STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
WRITTEN PUBLIC COMMENT
Proposed Amendments to 7 DE Admin. Code 1147 — CO2 Budget Trading Program — SAN 2026-02

Docket #2026-R-A-0003

Submitted in writing during the public comment period following the July 28, 2026 public hearing, closing August 14, 2026

Written Comment of John N[redacted], Delaware Ratepayer

Who I Am

My name is John N[redacted]. I am a Delaware electricity customer and a citizen ratepayer advocate. I have intervened before the Delaware Public Service Commission. My most significant success there was the Transparency Docket — PSC Docket No. 13-250 — which resulted in the disclosure of REPSA renewable energy costs on the electricity bills of Delmarva Power ratepayers. Ratepayers had been paying those costs without knowing it.

I have also been a co-plaintiff, alongside FuelCell Energy, Inc., in a challenge to the State's Bloom Energy tariff. My individual claims in that case were dismissed for lack of standing. The case was nonetheless resolved when Governor Markell agreed, without admitting wrongdoing, not to bring another Bloom Energy tariff to Delaware without going through proper procedures. An additional 20 megawatts of Bloom Energy capacity authorized in the original legislation was never deployed.

I am not a lawyer and I am not an economist. I am someone who has spent a long time paying close attention to how electricity costs get set in this state, and who has learned enough about the system to ask questions that deserve answers.

I am submitting this comment because I believe the amendments proposed in SAN 2026-02 will increase what Delaware electricity customers pay on their bills, and I believe the process used to adopt them may not be lawful under the Delaware Constitution.

What RGGI Actually Does to Electricity Prices

I want to explain how RGGI affects electricity prices, because the way it is usually described — as a program that applies to power plants — obscures what actually happens to the people who pay electric bills.

Delaware gets most of its electricity from a regional grid called PJM. PJM covers thirteen states and the District of Columbia. Every hour of every day, the power plants connected to PJM submit bids saying how much it will cost them to run. PJM then selects the cheapest plants first and works up the list until it has enough power to meet demand. The price paid to every plant that runs is determined by the most expensive plant needed to keep the lights on.

That last part matters. If the marginal plant — the most expensive one needed — bids at a certain price, every other plant running at that moment gets that same price, regardless of what it cost them to produce their power.

RGGI creates a direct cost for power plants that burn natural gas or previously burned coal in Delaware. For every ton of carbon dioxide they emit, they must buy an allowance at a RGGI auction. That cost goes into the plant's bid. When the plant's bid goes up, the clearing price for all the electricity in the region goes up. Every Delaware ratepayer pays more on every kilowatt-hour they use — not just the kilowatt-hours from gas plants.

The size of that cost depends heavily on which kind of gas plant is running. A modern combined-cycle gas plant, burning roughly 6,400 Btu of fuel for every kilowatt-hour it generates, emits on the order of 0.37 tons of CO_2 per megawatt-hour — using the EIA's standard natural gas emissions factor of about 117 pounds of CO_2 per million Btu, that plant needs roughly four-tenths of an allowance for every megawatt-hour it produces. A less efficient simple-cycle peaking plant, burning closer to 10,000 Btu per kilowatt-hour, emits closer to 0.585 tons of CO_2 per megawatt-hour — nearly six-tenths of an allowance for the same output. Peaking plants, which are frequently the marginal, price-setting units during the tightest hours on the grid, carry a meaningfully larger RGGI cost per megawatt-hour than efficient baseload gas units.

In practice, no plant's actual compliance obligation is calculated this way. Each unit's real obligation is metered directly, consistent with EPA's Part 75 monitoring framework: the unit continuously meters its own fuel flow, periodically samples the gas for heat content, and multiplies its metered heat input by a certified carbon-based emissions factor to arrive at its actual, hour-by-hour CO_2 tonnage. The figures above are illustrative of the order of magnitude and the real difference between plant types — not a substitute for each unit's own metered data — but they show why RGGI's cost is not a flat, uniform add-on across the gas fleet.

The proposed amendments tighten every mechanism that controls allowance prices. The **minimum reserve price** becomes a hard floor — no relief valve. The **cost containment reserve** requires a higher price trigger to release any allowances at all. The **offset compliance alternative**, which let plants meet a portion of their obligation through other means, is eliminated entirely. **Delaware's share of the regional cap** gets smaller every year from 2027 through 2037.

Each of those changes pushes the price of RGGI allowances higher. Higher allowance prices mean higher plant operating costs. Higher plant operating costs mean higher bids into PJM. Higher bids mean a higher price for all the electricity Delaware customers buy.

The Second Way RGGI Costs Reach Delaware Customers

There is a second cost that is less visible but just as real.

PJM does not just buy electricity. It also runs a separate auction to make sure there are enough power plants available to meet future demand. This is called the capacity market. Power plants bid into this auction to be paid for being available, not just for the power they actually produce.

Southern Delaware sits in a part of the PJM grid called the DPL-South zone — specifically, the portion of Delaware's grid south of the Chesapeake & Delaware Canal, which also includes the Eastern Shores of Maryland and Virginia. Because the transmission lines into this zone are limited, it cannot simply import all the power it needs from somewhere else. It depends heavily on local generation — primarily natural gas plants. When the capacity auction runs, this zone has repeatedly cleared at a higher price than the rest of PJM because local supply is tight.

RGGI increases the ongoing operating costs of those local natural gas plants. When a plant's operating costs go up, it becomes harder to justify keeping the plant running. As plants become less economical, some will retire or reduce their availability. Fewer available plants in an already-constrained zone means higher prices in the capacity auction. Delmarva Power bills nearly all of its Delaware customers through a single, statewide Standard Offer Service rate rather than a rate that varies by zone. That means when DPL-South clears at a premium, that premium is not confined to customers living south of the Chesapeake & Delaware Canal — it is spread across Delmarva's entire Delaware customer base, including New Castle County.

This is not a hypothetical. In the 2024/2025 capacity year, the DPL-South zone cleared at $426.17 per megawatt-day — up from $69.95 per megawatt-day the year before, a roughly six-fold increase. RGGI's effect on the operating economics of local generation is part of what makes this zone vulnerable to that kind of price spike.

That spike occurred before PJM's current price cap and floor took effect. In April 2025, FERC approved a cap of approximately $325 per megawatt-day and a floor of approximately $175 per megawatt-day, applied uniformly across every PJM zone including DPL-South, for the 2026/2027 through 2029/2030 delivery years. Under that cap, DPL-South cannot currently clear anywhere near $426.17, so there is currently no zone premium for Delmarva's statewide rate to pass through to customers. But the cap is temporary, authorized only through 2029/2030, and nothing currently in place prevents a repeat of this kind of spike, and the statewide cost-spreading that would come with it, once the cap expires.

Where the Money Goes — and Why That Matters

RGGI has been running since 2009. The public records are clear about what has been collected and what it costs to run the program.

The organization that runs the auctions — RGGI Inc., a nonprofit — files public tax returns with the IRS. Its most recent available return, for 2024, shows total revenue of $2.86 million.

In 2025 alone, Delaware collected approximately $60 million in RGGI auction proceeds — 65% of which, or $39 million, flowed by statute to the Sustainable Energy Utility, operating as Energize Delaware. Delaware's cumulative RGGI proceeds since 2009 are approximately $390 million. Delaware's cost to administer its participation in the program is, by any reasonable estimate, under $200,000 per year.

Comparing those figures on the same annual basis, Delaware collects roughly 300 times what it costs the state to administer the program each year. For every dollar Delaware spends running RGGI, it collects on the order of $300 more than that cost requires.

That ratio matters because of a legal principle I address below. But as a factual matter, it tells you something important about what RGGI is. A program fee is money collected to cover the cost of running a program. When the money collected is this many multiples of the cost of running the program, and the surplus flows to other government programs and to a private nonprofit corporation entirely apart from program administration, the fee has become something else.

The Constitutional Question I Am Raising

I am raising two independent constitutional arguments. Either one, standing alone, would call the lawfulness of what DNREC is being asked to expand into question. I present them separately because they rest on different provisions of the Delaware Constitution, and a weakness in one should not be read as a weakness in the other.

First: The Appropriation of RGGI Proceeds to a Private Corporation (Article VIII, § 4)

Sixty-five percent of Delaware's RGGI auction proceeds — the largest single share, by statute — is directed to the Sustainable Energy Utility, doing business as Energize Delaware. The SEU is not a state agency. It is, by its own enabling statute and by its own bond documents filed with the State's underwriters, "a Delaware nonprofit corporation."

Article VIII, § 4 of the Delaware Constitution provides: "No appropriation of the public money shall be made to... any... corporation... otherwise than by an Act of the General Assembly, passed with the concurrence of three-fourths of all the members elected to each House."

When the General Assembly created the SEU in 2007 — Senate Substitute No. 1 for Senate Bill No. 18, 144th General Assembly, codified at 29 Del. C. § 8059 — it enacted that statute with the concurrence of three-fourths of the members of each House, exactly as Article VIII, § 4 requires for legislation touching this corporation's finances. **(Note to author: legislative history still needed from the Delaware General Assembly Division of Legislative Services archivist — 144th General Assembly (2007–2008), Senate Substitute No. 1 for Senate Bill No. 18 — specifically the fiscal note and any floor or committee discussion explaining the basis for the three-fourths enactment requirement.)**

One year later, Senate Bill 263 of the same General Assembly — the statute that created the RGGI auction and directed 65% of its proceeds to that same corporation — was not enacted with three-fourths concurrence. It passed the Senate 15 to 5 and the House 39 to 1, certified on the record as ordinary Simple Majority votes. Delaware's Senate has 21 members; three-fourths of 21 is 16. The Senate vote on SB 263 fell one vote short of that threshold, even though it comfortably cleared both a simple majority and a three-fifths threshold. The House vote of 39 cleared three-fourths of its 41 members without difficulty.

I am not asking this agency to resolve, on its own, whether directing an ongoing share of program revenue to a nonprofit corporation is the kind of "appropriation of the public money" that Article VIII, § 4 was written to reach, as opposed to a bond pledge or a direct budget appropriation. That is a real legal question. The same General Assembly treated this exact corporation's finances as requiring a three-fourths vote once, a year earlier, for a smaller and more contingent commitment than the one at issue here. That inconsistency deserves an answer before this agency adopts amendments that increase the volume of proceeds flowing through that same, apparently under-scrutinized, channel.

Second: Whether the RGGI Compliance Charge Is a Tax (Article VIII, § 11)

Separately, Article VIII, § 11 requires that "no tax or license fee may be imposed or levied except by an Act of the General Assembly adopted with the concurrence of three-fifths of all members of each House."

Delaware courts have long distinguished a tax from a regulatory fee by asking whether the charge is compulsory and whether the issuing authority retains genuine discretion over it. In Conard v. State (Del. Super. 1940), and again in Tri-State Amusement, Inc. v. State Tax Dept. (Del. 1969), the Delaware courts held that where a license is issued automatically to anyone who pays — with no discretion to refuse and no case-by-case regulatory judgment involved — the charge is "a revenue-raising measure," a tax, regardless of what the statute calls it. RGGI allowances are compulsory: no covered plant may legally operate without them. DNREC exercises no discretion in the auction; any bidder who meets the clearing price receives allowances, mechanically, with no individualized regulatory judgment at all. That combination — compulsion without discretion — is the signature of a tax under Delaware's own test, not a fee.

Other courts examining RGGI specifically have used a related but distinct test: whether the money collected is proportionate to what it costs to administer the program. On November 1, 2023, the Pennsylvania Commonwealth Court applied that test to RGGI in Bowfin KeyCon Holdings, LLC v. PADEP and struck down Pennsylvania's participation as an unconstitutional tax, finding that the overwhelming majority of proceeds went to purposes other than program administration. There is no Delaware case adopting that specific proportionality test. The underlying facts are available for this agency to consider regardless of which test applies: in 2025, Delaware collected approximately $60 million in RGGI proceeds against an administrative cost of the program of under $200,000 — a ratio of roughly 300 to 1 — while the organization that runs the multi-state auction itself, RGGI Inc., operates on a total annual budget of under $3 million.

Whether one applies Delaware's own compulsion-and-discretion test, or the proportionality reasoning a neighboring state's court applied to this identical program, the conclusion available to this agency is the same: there is a serious, unresolved question as to whether the RGGI compliance obligation is, in substance, a tax that has never received the vote the Delaware Constitution requires for one.

I am aware that Delaware's participation in RGGI was previously challenged in Superior Court, in Stevenson v. DNREC, and that the case was dismissed in 2018. That case is not a bar to either question I am raising here. The Stevenson plaintiffs argued that RGGI had provably raised their individual electric bills, and the court dismissed the case because they could not establish that specific causal link after years of litigation. I am not making that argument, and I do not need to prove what RGGI cost any one individual customer. The questions here are structural: whether the relationship between what RGGI collects and what it costs to administer renders the charge a tax, and whether the 2008 provision directing RGGI proceeds to the SEU was validly enacted, regardless of any single ratepayer's bill. Those are legal and documentary questions, not case-specific injury questions, and neither was resolved by Stevenson.

I am not asking DNREC to make a final legal ruling on either question. I am asking DNREC to acknowledge that these are serious constitutional questions that deserve serious answers before the agency adopts amendments that increase the cost and reach of a program whose lawful foundation is in doubt.

The General Assembly Vote on SAN 2026-02

Whatever the answer to the two constitutional questions above, one fact is not in dispute: the amendments now proposed in SAN 2026-02 have received zero votes in the General Assembly. They are being adopted entirely through agency rulemaking. If the underlying program requires a three-fifths or three-fourths vote to be lawfully imposed or expanded — and I believe a court may well find that it does — then amendments that increase its cost and reach certainly require the same.

What I Am Asking

I am asking this agency to do three things.

First, before adopting these amendments, obtain a written legal opinion from the Department of Justice on whether SAN 2026-02, and the underlying statutory structure it amends, are consistent with Article VIII, Sections 4 and 11 of the Delaware Constitution. Place that opinion in the public record.

Second, commission or require an independent economic analysis of the impact of the proposed amendments on Delaware electricity customers — specifically, on the PJM clearing price and on capacity market costs in the DPL-South zone. The agency's own savings claims have not been subjected to independent scrutiny. Ratepayers deserve an analysis that is not produced by the same parties who benefit from the program continuing.

Third, do not adopt these amendments on the current timeline. The constitutional questions I have raised are not frivolous. A court in a neighboring state has already agreed with the reasoning behind one of them. Delaware ratepayers are entitled to have these questions resolved before they are committed to additional years of a program that may not be lawfully imposed.

Closing

I have been paying attention to how electricity costs are set in Delaware for a long time. I have filed comments, intervened in rate cases, and been party to litigation testing the limits of executive authority over ratepayer-funded programs. I am not submitting this comment to obstruct environmental policy. I am submitting it because I believe the people who pay electric bills in this state have a right to have the law followed.

The law says taxes require legislative authority, and appropriations to corporations require an even higher threshold. If RGGI is a tax, or if the 2008 provision directing RGGI proceeds to the SEU was never validly enacted under that higher threshold, then Delaware ratepayers have been paying into a structure without the votes the Constitution requires. The proposed amendments would extend and deepen that obligation. Before that happens, these constitutional questions deserve answers.

I would also note the broader context in which this rulemaking is occurring. In February 2026, EPA finalized the rescission of the federal Endangerment Finding as applied to motor vehicles, concluding that greenhouse gas emissions do not meet the Clean Air Act's threshold for that kind of regulation, and a parallel EPA rulemaking that would reach the same conclusion for fossil-fuel-fired power plants is now awaiting final publication after clearing White House review.

RGGI's legal authority rests on state law, not on EPA's endangerment finding, so this does not resolve the constitutional questions I've raised here. But it is worth this agency's notice that the federal government is moving in the opposite direction on the same underlying premise — that CO_2 must be treated as a regulated pollutant — at the same time Delaware is being asked to tighten a program built on that premise and increase its cost to ratepayers.

I respectfully ask that this agency provide answers to both constitutional questions before adopting these amendments.