffs David T. Stevenson, R. Christian Hudson, John W. Moore, and Jack Peterman bring this action for Declaratory Relief regarding illegal state regulations pursuant to the Administrative Procedures Act, based upon the following:

**THE PARTIES**

1. Plaintiff David T. Stevenson ("Stevenson") is a Sussex County, Delaware resident, currently residing at 37524 Golden Eagle Boulevard in Lewes, Delaware. Stevenson is an electric power customer of Delaware Electric Cooperative, Inc.

2. Plaintiff R. Christian Hudson ("Hudson") is a Sussex County, Delaware resident, with offices at 30045 Eagle Crest Road in Milton, Delaware, with businesses known as Sam Yoder And Son, LLC and Hudson Management. Hudson is an electric power customer of Delmarva Power and one of his businesses is a customer of Delaware Electric Cooperative, Inc.

3. Plaintiff John W. Moore (“Moore”) is a New Castle County, Delaware resident. Moore is an electric power customer of Delmarva Power.

4. Plaintiff Jack Peterman (“Peterman”) is a Kent County, Delaware resident, currently living at 595 Log Cabin Road in Milford, Delaware, and currently serves as a member of the Delaware State House of Representatives, representing the 33<sup>rd</sup> District. Peterman is an electric power customer of Delaware Electric Cooperative, Inc.

5. Defendant Delaware Department of Natural Resources And Environmental Control (“DNREC”) is an agency of the State of Delaware, created and empowered pursuant to the provisions of 29 *Del. C.* Ch. 80 and Title 7 of the Delaware Code.

6. Defendant Colin O’Mara is the Secretary of DNREC (the “Secretary”), and is named solely in his official capacity.

#### **JURISDICTION**

7. This Court has jurisdiction over this action pursuant to provisions of 10 *Del. C.* § 541, Article IV, § 7 of the Delaware Constitution, and 29 *Del. C.* § 10141.

#### **THE FACTS**

8. In December of 2005, the State of Delaware entered into a Memorandum of Understanding with six (6) other states located in the northeast section of the United States regarding a Regional Greenhouse Gas Initiative (the “MOU”). The MOU was executed by the then Governor of Delaware, and was ultimately approved by six (6) other states: Connecticut; Maine; New Hampshire; New Jersey; New York; and Vermont. New Jersey subsequently withdrew from the MOU, and Massachusetts and Rhode Island joined in.

9. Under the MOU, the seven (7) states committed to propose for legislative and/or regulatory approval a program reflected in the MOU's "Model Rule," with a launch date for the program of January 1, 2009.

10. The MOU proposed to establish a Carbon Dioxide (CO<sub>2</sub>) trading program (the "Program") for, *inter alia*, Electric Generation facilities. It also set regional and individual State Carbon Dioxide emission caps, which were to remain constant through 2014 and be reduced by 2.5% per year in the years 2015 through 2018.

11. The MOU also provided that each State would: 1) allocate "allowances" to emit Carbon Dioxide which would not exceed the individual State cap amounts; and 2) conduct a comprehensive review of the Program in the year 2012, in order to evaluate success, impacts, further reductions, and status of sales of CO<sub>2</sub> emission allowances. But in no event were cap amounts to be reduced prior to 2018.

12. In furtherance of the commitments made by the State of Delaware in the MOU, the Delaware General Assembly enacted the Regional Greenhouse Gas Initiative Act as 7 *Del. C.* §§ 6043-6047 in 2008 (the "RGGI Act").

13. The RGGI Act: 1) declared Carbon Dioxide to constitute an "air contaminant" subject to state regulation; 2) established a "cap and trade" allowance program to control CO<sub>2</sub> emissions; and 3) provided that Delaware Electric Generation facilities would be required to hold sufficient government-issued "CO<sub>2</sub> allowances" to cover their respective annual CO<sub>2</sub> emission levels.

14. In turn, 7 *Del. C.* §§ 6001(2)-(3) and 6003 subject "air contaminant" generators to the permitting and regulatory authority of DNREC and the Secretary.

15. The RGGI Act establishes mandatory requirements that Electric Generation facilities purchase “CO<sub>2</sub> allowances” in order to emit Carbon Dioxide. Delmarva Power and Delaware Electric Cooperative, Inc. both purchase electricity to distribute to customers from Delaware Electric Generation facilities that must purchase “CO<sub>2</sub> allowances.”

16. DNREC has sold CO<sub>2</sub> allowances for monetary consideration in order to enable Electric Generation companies to continue functioning and providing electricity as their business purposes require. CO<sub>2</sub> allowances are only good for a short number of years, after which new ones must be purchased.

17. No Electric Generation facility in Delaware may legally operate unless it purchases the mandatory CO<sub>2</sub> allowances from DNREC in return for a required monetary payment, which DNREC sets the minimum price for. Thus, a CO<sub>2</sub> allowance effectively constitutes a “permit” (the “CO<sub>2</sub> Permit”).

18. After adoption of the RGGI Act, the Secretary of DNREC adopted regulations consistent with the MOU.

19. On November 19, 2013, DNREC issued Secretary’s Order No. 2013-A-0054, approving final amendments to 7 DE Admin. Co. 1147: Carbon Dioxide (CO<sub>2</sub>) Budget Trading Program – Regional Greenhouse Gas Initiative, which had an effective date of December 11, 2013 (the “New RGGI Regulations”). The New RGGI Regulations were published in the Delaware Register of Regulations on December 1, 2013.

20. The New RGGI Regulations include changes in: 1) the size and structure of the CO<sub>2</sub> allowance cap; and 2) the effective price of a CO<sub>2</sub> Permit.

21. Pursuant to 7 *Del. C.* §§ 6043 and 6044, the Secretary of DNREC is authorized to participate in the Regional Greenhouse Gas Initiative and to promulgate regulations to

implement the RGGI cap and trade program consistent with the MOU. Thus, the Secretary's delegated powers are expressly limited by and subject to the MOU terms.

22. The New RGGI Regulations illegally decreased the CO<sub>2</sub> cap for Delaware below the levels provided for in the MOU. Based on principles of supply and demand, the lower CO<sub>2</sub> cap provisions in the New RGGI Regulations will directly and proximately increase the cost of CO<sub>2</sub> Permits, which will concomitantly increase electric power rates charged to customers.

23. The New RGGI Regulations also illegally establish a higher price floor and a new method for the trade of CO<sub>2</sub> allowances, which will cause the price of CO<sub>2</sub> Permits for Electric Generating facilities to increase. But the General Assembly never approved an increase in such permit rates by the required three-fifths (3/5<sup>ths</sup>) vote.

24. The Plaintiffs are aggrieved *per se* by the New RGGI Regulations' violation of Article VIII, § 10 of the Delaware State Constitution. And they are also aggrieved since their electric power rates will rise as a result of increased costs to the Electric Generation facilities stemming from higher CO<sub>2</sub> Permit rates driven by the RGGI Regulations.

**COUNT I – DECLARATORY JUDGMENT –  
STATE CONSTITUTIONAL ILLEGALITY**

25. The contents of paragraphs 1. through 24. are hereby restated as if fully set forth herein.

26. Pursuant to the Delaware Administrative Procedures Act, 29 *Del. C.* § 10141, persons claiming the unlawfulness of a regulation may bring a complaint for declaratory relief in this Court.

27. Additionally, this Court has the authority to declare the actions of government agents such as DNREC and O'Mara to be invalid under the Delaware Code pursuant to the Declaratory Judgment Act, 10 *Del. C.* Ch. 65.

28. As adopted, the New RGGI Regulations would permit DNREC and O'Mara to administratively increase CO<sub>2</sub> Permit rates.

29. The New RGGI Regulations are unconstitutional in contravention of Article VIII, § 10 of the Delaware Constitution since the CO<sub>2</sub> Permit fees that result therefrom were not expressly approved by a three-fifths (3/5<sup>ths</sup>) vote of the Delaware General Assembly.

**COUNT II – DECLARATORY JUDGMENT –  
RGGI ACT AND DELEGATION DOCTRINE ILLEGALITY**

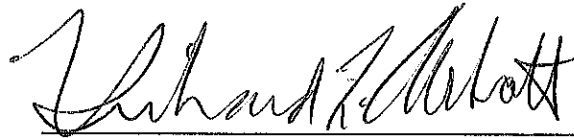
30. The contents of paragraphs 1. through 29. are hereby restated as if fully set forth herein.

31. The New RGGI Regulations also run afoul of the RGGI Act since the new, lower CO<sub>2</sub> emissions cap provisions are not consistent with the MOU. The MOU is expressly required to be followed pursuant to the RGGI Act.

32. Under the principles of legislative delegation, DNREC and the Secretary are required to act in strict conformance with the conditions of their delegated authority in the RGGI Act. Since the New RGGI Regulations stray from the emissions cap provisions of the MOU contrary to the express terms of the legislative delegation in the RGGI Act, such regulatory action is illegal.

WHEREFORE, the Plaintiffs David T. Stevenson, R. Christian Hudson, John W. Moore, and Jack Peterman respectfully request that this Court enter a Judgment in their favor and against Defendants DNREC and O'Mara pursuant to the Administrative Procedures Act by declaring that the New RGGI Regulations are invalid based upon their contravention of the Delaware Constitution and the RGGI Act.

ABBOTT LAW FIRM

A handwritten signature in cursive script, reading "Richard L. Abbott". The signature is written in black ink and is positioned above a horizontal line.

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Attorneys for Plaintiffs

Dated: December 30, 2013