

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. 2009 369

RJI No. 2009/0369

Hon. Thomas D. Nolan, Jr.

**BRIEF OF AMICI CONSERVATION LAW FOUNDATION
ENVIRONMENTAL ADVOCATES OF NEW YORK,
ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL,
PACE ENVIRONMENTAL LAW CENTER**

This Court has been asked to derail the Regional Greenhouse Gas Initiative (“RGGI”), the first effort in the United States to regulate emissions of carbon dioxide (CO₂) that are driving global warming. After six years of intensive analysis, planning, and public notice-and-comment, New York and nine other states are each implementing their own market-based programs to reduce CO₂ emissions in service of a shared goal to forestall climate change. Already, RGGI has become a model for cutting CO₂ emissions cost-effectively at the federal level, in other states, and in Canada. In January of this year, the U.S. Environmental Protection Agency (“EPA”) awarded its Climate Protection Award to RGGI, recognizing that the cooperative effort in New York and other states “can already be considered a tremendous success.” U.S. EPA, 2009 *Climate Award Winners*, <http://www.epa.gov/cppd/awards/2009winners.html> (last visited on May 18, 2009). By 2018, New York and the other RGGI states will each cut their CO₂ emissions by ten percent.

These emissions reductions are urgently needed. As temperatures continue to rise in the Northeast, New York and the other RGGI states face more dangerous heat waves, dangerous ozone pollution, increased coastal erosion and eventual inundation, severe storms and flooding, the spread of Lyme Disease, West Nile Virus and other insect-borne diseases, increased pressure on the public water supply, forest degradation, loss of wildlife habitat, and diminished agricultural production. Reducing CO₂ emissions to the maximum extent possible is essential *now* in order to avoid the most devastating of these impacts in the future.

Against this backdrop, Indeck Corinth, L.P. (“Indeck”), advances a number of meritless legal arguments aimed at invalidating New York’s CO₂ Budget Trading Program and indeed, dismantling every state program adopted to implement RGGI’s goals. Just by filing this lawsuit, Indeck has succeeded in stalling New York’s investment in energy efficiency and clean energy

projects that are needed to hasten the state’s transition away from carbon-intensive power. Yet it is unclear what, if anything, Indeck stands to lose as a result of CO₂ regulation in New York and other northeastern states. Indeck already has secured a substantial set-aside of free CO₂ allowances from the New York State Department of Conservation (“DEC”), and it appears likely that it will not suffer any economic harm as a result of New York’s CO₂ Budget Trading Program.¹

Indeck wrongly seeks to preclude not only New York but all states from adopting cap-and-trade regulations that offer the greatest compliance flexibility to regulated generators including Indeck. Amici Conservation Law Foundation, Environmental Advocates of New York, Environmental Defense Fund, Natural Resources Defense Council, and Pace Energy and Climate Center respectfully request that this Court dismiss Indeck’s petition and complaint and affirm the legitimacy of these important regulations.

The challenged rules are a valid exercise of DEC’s broad grant of authority to prevent the environmental harms that global warming threatens. Similarly, the New York Energy Research and Development Authority (“NYSERDA”) has ample authority to auction CO₂ allowances and invest the proceeds into the very energy efficiency and innovative energy technology programs that it was chartered to promote. In allowing power generators to purchase CO₂ allowances at auction, the DEC has not imposed an unlawful tax or any impermissible fees on power generators. Moreover, the Compact Clause of the U.S. Constitution is not a bar to New York’s

¹ Indeck has failed to submit any evidence to substantiate its allegations of injury. *Cf. Society of Plastics Indus. v. City of Suffolk*, 77 N.Y.2d 761, 769, 573 N.E.2d 1034, 1039, 570 N.Y.S.2d 778, 782 (N.Y. 1991) (“[A] litigant must establish its standing in order to seek judicial review.”). Thus, at the outset, Indeck has failed to establish standing to bring this case. *See id.* (“Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation.”).

or any other state's participation in the collaborative RGGI effort. While Indeck presents this Court with a scatter-shot array of arguments, none of them hits its mark.

STATEMENT OF INTEREST

Amicus Conservation Law Foundation (“CLF”) is a member-supported environmental organization that is engaged, among other things, in state, regional and federal advocacy efforts to reduce energy sector contributions to global warming. CLF, which has members living across the Northeast, including in New York, has a longstanding interest in RGGI. CLF was a designated “stakeholder” in the multi-state RGGI process, and it has been actively involved in the design and creation of implementing state programs such as the New York State CO₂ Budget Trading Program.

Amicus Environmental Advocates of New York was founded to protect the state's air, land, water and wildlife and the health of all New Yorkers. Based in Albany, Environmental Advocates monitors state government, evaluates proposed laws, and champions policies and practices that ensure the responsible stewardship of our shared environment. Environmental Advocates is working to address global warming threats through the promotion of responsible energy policy. Thus, it has a longstanding interest in the success of RGGI. Environmental Advocates was a designated stakeholder in the multi-state RGGI process, and has been active in New York's process to design and implement a CO₂ Budget Trading Program.

Environmental Defense Fund (“EDF”) is a national nonprofit organization representing more than 500,000 members. Since 1967, EDF has linked science, economics and law to create innovative, equitable and cost-effective solutions to society's most urgent environmental problems. EDF is actively involved in promoting sound and effective climate policy at the state, federal, and international levels. A major proponent of carbon cap-and-trade systems, EDF

strongly supported the New York State CO₂ Budget Trading Program during the rulemaking process.

Amicus Pace Energy and Climate Center (“Pace”), formerly the Pace Energy Project, is affiliated with Pace University School of Law in White Plains, New York. Throughout its twenty-year history, Pace has been active in utility regulatory matters in New York and throughout the Northeast. Pace conducts policy analysis, provides legal and technical assistance, and supports education and outreach efforts to promote energy efficiency and sustainable energy technologies. Pace was an active participant in the development and design of the RGGI program through its advisory role in the stakeholder process. Pace currently serves on the RGGI Advisory Group, which provides advice to NYSERDA on the use of RGGI auction proceeds. As a proponent of increased investment in energy efficiency and clean, sustainable energy sources, Pace has an interest in preserving New York’s ability to participate in the existing RGGI auction process, which provides funding for necessary investments in energy efficiency, renewable energy and carbon emission-reducing technologies throughout New York.

Amicus Natural Resources Defense Council (“NRDC”) is a national not-for-profit environmental organization with over fifty thousand members in the state of New York. NRDC works to protect all aspects of the environment at the state, regional, and federal level. Addressing the global warming crisis is NRDC’s top institutional priority. NRDC was a designated stakeholder in the RGGI process, and it is actively involved in the design and implementation of climate initiatives at the state, regional and federal levels, including similar regional efforts in the western and midwestern United States. NRDC strongly supports the New York State CO₂ Budget Trading Program.

STATEMENT OF FACTS

A. CO₂ and Climate Change in New York

New York's climate has warmed considerably in recent years due to increasing atmospheric concentrations of CO₂ and other greenhouse gases. *See* AR 10 at 15-16.² Temperatures in the Northeast have risen by 0.5°F per decade since 1970. *See* AR 1 at 3; AR 10 at 16-17. "Winter temperatures have risen faster, at a rate of 1.3°F per decade from 1970 to 2000," and "[t]emperature increases in the coastal areas of the state have been more dramatic." AR 1 at 3; AR 10 at 16-17. As a result, New York is experiencing more frequent "extreme heat days" and "heavy rainfall events," less snow and more rain, "higher and earlier spring river flows," and "[r]ising sea surface temperatures and sea level." AR 10 at 17. Ecological cycles are changing too. Plants are leafing out and blooming earlier; frogs are mating earlier; and Atlantic salmon are migrating earlier. *See id.*

If current emissions trends continue, New York will experience far more dramatic climate changes over the next half of the century. *See id.* at 18-19. Scientists predict that temperatures will increase from 8 to 12°F in winter and 6 to 14° degrees in summer. *See id.* at 18 (citing comprehensive research by 40 independent scientists). Less snowfall and increased rainfall will cause flooding in winter, and the extreme storms that currently hit the southeast will travel up the east coast to New York. *See id.* Further, as global temperatures rise and glaciers melt, accelerating sea level rise will result in substantial property loss along New York's shoreline. *See id.* at 20.

In summer, prolonged heat-waves will cause not only short-term droughts but also many deaths and heat-related illnesses. *See id.* at 18-19. According to EPA, just "a one degree

² "AR" as used herein refers to the Administrative Record filed by government respondents. Citations are to AR document numbers and internal page numbers.

Fahrenheit increase in average temperature could more than double heat-related fatalities in New York City from 300 to 700 per year.” *Id.* (citing U.S. EPA, *Climate Change and New York* 3 (1997)). Further, higher temperatures will increase the incidence of respiratory illnesses in children and other vulnerable populations by fueling the formation of ground-level ozone. *See id.*; *see also* EPA, *Ground-level Ozone, Health and Environment*, <http://www.epa.gov/air/ozonepollution/health.html> (last visited on May 19, 2009) (explaining that breathing ozone, even for short periods, aggravates asthma and other respiratory diseases and permanently scars lungs with repeated exposures). Given that much of New York is already out of attainment with the federal, health-based National Ambient Air Quality Standards for ozone, additional pollution represents a serious human health threat. *See* EPA, *Region 2: State Designations for the 1997 8-Hour Ozone Standard*, available at <http://www.epa.gov/ozonedesignations/1997standards/regions/region2desig.htm/> (last visited on May 18, 2009).

Changes in temperature and precipitation also are expected to: stress the public water supply; increase the spread of insect-borne diseases such as West Nile Virus, Equine Encephalitis, and Lyme Disease; lower water levels in the Great Lakes, which “could severely affect commercial shipping”; endanger the hardwood ecosystems of New York’s forests; destroy habitat for cold-water fisheries and migratory birds; diminish the yield of New York’s cold-weather crops such as apples and potatoes; decrease milk production at dairy farms; and impair maple syrup production. *See id.* at 19-22.

The severity of these anticipated adverse impacts will depend upon the magnitude of temperature increases and associated precipitation changes. Based on a survey of the best available scientific data, DEC concluded that “[t]he rate and magnitude of warming is primarily

dependent upon the level of CO₂ emissions.” *Id.* at 25. “The greater the emissions, the greater and faster the temperature change will be, with greater resulting injuries.” *Id.* However, “[t]he lower the level of emissions, the smaller and lower the temperature change will be, with lesser injuries.” *Id.*

B. RGGI

While national and international action is needed to cut global emissions and stabilize atmospheric CO₂, “state action and regionally coordinated policies offer a path for progress” toward global warming solutions. *Id.* at 23. With this express goal, the State of New York pioneered RGGI to reduce CO₂ emissions from fossil-fuel burning power plants in the Northeast. *See* AR 244 at 1. Because power plants are responsible for roughly 25 percent of New York’s CO₂ emissions and over 40 percent of emissions nationwide, they are necessarily a high-priority target for regulation. *See* AR 10 at 24; DOE, EPA, *Carbon Dioxide and Emissions from the Generation of Electric Power in the United States 2* (2000), http://www.eia.doe.gov/cneaf/electricity/page/co2_report/co2emiss.pdf. (last visited on May 18, 2009); *see also* AR 10 at 25-26 (explaining that reducing carbon emissions from the power sector will provide significant environmental co-benefits, including reduced emissions of conventional air pollutants).

Work on RGGI began in 2003, when then-Governor Pataki invited northeastern states to join in a collaborative effort to reduce CO₂ emissions “by developing a regional strategy regarding carbon dioxide emissions from power plants.” AR 244 at 1; *see also* Affidavit of Michael Sheehan (“Sheehan Aff.”) ¶ 36 (filed with government respondents’ May 15, 2009 response brief). After two years of extensive technical analysis and public input in each state, the Governors of New York, Connecticut, Delaware, Maine, New Hampshire, New Jersey, and

Vermont signed a memorandum of agreement (“MOU”) in December 2005.³ *See* AR 245 at 12-18. Subject to state rule-making requirements, each state agreed to reduce and stabilize CO₂ emissions by setting a cap on CO₂ emissions from power plants and allowing generators to trade CO₂ allowances (“CO₂ Budget Trading Program”). *See id.* at 2; *see also* Sheehan Aff. ¶ 36.

To facilitate the development of individual state programs, representatives from each state worked together with stakeholders and the public to draft “model rules” that could serve as a template for state regulation. *See* AR 223-243. Essentially, the model rules contemplated a cap on CO₂ emissions, an annual budget for emissions between 2009 and 2014, and a 10 percent emissions reduction by 2018. *See* Sheehan Aff. ¶ 48; AR 243 at 38. Each state would create CO₂ emission allowances commensurate with the cap, and power plants would be required to obtain an allowance for each ton of CO₂ emitted during a given compliance period. *See* Sheehan Aff. ¶ 48; AR 243 at 23-24, 38.

After the model rules were completed in 2006, the states spent the next two years developing their own rules in keeping with all applicable state requirements. To allow for interstate allowance trading, all ten states established budget trading programs that are generally consistent with the model rules. *See* RGGI, *Participating States*, <http://www.rggi.org/states> (last checked May 19, 2009). However, no state was bound to follow the model rules, and the state programs vary in notable respects. *See* Sheehan Affidavit ¶¶ 45, 49-50. For instance, most states including New York have chosen to auction the vast majority of CO₂ allowances, while a few states are giving some percentage of allowances away for free. *Compare* Sheehan Aff. at ¶ 50 (Delaware, for example, will auction only 60 percent of its allowances in the first five years of the program) *with* DEC, *How the Carbon Dioxide Budget Trading Program Works*,

³ Massachusetts, Rhode Island, and Maryland later signed on to the MOU as well. *See* AR 247 at 1; *see also* Sheehan Aff. ¶ 36.

<http://www.dec.ny.gov/energy/39276.html> (last visited on May 18, 2009) (New York’s rules provide for auction of 96.5 percent of allowances). Similarly, several states including New York departed from the model rules to create a “set-aside” of free CO₂ allowances for generators that are unable pass on the costs of purchasing allowances due to long-term contract obligations to sell their power at a fixed price. *See, e.g.*, 6 NYCRR § 242-5.3(d); Conn. Agencies Regs. § 22-174-31(f)(3)(a)(iv).

C. New York’s Adoption of a CO₂ Budget Trading Program

In electing to establish a CO₂ emissions trading program in New York, DEC concluded that a cap-and-trade mechanism would “stabilize and then reduce anthropogenic emissions of carbon dioxide” from power plants “in an economically efficient manner.” AR 1 at 1, 4.

Compared with an “emissions rate program” that would force all sources to make uniform emissions reductions, a trading program that allows “sources with high implementation costs to seek out sources with low implementation costs and purchase excess allowances from those sources” reduces compliance costs by over 25 percent. AR 10 at 58-59.

By “attaching tangible financial value to avoided carbon emissions,” DEC concluded that an emissions trading program “will provide a market incentive for developing and deploying new technologies that can increase fuel efficiency, utilize non-carbon resources (including renewable technologies such as wind and solar power), and reduce or eliminate carbon emissions from combustion sources.” *Id.* at 26. Further, DEC anticipates that the program “will create a direct incentive to reduce the fossil fuel inputs required to produce electricity through more efficient generating technologies.” *Id.* (explaining that “offsets provisions will create incentives to promote improved demand-side efficiency, including not only more efficient technologies for

reducing electricity consumption, but technologies for reducing primary energy consumption — both natural gas and home heating oil — in residential and commercial buildings.”).

To maximize the program’s incentives to reduce carbon emissions and promote energy efficiency, DEC decided to auction CO₂ allowances rather than allocating them to power generators directly. Because generators must internalize at least some of the costs of purchasing allowances, the auction motivates generators to reduce CO₂ emissions to the maximum extent feasible. *See id.* at 26; *see also* Sheehan Affidavit at ¶ 67 (explaining that “it was not . . . the intent of DEC . . . that all costs must or should be passed on to consumers through increased electricity prices”). In addition, the auction ensures that generators do not receive a windfall at the expense of ratepayers. As explained by DEC:

[i]n New York’s deregulated electricity market, the value of emissions allowances are passed on as operating costs to the consumers of electricity whether the generators receive the allowances for free or pay for them. . . . A plant operator will include the value of the allowances needed to operate in its electricity price because the value represents the opportunity cost of using the allowances to operate rather than selling the allowances on the market. Given this dynamic, allocating allowances to generators at no cost is not cost-effective. Furthermore, the cost of the Program does not increase if the generators are required to purchase the allowances, because the generator incorporates the same dollar value of the allowance in its bid to supply electricity whether the allowance was obtained at no cost or through purchase on the open market. The [auction] recognizes this economic reality and aims to avoid the inequity that occurs when consumers are required to pay for the emissions allowance as part of the cost of electricity even though the generators were given the allowance at no charge.

AR 10 at 43-44. Thus, the auction “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.” *Id.* In short, the sale of allowances fortifies the program’s incentive structure, motivating generators to reduce emissions and consumers to reduce electricity consumption, and at the same time, it

allows for investment in energy efficiency and clean energy programs that will reduce emissions from the power sector even further.

Ideally, to send the strongest price signal to generators, New York would auction 100 percent of its CO₂ allowances. However, during the rule-making process, Indeck and a few other generators complained that they would be unable to “pass through” the costs of allowances to consumers because they were operating under long-term contracts that failed to include re-opener provisions to accommodate the new costs of carbon regulation. *See* AR 100 at 2; *see also* AR 102 at 2, 103 at 1, 104 at 8, 105 at 14, 107 at 2. Thus, Indeck insisted that the regulations would impose significant financial hardship, although it never provided DEC with requested documentation of its alleged economic injuries. *See* AR 100 at 2; Sheehan Aff. ¶ 75. To accommodate Indeck and other long-term contract (“LTC”) holders, DEC eventually agreed to set aside up to 1.5 million free allowances for generators that are subject to non-negotiable long-term contracts. *See* 6 NYCRR § 242-5.3(d); *see also* AR 61 at 50-52.

D. How New York’s CO₂ Budget Trading Program Works

New York’s CO₂ Budget Trading Program incorporates the basic design of the “model rules.” DEC’s rules establish an annual “base budget” of emissions from all power plants in New York with a 25-megawatt or greater capacity. *See* AR 1 at 1-2, 6 NYCRR §§ 242-1.4(a), 242-5.1. Between 2009 and 2014, CO₂ emissions are capped at approximately 64 million tons per year, and by the end of 2017, the cap is reduced to approximately 58 million tons or 10 percent below the 2009 cap for all succeeding years. *See* 6 NYCRR § 242-5.1.

For each ton of CO₂ in the base budget, DEC creates an emissions allowance. *See* AR 1 at 1-2, 6 NYCRR § 242-1.2(17). DEC deposits nearly all of the allowances into an “energy efficiency and clean technology” account operated by NYSERDA, and NYSERDA arranges for

the sale of the allowances at multi-state auctions. *See* AR 1 at 2, 6 NYCRR § 242-5.3; 21 NYCRR § 507.3. NYSERDA is then required to use the auction proceeds “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.” 21 NYCRR § 507.4(d).

Most of the remaining allowances that are not deposited into the Energy Efficiency and Energy Conservation account are set aside for allocation to long-term contract generators that will suffer financial hardship if they are obliged to purchase allowances. *See* 6 NYCRR § 242-5.3(d); AR 10 at 45.

In order to comply with the program, each regulated power plant must obtain an operating permit modification to incorporate the requirements of the budget trading program.⁴ *See* 6 NYCRR § 242-3.1(b). Specifically, generators must monitor and report CO₂ emissions, set up a “compliance account,” and hold enough allowances in the account to cover all of their reported emissions over a three-year compliance period. *See* AR 1 at 1-2, 6 NYCRR § 242-1.5. Generators can purchase allowances from any RGGI state at auction or from third parties on the secondary market. *See* AR 23 at 11. Generators also may rely on “offset allowances” to cover some portion of their CO₂ emissions. 6 NYCRR § 242-1.5(c)(5); *see also* 6 NYCRR § 242-10 (providing for the issuance of “offset allowances” to sponsors of projects that reduce or avoid loading of CO₂ into the atmosphere). Finally, generators may reduce the need for allowances in the first instance by making heat-rate improvements at their plants or by switching to less carbon-intensive fuels (*e.g.*, replacing oil with natural gas).

⁴ Under DEC’s air permitting program, operating permits are issued to emitting sources pursuant to 6 NYCRR Parts 201 and 621.

E. Implementation of the CO₂ Budget Trading Program To Date

New York has participated in two auctions since the CO₂ Budget Trading Program was established in October 2008. *See* Affidavit of John G. Williams ¶ 28 (filed by government respondents on May 15, 2009). In the December 2008 and March 2009 auctions, New York sold a total of 25.4 million allowances for approximately \$88 million. *See id.*

While this money should be invested in energy efficiency and clean energy programs, NYSERDA is delaying disbursement of the auction proceeds pending the outcome of this lawsuit. *See* Memorandum from the President and Chief Executive Officer to the Members of the Board 4 (Apr. 16, 2009) (attached as Exhibit 1) (stating the position that NYSERDA “has a solid legal basis to begin spending” but adopting “a conservative approach to delay most spending until the Authority has more information on the litigation”).

ARGUMENT

Indeck advances numerous claims challenging New York’s CO₂ Budget Trading Program and associated auction rules, but none of them has merit. Amici incorporate by reference the State’s arguments in defense of the rules. In addition, Amici respectfully present this Court with additional argument regarding the claims to which Indeck devotes most attention, specifically its claims that (1) DEC and NYSERDA lack statutory authority to implement the CO₂ Budget Trading Program; (2) the program imposes an unlawful tax, or alternatively an impermissible license fee; and (3) the rules violate the Compact Clause of the U.S. Constitution.

I. DEC AND NYSERDA HAVE AUTHORITY TO IMPLEMENT NEW YORK’S CO₂ BUDGET TRADING PROGRAM

DEC and NYSERDA have properly exercised their respective powers to regulate harmful air emissions and to promote energy efficiency and conservation. Indeck argues that “[i]n implementing RGGI, DEC and NYSERDA have acted in an *ultra vires* manner because the

agencies have not been granted such authority by the Legislature.” Petitioner/Plaintiff’s Memorandum of Law (“Indeck Br.”) at 27. However, DEC’s enabling legislation gives it wide-ranging authority to control pollution and its adverse impacts using “all available” means. N.Y. Env’tl. Conserv. Law (“ECL”) § 19-0103; *see also id.* §§ 1-0101, 3-0301(1)(i). Thus, DEC has more than sufficient authority to establish a cap-and-trade program for CO₂, to allocate CO₂ allowances to the Energy Efficiency and Clean Energy Account administered by NYSERDA, and to provide for the sale of these allowances at auction. For its part, NYSERDA is expressly empowered to accept and dispose of assets at auction and to disburse the proceeds in service of renewable energy and energy efficiency and conservation programs. N.Y. Pub. Auth. Law (“PAL”) § 9-1855(5). Thus, contrary to Indeck’s arguments, DEC and NYSERDA are acting well within the bounds of their legislatively delegated authorities in implementing RGGI’s creative approach to reducing greenhouse gas emissions.

A. DEC Has Ample Authority To Regulate CO₂ Under Cap-and-Trade Rules

DEC’s broad grant of authority to abate air pollution and protect the environment encompasses the authority to regulate CO₂ emissions under the budget trading program. In establishing the DEC as “the keystone” of the state’s “crusade for a quality environment,” the Legislature armed DEC with the necessary tools not only to “clean up air, water, and land pollution in New York State” but also to “identif[y] the new problems, tak[e] prompt steps to avert future crises and mediat[e] the requirements for a livable environment with the needs for economic growth and human progress.” Public Papers of Nelson C. Rockefeller, Governor’s Bill Jacket to 1970 N.Y. Laws 140 at 231 (attached as Exhibit 2). As the Court of Appeals has affirmed, the Legislature “confer[red] broad powers upon the agency to fulfill the policy goals embodied” in the Environmental Conservation Law (“ECL”). *Matter of Consolidated Edison*

Co. of New York v. Dep't of Env't'l Conserv., 71 N.Y.2d 186, 191, 519 N.E.2d 320, 322, 524 N.Y.S.2d 409, 411 (N.Y. 1988).

The ECL's stated policy goal is "to conserve, improve and protect [New York's] natural resources and environment and to prevent, abate 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(1); *Consolidated Edison Co.*, 71 N.Y.2d at 192, 519 N.E.2d at 322, 524 N.Y.S.2d at 412 (quoting same). In addition, the Legislature provided that "[i]t shall further be the policy of the state to improve and coordinate the environmental plans, functions, powers and programs of the state, in cooperation with ... regions, ... and to develop and manage the basic resources of water, land, and air to the end that the state may fulfill its responsibility as trustee of the environment for the present and future generations." ECL § 1-010(2). This mandate for environmental stewardship includes a commitment to ensure that "care is taken for the air, water and other resources that are shared with other states of the United States and with Canada in the manner of a good neighbor." *Id.* § 1-0101(3)(e). Thus, the ECL expressly contemplates regionally-focused regulation by DEC to address the full scope of emerging environmental issues.

DEC's statutory mandate is especially robust with respect to "air pollution," which the Legislature defined expansively to mean "the presence in the outdoor atmosphere of one or more air contaminants in quantities, of characteristics and of a duration which are injurious to human, plant or animal life or to property or which unreasonably interfere with the comfortable enjoyment of life and property throughout the state or throughout such areas of the state as shall

be affected thereby.” ECL § 19-0107(3).⁵ The ECL’s declared policy is “to require the use of *all* available practical and reasonable methods to prevent and control air pollution in the state of New York” in order to protect “public health and welfare,” “flora and fauna,” the state’s capacity for “industrial development,” and “physical property and other resources.” ECL § 19-0103 (emphasis added); *see also id.* § 3-0301(1)(i) (giving DEC the authority to “[p]rovide for prevention and abatement of all water, land and air pollution including, but not limited to, that related to hazardous substances, particulates, gases, dust, vapors, noise, radiation, odor, nutrients and heated liquids”). To this end, DEC is empowered to “[f]ormulate, adopt and promulgate, amend and repeal codes and rules and regulations for preventing, controlling or prohibiting air pollution in such areas of the state as shall or may be affected by air pollution.” ECL § 19-0103(1)(a). In addition, DEC can “[e]nter into contracts with any person to do *all things necessary or convenient* to carry out the functions, powers and duties of the department.” ECL § 3-0301(2)(b) (emphasis added).

In keeping with these general powers, DEC has the express authority to regulate “the extent to which air contaminants” including CO₂ “may be emitted to the air by any air contamination source.” *Id.* §19-0301(1)(b)(2); ECL § 19-0107(2), (3) (defining “air contaminant” and “air pollution” broadly). Further, DEC has an affirmative duty to “[p]repare and develop a general comprehensive plan for the control or abatement of existing air pollution and for the control or prevention of any new air pollution.” *Id.* § 19-0301(2)(a).

While these broad powers necessarily encompass the power to limit emissions of CO₂, Indeck nevertheless insists that the DEC’s RGGI regulations are *ultra vires* because the Legislature has not provided a specific authorization to institute a cap-and-trade “regulatory

⁵ “Air contaminant” means “a dust, fume, gas, mist, odor, smoke, vapor, pollen, noise or any combination thereof.” ECL § 19-0107(2).

scheme” and “the existing authority in this area suggests strongly that such a grant of authority cannot be implied.” Indeck Br. at 17; *see also id.* at 18, 27. Indeck offers no support for this assertion, and “existing authority” is to the contrary.

As the courts have made clear, “it is not always necessary that the Legislature provide precise guidelines to an agency charged with carrying out the policies embodied in a legislative delegation of power.” *Consolidated Edison*, 71 N.Y.2d at 191, 519 N.E.2d at 322, 524 N.Y.S.2d at 411. “In certain technical areas, where flexibility is required to enable an administrative agency to adapt to changing conditions, 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.” *Id.*; *see also Nicholas v. Kahn*, 47 N.Y.2d 24, 31, 389 N.E.2d 1086, 1090, 416 N.Y.S.2d 565, 569 (N.Y. 1979) (“The difficulty and complexity of most of these policy determinations mandates that the legislative body be permitted to provide for the implementation of basic policy through the use of specialized agencies.”); *Broidrick v. Lindsay*, 39 N.Y.2d 641, 646, 350 N.E.2d 595, 597, 385 N.Y.S.2d 265, 267 (N.Y. 1976) (“Although not often given explicit recognition, the degree of flexibility [enjoyed by the agency] varies according to the nature of the problem sought to be remedied by the legislation. Where it is impracticable for the legislative body to fix specific standards for enforcement without destroying the flexibility necessary to meet the variety of circumstances likely to be encountered in carrying out the legislative will, broad flexibility in determining the proper methods of enforcement will be sustained.”) (internal citations omitted). Here, the Legislature established the guiding policy goal to abate air pollution in order to preserve a healthy environment. With the challenged rules, DEC has filled in the “regulatory details” to

vindicate that fundamental goal in the face of rapidly escalating threats posed by climate change. *Consolidated Edison*, 71 N.Y.2d at 191, 519 N.E.2d at 322, 524 N.Y.S.2d at 411.

Indeck insists that “it would be unprecedented” to read “the generic grant of rulemaking authority in § 19-0301 as permitting the establishment of a cap and trade program.” Indeck Br. at 18. However, it is well-settled that the agency’s “broad enabling legislation” is “sufficient to permit DEC to adopt” cutting-edge regulations without an express authorization from the Legislature. *Motor Vehicle Manufacturers Association of the United States v. Jorling*, 181 A.D.2d 83, 87, 585 N.Y.S.2d 596, 599 (3d Dep’t 1992) (upholding DEC’s authority to adopt California’s stringent emissions standards “in the absence of specific legislative findings authorizing [their] adoption” even though other states had obtained legislative authorization to adopt the same standards); *Motor Vehicle Manufacturers Association v. Jorling*, 152 Misc.2d 405, 407, 577 N.Y.S.2d 346, 348 (N.Y. Sup. Ct., Albany Cty. 1991) (same); *Consolidated Edison*, 71 N.Y. 2d at 192-196, 519 N.E.2d at 322-25, 524 N.Y.S.2d at 412-14 (upholding DEC’s petroleum bulk storage rules for major facilities as a valid exercise of its ECL authorities to regulate liquids and abate water pollution); *Chemical Specialties Mfrs. Ass’n v. Jorling*, 85 N.Y.2d 382, 389, 394, 649 N.E.2d 1145, 1148-49, 1151-52, 626 N.Y.S. 2d 1, 4-5, 7-8 (N.Y. 1995) (upholding DEC’s rules banning the use, sale, and distribution of products containing pesticides based on the ECL’s “broad legislative delegations to the Commissioner to act against dangerous pesticides”); *see also Rent Stabilization Ass’n of N.Y. City v. Higgins*, 83 N.Y.2d 156, 168-170, 630 N.E.2d 626, 630-32, 608 N.Y.S.2d 930, 934-36 (N.Y. 1993) (holding that the general authority to promulgate “necessary or proper” regulations “to effectuate the purposes of rent control,” “appropriate rent stabilization,” and “protect[ing] tenants and the public interest” empowered the Division of Housing and Community Renewal (“DHCR”) to make rules that

“chang[ed] the legal relationship between landlords and tenants” and substantially enlarged the class of people entitled to succeed to rent-regulated apartments) (internal quotations, citations, and alterations omitted).⁶

Under this governing case law, DEC has the requisite flexibility to regulate CO₂ pollution using the most practical tools available — including cap-and-trade and allowance auction mechanisms — so long as it does not cross the “line between administrative rule-making and legislative policy-making.” *Boreali v. Axelrod*, 71 N.Y.2d 1, 11, 517 N.E.2d 1350, 1355, 523 N.Y.S.2d 464, 469 (N.Y. 1987). With respect to the CO₂ Budget Trading Program, it is clear that DEC has not crossed the line established in *Boreali*. There, “a number of coalescing circumstances” persuaded the court that the Public Health Council (“PHC”), in instituting an indoor smoking ban, had “improperly assumed for itself the open-ended discretion to choose ends, which characterizes the elected legislature’s role in our system of government.” *Id.* However, in a series of subsequent cases, New York courts including the Court of Appeals have applied the *Boreali* factors to uphold agency rules with major policy implications. *See Consolidated Edison*, 71 N.Y. 2d at 192-196, 519 N.E.2d at 322-25, 524 N.Y.S.2d at 412-14 (upholding DEC’s petroleum bulk storage rules for major sources even though the Legislature had created an express exemption for major sources in the underlying statute); *Rent Stabilization Assn. of N.Y. City v. Higgins*, 83 N.Y.2d at 168-170, 630 N.E.2d at 630-32, 608 N.Y.S.2d at 934-36 (upholding DHRC rules dramatically expanding the class of tenants entitled to become

⁶Indeck cites two cases to suggest that DEC’s “generalized grant of authority” is only “sufficient to allow DEC to implement rules consistent and in conformity with a *federal* statutory scheme.” Indeck Br. at 17 (emphasis added). For this proposition, Indeck remarkably cites to *Motor Vehicle Mfrs. Ass’n v. Jorling*, 181 A.D.2d at 83, 585 N.Y.S.2d at 596, in which the court upheld DEC regulations that were expressly inconsistent and *not* in conformity with federal standards, and to *Oxygenated Fuels Ass’n v. Pataki*, 293 F. Supp. 2d 170 (N.D.N.Y. 2003), where there was no administrative regulation at issue. As governing New York case law makes clear, DEC does not need a federal mandate to exercise the regulatory authorities granted in the ECL.

successors to rent-controlled apartments); *Motor Veh. Mfrs. Assn. v. Jorling*, 152 Misc.2d at 407, 577 N.Y.S.2d at 347-48 (rejecting *Boreali* argument that “adoption of the California emission standards requirements by the [DEC] constitutes a social policy question of great import and substantial expense which must be addressed by the legislature rather than an administrative agency”).

The challenged cap-and-trade rules are also easily distinguished from the indoor smoking regulations that were struck down in *Boreali*. There, the agency had weighed competing health and public policy concerns in violation of its statutory mandate to consider health concerns exclusively; the Legislature had debated and repeatedly failed to pass indoor smoking bills, making it clear that the agency was setting policy in the Legislature’s stead, and there was nothing about the regulatory scheme that implicated the agency’s special expertise. *See Boreali*, 71 N.Y.2d at 11-13, 517 N.E.2d at 1355-56, 523 N.Y.S.2d at 469-71. While none of these circumstances “standing alone, [was] sufficient to warrant the conclusion that the [agency] had usurped the Legislature’s prerogative,” all of them “viewed in combination” led the Court to conclude that “the difficult to define line between administrative rule-making and legislative policy-making ha[d] been transgressed.” *Id.* at 11, 517 N.E.2d at 1355, 523 N.Y.S.2d at 469.

None of these “coalescing circumstances” is present in this case. First, in adopting a market-based measure to reduce CO₂ emissions as cost-effectively as possible, DEC properly exercised its powers to balance “public health and welfare [and] industrial development.” *Motor Veh. Mfrs. Ass’n v. Jorling*, 152 Misc.2d at 407, 577 N.Y.S.2d at 348 (distinguishing *Boreali* on grounds that the ECL requires DEC to engage in “cost-benefit” analysis); *see also* ECL §§ 1-0101(3), 19-0103. Second, DEC did not operate on “a clean slate” in adopting the CO₂ budget trading rules. Rather, the Legislature set the goal to abate harmful air pollution using “all

available practical and reasonable methods,” and DEC selected an appropriate means of achieving it. ECL § 19-0103. Third, there is no history of legislative debate, much less deadlock, with respect to RGGI, whereas in *Boreali*, “some 40 bills” addressing indoor smoking had been introduced and killed in the Legislature. *Boreali*, 71 N.Y.2d at 7, 517 N.E.2d at 1352, 523 N.Y.S.2d at 466. Thus, DEC has not “acted in an area in which the Legislature ha[s] repeatedly tried and failed to reach agreement in the face of substantial public debate.” *Id.* at 13, 517 N.E.2d at 1356, 523 N.Y.S.2d at 470. Finally, DEC’s “special expertise or technical competence” was essential to setting a statewide cap on CO₂ emissions, targeting priority emitting sources, crafting a system for ensuring emissions reductions, designing an allowance auction process, and integrating all of the elements of this new program into the existing air permitting framework. *Id.* at 14, 517 N.E.2d at 1356, 523 N.Y.S.2d at 471. In sum, all of the *Boreali* factors establish that DEC’s CO₂ Budget Trading Program is the product of valid administrative rule-making, not legislative policy-making.

In arguing that DEC has exceeded the bounds of its authority in adopting the challenged rules, Indeck does not seek to rely on (or even cite to) *Boreali*, the controlling case on point. Rather, Indeck suggests that a cap-and-trade system can only be established through legislation. *See* Indeck Br. at 17. In an effort to bolster this argument, which finds no support in state law, Indeck cites two recent decisions by the D.C. Circuit Court of Appeals for the proposition that “[a]t the federal level, where attempts have been made to establish regulatory cap and trade systems through executive authority, they have been struck down.” *Id.* (citing *North Carolina v. Environmental Protection Agency*, 531 F.3d 896 (D.C. Cir. 2008), *remanded without vacatur after reh’g in part*, 550 F.3d 1176 (D.C.Cir. 2008) (invalidating the Clean Air Interstate Rule (“CAIR”) and *New Jersey v. Environmental Protection Agency*, 517 F.3d 574 (D.C. Cir. 2008)

(invalidating the Clean Air Mercury Rule (“CAMR”), *cert. denied*, 128 S.Ct. 1308 (2009)).

Neither case supports Indeck’s position. The D.C. Circuit did not strike down CAIR and CAMR because they were cap-and-trade rules.⁷ In both cases, the court found that other aspects of the rules were inconsistent with the plain language of the federal Clean Air Act.⁸ *See North Carolina*, 531 F.3d at 929-30; *New Jersey*, 517 F.3d at 582-84. EPA’s “executive authority” to establish a regulatory cap-and-trade system was never questioned; it was assumed. *See North Carolina*, 531 F.3d at 906 (noting that North Carolina “did not submit that any trading is per se unlawful”). Indeed, the D.C. Circuit has previously upheld a cap-and-trade regime established by EPA pursuant to its general grant of statutory authority under the Clean Air Act. *See Michigan v. Environmental Protection Agency*, 213 F.3d. 663, 685-86 (D.C. Cir. 2000) (upholding EPA rule that established a state-by-state “cap” on nitrogen oxide emissions and further gave states the option to adopt a model interstate trading program to meet the federal cap.”).

There is no legitimate basis for challenging DEC’s authority to establish the challenged cap-and-trade scheme to reduce emissions of CO₂. DEC’s CO₂ budget trading program is

⁷ Ultimately, CAIR was not “struck down” in its entirety at all. Upon rehearing following the rule’s initial vacatur, the D.C. Circuit recognized the need to preserve the environmental gains afforded by CAIR and therefore issued a new order requiring EPA to “correct CAIR’s flaws” but allowing CAIR “to remain in effect until it is replaced by a rule consistent with [the court’s] opinion.” *North Carolina v. Environmental Protection Agency*, 550 F.3d at 1178.

⁸ In the *New Jersey* case, the cap-and-trade program was rejected because it purported to regulate emissions of mercury from power plants. Unlike CO₂, mercury is a listed “hazardous air pollutant,” and the exclusive vehicle for regulating hazardous air pollutants is Section 112 of the Clean Air Act, which does not allow for emissions trading. *See New Jersey*, 517 F.3d at 582-584. Thus, the court did not hold that EPA lacks authority to implement cap-and-trade programs generally. It held only that EPA violated the Clean Air Act in seeking to implement a cap-and-trade program for a hazardous air pollutant.

entirely consistent with the ECL's mandate to abate air pollution and help prevent the catastrophic harms that global warming threatens in New York.

B. NYSERDA Has The Authority To Accept and Auction Allowances and Use the Proceeds to Fund Clean Energy and Energy Efficiency Programs

NYSERDA properly exercised its statutory authorities in promulgating the CO₂ Allowance Auction Rules. Indeck argues that NYSERDA does not have “enumerated powers” to dispose of allowances at auction and distribute the proceeds “at its unfettered whim.” Indeck Br. at 19, 23. However, the Legislature has expressly authorized NYSERDA to accept and dispose of assets from other agencies and to use the proceeds to fund energy efficiency and clean energy projects that are at the very core of its mission.

NYSERDA's overarching mandate is “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 § 9-1854. To this end, NYSERDA is empowered to “conduct, sponsor, assist and foster programs of research, development and demonstration in new energy technologies.” *Id.* § 9-1854(1) (setting forth NYSERDA's “specific authorities”). These programs may be directed at achieving a wide variety of purposes “including but not limited to:

- (a) energy conservation,
- (b) production of power from new sources with emphasis on renewable energy sources such as solar, wind, bioconversion and solid waste,
- (c) storage of energy with emphasis on inertial and battery storage,
- (d) conversion and/or technological improvement of facilities now utilizing nuclear fission energy and fossil fuel energy technologies,
- (e) transmission and distribution of power, and

(f) conversion of energy and improvements of efficiencies of such conversion, including the power after assessing and taking into account environmental considerations thereof, to establish, acquire, operate, develop and manage facilities therefor.”

Id. § 1854(1). Thus, the “specific authorities” granted to NYSERDA in its enabling legislation give it broad discretion to invest in any and all programs that promote sustainable energy policy.

Id.

Further, its “general powers of the authority” give NYSERDA great flexibility in the administration and implementation of its chosen programs. NYSERDA can “make rules and regulations governing the exercise of its corporate powers and the fulfillment of its corporate purposes.” *Id.* § 9-1855(4). It can “enter into any contracts” and “execute all instruments necessary or convenient for the exercise of its corporate powers and the fulfillment of its corporate purposes.” *Id.* § 9-1855(10). It can “accept *any* gifts or grants or loans of funds or property or financial or other aid *in any form* from the federal government or any agency or instrumentality thereof or 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.* § 9-1855(14) (emphasis added). It is also authorized to “purchase receive, lease or otherwise acquire, to hold in the name of the state or otherwise, and to sell, convey, mortgage, lease, pledge, or *otherwise dispose of*, upon such terms as the authority may deem advisable, real and personal property.” *Id.* § 9-1855(5) (emphasis added); *see also* N.Y. Gen. Constr. Law. (“GCL”) § 39 (defining “personal property” to mean “everything except real property, which may be the subject of ownership”). Moreover, it can “do all things necessary or convenient to carry out its corporate purposes and exercise the powers given and granted by this title.” *Id.* § 9-1855(17).

These exceedingly broad powers are more than sufficient to permit NYSERDA to accept the deposit of allowances into its energy efficiency and clean energy account, *see id.* § 9-1855(5), (14) (allowing for the acquisition and receipt of assets or aid of any kind from another agency); to arrange for the sale of these allowances at auction, *see id.* § 9-1855(5) (authorizing the disposition of personal property, which includes under GCL § 39 anything “subject to ownership” that can be bought and sold),⁹ and to distribute the proceeds “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.” 21 NYCRR § 507.4(d) (limiting NYSERDA’s discretion to distribute auction proceeds); *see also* PAL § 1854(1) (setting forth NYSERDA’s authority to fund innovative energy programs); *id.* §§ 1855(4), (17) (authorizing NYSERDA to make rules and undertake any action “necessary or convenient” to further its corporate purposes).¹⁰

Notwithstanding the broad grant of authority in NYSERDA’s enabling legislation, Indeck asserts that the CO₂ Allowance Auction Rules are *ultra vires* because NYSERDA “was created by the New York Legislature with ‘specific powers.’” Indeck Br. at 28. According to Indeck, “[s]pecific powers granted to a public corporation should be strictly construed and powers not

⁹ Allowances are considered assets under the U.S. Tax code. *See* Rev. Proc. 92-91, 1992-2 C.B. 503, 1992 IRB LEXIS 584 (treating federal emission allowances as capital assets).

¹⁰ As set forth *supra*, DEC has the requisite authority to establish a cap-and-trade program and to allocate allowances to the Energy Efficiency and Clean Energy Account for administration by NYSERDA. Just as the agency can allocate allowances directly to generators including Indeck, it can allocate allowances to an account administered by a public benefit corporation that was established precisely to fund energy efficiency and clean energy programs. *See* ECL § 3-0301(2)(b) (authorizing DEC to “[e]nter into contracts with any person to do all things necessary or convenient to carry out the functions, powers and duties of the department”).

stated in the statute should not be implied.” Indeck Br. at 28. This argument is wrong both as a matter of fact and law.

First, Indeck misstates the nature of NYSERDA’s authorities: the legislature gave NYSERDA both specific and general powers. *See* PAL §§ 9-1854 (“Purposes and specific powers of authority”), 9-1855 (“General powers of the authority”). Second, Indeck misstates the law applicable to public benefit corporations.¹¹ As the courts have made clear, a public benefit corporation such as NYSERDA is “created to accomplish a specific purpose or mission and is endowed with the freedom and flexibility necessary to achieve that mission.” *Mason v. Clifton Park Water Authority*, 302 A.D.2d 818, 818-19, 755 N.Y.S.2d 515, 517 (3d Dep’t 2003) (quoting *Levy v. City Commn. on Human Rights*, 85 N.Y.2d 740, 745, 651 N.E.2d 1264, 1267, 628 N.Y.S.2d 245, 248 (N.Y. 1995)). Thus, “[a] public benefit corporation is authorized to act in accordance with the powers enumerated in *and necessarily implicated* by its enabling statutes.” *Mason*, 302 A.D.2d at 819, 755 N.Y.S.2d at 517 (emphasis added) (recognizing Water Authority’s implicit leasing authority based on its “many enumerated powers including, among others, acquiring property, managing the property, improving its property, entering contracts and managing its financial affairs”); *see also Citizens for an Orderly Energy Policy v. Cuomo*, 78 N.Y.2d 398, 412, 582 N.E.2d 568, 574, 576 N.Y.S.2d at 185, 191 (N.Y. 1991) (rejecting “negative inference” that Long Island Power Authority (“LIPA”) lacked authority to enter into a settlement agreement to acquire and decommission Shoreham nuclear plant without acquiring all assets of the private power company); *R.A. Bronson, Inc. v. Franklin Correctional Facility*, 255

¹¹ In citing to *Koch v. Dyson*, 85 A.D.2d 346, 374, 448 N.Y.S.2d 698, 715 (2d Dep’t 1982), Indeck fails to disclose that it is relying on language that does not appear in the majority opinion of the court. *See id.* (Titone, J. concurring in part and dissenting in part). This separate opinion does not reflect governing law in New York. *See id.* (citing to 81A C.J.S., States § 142 rather than New York case law).

A.D.2d 723, 724-25, 680 N.Y.S.2d 270, 276 (3d Dep't 1998) (recognizing waste management authority's implicit authority to enter into contracts for waste collection services); *Apollon v. Giuliani*, 168 Misc.2d 363, 372-73, 637 N.Y.S.2d 270, 276 (N.Y. Sup. Ct., N.Y. Cty. 1995) (affirming City University of New York Construction Fund's authority to use investment earnings to reduce the City's debt-service obligation on grounds that public benefit corporations "have great flexibility in their methods of operation").

Where, as here, the Legislature has given a public benefit corporation the authority to "do all things necessary or convenient to carry out its corporate purposes and exercise [its] powers," the Court of Appeals has emphasized that "one would be hard pressed to find language more clearly conveying legislative intent to give the implementing agency the broadest flexibility in administering the statute." *Citizens for an Orderly Energy Policy*, 78 N.Y.2d at 409, 582 N.E.2d at 571, 576 N.Y.S.2d at 188 (internal quotations and alterations omitted); *see also id.* at 410, 582 N.E.2d at 572, 576 N.Y.S.2d at 189 (explaining that the Legislature was not required to supply LIPA with "rigid marching orders, especially in a field as complex as nuclear power regulation, which is 'simply incapable of statutory completion' and 'where flexibility in the adaptation of the legislative policy to infinitely variable conditions constitute[s] the very essence [of the Act]'" (quoting *Matter of Nicholas v. Kahn*, 47 N.Y.2d at 31, 389 N.E.2d at 1090, 416 N.Y.S.2d at 569)). Because NYSERDA, like LIPA, enjoys "all of the powers necessary or convenient to implement its multipronged, complicated purposes," it does not require express authorization to play its assigned role in the RGGI program. *Id.* at 412, 582 N.E.2d at 573, 576 N.Y.S.2d at 190 (internal quotations omitted).

Nor is it the case that "NYSERDA is asking this Court to interpret a limited grant of power from the Legislature in a breathtaking and unprecedented fashion." *Indeck Br.* at 19.

NYSERDA has long served as a clearinghouse for funds raised in connection with regulatory programs administered by other agencies. Indeed, NYSERDA is primarily funded through Systems Benefit Charges (“SBC”) that the Public Service Commission (“PSC”) assesses and deposits with NYSERDA. *See* NYSERDA, *About NYSERDA*, <http://www.nyserdera.org/About/default.asp> (last visited on May 18, 2009). NYSERDA has no express legislative authorization to receive over \$175 million in SBC funds each year from the PSC or to serve as the “SBC fund administrator,” distributing these funds to energy efficiency programs and services, energy-related “public benefit” programs, and environmental programs. Public Service Commission, Opinion No. 98-3 at 4, Case 94-E-0952 (Jan. 30, 1998).¹² Yet for over two decades, NYSERDA has served these functions, and its authority to administer the SBC fund has not been questioned.

Similarly, under New York’s CAIR program, DEC’s budget trading rules direct the agency to deposit Nitrogen oxides (“NOx”) and Ozone Seasonal emissions allowances into a NYSERDA “Energy efficiency and renewable energy technology account,” and NYSERDA is then permitted to sell or distribute the allowances. *See* 6 NYCRR §§ 243-5.3(g), 244-5.3(d)(3). Thus, contrary to Indeck’s arguments, there is a direct “regulatory precedent” for NYSERDA’s new CO₂ auction allowance rules.

In short, Indeck fails to present any credible reason why NYSERDA is not empowered to assist in the implementation of DEC’s CO₂ Budget Trading Program by administering an account for allowances, arranging for auctions, and distributing the proceeds to programs that further both its corporate purposes to promote clean energy and energy efficiency and DEC’s fundamental purpose to reduce greenhouse gas emissions.

¹² Opinion No. 98-3 is online at <http://www.dps.state.us/index.html>.

II. THE CO₂ BUDGET TRADING AND AUCTION RULES DO NOT IMPOSE AN IMPERMISSIBLE TAX OR LICENSE FEE

While the budget trading and auction rules are well within the scope of authorities granted to DEC and NYSERDA, Indeck contends that they are nevertheless *ultra vires*. According to Indeck, the auctioning of CO₂ allowances imposes an unconstitutional tax or, in the alternative, an impermissible licensing fee on regulated energy producers. *See* Indeck Br. at 30-35. Neither contention is correct. The purchase price paid for a CO₂ allowance is not a tax or a licensing fee but rather a cost of compliance with a legitimate regulatory program. Regulation routinely imposes new costs on industry, and so do the challenged rules. While Indeck would prefer not to pay these costs, they are not unlawful. In providing for the sale of allowances at auction, DEC properly exercised its delegated police powers to create a price signal that furthers RGGI's legitimate purpose to reduce CO₂ emissions.

Fundamentally, the argument that the cost of an allowance is either a tax or a fee ignores the reality of how the CO₂ Budget Trading Program works. Generators in New York can comply with the program without purchasing a single allowance issued by New York — *i.e.* generators can obtain allowances that have been issued by other states at auction or from third parties on the secondary market. Thus, it is entirely possible that a regulated party could comply with the program without making any payment to New York State. This fact alone demonstrates that the purchase price of an allowance is not a tax or fee. Further, it cannot be said that third parties who choose to buy allowances at auctions are paying a tax or a fee. Rather, they are making an investment. Finally, Indeck ignores the fact that DEC is not setting the price of allowances. The price of an allowance essentially derives from the interplay between the CO₂ cap, the availability of offsets, and market forces. A market-driven purchase price is not a tax or a fee.

A. The Budget Trading and Auction Rules Do Not Impose A Tax

In putting a price on carbon emissions, the budget trading and auction rules do not impose a tax. As the Court of Appeals recognized more than a century ago, the government can deliberately increase the cost of carrying on a business without imposing a tax. *See People ex rel. Einsfeld v. Murray*, 149 N.Y. 367, 44 N.E. 146 (N.Y. 1896) (rejecting liquor distributors’ challenge to the imposition of an excise tax that was not authorized by the legislature in accordance with Constitutional requirements). So long as a measure is intended to regulate rather than raise revenues, it qualifies as an exercise of the police power rather than a tax. Thus, in *Einsfeld*, the Court found that the challenged “excise tax” on liquor was not a tax despite its denomination as such. *See id.* at 377-78, 44 N.E. at 149. While there was “no doubt that a large revenue [would] result” and that “this was contemplated,” the court found that this was “a consequence of the system, and was not the motive of its adoption.” *Id.* at 378, 44 N.E. at 149. As the Court explained, “[a]n exaction imposed as a condition of the right to carry on a business dangerous to public morals or which may involve public burdens, by way of discouragement or regulation, is not in any proper sense a tax.” *Id.* Crucially, “[t]he imposition is made in such cases generally for a double purpose, to discourage the business and to secure indemnity in part to the public from the losses and burdens which the business is likely to entail.” *Id.* Thus, “the so-called excise tax is for the protection of the community and not for the protection of the person from whom it is exacted.” *Id.*

Einsfeld recognized a fundamental distinction between revenue-generating measures that are intended to benefit taxpayers generally — *i.e.* taxes — and revenue-generating measures that are intended to discourage harmful activities and defray their societal costs — *i.e.* police power regulations. *See id.* Based on this distinction, New York courts look to the purpose of a given

regulation to determine whether it imposes a tax. If its “purpose” is “raising revenue for a general governmental purpose,” it imposes a tax. *Radio Common Carriers of N.Y. v. State of New York*, 158 Misc.2d 695, 698, 601 N.Y.S.2d 513, 515 (N.Y. Sup. Ct., New York Cty. 1993); *see also Health Servs. Med. Corp. of Cent. N.Y. v. Chassin*, 175 Misc.2d 621, 668 N.Y.S.2d 1006, 1009-10 (N.Y. Sup. Ct., Onandaga Cty. 1998) (defining taxes as “charges exacted for revenue purposes or to offset the cost of general governmental functions”); *American Sugar Ref. Co. of N.Y. v. Waterfront Commn. of N.Y. Harbor*, 55 N.Y. 2d 11, 27, 432 N.E.2d 572, 585, 447 N.Y.S.2d 685, 692 (N.Y. 1982) (holding that “the primary purpose of a tax is to raise money for support of the government generally”); *Joslin v. Regan*, 63 A.D.2d 466, 470, 406 N.Y.S.2d 938, 941 (4th Dep’t 1978) (explaining that taxes are typically “payable into the general fund of the government to defray customary governmental expenditures”) (internal quotations and citations omitted).

The budget trading and auction rules do not impose a tax, because they do not generate revenues to support general governmental functions. Their “primary purpose . . . is to discourage the emissions of CO₂.” AR 1 at 9. In service of this purpose, they are “designed to stabilize and then reduce anthropogenic emissions of carbon dioxide . . . in an economically efficient manner.” *Id.* at 1; *see also* 6 NYCRR § 242-1.1. The auction process that Indeck challenges is a key element of this regulatory design. As DEC explained during the rule-making process, “[t]he sale and auction of allowances will help create CO₂ allowance price signals at a level sufficient to cause investment in technologies and strategies that would reduce or avoid emissions of CO₂.” AR 1 at 9. In other words, by putting a market price on carbon emissions, the auction process creates an incentive for electric generators to emit less CO₂ and for consumers to use less electricity and less carbon-intensive electricity in particular. Thus, “for the benefit of the

community,” auctioning “discourages” the emission of CO₂ by the sources that contribute most to global warming. *Einsfeld*, 149 N.Y. at 378, 44 N.E. at 149. At the same time, auctioning generates funds to promote energy efficiency and clean energy and thereby “secures indemnity in part to the public from the losses and burdens” associated with conventional, carbon-intensive power generation. *Id.* This “double purpose” — (1) to reduce harmful CO₂ emissions that are driving global warming and (2) to invest in a remedial effort to promote energy efficiency and clean energy development — is the hallmark of police powers regulation as opposed to taxation. *Id.*

The nature of the cost charged for CO₂ allowances further confirms that the RGGI program is not a tax scheme. “A tax is a forced charge levied by the State upon persons or property.” *Central Sav. Bank v. City of New York*, 279 N.Y. 266, 280, 18 N.E.2d 151, 156 (N.Y. 1938). As such, “[i]t operates in invitum and is in no way dependent upon the will or contract, express or implied, of the persons taxed.” *Id.* In contrast, the purchase of CO₂ allowances at auction is not compulsory for generators, much less for “brokers,” “environmental groups,” “financial and investment institutions,” and “other market participants,” that are allowed to place bids. 21 NYCRR § 507.8(b). To be clear, generators including Indeck are not *required* to purchase allowances at auction in order to comply with the rules. They can purchase allowances from regulated entities and third parties on the secondary market, and they can purchase a limited number of carbon offsets. *See* AR 23 at 11. Moreover, generators can reduce the need for allowances in the first instance by reducing CO₂ emissions — for example by switching fuels or undertaking efforts to operate more efficiently. Thus, the costs incurred to comply with the challenged rules are not “forced charges” that are “in no way dependent upon the will or contract” of regulated generators such as Indeck. *Central Sav. Bank*, 279 N.Y. at 280, 18

N.E.2d. at 156. Indeed, for unregulated market participants, the costs of allowances are entirely voluntary. For this reason too, the challenged rules do not impose a tax.

B. The CO₂ Budget Trading and Auction Rules Do Not Exact Impermissible License Fees

The budget trading and auction rules do not exact impermissible license fees. Indeck wrongly contends that the cost of a CO₂ allowance must be a license fee if it is not a tax. *See* Indeck. Br. at 30-31. According to Indeck, an “allowance is necessarily a license” because it is “part of any agency permit” and is itself a free-standing “minor permit.” *Id.* at 29-30 (failing to explain how an allowance could be both part of Title V operating permit and a “minor permit” under the ECL). Thus, Indeck argues that the cost of an allowance is inherently a license fee that exceeds the authority of DEC and NYSERDA to impose. *See id.* at 30-31.

This argument fails at the outset because a CO₂ allowance is not a license. An allowance does not entitle its holder to emit CO₂. An environmental group that purchases allowances is not licensed to emit CO₂, and the same is true of generators — *i.e.* the mere purchase of allowances does not license any given power plant to emit CO₂. Crucially, the requisite license to emit is the operating permit for the regulated CO₂ source.

Under the challenged rules, “[e]ach CO₂ budget source is required to modify its permit. . . to include all applicable requirements of the CO₂ Budget Trading Program.” 6 NYCRR § 242-1.5(a)(1). Thus, amended permits must include a condition that “the owners and operators . . . shall hold CO₂ allowances . . . in the source’s compliance account in an amount not less than the total CO₂ emissions for the control period from all CO₂ budget units at the source.” *Id.* § 242-1.5(c)(1). The allowances themselves are not part of the operating permit or any other “agency approval.” *Cf.* N.Y. A.P.A. Law § 102(4) (setting forth the State Administrative Procedure Act (“SAPA”) definition of license as “the whole or part of any agency permit, certificate, approval,

registration, charter, or similar permission required by law”); *see also* Indeck Br. at 29 (quoting same). On the contrary, owners and operators hold allowances in a “compliance account” in order to establish compliance with the terms of its permit. 6 NYCRR § 242-1.5(c)(1). Thus, a permitted plant that fails to obtain the requisite number of allowances is not lacking a necessary permit condition or agency approval; it is out of compliance with its permit. *See id.* § 242-1.5(d)(2) (providing for fines and penalties in the event that a CO₂ sources fails to hold a sufficient number of allowances in its compliance account). In this way, allowances are analogous to control technology that must be installed to ensure compliance with permitted emissions limits for conventional air pollutants. Just as the cost of pollution controls is a compliance cost, the market-driven cost of holding allowances is a compliance cost and not a license fee.

Indeck’s argument to the contrary cannot be squared with governing case law. It is well-settled that license fees are “a visitation of the costs of special services upon the one who derives a benefit from them” imposed “to defray or help defray the cost of particular services.” *Joslin v. Regan*, 63 A.D.2d. at 470, 406 N.Y.S.2d at 941 (internal quotations and citations omitted). Thus, a license fee “must be such a fee as will legitimately assist in regulation of the business or occupation, and it should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers.” *Mobil Oil Corp. v. Town of Huntington*, 85 Misc.2d 800, 806, 380 N.Y.S.2d 466, 474 (N.Y. Sup. Ct., Suffolk Cty. 1975); *see also Health Servs. Med. Corp.*, 175 Misc.2d 621, 688 N.Y.S.2d at 1010 (stating that license fees must be “reasonably necessary to cover the costs of issuance, inspection, and enforcement”).

The legitimate costs imposed by the budget trading and auction rules are entirely distinct from such license fees, which are levied to run a licensing or permitting program that ultimately

serves the regulated industry. *Cf.* ECL § 72-0302 (establishing fees to cover the costs of the air permitting program). The purchase price of an allowance is not intended to cover the costs of regulating the power industry but rather to affect the behavior of both generators and consumers — and to reduce emissions of CO₂ as a result. Because the costs imposed by the budget trading and auction rules are “for the protection of the community” not for the benefit of the power industry, they are not license fees. *Einsfeld*, 149 N.Y. at 378, 44 N.E. at 149.

C. The Budget Trading and Auction Rules Are A Valid Exercise of DEC’s Police Powers

It is both impossible and unnecessary to classify the purchase price of a CO₂ allowance as either a tax or a licensing fee. Like the “excise tax” in *Einsfeld*, the budget trading and auction rules impose a regulatory cost that is designed to curtail the generation and consumption of carbon-intensive electricity. As such, the rules are a valid exercise of DEC’s delegated police powers.

Nevertheless, Indeck insists that that the cost of allowances must be either an unconstitutional tax or a fee that impermissibly generates more proceeds than are needed to “cover the cost” of regulating the electric power industry. Indeck Br. at 33. This argument is premised on a false dichotomy, and Indeck resorts to an extremely misleading citation to *Mobil Oil Corp.* in order to support it. *See* Indeck Br. at 32 (citing 85 Misc.2d at 806, 380 N.Y.S.2d at 474). Indeck cites the first half of the court’s holding: “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 the label.” *Id.* at 32. Yet Indeck omits the qualifying final phrase: “although the rule is applicable only where the creation of revenue is the motive for enacting the provision.” *Mobil Oil Corp.*, 85 Misc.2d at 806, 380 N.Y.S.2d at 475.

Read in its entirety, this language from *Mobil Oil* defeats Indeck's argument. If a measure is intended to raise revenues, it is a tax unless it is tailored to defray administrative costs, in which case it is a license fee. However, if "the creation of revenue" is *not* the motive for imposing costs, the measure is neither a tax nor a license fee but rather an exercise of the police powers. *Id.*; *see also id.* at 806, 380 N.Y.S.2d at 474 ("Whether a particular exaction is a tax *or* a regulatory *or* licensing measure under the police power can be determined from looking at the whole scope and tenor of the provision.") (emphasis added) (citing *Einsfeld*, 149 N.Y. 367, 44 N.E. 146).

The facts of *Mobil Oil Corp.* are illustrative. Mobil challenged a town ordinance that regulated the transfer of oil by charging an annual fee that was deposited into a fund for oil spill cleanups. *Id.* at 802-3; 380 N.Y.S.2d at 470. In rejecting the argument that the clean-up fund assessment was a tax, the court assumed for purposes of remand that the assessment could be upheld as a permissible regulatory fee even though it was not intended to cover administrative costs. *See id.* at 807; 380 N.Y.S.2d at 475. Similarly, in *Einsfeld*, the challenged "excise tax" was permissible even though it was not calculated to cover the costs of regulating liquor distributors. *See Einsfeld*, 149 N.Y. at 378; 44 N.E. at 149.

New York courts are not alone in recognizing this third "regulatory" category of imposed costs or "regulatory fees" that may be imposed pursuant to the police powers without reference

to administrative costs.¹³ The California Supreme Court upheld a fee that was assessed on paint manufacturers in order to fund medical services for children determined to be potential victims of lead poisoning on grounds that it was a “regulatory fee” that fell “squarely within a third category not dependent on government conferred benefits or privileges . . . [and] imposed under the police power.” *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal.4th 866, 875, 937 P.2d 1350, 1355, 64 Cal.Rptr.2d 447, 452 (Cal. 1997). Similarly, then-Judge Breyer recognized that a fee “may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive.” *San Juan Cellular Tel. Co. v. Public Serv. Comm’n of P.R.*, 967 F.2d 683, 685 (1st Cir. 1992).

These decisions affirm the validity of police power regulations that impose costs to address societal evils. Because the RGGI auction process is well-designed to reduce CO₂

¹³ As discussed *supra*, the costs imposed by the challenged rules are compliance costs, not fees. Given that Indeck and other generators are not compelled to buy allowances, the cost of an allowance is not a “fee” of any kind. However, even if the auction price of an allowance is viewed as a “regulatory fee,” it is not correct that “any fees DEC imposes must be expressly authorized by the Legislature.” Indeck Br. at 31. Indeck cites *Matter of Tze Chun Liao v. N.Y. State Banking Dept.*, 74 N.Y.2d 505, 548 N.E.2d 911, 549 N.Y.S.2d 373 (1989) as “stating that agencies may not establish fees *sua sponte* without the Legislature’s delegation of fee-making authority.” Indeck Br. at 31. But *Liao* does not state this, and there were no fees at issue in the case. The decision states only the truism that administrative agencies cannot exceed the bounds of their authorities. See *Liao*, 74 N.Y.2d. at 511, 548 N.E.2d. at 914, 549 N.Y.S.2d at 376. Here, DEC has not exceeded the bounds of its authority in setting a price on carbon. See discussion *supra* at 12-26. Indeck also cites to the ECL’s fee provisions for the air permitting program. See Indeck Br. at 31; see also ECL § 72-0302. These provisions do not preclude DEC from using its broad grant of authority to make rules that establish “regulatory fees” to curb CO₂ emissions as opposed to “license” fees to cover permitting costs. See, e.g., *Consolidated Edison*, 71 N.Y.2d at 191-196, 519 N.E.2d at 322-35, 524 N.Y.S.2d at 412-14 (affirming that DEC retained its broad authority to regulate bulk petroleum storage even where the Legislature had imposed its own requirements on bulk petroleum storage); *Suffolk Co. Bldrs Assn. v. County of Suffolk*, 46 N.Y.2d 613, 619, 389 N.E.2d 133, 136, 415 N.Y.S.2d 821, 823 (N.Y. 1979) (recognizing implied authority to impose fees based on broad grant of general authorities in Public Health Law).

emissions through the creation of price signals, it does not impose an unlawful tax or any impermissible fees.

III. RGGI DOES NOT VIOLATE THE COMPACT CLAUSE

State programs implementing RGGI do not violate the Compact Clause. *See* U.S. Const., Art. I, § 10, cl. 3. Indeck argues that RGGI “enhances the power of the States to regulate interstate commerce beyond that of any single state acting alone.” Indeck Br. 36. However, RGGI is clearly a valid interstate agreement under controlling Supreme Court precedent.

The Supreme Court has long held that “[t]he application of the Compact Clause is limited to agreements that are [d]irected 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.” *Northeast Bancorp, Inc. v. Bd of Governors of Federal Reserve*, 472 U.S. 159, 175-76 (1985) (quoting *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976) (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893))) (internal quotation marks omitted). The Clause was not intended 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.”” *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 470 (1978) (quoting *New York v. O’Neill*, 359 U.S. 1, 6 (1959)). Courts adjudicating challenges to interstate arrangements have remained mindful of the Compact Clause’s distinctly limited role as a protection against interstate arrangements that threaten federal supremacy. Indeed, no court has ever voided a state agreement for failure to obtain congressional consent. *See* Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 Harv. L. Rev. 1958, 1960 (2007).

In *U.S. Steel*, the Court rejected a Compact Clause challenge to the Multistate Tax Compact (“MTC”), an effort jointly undertaken by 21 states to “facilitat[e] proper determination of state and local tax liability of multistate taxpayers” and “promot[e] uniformity and compatibility in state tax systems.” 434 U.S. at 456. The challenged agreement created the Multistate Tax Commission and empowered it, among other things, to adopt rules and regulations that the member states could choose to adopt and to perform audits requested by member states. *Id.* at 457. In holding that the MTC did not require congressional consent, the Court explained that “the multilateral nature of the [MTC] and its establishment of an ongoing administrative body do not, standing alone, present significant potential for conflict with the principles underlying the Compact Clause.” *Id.* at 472. Further, the Court emphasized that the number of parties to an agreement is “irrelevant if it does not impermissibly enhance state power at the expense of federal supremacy.” *Id.* The Court went on to conclude that the MTC:

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. *This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover, as noted above, each State is free to withdraw at any time.*

434 U.S. at 472-73 (emphasis added). Thus, the Court held that the challengers had made “no showing that increased effectiveness in the administration of state tax laws, promoted by such legislation, threatens federal supremacy.” 434 U.S. at 476 (footnote omitted).

Indeck’s Compact Clause claim is considerably weaker than the claim that the Supreme Court rejected in *U.S. Steel*. The subject-matter of the MTC — state taxation of interstate

commerce — was so inherently problematic from a constitutional standpoint that the Court, in a leading tax decision cited in *U.S. Steel*, described it as a “tangled underbrush” marked by “controversy and confusion,” which had (by 1957) generated “three hundred full-dress [Supreme Court] opinions” and a resulting legal “quagmire.” *Northwestern States Portland Cement Co. v. State of Minn.*, 358 U.S. 450, 457-458 (1959) (citation omitted). Moreover, in *U.S. Steel*, there was evidence that both political branches disapproved of the MTC’s resolution of these thorny issues. *See* 434 U.S. at 487-88 (White, J., dissenting) (discussing “hostile stalemate” between the Multistate Tax Commission and the federal government over issues of international and federal tax policy). Nevertheless, the Court upheld the legitimacy of the 21-state agreement under the Compact Clause.

RGGI presents a far easier case. First, the states’ broad authority to control harmful air emissions is clear. Regulating pollution from sources within the state is a classic exercise of the state’s police power.¹⁴ There is no evidence that either Congress or the Executive Branch regards RGGI as an encroachment on federal powers. On the contrary, the federal Clean Air Act expressly confirms the states’ “primary” authority in this area, and declares that state regulations of air pollution are permissible except in those narrow and specific areas of express

¹⁴ *See, e.g., Exxon Mobil Corp. v. U.S. E.P.A.*, 217 F.3d 1246, 1255 (9th Cir. 2000) (“Air pollution prevention falls under the broad police powers of the states”); *Associated Indus.. v. Snow*, 898 F.2d 274, 282 (1st Cir. 1990) (same). States and their subdivisions were regulating air pollution long before Congress entered the field. *See* J. William Futrell, *The History of Environmental Law in Sustainable Environmental Law* 3, 23-24 (Celia Campbell-Hohn et al., eds., 1993); *see also Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (noting state’s interest in “all the earth and air within its domain”) (Holmes, J.).

preemption.¹⁵ Section 102 of the Act expressly encourages interstate cooperation “for the prevention and control of air pollution” and provides congressional consent for states to negotiate and enter into agreements and compacts directed at controlling air pollution and enforcing air pollution laws. 42 U.S.C. § 7402(a), (c).

Second, RGGI, like the MTC, merely coordinates the states’ exercise of powers that each possesses under its own laws — allowing for the creation of a jointly formulated regulatory program that member states may choose to adopt or reject pursuant to their individual lawmaking authorities. Like the MTC, RGGI “does not purport to authorize the member States to exercise any powers they could not exercise in its absence.” 434 U.S. at 473; *see also id.* at 474 (rejecting challenge to interstate commission’s audit power because “appellants do not contest the right of each State to adopt these procedures if they conducted the audits separately”) (footnote omitted); *New York v. Trans World Airlines, Inc.*, 728 F. Supp. 162, 183 (S.D.N.Y. 1989) (holding that “the Compact Clause applies only where the challenged interstate agreement embraces actions a state could not take acting alone”). Rather, states implement RGGI under existing state laws. *See* AR 245 at 8. As with the MTC, each RGGI state retains the authority to withdraw from the agreement. *See id.* § 5(B); AR 245 at 9.

Moreover, like the agreement in *U.S. Steel*, RGGI does not “enhance state power to the detriment of federal supremacy.” 434 U.S. at 460. Congress’ (and EPA’s) powers to regulate greenhouse gas emissions, including by means of an emissions trading program, remain

¹⁵ *See* 42 U.S.C. § 7401(a)(3) (Clean Air Act’s finding that “air pollution prevention and air pollution control at its source is the primary responsibility of States and local governments”); § 7416 (except where specifically provided otherwise, preserving states’ power to adopt “any standard or limitation respecting emissions of air pollutants,” provided it is at least as stringent as any applicable federal standard). The Executive Branch also has recognized the urgency of controlling greenhouse gas emissions. *See* 74 Fed. Reg. 18,886 (Apr. 24, 2009) (announcing U.S. Environmental Protection Agency’s proposed “endangerment” finding with respect to greenhouse gas emissions from motor vehicles).

unimpaired by RGGI. Congress could at any time preempt RGGI and all state laws and regulations adopted in conformity with it. Alternatively, Congress could adopt legislation that preserves RGGI in whole or in part. *Cf.* America’s Climate Security Act, S. 2191, 110th Cong. § 9004(a)(1) (2007) (proposing to preserve “any [state] standard, cap, limitation, or prohibition relating to emissions of greenhouse gas”). In either event, as in *U.S. Steel*, “[f]ederal power in the relevant areas remains plenary.” 434 U.S. at 479. Thus, Indeck’s complaint and brief fail to present any reason why RGGI, or the states’ actions implementing RGGI, poses any threat to “our federal structure.” *Id.* at 471.

The fact that the RGGI states have common views about the propriety and optimal design of greenhouse gas regulation — and that they can be expected to “lobby” the federal government in light of those shared perspectives — does not raise any question under the Compact Clause. Although an interstate agreement may indicate “strength in numbers and organization,” and “enhanced capacity to lobby,” such incidents of interstate cooperation “fall[] far short of threatened ‘encroach[ment] upon or interfer[ence] with the just supremacy of the United States.’” 434 U.S. at 479 (quoting *Virginia*, 148 U.S. at 519). RGGI does not raise any of the concerns embodied in the Compact Clause as authoritatively construed by the Supreme Court.

Indeck suggests — without citing to any authority — that RGGI interferes with federal authority to “establish interstate emission limits.” Indeck Br. at 36. However, regulations adopted pursuant to RGGI only control emissions *within* the boundaries of each RGGI state. While the Clean Air Act contains provisions limiting interstate pollution, 42 U.S.C. §§ 7410(a)(2)(D)(i), 7426, those provisions do not purport to preempt state laws that reduce in-state emissions that contribute to pollution elsewhere. *See* Note 15, *supra*.

Indeck also cites various federal interests that RGGI allegedly affects, including regulation of interstate air pollution and the interstate power market. *See* Indeck Br. at 36-37.

However, the Supreme Court rejected analogous arguments in *U.S. Steel*.

Absent a threat of encroachment or interference [with federal supremacy] through enhanced state power, the existence of a federal interest is irrelevant. Indeed, every state cooperative action touching interstate or foreign commerce implicates some federal interest. Were that the test under the Compact Clause, virtually all interstate agreements and reciprocal legislation would require congressional approval.

434 U.S. at 479 n.33.

Indeck offers a laundry list of interstate agreements that *have* received congressional approval, but the list proves nothing.¹⁶ *See* Indeck Br. at 37. That New York and other states have sought congressional approval for certain agreements, which bear no resemblance to RGGI, is irrelevant to the question whether congressional approval is needed in this case. That question is governed by the *Virginia/U.S. Steel* test, which RGGI passes. *See* 434 U.S. at 471 & n.24 (noting that congressional approval of other multilateral agreements was “not controlling” as to the validity of the MTC).

Finally, Indeck asserts that RGGI operates “at the expense of all other States” but fails to

¹⁶ Courts have rejected Compact Clause challenges to several undertakings to which New York was a party. *See Star Sci. Inc. v. Beales*, 278 F.3d 339, 359-60 (4th Cir.), *cert. denied sub nom. Star Sci., Inc. v. Kilgore*, 537 U.S. 818 (2002); *Trans World Airlines, Inc.*, 728 F. Supp. At 182-83, 182-83; *see also Landes v. Landes*, 1 N.Y.S.2d 358, 135 N.E.2d 562, 153 N.Y.S.2d 14, app. dismissed 352 U.S. 948 (1956).

explain how regulation of CO₂ in the RGGI states harms other states.¹⁷ *Indeck Br.* at 38. To the extent that RGGI succeeds in prompting the development of clean energy sources within RGGI states, nothing prevents non-party states from adopting similar or more stringent controls. In *U.S. Steel*, the Court rejected a claim that the MTC violated the Compact Clause by exerting “economic pressure” on non-member states:

[I]t is not explained how any economic pressure that does exist is an affront to the sovereignty of nonmember States. Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result. Unless the pressure transgresses the bounds of the Commerce Clause of the Privileges and Immunities Clause . . . it is not clear how our federal structure is implicated.

434 U.S. at 478.

In short, *Indeck* cannot establish a violation of the Compact Clause. RGGI is a classic example of the “voluntary and cooperative actions” that remain “within the unrestricted area of action left to the States by the Constitution.” *U.S. Steel*, 434 U.S. at 470 (quoting *O’Neill*, 359 U.S. at 6).

CONCLUSION

For all of the reasons set forth above, and the reasons set forth in the State’s response brief, Amici respectfully request that this court deny *Indeck*’s petition and complaint.

¹⁷*Indeck* makes the awkward suggestion that RGGI will harm the member states to the benefit of non-member states. In this regard, it speculates that the RGGI states will adopt measures to address so-called “leakage” of power generation capacity into non-RGGI states and that those measures will represent “an attempt to regulate interstate commerce.” *Indeck Br.* at 36. Unsupported allegations regarding entirely speculative *future* actions by the RGGI states provide no basis to hold RGGI unconstitutional under the Compact Clause. *See U.S. Steel*, 434 U.S. at 477 (claim that MTC could be misused in a manner that infringed federal authorities did not implicate “the facial validity of the Compact”). Indeed, the same law review note that *Indeck* cites for its “leakage” contention concludes that RGGI does not require congressional assent under the prevailing Supreme Court test, and that it also would be permissible under the more stringent “categorical” test that the author advocates. *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 Harv. L. Rev. 1958, 1962-67, 1973-76 (2007).

Respectfully submitted on this 19th day of May, 2009,

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