

NEW YORK'S CO₂ CAP-AND-TRADE PROGRAM: REGULATING
CLIMATE CHANGE WITHOUT CLIMATE CHANGE
LEGISLATION

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I. INTRODUCTION

In 2005, New York joined six other states in announcing their plan to implement the Regional Greenhouse Gas Initiative (“RGGI”), the first ever mandatory cap-and-trade program for carbon dioxide.¹ Cap and trade refers generally to regulatory programs that set an overall emissions cap and then allocate allowances, or portions of that cap, to emitters.² Those emitters must hold enough allowances to cover the actual amount of CO₂ emitted during a compliance period.³ The participating states signed a memorandum of understanding agreeing to implement the RGGI and began the rulemaking process to implement the RGGI regulations within each of their states.⁴ With the exception of New York, each of the RGGI states enacted or modified legislation specifically to provide for the implementation of the RGGI.⁵ In contrast, New York is implementing its RGGI program, known as the CO₂ Budget Trading Program, by the promulgation of regulations by the New York State Department of Environmental

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¹ Regional Greenhouse Gas Initiative, History, <http://www.rggi.org/about/history> (last visited May 16, 2010). In 2007, the original seven states participating in RGGI were joined by two other states—Massachusetts and Rhode Island. *Id.*

² Dennis Hirsch, Andrew Bergman & Michael Heintz, *Emissions Trading—Practical Aspects*, in GLOBAL CLIMATE CHANGE AND U.S. LAW 627, 629 (Michael B. Gerrard ed., 2007).

³ *Id.*

⁴ Regional Greenhouse Gas Initiative, History, *supra* note 1.

⁵ CONN. GEN. STAT. ANN. § 22a-200c (West Supp. 2009); DEL. CODE ANN. tit. 7, § 6043 (Supp. 2008); ME. REV. STAT. ANN. tit. 38, § 579 (Supp. 2008); MD. CODE ANN., ENVIR. § 2-1002 (LexisNexis Supp. 2008); MASS. ANN. LAWS ch. 21A, § 22 (LexisNexis Supp. 2009); N.H. Rev. Stat. Ann. § 125-O:19 (Supp. 2008); N.J. STAT. ANN. § 26:2C-45 (West Supp. 2009); R.I. GEN. LAWS § 23-82-2 (Supp. 2008); VT. STAT. ANN. tit. 30, § 255 (2008).

Conservation (“DEC”) through its authority under the Air Pollution Control Act (the “Act”).⁶ Public comments received by the DEC on the draft RGGI regulations questioned the DEC’s authority to regulate carbon dioxide emissions through the proposed cap-and-trade program without authorization from the legislature.⁷ Furthermore, one of the regulated entities filed suit against the DEC (among other defendants), alleging among other things that the DEC’s promulgation of the RGGI regulations was *ultra vires*.

This note analyzes the DEC’s statutory authority to implement the CO₂ Budget Trading Program under its authority to regulate air pollution provided by the Act. The landmark case of *Boreali v. Axelrod*⁸ provides the framework for this analysis. The outcome of the *Boreali* analysis turns primarily on whether or not carbon dioxide can be classified as an air pollutant. Finding that this classification is reasonable, this note concludes that the DEC does in fact have the statutory authority to implement the Regional Greenhouse Gas Initiative.

Part I provides background information regarding the growing sense of crisis over climate change, including the development in recent years of a scientific consensus that humans are changing the earth’s temperature and the increasing public pressure to take steps to address climate change. Part II provides an overview of one of the major efforts to address climate change in the United States—the Regional Greenhouse Gas Initiative—and in particular, New York’s RGGI program, known as the CO₂ Budget Trading Program. In addition, Part II details the basis of the challenge to the New York State Department of Environmental Conservation’s authority to implement the CO₂ Budget Trading Program. Part III provides an overview of the *Boreali* approach to analyzing whether an administrative agency has exceeded its statutory authority, and applies each of the four *Boreali* factors to the DEC’s exercise of its regulatory powers to implement the CO₂ Budget Trading Program. Finally, Part IV summarizes the results of the *Boreali* analysis and concludes that the DEC does in fact have the statutory authority to implement the RGGI under the Air Pollution Control Act.

⁶ N.Y. COMP. CODES R. & REGS. tit. 6, § 242 (2008).

⁷ N.Y. STATE DEP’T OF ENVTL. CONSERVATION, ASSESSMENT OF PUBLIC COMMENTS: 6 NYCRR PART 242, CO₂ BUDGET TRADING PROGRAM; 21 NYCRR PART 507, CO₂ ALLOWANCE AUCTION PROGRAM 1 (2008) [hereinafter INITIAL PUBLIC COMMENTS], available at http://www.dec.ny.gov/docs/air_pdf/apc1213.pdf.

⁸ *Boreali v. Axelrod*, 517 N.E.2d 1350 (N.Y. 1987).

II. THE EMERGING CRISIS OF CLIMATE CHANGE

Growing consensus among scientists that the earth's climate is changing has, over the past few years, resulted in great concern among policy makers and the public over the anticipated impacts of climate change and the role that humans are playing in causing or accelerating climate change. In 2007, the Intergovernmental Panel on Climate Change ("IPCC") concluded that "[w]arming of the climate system is unequivocal."⁹ The United States Supreme Court echoed that concern in its landmark decision of *Massachusetts v. EPA*.¹⁰ In fact, data suggest that climate change is already impacting the environment. According to the IPCC, research strongly indicates that climate change has already impacted both natural systems, for example, by destabilizing permafrost (soil that remains frozen for two or more years), and human systems such as agriculture.¹¹

The causes of climate change, and especially the role of human activity in causing or accelerating climate change, is somewhat more contested. According to the IPCC, the primary driver of climate change is the level of Greenhouse Gas ("GHG") emissions in the atmosphere.¹² These GHGs can be both naturally occurring and anthropogenic (i.e. caused by human activity).¹³ According to the IPCC, the dramatic increase in carbon dioxide—the primary greenhouse gas that has been seen over the past century—is “due primarily to fossil fuel use, with land-use change providing another

⁹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 30 (Abdelkader Allali et al. eds., 2007) [hereinafter IPCC REPORT], available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf. The IPCC report points to several indicators of global climate change, including global temperature changes and trends, ocean temperature changes, sea level rise, snow and ice coverage decreases, changes in precipitation amounts, and the frequency and intensity of weather events. *Id.*

¹⁰ *Massachusetts v. EPA*, 549 U.S. 497 (2007). The Supreme Court noted the “well-documented rise in global temperatures [that] has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere.” *Id.* at 504–05. Even the dissent acknowledged that “[g]lobal warming may be a ‘crisis,’ even ‘the most pressing environmental problem of our time.’ Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it.” *Id.* at 535 (citation omitted).

¹¹ IPCC REPORT, *supra* note 9, at 31, 33.

¹² *Id.* at 36. According to the United Nations Framework Convention on Climate Change, Greenhouse Gases include carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), perfluorocarbons (PFCs), hydrofluorocarbons (HFCs), and sulphur hexafluoride (SF₆). United Nations Framework Convention on Climate Change, GHG Data from UNFCCC, http://unfccc.int/ghg_data/ghg_data_unfccc/items/4146.php (last visited May 16, 2010); UNITED NATIONS, KYOTO PROTOCOL TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE 19 (1998), available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

¹³ IPCC REPORT, *supra* note 9, at 37.

significant but smaller contribution.”¹⁴ As a result of the work of the IPCC and other scientists across the globe, most scientists agree that, at least to some extent, human activity is causing or accelerating climate change. However, some scientists dispute this conclusion.¹⁵

Regardless of the continuing debate surrounding climate change, growing public sentiment and concern over the potentially devastating results of continued global warming¹⁶ have put pressure on policy-makers at the federal and state levels to address climate change and develop and implement clean technology. One example of the political response to this public outcry has been the establishment and implementation of the Regional Greenhouse Gas Initiative (“RGGI”).

III. RESPONDING TO CLIMATE CHANGE

A. *The Regional Greenhouse Gas Initiative*

One of the most aggressive climate change initiatives to date in the United States, the RGGI is a collaborative effort of ten states to reduce carbon dioxide emissions from power plants.¹⁷ The ten RGGI states have agreed to a regional limit on total power plant CO₂ emissions. Each participating state is allocated a portion of the total cap, and distributes carbon dioxide allowances to power plants operating within its boundaries.¹⁸ The allowances are similar to a permit to emit a certain amount of carbon dioxide. All of the participating RGGI states have agreed to issue at least some portion of these allowances through auctions, and to use the proceeds of those auctions to support energy efficiency and renewable energy within the state.¹⁹ The use of allowances

¹⁴ *Id.* at 37. “The atmospheric concentrations of CO₂ and CH₄ in 2005 exceed by far the natural range over the last 650,000 years.” *Id.*

¹⁵ *E.g.*, S. ENV’T & PUB. WORKS COMM., U.S. SENATE MINORITY REPORT: MORE THAN 700 INTERNATIONAL SCIENTISTS DISSENT OVER MAN-MADE GLOBAL WARMING CLAIMS: SCIENTISTS CONTINUE TO DEBUNK “CONSENSUS” IN 2008 & 2009 (Comm. Print 2009).

¹⁶ If warming continues at the projected rate, significant impacts, such as sea level rise, decreased snow cover, significant if not complete melting of sea ice, increased frequency of heat waves, heavy precipitation, typhoons and hurricanes, and changes in wind and temperature patterns are expected. IPCC REPORT, *supra* note 9, at 46.

¹⁷ RGGI, INC., REGIONAL GREENHOUSE GAS INITIATIVE (2008) [hereinafter RGGI FACT SHEET], available at http://www.rggi.org/docs/RGGI_Executive_Summary.pdf. The ten states participating in RGGI are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. *Id.*

¹⁸ *Id.* (“Each CO₂ allowance represents a limited authorization to emit one ton of CO₂.”).

¹⁹ *Id.*

encourages maximum efficiency and GHG reductions, because unneeded and unused allowances can then be sold on a secondary market to other companies unable or unwilling to reduce their emissions.²⁰

B. New York State's RGGI Program: The CO₂ Budget Trading Program

The DEC has promulgated regulations that implement the RGGI program in New York (called the CO₂ Budget Trading Program) under its existing statutory authority.²¹ Similarly, the New York State Energy Research and Development Authority ("NYSERDA") promulgated regulations establishing a CO₂ Allowance Auction process.²² This auction process will be the primary mechanism through which CO₂ allowances will be distributed.²³ These two agencies, in collaboration with the Department of Public Service, have been charged with implementing New York's RGGI program.²⁴

New York has decided to auction nearly one hundred percent of its CO₂ allowances.²⁵ These allowances will be used "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."²⁶ NYSERDA anticipates allocating the majority of the auction proceeds for technologies and projects with the potential for near term reductions in CO₂; however, at least twenty-five percent

²⁰ *Id.*

²¹ N.Y. COMP. CODES R. & REGS. tit. 6, § 242 (2008).

²² N.Y. COMP. CODES R. & REGS. tit. 21, § 507.1 (2008). The "New York State Energy Research and Development Authority (NYSERDA) is a public benefit corporation" authorized by New York's Public Authorities Law. N.Y. State Energy Research and Development Authority, About NYSERDA, <http://www.nyserda.com/About/default.asp> (last visited May 16, 2010). Initially created to conduct research and oversee development projects related to reducing oil consumption in New York, NYSERDA now broadly focuses on using "innovation and technology to solve some of New York's most difficult energy and environmental problems in ways that improve the State's economy." N.Y. State Energy Research and Development Authority, Mission Statement, http://www.nyserda.com/About/about_mission_statement.asp (last visited May 16, 2010).

²³ N.Y. State Dep't of Env'tl. Conservation, How the Carbon Dioxide Budget Trading Program Works, <http://www.dec.ny.gov/energy/39276.html> [hereinafter How the Program Works] (last visited May 16, 2010).

²⁴ N.Y. State Dep't of Env'tl. Conservation, Regional Greenhouse Gas Initiative: (RGGI) Carbon Dioxide Budget Trading Program, <http://www.dec.ny.gov/energy/rggi.html> (last visited May 16, 2010).

²⁵ How the Program Works, *supra* note 23.

²⁶ N.Y. COMP. CODES R. & REGS. tit. 21, § 507.4.

is expected to go towards longer-term investments.²⁷

C. The Challenge to the DEC's Statutory Authority

All of the states participating in the RGGI, with the exception of New York, have passed legislation authorizing the implementation of the RGGI.²⁸ In contrast, New York is implementing the RGGI through regulatory action by the DEC under existing statutory authority.²⁹ Specifically, the DEC is relying on its authority under the Act “to safeguard the air resources of the state from pollution by: (1) controlling or abating air pollution . . . and (2) prevent[i]ng new air pollution,”³⁰ and the DEC’s general authority to “[p]rovide for prevention and abatement of all . . . air pollution.”³¹ Air pollution is defined by the Act as

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.³²

In essence, the New York’s DEC has determined that carbon dioxide is an air pollutant subject to regulation under its existing statutory authority to regulate air pollution.

In 2007, the DEC published the draft CO₂ Budget Trading Program regulations for public comment. The public comments received in the fall of 2007 questioned the DEC’s authority to implement the RGGI. For example, one public comment received by the DEC charged that “[w]ithout any legislative expression of

²⁷ N.Y. STATE ENERGY RESEARCH & DEV. AUTH., OPERATING PLAN FOR INVESTMENTS IN NEW YORK UNDER THE CO₂ BUDGET TRADING PROGRAM AND THE CO₂ ALLOWANCE AUCTION PROGRAM: CONCEPT PAPER 6 (2008), available at <http://www.nyserdera.org/RGGI/Concept%20Paper%20Nov%202012.pdf>.

²⁸ CONN. GEN. STAT. ANN. § 22a-200c (West Supp. 2009); DEL. CODE ANN. tit. 7, § 6043 (Supp. 2008); ME. REV. STAT. ANN. tit. 38, § 579 (Supp. 2008); MD. CODE ANN., ENVIR. § 2-1002 (LexisNexis Supp. 2008); MASS. ANN. LAWS ch. 21A, § 22 (LexisNexis Supp. 2009); N.H. Rev. Stat. Ann. § 125-O:19 (Supp. 2008); N.J. STAT. ANN. § 26:2C-45 (West Supp. 2009); R.I. GEN. LAWS § 23-82-2 (Supp. 2008); VT. STAT. ANN. tit. 30, § 255 (2008).

²⁹ See N.Y. COMP. CODES R. & REGS. tit. 21, § 507.2 (implementing the auction allowance component of the RGGI through regulations promulgated by NYSERDA). The statutory authority of NYSERDA to implement this component of the program is not addressed in this note.

³⁰ N.Y. ENVTL. CONSERV. LAW § 19-0105 (McKinney 2006).

³¹ § 3-0301 (McKinney 2005).

³² § 19-0107.

Statewide policy addressing global climate change, including local reductions of CO₂ emissions, the [proposed regulations] violate[] the constitutional separation of powers.”³³ The commenter went on to say that “[t]he Legislature has neither articulated a policy to prevent global climate change nor approved the regulatory means selected to achieve that end.”³⁴ Therefore, “the proposed regulations represent an illegal arrogation of the Legislature’s exclusive policy making authority.”³⁵ The essence of the argument is that carbon dioxide is not an air pollutant, and that, therefore, climate change is an independent environmental problem that requires legislative, not administrative, action.

The DEC has responded that the RGGI program does not require specific legislative authorization because the DEC already has “broad authority to use all available methods to prevent and control air pollution from the generation of electricity, including establishing a cap and trade program.”³⁶ According to the DEC, “CO₂ emissions . . . are present in the outdoor atmosphere in quantities that engender and/or provoke climate change, which is injurious to life and property.”³⁷ Basically, the DEC’s argument is that carbon dioxide is an air pollutant and that climate change is just one of the harmful effects of air pollution.

IV. ANALYSIS OF DEC’S STATUTORY AUTHORITY

A. *Assessing Statutory Authority: The Boreali Approach*

In 1987, the New York Court of Appeals decided *Boreali v. Axelrod*³⁸ and established the framework for analyzing whether an administrative agency has exceeded its statutory authority.³⁹ In *Boreali*, the court examined whether the New York Public Health

³³ INITIAL PUBLIC COMMENTS, *supra* note 7, at 1.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1–2.

³⁸ *Boreali v. Axelrod*, 517 N.E.2d 1350 (N.Y. 1987).

³⁹ *Id.* at 1353–54. The Court first analyzed the threshold question of whether the authorizing legislation itself is unconstitutional because it cedes the legislative function to the administrative agency in violation of separation of powers. *Id.* Finding the grant of authority constitutional, the court then turned to an examination of whether the particular regulations in issue in *Boreali* stretched the boundaries of that authority beyond the scope of the legislative mandate. *Id.* The constitutionality of the DEC authorizing legislation and the Air Pollution Control Act has not been challenged in the context of New York’s RGGI program. Therefore, this note does not address the *Boreali* threshold question of the constitutionality of the Act.

Council (“PHC”) exceeded its legislative mandate to promulgate regulations designed to safeguard the public health when it prohibited smoking in a number of public areas. According to the court, the

salient inquiry is . . . whether the legislative branch of government has shown an intent to grant regulatory authority over a specific subject matter to an administrative agency which exists as part of the coequal executive branch. The inquiry includes an examination of both the scope of the statute authorizing the regulatory activity and the degree to which the administrative rules are either consistent or “out of harmony” with the policies expressed in the statute.⁴⁰

Concluding that the PHC had in fact gone beyond its legislative mandate, the court pointed to four factors that are indicative of a usurpation of the legislative function.⁴¹ These four factors are: (1) whether the regulatory scheme is inconsistent with the authority provided by the legislature;⁴² (2) whether the regulatory scheme goes beyond the interstitial rulemaking characteristic of administrative regulatory activity;⁴³ (3) whether the agency is acting in response to repeated failures of the legislature to address the issue;⁴⁴ and (4) whether the agency’s technical expertise and competence was unnecessary to the development of the regulations in question.⁴⁵

According to the court, these “coalescing circumstances . . . when viewed in combination, paint a portrait of an agency that has improperly assumed for itself ‘[t]he open-ended discretion to choose ends,’ which characterizes the elected Legislature’s role”⁴⁶ The court went on to say that none of the four factors, standing alone, are sufficient for a finding that the administrative agency has violated the separation of powers.⁴⁷ This characterization suggests that the court intended the *Boreali* factors to be interpreted as indicators of the usurpation of the legislature, rather than four required elements that must all be present in every case.

⁴⁰ *Id.* at 1357 (citation omitted).

⁴¹ *Id.* at 1355.

⁴² *Id.*

⁴³ *Id.* at 1356.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1355 (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 982 (3d ed. 2000)).

⁴⁷ *Id.*

1. Factor 1: Is the Regulatory Scheme Inconsistent with the Authority Provided by the Legislature?

Administrative agencies cannot engage in policy making, a function left to the legislative branch. On the other hand, “a cornerstone of administrative law is that the legislature may fix a primary standard and then endow agencies with the power [to proscribe] ‘rules and regulations consistent with the enabling legislation.’”⁴⁸ In essence, an administrative agency may implement regulations under a statutory grant of discretion by the legislature as long as the regulations are consistent with the legislative intent of that statute. Therefore, where the legislature has “clearly articulated a policy” concerning the matter of the regulations and the regulations are consistent with that policy, this factor is not satisfied.⁴⁹

In *Boreali*, the court found that the PHC’s promulgation of comprehensive regulations that banned smoking in some public places was not consistent with the authority provided by the legislature under the public health law to promulgate regulations on matters concerning public health.⁵⁰ The court pointed to the PHC’s inclusion of exceptions and exemptions that reflected the agency’s own balancing of economic and social implications of the regulations as clear evidence that the regulatory scheme was inconsistent with the agency’s legislative authority.⁵¹ This effort to “[s]trik[e] the proper balance among health concerns, cost and privacy interests . . . is a uniquely legislative function.”⁵² According to the court, the inclusion of exemptions is particularly telling because exemptions typically “run counter to such goals and, consequently, cannot be justified as simple implementations of legislative values.”⁵³ The exceptions did not, therefore, reflect the agency’s charge to protect public health but instead reflected the agency’s own policy decisions regarding balancing the relative importance of protecting public health with ensuring the economic

⁴⁸ *Rainbow Beach Ass’n v. N.Y. State Dep’t of Health*, 590 N.Y.S.2d 561, 562–63 (App. Div. 1992).

⁴⁹ *See, e.g., id.* at 563 (“[T]he Legislature has clearly articulated a policy concerning the matter at hand by mandating the Public Health Council regulate bathing beaches.” (citations omitted)).

⁵⁰ *Boreali*, 517 N.E.2d at 1355.

⁵¹ The public health commission had exempted certain establishments, such as bars and certain restaurants, from the indoor smoking bans. *Id.*

⁵² *Id.*

⁵³ *Id.*

viability of certain industries.

The Act gives the DEC the authority to regulate “the extent to which air contaminants may be emitted to the air by any air contamination source.”⁵⁴ Through the Act, the legislature intended to give the DEC authority to promulgate regulations to prevent, abate, and control the release of any contaminant that falls within the broadly defined category of “air pollutant” and to rely on the DEC’s expertise to determine: (a) what contaminants satisfy that definition; and (b) the best ways to prevent and control the release of those contaminants. This approach was intended to give the DEC flexibility to adjust to changing science and advances in our understanding of the harmful effect of chemicals. The approach also lends itself to the classification of additional emissions as air pollutants as their harmful effects become known. Since its enactment, the DEC has implemented regulations under the Act designed to control emissions of air pollutants from numerous sources, including motor vehicles,⁵⁵ steel mills,⁵⁶ incinerators,⁵⁷ and refineries.⁵⁸ The DEC has even promulgated regulations that establish mandatory cap-and-trade programs similar to the RGGI that limit emissions from power plants of other air pollutants.⁵⁹ These programs, however, do not include an auction process for allowances. Instead, the allowances are distributed to regulated entities free of charge.

Commentators who questioned the DEC’s authority to promulgate the CO₂ Budget Trading Program argue that, unlike the gases that were the subject of these prior cap and trade programs, CO₂ is not an air pollutant subject to regulation by the DEC under the Act. If this is true, the CO₂ Budget Trading Program is clearly not consistent with the legislature’s intent in passing the Act, as that act limited the DEC’s authority to the regulation of air pollutants. The DEC has responded to this charge by pointing to the landmark decision of the U.S. Supreme Court in *Massachusetts v. EPA*.⁶⁰ There, the Court held that the Clean Air Act gave the Environmental Protection Agency (“EPA”) the authority to regulate

⁵⁴ N.Y. ENVTL. CONSERV. LAW § 19-0301 (McKinney 2006).

⁵⁵ N.Y. COMP. CODES R. & REGS. tit. 6, § 218 (2008).

⁵⁶ § 216.

⁵⁷ § 219.

⁵⁸ § 223.

⁵⁹ See, e.g., § 204 (NO_x Budget Trading Program); § 238 (Acid Deposition Reduction SO₂ Budget Trading Program).

⁶⁰ 594 U.S. 497 (2007).

carbon dioxide as an air pollutant.⁶¹ The DEC points to this decision as support for its treatment of carbon dioxide as an air pollutant.

While at first glance, the DEC appears to have a strong argument, its reliance on *Massachusetts v. EPA* is much more tenuous. The Clean Air Act, which was the subject of *Massachusetts v. EPA*, requires the EPA to promulgate regulations controlling the emission of any air pollutant by motor vehicles which “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.”⁶² While this is similar to the definition of air pollutant under the Air Pollution Control Act,⁶³ the Clean Air Act further defines “welfare” to specifically include “effects on . . . weather . . . and climate.”⁶⁴ Therefore, the Clean Air Act more directly supports the conclusion that Congress intended to incorporate climate change in the scope of statutory authority granted to the EPA. No such reference to weather and climate is found in the New York counterpart. Therefore, no similar inference can be made about the intent of the New York State Legislature in implementing the Air Pollution Control Act.

Despite this, the DEC's interpretation of air pollution as including carbon dioxide is likely to be upheld. Administrative agencies are afforded deference by the courts in many circumstances.⁶⁵ In particular, “it is . . . well settled that an agency's interpretation of the statutes and regulations it is responsible for administering is entitled to great deference, and must be upheld if reasonable.”⁶⁶ This deference includes the “specific application of a broad statutory

⁶¹ *Id.* at 532.

⁶² 42 U.S.C. § 7408(a)(1)(A) (2006). The Clean Air Act defines air pollutant as “any air pollution agent or combination of such agents . . . which is emitted into or otherwise enters the ambient air.” 42 U.S.C. § 7602(g) (2006).

⁶³ As discussed earlier, air pollution is defined under the Air Pollution Control Act as “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 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.” N.Y. ENVTL. CONSERV. LAW § 19-0107 (McKinney 2006).

⁶⁴ 42 U.S.C. § 7602(h).

⁶⁵ 2 N.Y. JUR. 2D *Administrative Law* § 115 (2008). Deference is accorded when (a) the interpretation involves specialized knowledge; (b) the interpretation involves the analysis and interpretation of data; (c) the agency has applied its expertise; (d) the agency contemporaneously interprets a statute it is charged with enforcing; and (e) when the language of the statute is special or technical. *Id.*

⁶⁶ *P'ship 92 v. N.Y. State Div. of Hous. & Cmty. Renewal*, 849 N.Y.S.2d 43, 47 (App. Div. 2007).

term,”⁶⁷ especially when the term is “special or technical.”⁶⁸ For example, the Third Department deferred to the New York State Department of Health’s interpretation of the term “invasive modality” in *Kennedy v. Novello*.⁶⁹

Given this, the DEC’s interpretation of the term “air pollution” to include carbon dioxide should be upheld as long as the interpretation is not irrational, unreasonable, or contrary to legislative intent. The DEC’s interpretation is clearly not irrational or unreasonable. The challenge to the DEC’s classification of carbon dioxide as an air pollutant arises from the fact that carbon dioxide is different from traditional air pollutants, such as ozone, carbon monoxide, and sulfur oxides. Air pollutants have traditionally been viewed as gases and substances that locally accumulate in the ambient air and have a direct, adverse effect on human health and plant and animal health.⁷⁰ Carbon dioxide is distinctive from these other emissions for two reasons. First, carbon dioxide does not accumulate in the ambient air and instead is distributed in the upper atmosphere in fairly uniform concentrations around the globe.⁷¹ Second, carbon dioxide does not directly harm human health when it is inhaled, and is not directly harmful to plant and animal life, as are the more traditional air pollutants.⁷²

Despite this, the DEC’s categorization of carbon dioxide as an air pollutant is rational and reasonable. While CO₂ may not directly harm humans or plant and animal life, mounting evidence indicates that CO₂ does have a serious, albeit indirect, harmful effect on humans, plants and animals.⁷³ Most scientists agree that continuing climate change will result in a number of adverse effects on ecosystems, including increased risk of extinction for twenty to thirty percent of species, changes in ecosystem structure and interaction, and decreased biodiversity.⁷⁴ Negative human health

⁶⁷ *O’Brien v. Spitzer*, 851 N.E.2d 1195, 1196 (N.Y. 2006).

⁶⁸ *Kennedy v. Novello*, 750 N.Y.S.2d 175, 177 (App. Div. 2002). (“[Questions] of ‘pure legal interpretation’ of clear and unambiguous statutory terms requires no deference to an agency’s interpretation. . .”).

⁶⁹ *Id.* at 178. Similarly, the Court of Appeals deferred to the attorney general’s definition of “employee” for purposes of the public officers law. *O’Brien*, 851 N.E.2d at 1196–97.

⁷⁰ Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003) (notice of denial of petition for rulemaking); Nicholle Winters, *Carbon Dioxide: A Pollutant in the Air, but Is the EPA Correct That It Is Not an “Air Pollutant”?*, 104 COLUM. L. REV. 1996, 2010 (2004); U.S. Environmental Protection Agency, Air: Air Pollutants, <http://www.epa.gov/ebtpages/airairpollutants.html> (last visited May 16, 2010).

⁷¹ Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,927.

⁷² *Id.* at 52,928.

⁷³ See *supra* text accompanying note 10.

⁷⁴ IPCC REPORT, *supra* note 9, at 48.

effects are anticipated in a variety of ways, including changes in crop productivity, increases in extreme and dangerous weather events, increased coastal erosion and sea level rise causing homelessness and migration, increased malnutrition, increased frequency of many diseases, and exacerbation of water shortages.⁷⁵ Many of these consequences are expected to be felt in New York, especially in New York City, where the sea level is projected to rise five inches by 2030 and the severity and frequency of storms is expected to increase significantly.⁷⁶

The fact that there is disagreement in both the scientific and political fields around the classification of carbon dioxide as an air pollutant further strengthens the need for deference to the DEC. According to the Third Department in *Kennedy*, “the existence of . . . ambiguity requires deference to agency expertise provided that the interpretation adopted by the agency is reasonable.”⁷⁷ When the statutory language involves technical matters and is susceptible to multiple interpretations, and when the experts cannot agree on the proper interpretation, deference to an administrative agency with the requisite expertise is even more appropriate.⁷⁸

The classification of carbon dioxide as an air pollutant is also consistent with the legislature's intent in enacting the Act. In attempting to address the highly technical and scientific area of air pollution, the legislature enacted broad legislation that provided a general framework within which it gave the DEC the discretion to promulgate regulations.⁷⁹ Similarly, the legislature defined air pollution in broad terms that required the interpretation and application of scientific knowledge about the nature and effects of air contaminants in application. This approach was intended to give the DEC flexibility in designing and revising regulations to reflect the state of the scientific field and adjust to new

⁷⁵ *Id.* at 48–49.

⁷⁶ CITY OF NEW YORK, GREENYC: CLIMATE CHANGE (2007), available at http://www.nyc.gov/html/planyc2030/downloads/pdf/greenyc_climate-change.pdf.

⁷⁷ *Kennedy v. Novello*, 750 N.Y.S.2d 175, 178 (App. Div. 2002).

⁷⁸ *Id.* at 178.

⁷⁹ See *infra* text accompanying notes 84–86. The control of air pollution of necessity requires language broad in nature which cannot be . . . precise . . .” *Delford Indus., Inc. v. N.Y. State Dep't of Env'tl. Conserv.*, 481 N.Y.S.2d 587, 590 (Sup. Ct. 1984). “It is complex and not reducible to easy equations, particularly in view of our constantly growing knowledge and understanding of our environment and its effect upon our lives and our very existence. Recognizing these facts the legislature acted to prohibit or control air contamination to the extent possible in the interest of health and the enjoyment of life or property.” *Id.* (quoting *S. Ill. Asphalt Co. v. EPA*, 303 N.E.2d 606, 611–12. (Ill. App. Ct. 1973)).

advancements and understandings about air pollution.⁸⁰ In fact, the history of air pollution is full of examples of chemicals that were initially considered major advancements for society, but after further scientific research, were reclassified as some of the most hazardous chemicals known to man and regulated as pollution.⁸¹ This flexibility should also allow for the regulation of what may be one of the most threatening contaminants in today's atmosphere—carbon dioxide.

Critics may point to the fact that all of the other nine states participating in the RGGI have enacted new statutes or amended existing statutes to specifically authorize the RGGI program. The fact that the remaining RGGI states felt such steps were warranted may suggest that the legislatures in those states did not believe that existing statutory authority was sufficient. Each of these states, like New York, had some form of air pollution control legislation already enacted which, if New York's approach were to be accepted, would potentially provide sufficient statutory authority for the RGGI program.⁸² It is unlikely, however, that this circumstance alone would be given much weight by the New York courts. In the past, New York's courts have been reluctant to use the fact that other states have enacted new legislation in support of a regulatory program as evidence that New York's administrative agencies exceeded the permissible scope of their statutory authority.⁸³

Under the Act, a contaminant that is "injurious to human, plant or animal life or to property or which unreasonably interfere[s] with the comfortable enjoyment of life and property" is an air pollutant.⁸⁴ While carbon dioxide may not have traditionally been considered an air pollutant, it clearly has negative consequences for humans, plants, and animals, and fits comfortably within this definition. Its

⁸⁰ See N.Y. ENVTL. CONSERV. LAW § 19-0103 (McKinney 2006) (requiring that codes, rules, and regulations promulgated under the Act "be clearly premised upon scientific knowledge of causes as well as of effects").

⁸¹ See generally Robert V. Percival, *Who's Afraid of the Precautionary Principle?*, 23 PACE ENVTL. L. REV. 21 (2006) (discussing the history of lead, asbestos, and Chlorofluorocarbons in the United States).

⁸² See, e.g., MASS. ANN. LAWS ch. 111, § 142A (LexisNexis 2004); N.J. STAT. ANN. § 26:2C (West 2007); N.H. REV. STAT. ANN. § 21-O:15 (2000).

⁸³ See, e.g., *Motor Vehicle Mfrs. Ass'n v. Jorling*, 585 N.Y.S.2d 596, 599 (App. Div. 1992) (rejecting petitioners argument that the fact that "both California and Massachusetts amended their enabling statutes to provide specifically for the adoption of the emission control regulations before adopting same" because "this fact is not relevant to New York where legislation was unnecessary").

⁸⁴ N.Y. ENVTL. CONSERV. LAW § 19-0107 (McKinney 2006).

classification as such is, therefore, reasonable. In light of this, the DEC's interpretation of the term "air pollution" would be upheld if challenged. In fact, a court "need not find that [the agency's] construction is the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings.' . . . [A court] need only conclude that it is a reasonable interpretation of the relevant provision[]."⁸⁵ As the Supreme Court stated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,

[i]f . . . the court determines [that the legislature] has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁸⁶

2. Factor 2: Does the Regulatory Scheme Go Beyond Interstitial Rule Making?

Administrative agencies play an important role in rulemaking, particularly in the context of broadly worded legislation that sets out general policy goals and program parameters. In this context, the administrative agency engages in what is known as interstitial rulemaking.⁸⁷ Interstitial rulemaking is the process of filling in the details of a broad legislative mandate and making that legislation operational.⁸⁸ Recognizing the validity and importance of this role, the courts have generally given great deference to administrative agencies engaged in this type of activity and generally accept agency actions that have "warrant in the record' and a reasonable basis in law."⁸⁹

⁸⁵ *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389 (1984) (quoting *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 422–23 (1983)).

⁸⁶ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

⁸⁷ See, e.g., *Consol. Edison Co. of N.Y. v. Dep't of Envtl. Conservation*, 519 N.E.2d 320, 325 (N.Y. 1988) (upholding DEC regulations designed to prevent liquid pollution because the Legislature had conferred broad power upon the agency to address liquid pollution through regulation); *Rainbow Beach Ass'n v. Dep't of Health*, 590 N.Y.S.2d 561, 563 (App. Div. 1992) (upholding public health council regulations of bathing beaches because the regulations were promulgated under the legislature's clearly articulated policy) (quoting *NLRB v. Hearst Publ'n, Inc.*, 322 U.S. 111, 131 (1944)).

⁸⁸ *Boreali v. Axelrod*, 517 N.E.2d 1350, 1356 (N.Y. 1987).

⁸⁹ *Howard v. Wyman*, 271 N.E.2d 528, 529–530 (N.Y. 1971) (deferring to the New York

When, however, an agency's actions go beyond filling in the details of a broad legislative scheme, it exceeds the limits of its authority. This was the case in *Boreali*. According to the New York Court of Appeals, the PHC "wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance."⁹⁰ Therefore, the court held that the PHC's actions were "a far cry from the 'interstitial' rule making."⁹¹

In the case of the RGGI, the outcome of this factor again turns on whether carbon dioxide can be classified as an air contaminant under the Act. The Act was clearly intended by the legislature to provide the DEC with broad discretion to engage in interstitial rulemaking designed to abate, control or prevent air pollution in New York State.⁹² The legislature intended to rely on the DEC's expertise to both identify emissions that are air contaminants and to determine exactly how best to control those contaminants. In fact, the DEC has used this interstitial rulemaking authority under the Act to implement similar cap and trade programs targeted at other air pollutants.⁹³ Furthermore, the DEC has used the Act to engage in interstitial rulemaking to control emissions of air contaminants from a specific source, such as power plants. In *Motor Vehicle Manufacturers Ass'n*, the court of appeals clearly stated that, in implementing regulations controlling emissions from cars, "[r]espondents did not engage in policymaking . . . but, rather, proposed rules which implemented the goals and plan set forth by the Legislature."⁹⁴ Therefore, if carbon dioxide is an air pollutant, the CO₂ Budget Trading Program would be exactly the kind of interstitial rulemaking intended by the legislature and engaged in by the DEC in the past.

On the other hand, if carbon dioxide cannot be classified as an air pollutant, then the argument that the DEC acted on a "clean slate" by "promulgat[ing] a comprehensive regulatory scheme addressing global climate change" holds more weight.⁹⁵ The DEC contends that it is not implementing a comprehensive climate change policy, and

City Social Services Department's refusal to replace furniture and clothing stolen during a burglary under the social services law because burglary did not fall within the meaning of "other like catastrophe" under the law).

⁹⁰ *Boreali*, 517 N.E.2d at 1356.

⁹¹ *Id.*

⁹² See *supra* text accompanying note 54–58.

⁹³ See N.Y. COMP. CODES R. & REGS. tit. 6, § 204 (2008) (NO_x Budget Trading Program); § 238 (Acid Deposition Reduction SO₂ Budget Trading Program).

⁹⁴ *Motor Vehicle Mfrs. Ass'n v. Jorling*, 585 N.Y.S.2d 596, 599 (App. Div. 1992).

⁹⁵ INITIAL PUBLIC COMMENTS, *supra* note 7, at 9.

is instead regulating “one air pollutant, CO₂, from one category of sources, electricity generators.”⁹⁶ It is true that a *comprehensive* climate change policy would require regulation of multiple greenhouse gases and multiple sources of those gases. The charge that the DEC is acting on a “clean slate,”⁹⁷ however, has less to do with the comprehensiveness of the policy and more to do with what the policy seeks to address. If CO₂ cannot be classified as an air pollutant, then the DEC’s actions represent inappropriate policy making on the part of the DEC to address a separate issue—climate change—that the DEC has *not* been given statutory authority to regulate. Comprehensive or not, regulation of an issue not within the scope of the DEC’s statutory authority is a violation of the separation of powers. In contrast, even a comprehensive policy that falls within the scope of the DEC’s statutory authority—in this case regulation of air pollution—is permissible.

Given the high likelihood that a court would uphold the DEC’s classification of carbon dioxide as an air pollutant,⁹⁸ the DEC has not acted on a “clean slate.” Instead, the DEC’s implementation of the CO₂ Budget Trading Program represents an appropriate use of its interstitial rule making function.

3. Factor 3: Is the Agency Acting in Response to Repeated Failures of the Legislature to Address the Issue?

The court in *Boreali* also placed significance on the fact that the legislature had repeatedly tried to pass legislation implementing indoor smoking bans, yet had failed to do so. This was, in the court’s view, indicative of the legislature’s inability to agree on “the goals and methods that should govern in resolving” the issue.⁹⁹ In this context, an agency’s attempt to “take it upon itself to fill the vacuum and impose a solution of its own” is improper.¹⁰⁰ Importantly, the court distinguished the case of failed legislative action from mere inaction, to which it did not ascribe the same significance.¹⁰¹ Therefore, mere legislative inaction on a particular issue should not satisfy this factor.

The situation in the climate change arena is similar to that of the

⁹⁶ *Id.* at 10.

⁹⁷ *Id.*

⁹⁸ See *supra* text accompanying notes 60–68 (discussing *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007)).

⁹⁹ *Boreali v. Axelrod*, 517 N.E.2d 1350, 1356 (N.Y. 1987).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

smoking ban in *Boreali*. Over the past few years, the legislature has repeatedly attempted, albeit unsuccessfully, to pass climate change legislation.¹⁰² A simple search on the New York State Assembly's Web site identifies eight bills that have been introduced in just the past year focused on the issue of climate change.¹⁰³ Many of these bills focused on establishing a task force or other group to study climate change and potential solutions.¹⁰⁴ This indicates that the legislature does not yet feel that there is enough information on climate change to facilitate the selection of the best course of action. This legislative action may, therefore, be interpreted as indicating that the legislature has, to date, been unable to reach a consensus on how best to approach the problem of climate change. The DEC's implementation of the CO₂ Budget Trading Program in this context could then be viewed as an attempt to overcome the legislature's hesitation.

While a cursory look at this factor suggests that the DEC has exceeded its authority in implementing the RGGI, closer examination weakens this contention. First, many of the proposed bills actually appear to assume that the DEC has authority to implement the CO₂ Budget Trading Program and instead focus on the allocation of the proceeds of the RGGI auctions. For example, Assembly Bill A6321 amends the Environmental Conservation Law and dedicates any proceeds from the RGGI to the establishment of a Climate Change Solutions Program.¹⁰⁵ The bill recognizes that "the state has led the way in developing RGGI" and requires that auction proceeds "be invested in energy efficiency initiatives" that will "protect New Yorkers from the harmful effects of *air pollution* created by fossil fuel-fired power plants," including "wide ranging negative effects associated with climate change."¹⁰⁶ The language of this bill, rather than refuting the DEC's authority to implement the RGGI, supports it by: (a) indicating the legislature's belief that CO₂ is an air pollutant; and (b) recognizing that climate change directly

¹⁰² See, e.g., Assem. B. 11302, 230th Assem., Reg. Sess. (N.Y. 2007) (amending the Environmental Conservation Law to establish a Climate Change Task Force); Assem. B. 7365, 230th Assem., Reg. Sess. (N.Y. 2007) (establishing the climate change solutions program act); S.B. 3959, 228th S., Reg. Sess. (N.Y. 2005) (enacting the New York State Global Climate Change Reduction Act).

¹⁰³ New York State Assembly, Bill Search Results, <http://assembly.state.ny.us/leg/?by=k&q=climate+change> (last visited May 16, 2010).

¹⁰⁴ See, e.g., Assem. B. 11302.

¹⁰⁵ Assem. B. A06321, 232d Assem., Reg. Sess. (N.Y. 2009).

¹⁰⁶ Assem. B. A6321 Memo, 232d Assem., Reg. Sess. (N.Y. 2009), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A06321%09%09&Memo=Y&Text=Y.

harms human health and well being.¹⁰⁷

Second, if we start with the premise that carbon dioxide can be classified as an air pollutant and, therefore, falls within the scope of the DEC's regulatory power under the Act, then this subsequent legislative activity could be read as modifying or curtailing the power of the DEC to regulate carbon dioxide. This argument is untenable. First, the lesson from *Massachusetts v. EPA* is that in the context of a broad grant of authority intended to provide an administrative agency with flexibility to adjust to scientific advancements and new challenges, subsequent legislative activity to address specific issues that fall within that broad grant of authority are not equivalent to an expression of legislative intent to limit the breadth of the previously granted authority.¹⁰⁸ In *Massachusetts v. EPA*, the Court rejected the EPA's argument that "postenactment congressional actions and deliberations . . . [are] tantamount to a congressional command to refrain from regulating greenhouse gas emissions."¹⁰⁹

Furthermore, even if we find that the legislature's inability to set CO₂ policy weighs in favor of a finding against the DEC, it would not by itself be sufficient to support the ultimate conclusion that the DEC has exceeded its statutory authority. The weight of this factor was significantly weakened by *Massachusetts v. EPA*. There, the EPA attempted to rely on congressional actions and deliberations after enactment of the Clean Air Act as evidence of a legislative command to refrain from the regulation of greenhouse gases.¹¹⁰ The Court rejected this argument:

Even if such postenactment legislative history could shed light on the meaning of an otherwise-unambiguous statute, EPA never identifies any action remotely suggesting that Congress meant to curtail its power to treat greenhouse gases as air pollutants. That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant

¹⁰⁷ Assem. B. A6321, 232d Assem., Reg. Sess., (N.Y. 2009).

¹⁰⁸ *Massachusetts v. EPA*, 549 U.S. 497, 529–30 (2007).

¹⁰⁹ *Id.* at 529. The court considered and rejected the EPA's argument that Congress' efforts to promote collaboration and research on the issue of climate change was equivalent to a legislative limitation on actions that can be taken to address climate change. *Id.* at 530. Furthermore, the court rejected the EPA's argument that it was precluded from regulating CO₂ emissions from vehicles because to do so, it would have to tighten vehicle mileage standards and, in effect, encroach on the Department of Transportation's responsibilities. *Id.* at 531–32.

¹¹⁰ *Id.* at 529.

when it amended [the Clean Air Act].¹¹¹

The Supreme Court then went on to say that

[w]hile the Congresses that drafted [the Clean Air Act] might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.¹¹²

The New York Court of Appeals has adopted a similar view of the extent to which subsequent legislative activity can limit a previous grant of authority. According to the court, “[r]epeal or modification of legislation by implication is not favored in the law. Absent an express manifestation of intent by the Legislature—either in the statute or the legislative history—the courts should not presume that the Legislature has modified an earlier statutory grant of power to an agency.”¹¹³

Therefore, while there is some indication that the legislature remains unsure of how best to approach the issue of climate change, this legislative uncertainty has little impact on the statutory authority of the DEC to regulate carbon dioxide as an air pollutant.

4. Factor 4: Was the Agency’s Technical Expertise and Competence Unnecessary to the Development of the Regulations in Question?

The final factor in assessing whether an administrative agency has exceeded the bounds of its legislative authority is whether “no special expertise or technical competence . . . was involved in the development of the . . . regulations” that are challenged.¹¹⁴ In *Boreali*, the PHC attempted to use its broad legislative grant of authority to improve public health to develop what the court called a “simple code” that banned indoor smoking and exempted certain groups.¹¹⁵ No technical competence or agency expertise was necessary to develop the code. Therefore, the court held that, even though the regulations clearly fall within the realm of public health, and even though the delegation of regulatory authority to protect

¹¹¹ *Id.* at 529–30.

¹¹² *Id.* at 532.

¹¹³ *Consol. Edison Co. of N.Y. v. Dep’t of Env’tl. Conserv.*, 519 N.E.2d 320, 324 (N.Y. 1988).

¹¹⁴ *Boreali v. Axelrod*, 517 N.E.2d 1350, 1356 (N.Y. 1987).

¹¹⁵ *Id.*

and improve the public health was valid, the PHC's actions in this case constituted policy-making and violated the constitutional separation of powers.¹¹⁶

The fact that the regulations in question did not require the agency's specialized expertise indicated to the court that the agency had engaged in unauthorized policy-making rather than interstitial rule-making.¹¹⁷ Similarly, in *Health Insurance Ass'n of America v. Corcoran*, the Third Department invalidated regulations promulgated by the New York State Superintendent of Insurance that banned the HIV testing of insurance applicants or use of test results in making insurance coverage determinations in part because "[n]either respondent nor the Commissioner of Health has any special technical expertise in deciding the fundamental question of how the potentially enormous financial and human costs of the AIDS crisis should be borne within society."¹¹⁸

Therefore, when regulations promulgated by an agency do not require the agency's special expertise, the courts view the regulations as more appropriately within the province of the legislature. In other words, the simplicity of the regulations (and lack of technicality) is an indicator to the reviewing court that the legislature would not have delegated this rulemaking power to the agency because the legislature could have acted itself with the same competence as the agency in setting the policy in question. On the other hand, agency rule making is appropriate when the development of the regulations requires significant expertise and cannot, therefore, be carried out by the legislature directly.¹¹⁹ When technical expertise and competence is appropriately used in developing the regulations, deference to that agency is commonplace, and the courts will uphold the regulations "[i]f its interpretation is not irrational or unreasonable."¹²⁰

The RGGI is a complicated cap-and-trade program that operates within the arenas of climate change and air pollution control—both

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ 551 N.Y.S.2d 615, 621–22 (App. Div. 1990).

¹¹⁹ *See id.*

¹²⁰ *N.Y. Life Ins. Co. v. State Tax Comm'n*, 436 N.Y.S.2d 380, 382 (App. Div. 1981) (“[W]here . . . the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely upon any special competence or expertise of the administrative agency and its interpretive regulations are, therefore, to be accorded much less weight.” (citation omitted)). In *New York Life Insurance Co.*, the court held that the tax commission's interpretation of a section of the tax law was unreasonable and irrational because the statute contained, on its face, a clear exclusionary rule that did not require any specialized knowledge or interpretation. *Id.* at 382–83.

highly technical and ever-changing scientific fields.¹²¹ The Intergovernmental Panel on Climate Change, for example, is a collaboration of hundreds of scientists working together to understand and define climate change, determine future effects, and weigh the benefits and costs of various approaches to addressing the problem.¹²² Even the courts have recognized the highly technical nature of pollution control and the need for broad statutory language that draws on the expertise of the DEC and other administrative bodies with appropriate expertise to fill in the details of the statutory goals.¹²³ In fact, the Act's declaration of policy itself requires that all codes, rules and regulations promulgated under the Act "be clearly premised upon scientific knowledge of causes as well as . . . effects."¹²⁴

This holds true for the design of the RGGI regulations. As distinguished from the "regulations" promulgated by the PHC in *Boreali*, the DEC did not simply set out a broad policy that climate change and the primary gas responsible for it (CO₂) should be prevented, and then set out exemptions based on economic and social interests. Instead, the DEC designed a complicated, highly technical cap-and-trade program that required the involvement of individuals with a high level of technical and scientific expertise in the area of climate change and air pollution. According to the DEC, significant technical expertise was required in formulating the regulations, particularly regarding "evaluation of the burdens on the regulated entities and engineering limitations, all of which played a role in determining the appropriate cap level, and the structure of the cap-and-trade program."¹²⁵

The CO₂ Budget Trading Program, therefore, is unlike the broad, non-technical policies typically invalidated based on this factor. The RGGI regulations include a level of technical detail that one

¹²¹ Regional Greenhouse Gas Initiative, About RGGI, <http://www.rggi.org/about> (last visited May 16, 2010).

¹²² Intergovernmental Panel on Climate Change, Organization, <http://www.ipcc.ch/organization/organization.htm> (last visited May 16, 2010).

¹²³ In New York, the courts have directed as to whether this factor is satisfied in the arena of air pollution control. According to the Third Department, air pollution control is a "complex [and] technical area[]" in which "the guidelines and standards established by the Legislature need not be precise." *Motor Vehicle Mfrs. Ass'n v. Jorling*, 585 N.Y.S.2d 596, 599 (App. Div. 1992). Similarly, the New York Court of Appeals characterized the control and abatement of water pollution as an area involving many complexities and requiring a broadly worded grant of authority. *Consol. Edison Co. of N.Y. v. Dep't of Env'tl. Conserv.*, 519 N.E.2d 320, 323 (N.Y. 1988).

¹²⁴ N.Y. ENVTL. CONSERV. LAW § 19-0103 (McKinney 2006 & Supp. 2009).

¹²⁵ INITIAL PUBLIC COMMENTS, *supra* note 7, at 11–12.

would not expect the legislature to provide. Therefore, analysis of this factor suggests that rather than being an inappropriate broad climate change policy, the regulations constitute interstitial, highly technical rulemaking by the DEC. Of course, even highly technical rule making can only be proper if there has been a broad grant of authority by the Legislature to regulate the subject matter of the regulations. However, in this case, the Act provides such authority.

V. CONCLUSION

The Department of Environmental Conservation does in fact have the statutory authority to implement the CO₂ Budget Trading Program. Under the Air Pollution Control Act, the legislature gave the DEC the authority to regulate any substance that the DEC determined satisfied the broad definition of air pollutant under the Act. If the legislature intended to limit the DEC's authority under the Act to certain traditional air pollutants, it could have simply listed those contaminants that were to be treated as air pollutants in the Act. However, the legislature purposefully decided not to specifically list or limit those emissions that are classified as air pollutants. Instead, the legislature set out a broad definition of "air pollution" and left it to the DEC's scientists to determine which emissions fell within this definition based on the latest research and scientific advancements.¹²⁶ Such an approach was intended to give the DEC the flexibility to efficiently respond to the constantly changing arena of environmental science. In this context, the argument that carbon dioxide cannot be treated as an air pollutant because it does not fit within the traditional notions of an air pollutant seems silly. In fact, the statute was designed to avoid just such constraints.

Furthermore, any court in which the DEC's authority is challenged is likely to defer to the DEC's determination that carbon dioxide is an air pollutant. Particularly in areas involving highly technical and scientific skills, determinations of an administrative agency charged with implementing a broadly worded statute are afforded great deference.¹²⁷ The DEC has determined that carbon dioxide is sufficiently harmful to the health of humans, as well as natural plant and animal systems, to be classified as an air pollutant.

¹²⁶ See *supra* text accompanying notes 79–81.

¹²⁷ *N.Y. Life Ins. Co. v. State Tax Comm'n*, 436 N.Y.S.2d 380, 382 (App. Div. 1981).

Once the conclusion is reached that the DEC can properly classify carbon dioxide as an air pollutant, the authority to implement the RGGI becomes clear. If CO₂ is an air pollutant, then the DEC's implementation of a program designed to control and reduce emission of CO₂ is clearly consistent with the legislature's intention to ensure that air pollution is addressed. In addition, the RGGI program can be characterized as interstitial rulemaking that required the expertise and technical competence of the DEC, in which the DEC is filling in the details of a broad mandate to address air pollution. The mere fact that the Legislature has considered bills targeted at addressing climate change, in the face of the little weight often given to this factor, is not sufficient to overcome the DEC's regulatory authority.